

**The establishment and use of cross border criminal intelligence under a European Criminal Intelligence Model in a period of modernism and post modernism societal change in the EU, and issues of accountability and human rights in the dissemination of such criminal intelligence exchange**

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## List of relevant abbreviations

BKA	German Federal Criminal Police Headquarters
COSI	Standing Committee on Operational Cooperation on Internal Security
COSPOL	Comprehensive Operational Strategic Planning for the Police
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
COREPER	Committee of Permanent Representatives
EC	European Community
ECB	European Central Bank
ECIM	European Criminal Intelligence Model
ECRIS	European Criminal Records Information System
EEC	European Economic Community
EPPO	European Public Prosecutor's Office
EU	European Union
IALEA	International Association of Law Enforcement Intelligence Analysts
ILP	Intelligence Led Policing
INTCEN	EU Intelligence Analysis Centre
LKA	German Regional Criminal Police Headquarters
MIS	Management Information System
NCA	National Crime Agency
NIM	National Intelligence Model

(S)OCTA	(Serious) and Organised Crime Threat Assessment
OMG	Outlaw Motorcycle Gang
RCMP	Royal Canadian Mounted Police
SOCA	Serious Organised Crime Agency
SOCTA	Serious and Organised Crime Threat Assessment
TA	Treaty of Amsterdam
TFEU	Treaty on the Functioning of the European Union
ZKA	German Federal Customs Headquarters

## 1. Abstract

Policing in Europe has become more complex, due to the nature of organised crime being more and more trans-national and a growing Europeanization in policing as a result of the creation of European agencies like Europol and Eurojust taking over activities which before the Lisbon Treaty remained within the sole responsibility of single Member State.

Informal law enforcement cooperation between Member States is being transferred into formalised cooperation by European agencies with a specific mandate and specific powers. This development also requires a mechanism to streamline national and European law enforcement priorities. In 2005 the United Kingdom proposed the European Criminal Intelligence Model (ECIM) as the tool to achieve this task. In general terms the ECIM is based on the principles stemming from the concept of intelligence-led-policing as proposed by Ratcliffe (2005). However, until today the implementation of the ECIM is not finalised.

This dissertation will address the conditions for such a model to be successful, especially with regard to the operationalisation of strategic findings at EU level within a national or trans-national setting.

In this regard, the question of the meaning of 'intelligence' for the ECIM is examined, especially taking into account that the concept of 'intelligence' in law enforcement still is a rather new discipline. In addition, this thesis will discuss the societal framework in which the ECIM is to be deployed with a focus on the respective consequences if our society has changed from modern to a postmodern society.

In relation to the ECIM a reflection on this aspect is of crucial importance as a shift in the societal paradigm would also question the value of a 'grand narrative' like the ECIM, a single, monolithic tool that would be able to address the problems in tackling trans-national organised crime as if made from one piece in a European context which is defined by diversity.

## 2. Introduction

This thesis takes a critical view on the latest development at EU level to harmonise the efforts to fight organised crime in a trans-national context, the proposed introduction of the European Criminal Intelligence Model - the ECIM. A specific focus will be on the link between an EU model and national law enforcement requirements. The review is based on the assumption that any successful strategy to tackle organised crime needs to impact on the operational level. Therefore, the thesis also illustrates the link between strategy and operationalisation and discusses how to make this link work. The potential success of the implementation of the ECIM is a core aspect of this thesis. However, any real impact of the ECIM is dependent on the societal framework such a model is embedded in. Therefore, the thesis will also reflect upon the possible success of the implementation of the ECIM by considering current societal developments, especially with regard to the potential shift from a modern to a post-modern society.

Introducing an ECIM as a trans-national instrument that is supposed to turn its findings into operational activities might have an impact on existing data protection regulations within the EU and in Member States. This facet will also be considered as part of the thesis.

Since the term ‘organised crime’ came into existence law enforcement and political decision makers are searching for the appropriate mechanism to effectively tackle organised crime. Organised crime is still a rather new concept within the history of law enforcement if one regards the Code of Ur-Nammu or the Code of Hammurabi as the actual starting point for ‘modern law enforcement’<sup>1</sup>. The idea of attributing the concept of organised crime to a criminal activity was first introduced in the US at the end of the 19th century. However, there was no specific definition attached to it. Two decades later, during the time of prohibition the term ‘organised crime’ was used to describe the development of illegal markets in North America. In the 60ies and 70ies the concept of organised was mainly associated with the Italian mafia. Only in the early 80ies the definition of organised crime moved away from the mafia perspective to a broader definition focusing more on enterprise related aspects with rational operations aiming at obtaining profits through illegal activities. At around the same time ‘organised crime’ as a specific phenomenon started to emerge in Europe, again primarily associated with the Italian mafia. Unsurprisingly with Italy as the first country to enact

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<sup>1</sup> L.W. King, *The Code Of Hammurabi*, Kessinger Publishing, 2004

legislation to tackle (mafia-style) organised crime. Germany was then the first country to further elaborate on organised crime, introducing a first law-enforcement driven definition of organised crime in 1986. By the end of the 90ies the United Kingdom and The Netherlands also provided definitions of organised crime based on their national perspectives.<sup>2</sup>

These developments show that organised crime initially was confined to the national context, which can also be seen when taking a closer look into the respective definitions.

What came more and more into play was the realisation in EU Member States that organised crime started to develop into a trans-national phenomenon. Organised crime groups were not only active in one jurisdiction. Several illegal commodities ‘administered’ by organised groups were produced outside, had to be brought into a Member State via other Member States before they were finally ‘distributed’ to the customer (in most of the cases drugs and counterfeit goods). In short, effective tackling of organised crime was not to be achieved by the means available in a single Member State only. The trans-national nature of organised crime made it necessary for Member States to cooperate. Besides informal cooperation the European Convention on Mutual Legal Assistance in Criminal Matters is the most known instrument that was developed to encourage the cross-border exchange of information.<sup>3</sup>

Mutual legal assistance was vital for having a successful trial against organised crime groups that were active in not just only one Member State. This development happened at the same time when European cooperation reached a new level. What had started as the European Economic Community (EEC) or the so-called common market slowly but surely transformed into the European Union. The EEC was an international organisation created by the Treaty of Rome in 1957.

The main aim of the EEC was to promote and establish economic integration, including a common market, among its six founding members: Belgium, France, Italy, Luxembourg, the Netherlands and West Germany. Upon the entry into force of the Maastricht Treaty in 1993, the EEC was renamed into the European Community (EC). This was also when the three European Communities, the European Coal and Steel Community, the European Atomic Energy Community, and the EEC, were integrated into the first of the three pillars of the European Union (EU). The European Community existed in this form until it was abolished by the 2009 Treaty of Lisbon. The Lisbon Treaty merged the EU's former three

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<sup>2</sup> For a more detailed background regarding the development of the concept of organised in the USA and in Europe see C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe: Concepts, Patterns and Policies in the European Union and Beyond*, Springer, 2004

<sup>3</sup> European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20/04/1959

pillars and established that the European Union would replace and succeed the European Community. Article 47 of the Treaty on European Union (TEU) explicitly recognises the legal personality of the European Union (EU). A 're-shaped player', stronger than before joined the pitch. Article 85 of the Treaty provides for the gradual strengthening of Europol, enabling the Council and the Parliament to further develop the missions and powers of Europol under the framework of the ordinary legislative procedure. In this context the Treaty of Lisbon specifies that new tasks could include the coordination, organisation and implementation of operational actions. In addition, Article 71 introduces a standing committee to be established within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union.

The committee (COSI) is tasked to facilitate coordination of the action of Member States' competent authorities.

Before the Lisbon Treaty it was the prerogative of Member States to deal with questions and approaches related to internal security. These issues were dealt with in the so-called intergovernmental 'third-pillar', outlining that the decision making power in this pillar remained at Member State level. To tackle crime and organised crime Member States had already gone through a variety of different models like problem-oriented policing, community policing, 'broken windows' policing, hot spots policing, 'pulling levers' policing, evidence-based policing, third party policing, predictive policing, and Intelligence-led policing.<sup>4</sup> Especially intelligence-led policing has been and still is regarded as the most promising approach in law enforcement as the model offering the best tool to effectively act against organised crime.

The researched European Criminal Intelligence Model (ECIM) is based on the principles of intelligence-led-policing, focusing on a Threat Assessment component as the main instrument for strategic decision making. The assessment is meant to stir effective operational activities based on the identification of the 'most appropriate' targets. Strategic intelligence used and processed in the ECIM is supposed to drive operational activities.

The ECIM goes a long way. As Simon Robertson put it in the 1997: "*Strategic intelligence focuses on the long term aims and objectives of law enforcement agencies. It typically reviews current and emerging trends to illuminate changes in the crime environment and emerging threats to public order. It draws upon a huge variety of information from both*

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<sup>4</sup> This list is not exhaustive but highlights the fact that law enforcement has taken quite some efforts to develop effective counter-strategies to deal with crime, including organised crime.

*within and beyond the law enforcement universe to identify opportunities for action and likely avenues for change to policies, programmes and legislation. Although operational and strategic intelligence analysis have different aims, they are mutually dependent and cannot be carried out in isolation. Attempts to separate them, or to foster one at the expense of the other, will result in a fundamentally flawed intelligence programme and a failure to generate meaningful assessments of criminal activity.”*<sup>5</sup> It took another 7 years for the intelligence-led-policing approach to surface in relation to organised crime. The EU Presidency’s Conclusion of 8th of November 2004 state: ‘*With effect from 1 January 2006, Europol must have replaced its "crime situation reports" by yearly "threat assessments" on serious forms of organised crime, ... . The Council should use these analyses to establish yearly strategic priorities, which will serve as guidelines for further action. This should be the next step towards the goal of setting up and implementing a methodology for intelligence-led law enforcement at EU level*’.<sup>6</sup> In the second half of 2005 the United Kingdom introduced the European Criminal Intelligence Model for the first time during its Presidency of the European Union. Although the initiative was generally welcomed not much did happen afterwards, except for Europol to develop the EU Organised Crime Threat Assessment (OCTA) in line with the requirements referred to above. In 2010 the Belgian Presidency initiated and finalised project Harmony, a project aiming at developing “*a generic European Criminal Intelligence Model bringing together the existing instruments and strengthening Europol’s central role*”. Project Harmony introduced a paradigm shift, moving away from a Member State driven agenda towards a more EU focused perspective in tackling against organised crime. Project Harmony incorporated the essence of the Lisbon Treaty, acknowledging and promoting a stronger Europeanisation in the area of law enforcement.

From this perspective it seems that the transition has been rather smooth, following a natural path, mirroring other developments pointing towards an EU with more responsibilities. However, a closer look from a practitioner perspective reveals that this transition is still rather wishful thinking. Operational law enforcement in Member States still follows traditional ways of thinking, focusing on national needs and tangible operational results. Even project Harmony with an agreed timeline for implementing the necessary ECIM framework at national level has so far not managed to bring a European strategic perspective and a national or trans-national operational perspective to beat in the same rhythm.

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<sup>5</sup> International Association of Law Enforcement Analysts (IALEA), *Intelligence-Led Policing - International Perspectives on in the 21st Century*, IALEA, 1997, p. 23

<sup>6</sup> 14292/1/04 REV 1 CONCL 3

Therefore, focusing on the ECIM concept and its implications for law enforcement agencies at national level is a core subject for this thesis. Strategic analysis and operational activities have to work hand in hand. For the ECIM this means that the model can only be called a success if strategic findings at European level are operationalised in Member States.

This thesis addresses the question to which extent the ECIM is able to produce or guide such operational successes, respectively what is needed for the ECIM to promote such a success or where the limitations are. As the ECIM needs to direct operational activities there will be a need to process personal data, at least at national level when strategic findings are turned into criminal investigations. However, for the time being there might only be the need to consider respective data protection requirements as a side issue as the link between the ECIM as strategic tool and operational activities in Member States is still weak, reducing the possibility for processing personal data within the current ECIM framework. Once the ECIM becomes operational, triggering criminal investigations at national level data protection requirements have to be looked into in more detail.

To consider the ECIM and its potential impact for law enforcement within the EU without reflecting on the societal context law enforcement is embedded in would not provide a holistic perspective. The actual perception on what law enforcement can or is able to achieve seems to have changed over the last decades. Law enforcement and political decision makers still seem to look for the 'great narrative' when it comes to find the answer in how to tackle organised crime most effectively. The ECIM is such an example. The underlying assumptions are very much attributed to a modern understanding of the world today. It echoes the idea of a world-formula for law enforcement. Over the last couple of decades this modern world view has been challenged by a post-modern perspective. Originating from art and architecture the post-modern perspective has been extended to a societal concept of postmodernism.

This thesis will not focus on an in-depth discussion to decide if we are living in a modern or a post-modern society. The thesis will also not focus on the discussions if postmodernism would be a new epoch or a necessary evolution of the modern perspective.

Nevertheless, there are indicators that show that the 'great narrative' which is challenged by the post-modern perspective might not be able to provide a satisfying answer to all open law enforcement related questions. Therefore, this thesis will examine the potential success of the ECIM as a common approach to tackle organised crime in a European Union of 28 individual Member States in the light of a developing post-modern societal setting. The need to reflect more on such a setting is underlined by looking at Member States as divers individual entities

with different histories, societies, constitutions, geographical and political peculiarities, legal systems, law enforcement agencies, and very country-specific perspectives. Based on those individual differences Member States define which crime needs to receive the highest priority when it comes to the respective counter-measures.

In sum, this thesis will critically discuss the potential success of implementing a European Criminal Intelligence Model in light of national priorities, taking into account societal developments that might point to more 'fragmented' solutions required by a post-modern paradigm. As there are also potential data protection implications when strategic findings are translated into operational activities these aspects are also discussed.

### 3. Research Methodology

*“Not everything that can be counted counts; and not everything that counts can be counted.”*

(Albert Einstein)

#### 3.1 Research method

Whether theory or the data should come first is a question that delineates much quantitative research from qualitative research. The basic difference between the two is the starting point. Quantitative research nearly always takes off from a theoretical perspective (Bryman, 2004)<sup>7</sup>. On the other hand qualitative research opposes the need of having a theory before data collection and data analysis.

In quantitative research the approach tends to be deductive, which means that valid premises lead logically to valid conclusions. It begins with a theory or hypothesis which is then proven or refuted by empirical testing. It uses deductive reasoning where. Quantitative research makes it possible to derive context-free generalizations. Qualitative research is exploratory and hypothesis-generating rather than hypothesis-testing and the process of building hypotheses and concepts is inductive. Categories emerge from the data rather than being identified beforehand by the researcher. Hypotheses are developed from the available details to explain the research question. These hypotheses are time/context-bound and based on particular individuals or events (Lincoln and Guba, 1985).<sup>8</sup> Where quantitative research is primarily concerned with measuring and finding facts and causes, qualitative research focuses on describing meaning (*verstehen*). It is also more concerned with describing processes than in measuring outcomes (Patton, 1990).

Qualitative research takes a phenomenological approach, with the theoretical component to arise from the data. Glaser and Strauss (1967)<sup>9</sup> elaborated on this approach which as a result has become to be known as ‘grounded theory’. According to Glaser and Straus (1967) a theory should not be superimposed on the data at the outset but follow from the researcher's engagement with the data and its context. Grounded theory uses qualitative research methods with the aim of generating theory which is grounded in the data, rather than testing existing

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<sup>7</sup> A. Bryman, *Social Research Methods*, Oxford University Press, 2004

<sup>8</sup> Y.S. Lincoln and E.G. Guba, *Naturalistic Inquiry*, Sage Publications, Beverly Hills, 1995

<sup>9</sup> B. Glaser and A. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research (Observations)*, Aldine Pub. Co, 1967

theories (Strauss and Corbin, 2008). Glaser (1992) noted that grounded theory is useful for research related to human behaviour in organisations, groups, and other social set-ups.

Charmaz (2005)<sup>10</sup> suggests that the application of grounded theory leads to data collection and theoretical analysis going hand in hand, to support each other in an interactive process: “grounded theory methods consist of simultaneous data collection and analysis, with each informing and focussing the other throughout the research process”. Easterby-Smith, Thorpe, and Lowe (1991)<sup>11</sup> propose to use grounded theory to develop theory from available data through comparisons as a result of looking at the same event or process in different settings or situations. As a consequence, quantitative and qualitative research methodologies differ beyond the way data is collected and processed. They also differ in their fundamental conceptual basis.

The following table provides a short overview outlining the fundamental differences between qualitative and quantitative research (Patton 1990; Chisnall, 2001):<sup>12</sup>

<b>Qualitative</b>	<b>Quantitative</b>
Inductive	deductive
Subjective	Objective
impressionistic	conclusive
holistic, interdependent	system independent and dependant variables
purposeful, key informants	random, probabilistic sample
not focused on generalization	focused on generalization
aims at understanding, new perspective	aims at truth scientific acceptance
case studies, content and patterns	statistical analysis
focus on words	focusing on numbers
Probing	counting
Communicability/Consistency/Transparency	Validity/Reliability

<sup>10</sup> K. Charmaz, Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies, in: Denzin, N.K. & Lincoln, Y.S. (eds.), *The Sage handbook of qualitative research*, 3rd ed. pp. 507-535. Thousand Oaks, Sage, 2005

<sup>11</sup> M Easterby-Smith, R. Thorpe, A. Lowe (1991). *Management research: an introduction*, Thousand Oaks, Sage, 1991

<sup>12</sup> M.Q. Patton, *Qualitative evaluation and research methods*, Newbury Park, Sage, 1990; P. Chisnall, *Market research*, Berkshire: McGraw Hill, 2001

Answering the research question required an in-depth understanding of the context, which is best addressed by a qualitative approach (Creswell, 2009)<sup>13</sup> informed by pragmatist research philosophy (Badley, 2003; Creswell, 2009).<sup>14</sup> Qualitative research aims to understand a complex social problem in its natural setting (Denzin, 1994; Creswell, 2009). Qualitative methods focus on the why and how, not just on what, where, when. Pragmatist researchers reject the competing nature of quantitative and qualitative epistemologies (Pring, 2000). Instead, pragmatist researchers favour choosing the appropriate methods for a given problem or question (Creswell, 2009). Qualitative methods are useful for understanding the research question of this thesis due to the desire to understand actions, situations, and problems (Creswell, 2009).

The thesis also uses case studies as a useful tool for understanding a situation within its context. Yin (2003)<sup>15</sup> describes the use of case study as being based on the desire to “*understand complex social phenomena*”, while keeping in mind “*the holistic and meaningful characteristics of real-life events*”.

### 3.2 Document analysis

Document analysis is a systematic procedure for reviewing or evaluating documents, both printed and electronic material (Bowen, 2009).<sup>16</sup> Documents contain text (words) and images that have been recorded without a researcher’s intervention. By examining information collected through different methods the researcher can validate findings across data sets, reducing the impact of potential biases. Atkinson and Coffey (1997)<sup>17</sup> advise researchers to consider carefully whether and how documents can serve particular research purposes. Documents can provide background and context, additional reflections, supplementary data, information on changes and developments, and verification of findings from other data sources.

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<sup>13</sup> J.W. Creswell, *Qualitative Inquiry and Research Design - Choosing Among Five Approaches*, Third Edition, University of Michigan, 2009

<sup>14</sup> G. Badley, The crisis in educational research: A pragmatic approach, *European Educational Research Journal*, vol. 2 no. 2, pp. 295–308, 2003

J.W. Creswell, *Research design: Qualitative, Quantitative, and Mixed Methods Approaches*. Thousand Islands, Sage, 2009

<sup>15</sup> R.K. Yin, *Case Study Research: Design and Methods*, Thousand Oaks, Sage, 2003

<sup>16</sup> G.A. Bowen, ‘Document Analysis as a Qualitative Research Method’, *Qualitative Research Journal*, vol. 9 no. 2, pp. 27-40;

Z. O’Leary, *The essential guide to doing your research project* (2nd ed.). Thousand Oaks, Sage, 2014

<sup>17</sup> P. Atkinson and A. Coffey, *Analysing Documentary Realities*. London, Sage, (Chapter 4), 1997

Moreover, documents allow for the gathering of data when events are no longer to be observed.

Qualitative data collection, collation, interpretation/analysis and reporting included official academic and practitioner's publications, professional journals and official magazines, national strategic papers related to law enforcement, books, and political documents published at EU level. In addition open sources and information available online via the internet is used.

For the purpose of this thesis the information obtained was then combined and synthesised also by making use of the experience of the author as an actively serving police practitioner at Europol, at the same time drawing from the experiences gained when serving at national level. Additional benefit is provided based on the fact that the author has extensive experience in operational case handling, at strategic level and in preparing political decision making.

### **3.3 Interviews**

Qualitative research interviews seek to cover both a factual and a meaning level, though it is usually more difficult to interview on a meaning level (Kvale, 1996).<sup>18</sup>

In the author's thesis face-to-face interviews using semi-structured questionnaires were used to collect additional data to be used for the study. The aim of interviewing was to identify issues related to the research questions. According to Mouton (2006), "*the researcher has a list of questions or fairly specific topics to be covered, often referred to as an interview guide, but the interviewee has a great deal of leeway in how to reply*". Additional questions that were not included in the interview guide were asked to stimulate further discussions on the topic and to provide clarifications where needed.

All questions were asked and the same wording was used from interviewee to interviewee. The advantage of this research method was that the researcher was able to exercise maximum control over the respondent's frame of reference when responding to questions and was able to pose follow-up questions to obtain more information on certain issues (Patten, 2009)<sup>19</sup>.

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<sup>18</sup> S. Kvale, *InterViews: An Introduction to Qualitative Research Interviewing*, Sage, 1996

<sup>19</sup> M.L. Patten, *Understanding Research Methods: An Overview of the Essentials*, 7<sup>th</sup> Edition, Routledge, 2009

However, this research method has no flexibility, requires that questions be asked with exactly the same wording and in the same sequence for all the respondents (Babbie and Mouton, 2006 )<sup>20</sup>.

The author has arranged personal interviews with different stakeholders in Member States and at EU-level to obtain expert opinion covering a wide range of perspectives. Voluntary interviews were conducted in 2014 with 4 senior law enforcement officers in the UK, France, Germany, and the Baltic States. In addition, 3 individuals within the political EU structures in Brussels focusing on a European perspective in law enforcement were interviewed.

The interview results were analysed and relevant aspects used in developing the arguments presented in this thesis. The thesis does not refer in detail to the individual answers provided by the respondents to guarantee anonymity of the source. Relevant statements were synthesised and form part of the analysis throughout the document.

### **3.4 Ethical considerations**

Interviewees were in detail informed of the objectives of the study. The research strategy and methods of the study to the respondents were clearly explained in order to ensure that assumptions about the research were understood (van Thiel, 2014).<sup>21</sup> Interviewees were also assured that they may withdraw from their contribution at any time.

In the case of interviews, the participants were assured confidentiality in order to protect the participants' right to privacy and guarantee their anonymity.

There was no power relationship between the researcher and the interviewees. Interviewees were independent and in case where a professional existed the interviewee was higher ranked than the researcher.

Although information received from participants in the interviews conducted could not be kept confidential as it was used to support the build-up of this thesis, no specific reference to any of the participants was made. Information from the interviews was only used to back up and confirm information gathered from other sources and to help the researcher to fine-tune the conceptual model of the European Criminal Intelligence Model.

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<sup>20</sup> E. Babbie, and J. Mouton, *The practice of social research*, Cape Town, Oxford University Press, 2010

<sup>21</sup> S. Van Thiel, *Research Methods in Public Administration and Public Management: An Introduction*. Routledge, 2014

### **3.5 The context of the thesis**

The main aims of this thesis are:

- (a) to review the history, development and current status of the 'European Criminal Intelligence Model' in the current EU set-up;
- (b) to elaborate its opportunities and limitations in the day-to-day policing of trans-national organised crime/terrorism and to highlight the resulting consequences for law enforcement at Member State and at EU level;
- (c) To assess the nature, level, and effectiveness of the use of intelligence between law enforcement agencies beyond the national level;
- (d) to examine the issues of governance and accountability in the collection and deployment of intelligence beyond Member State level;

In addition, the thesis will also reflect upon the following areas, which have to be considered when addressing the aforementioned main aims:

- (a) to review and describe the structure of the intelligence function in Member States and at EU level, and the current situation regarding knowledge-based policing;
- (b) to deploy case studies of intelligence operations involving at least two Member States, to show reasons for their success/failure and the learnt;
- (c) to assess the general impact and contribution of 'intelligence' to law enforcement cooperation between Member States and at EU level, including a review on resources involved, equipment/technology, and the management of intelligence;
- (d) to identify the problems and difficulties in the collection, application and deployment of intelligence beyond Member State level;
- (e) make suggestions and recommendations for the further development and enhancement of the intelligence function in a trans-national context and at EU level, including areas of further research.

Trans-national law enforcement cooperation has become a main feature in trans-national cooperation amongst Member States over the last decades. The EU has developed closer relationships that are going far beyond the initial economic cooperation. This process which was initially expressed in the TEU of 1982 has since been revised several times (the Treaty of

Amsterdam 1997, Treaty of Nice 2001, and the Lisbon Treaty 2009). What these amendments have in common is a development towards a more community driven approach.

The 'Hague Programme' (2004 -2009) contained amongst others the following statements related to re-enforced law-enforcement cooperation beyond national level:<sup>22</sup>

- multi-disciplinary and concerted action both at EU level and at national level between the competent law enforcement authorities, especially police, customs and border guards;
- an innovative approach to the cross-border exchange of law-enforcement information. The mere fact that information crosses borders should no longer be relevant;
- setting up and implementing a methodology for intelligence-led law enforcement at EU level;
- intensified practical cooperation between police and customs authorities of Member States and with Europol and better use of existing instruments in this field.

In addition, the Stockholm Programme (2010 - 2014) reiterates these statements and adds the following aspects:

- to define a comprehensive Union internal security strategy based, in particular, on the following principles;
- to bring clarity on the division of tasks between the Union and the Member States, reflecting a shared vision of today's challenges;
- monitoring and implementing the internal security strategy should become one of the priority tasks of COSI set up under Article 71 TFEU;
- Europol should become a hub for information exchange between the law enforcement authorities of the Member States;

The communication from the Commission to the Council and the European Parliament 'Towards enhancing access to information by law enforcement agencies (EU information policy)', COM/2004/0429 final, proposed:

- to develop EU intelligence-led law enforcement, where criminal intelligence assists the competent authorities in the performance of their strategic or operational tasks, in order to prevent and combat terrorism and other serious or organised crime, as well as the

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<sup>22</sup> OJ C 53, 3.3.2005, pp. 1-14, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, (2005/C 53/01)

threats caused by them. The introduction of a European Criminal Intelligence Model would render intelligence-led law enforcement effective and allow for enhanced cooperative action. It would comprise issues such as the synchronisation of threat assessment based on a common methodology, systematic underpinning of threat assessment by sectoral vulnerability studies and the required financial and human resource allocation.

The study is anticipated to assist in evaluating the underlying concepts, practices, procedures and processes focusing on criminal intelligence, by identifying possible areas of weakness related to a trans-national intelligence architecture, with a view to considering mandatory requirements to allow for successful implementation.

As implementing such a model will also require a strong political will and direct support due to the direct interference with the sovereignty of the nation state in the area of justice and home affairs, it is believed that the content of the study will be met with interest at political and law enforcement level.

During the course of the study other factors in the context of the European Criminal Intelligence Model were taken into account, namely the ambivalence between policing at national level and the political decision making at EU level.

The meaning of the intelligence function in today's law enforcement, starting on a national and focusing on a trans-national level is another aspect that will be discussed in this thesis as understanding the intelligence function is a key element in being able to analyse and evaluate the anticipated trans-national framework as proposed by the European Criminal Intelligence Model.

Intelligence-Led Policing (ILP) is the (current) law enforcement answer to a changing policing environment. However, the concept as such is mainly Anglo-Saxon driven and there needs to be a reflection to which extent such a concept which builds a major corner-stone in the ECIM can be regarded as a valid starting point taking into account the different legal systems applied in Member States. In this context a critical discussion with the works presented by Ratcliffe (2008) are essential. Detailed academic and analytical work dedicated to the concept of intelligence and its impact/value at trans-national level is limited.

The proposed research study will contribute to improve this situation.

Trans-national exchange of intelligence goes further than the exchange of information across different jurisdictions. This automatically raises questions regarding accountability, the rights

of the individuals concerned and the need for a supervising body to guarantee that sufficient safeguards are in place and complied with. Another facet in this context refers to the possible need to develop a trans-national ‘principle of dedicated use. The thesis will explore these aspects in a separate chapter.

In addition, effective law enforcement has to be put in context, as an effective law enforcement approach has to reflect on society it is applied in. Therefore, societal developments must have an immediate influence on the right law enforcement practices to be chosen. Developing a European law enforcement concept is even more demanding as Europe still is based on a nation state concept paired with an increased influence of a trans-national European dimension that sometimes acts as antidote. Here, the study will discuss the impact a societal change moving from modern to post-modern will have on the ability to implement the ECIM. For such an overarching concept to be successful in such a ‘hostile’ environment it is important to critically research if successful policing concepts like the ECIM need to be based on the requirements determined by the principles of a modern or postmodern society.

### **3.6 Originality of the project**

Over the last 20 years the concept of intelligence, often also referred to as ‘Intelligence-Led Policing’ (ILP) as an effective tool in the tool-box of law enforcement policing has received quite some attention and has been subject to many initiatives to establish a more streamlined trans-national or even European approach. However, being en-vogue for such a long time has also led to further developments in this area. ILP which has been the driving force for many policing models at national and international level is nowadays at least contemplated by other concepts like problem-oriented or knowledge-based policing. Still, ILP can still be found in many major initiatives (e.g. Project Harmony initiated by the Belgian Presidency in the second half of 2010).<sup>23</sup>

The thesis aims at providing a contribution to the body of knowledge in this field, by giving an insight into how the law enforcement community conceives the concept of intelligence, especially in a European context and the problems involved.

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<sup>23</sup> Council of the European Union, ‘Result of the “Harmony” project – “A generic European Criminal Intelligence Model – Bringing together the existing instruments and strengthening Europol’s central role’, *Enfopol* 282, <http://register.consilium.europa.eu/pdf/en/10/st14/st14851.en10.pdf>, viewed on 20 May 2015

Another focus was put on human rights issues related to the trans-national exchange of intelligence in the framework of an ECIM, taking into account that such a framework might actually considerably collide with the basic principles related to a common space of Justice, Freedom and Security in Europe. The work also considered, although to a lesser extent the impact resulting from the entering into force of the Lisbon Treaty because there is still too little practical experience yet concerning the impact of the treaty in the area of law enforcement cooperation.

Specifically, the thesis derives its originality from the fact that

- it is the first time a possible European Criminal Intelligence Model is being looked at from an academic and analytical perspective. There is an enormous amount of documentation addressing the concept of an ECIM but this documentation is more concerned with the practicalities rather than examining the scientific basis for proposing such an approach. This is different in the thesis. The work goes beyond the 'status quo' and develops a critical perspective when assessing the possible success for implementing the ECIM;
- the scope and perspectives of the already existing documentation related to an ECIM often lacks an academic level, with concepts, theories and a proper research methodology;
- there is no holistic view on the ECIM, its consequences for policing at national level, and the impact related to human rights aspects. This thesis tries to provide such an overarching perspective;
- finally, the thesis is a product combining the strength of a scientific approach with the experience and knowledge of almost 30 years of policing, therefore striking the balance between the need for a proper theoretical foundation and a practical framework in which such a theory can be successfully applied.

### **3.7 Rationale for and sequence of chapters**

The author of this thesis has been in law enforcement for more than 30 years in a variety of different functions and positions at national and international level. During his time at Europol (1998-2012) the author has been actively involved in the developing the OCTA methodology and the ECIM in close cooperation with representatives in Member States. The extensive work done enables the author to draw from his own experience, to have access to a variety of experts, and to be aware of relevant documents and developments that impacted and still impact the successful implementation of the ECIM. The professional experience is also reflected in the structure of the chapter

The thesis starts with an Abstract, followed by an Introduction outlining the pathway on which the project developed and the direction the project will take. The introduction includes the problem statement, the purpose of the study, its significance and justification, scope and limitations, and the methodology chosen.

The third chapter described the chosen methodological approach taken in writing this thesis. The chapter addresses questions related to qualitative and quantitative research aspects applied for writing his paper. In addition, possible ethical considerations are reflected upon, as well as the time-frame and the continued update of the thesis for the findings to stay up-to-date.

The fourth chapter ‘Literature Review’ summarises available evidence on the concept and development of a trans-national intelligence community with a specific focus on the differences/similarities amongst some Member States and at EU level in relation to the ECIM, including generic reflections for a law enforcement based ‘intelligence model’. The review also focuses on the societal developments in Europe with a specific emphasis on modern and post-modern concepts as an influencing factor for the implementation of the ECIM in a societal context.

The fifth chapter addresses the basic question regarding the differences between Intelligence and Information as the basic ingredient for an ECIM. Elaborating on the potential differences between the concepts is important for understanding the data requirements for the ECIM. Information is referring to a factual framework whereas intelligence always contains an interpretative component. Relying on intelligence when developing a strategic tool for priority setting calls for a different data-model compared to a model based on information.

Chapter six discusses the theoretical framework of the ECM, especially if the model is a Criminal-Intelligence Model or a Criminal Intelligence-Model as the place for the hyphen creates a fundamental difference with regard to how such a model will look like. Referring only to Criminal-Intelligence in the model narrows the perspective whereas a crime focused Intelligence-Model to tackle organised crime takes a wider holistic perspective in deciding upon strategic priorities.

Chapter seven provides an overview beyond the national level identifying the non-criminal environment in which trans-national organised crime activities are embedded in. Any ECIM has to take into account the trans-national landscape to be able to deliver strategic findings that are suited to accommodate differences that exist when European findings have to be translated into regional and national settings. In addition, the role of the private sector as an important contributor to the ECIM is highlighted.

In chapter eight the reader is provided with a reflection on the challenges traditional law enforcement faces when a criminal investigation at tactical level is used as source for strategic analysis. In contrast to the strategic analysis proposed for the ECIM data obtained for a criminal investigation is fact based and does not interpret. The chapter also reviews existing assumptions related to organised crime, especially the business-like concept and the rational-actor hypothesis. The latter being of specific interest when putting the ECIM in a modern or postmodern context. Finally the chapter elaborates on the necessary link between the ECIM and National Intelligence Models.

As the (Serious and) Organised Crime Threat Assessment ((S)OCTA) is the core component of the ECIM chapter nine describes the OCTA concept and the way the OCTA is anchored within a national context.

Chapter ten describes in more detail the modern/postmodern link the ECIM has to consider for being successful. It is the reflection on the current societal set-up which also influences the way law enforcement agency act at national and trans-national level. In consequence the ECIM has to follow a different path when operationalising strategic findings.

Chapter eleven focuses on data protection and the human rights dimension taking into the fact that standardised trans-national exchange of intelligence will change the role of the individual who might have to bear personal consequences resulting from such an exchange.

This includes the question of accountability where intelligence exchanged in the framework of an ECIM is used in another Member State to initiate coercive measures.

Chapter nine puts the ECIM and the (S)OCTA into a structural framework, elaborating in detail on the threat assessment component, as the potential success for implementing an ECIM to be recognised by law enforcement in Member States depends on a common understand on how the ECIM produces its strategic findings that have to be operationalised at national level. Accepting the structural frame is a prerequisite to embrace the related data collection requirements.

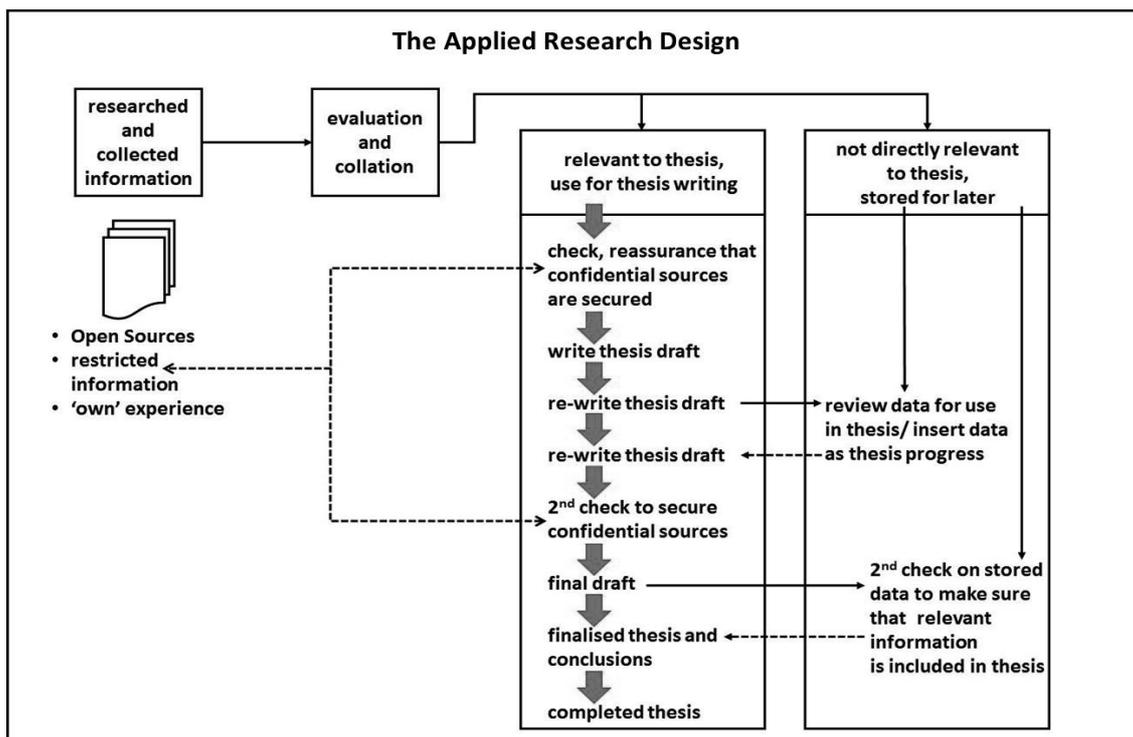
The conclusion is a summary of the work delivered, focusing on the highlights elaborated and making recommendations on enhancing and properly embedding the exchange of intelligence in a European Criminal Intelligence Model including law enforcement requirements in a changing society, and will include areas for further research.

### 3.8 Time-frame of sources used

Relevant information and sources used for this thesis range are from the mid-90s to 2015 and the information and researched data is up to date with regard to the date of the thesis submission and its revision. The author continues to monitor and research trends in the thesis topic.

### 3.9 Research design

The research design followed for writing this thesis is summarised in the following chart:



## 4. Literature Review

This chapter summarises available evidence on the concept and development of a trans-national intelligence community with a specific focus on the differences/similarities amongst some Member States and at EU level in relation to the ECIM, including generic reflections for a law enforcement based ‘intelligence model’. The review also focuses on the societal developments in Europe with a specific emphasis on modern and post-modern concepts as an influencing factor for the implementation of the ECIM in a societal context. Finally, the literature review provides the overall context for the ECIM by describing the history of the developments at European level.

### 4.1 Literature related to the concept of a European Criminal Intelligence Model

Literature focusing on the European Criminal Intelligence Model is scarce. Although the long-term consequences of introducing the ECIM will fundamentally re-shape law enforcement priority setting in the EU the approach has not been met with a significant response from academia. The best known discussion on the subject is an article by Hugo Brady (2008).<sup>24</sup> The article recognises organised crime as a rising threat for the Member States of the EU. Brady takes note of an increased Europeanization, the beginning of which he dates back to 2004. Although Member States accept the need for a closer-cross border and trans-national cooperation, law enforcement agencies still have difficulties to accept the transfer of their ‘responsibilities’ to a trans-national, European level. Brady highlights the diversity of the different law enforcement agencies in Member States as another reason that makes it difficult to harmonise law enforcement activities beyond a national perspective.

Although not outspoken in this context Brady addresses the basic difficulties when the needs of a post-modern society are dealt with from a modern perspective. Not the fact that law enforcement functions differently in different Member States is new, what is new is the acknowledgement that such differences will make it difficult to be streamlined by monolithic approaches. Although this is not directly referring to a post-modern concept, accepting

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<sup>24</sup> H. Brady, ‘Europol and the European Criminal Intelligence Model: A Non-state Response to Organised Crime’, *Oxford Journal ‘Policing’*, 2008

‘law enforcement pluralism’ at country level as a possible obstruction to achieve a solid, harmonised European standpoint bears some similarity to questioning the validity of the ‘grand narrative’ in a post-modern society.

With regard to trans-national investigations and prosecutions Brady refers to the Council of Europe Convention on Mutual Assistance in Criminal Matter as the only instrument that would enable such activities. Taking into account that Brady’s article dates back to 2008 it is not surprising that there is no mentioning of the Prüm Treaty or the European Criminal Records Information System (ECRIS). It is interesting that Brady did not mention Council Framework Decision 2006/960/JHA of 18 December 2006 which focuses on simplifying the exchange of information and intelligence between law enforcement authorities of Member States of the European Union. Especially with regard to a proposed European Criminal Intelligence Model it would have been worthwhile to mention the decision as an instrument providing the legal basis for the trans-national exchange of information and intelligence generated in a law-enforcement environment.

The article outlines the principles of law enforcement cooperation, putting a focus on national perspectives highlighting the tendency to implement structures that support national investigations which have a trans-national dimension, e.g. by using the Schengen Information System or via the Schengen Agreement. Regarding trans-national cooperation and coordination mechanisms Brady highlights the Police Chief Task Force and the ‘Comprehensive Operational Strategic Planning for the Police’ (COSPOL). With regard to COSPOL it needs to be understood that this mechanism was intended to prioritise competing trans-national investigations without a decision making mechanism based on a pan-European perspective, therefore not really a tool to be used for a ECIM.<sup>25</sup> When addressing the European perspective Brady highlights the role of COREPER (Comité des représentants permanents) and CATS (Comité de l'article trente-six). Although both entities fulfil a certain function within the new European internal security structure the entering into force of the Lisbon Treaty has changed their actual roles - a process which until now is still going on and is further influenced by defining the role of COSI.<sup>26</sup>

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<sup>25</sup> It should be noted that the framework for the activities of the EPCTF have changed and the COSPOL mechanism does not exist anymore.

<sup>26</sup> *The future of CATS - Contribution to the evaluation by COREPER*, CATS 179 (2014) <http://data.consilium.europa.eu/doc/document/ST-15508-2014-INIT/en/pdf>, viewed on 24 July 2015

Brady describes Europol as the *'main tool to assist Member States in their investigations into transnational organised crime'* and regards the introduction of the ECIM as a *'subtle attempt to promote the use of intelligence-led policing methods throughout the EU'*.

As further elaborated in this thesis Brady also recognises the missing acceptance of the ECIM by law enforcement agencies in Member States. However, he believes that the acceptance level will increase over time, once law enforcement agencies have gotten used to its existence. It seems that Brady does not entirely reflect on the fundamental paradigm change an ECIM will bring, taking away a large piece of national sovereignty in deciding on law enforcement investigative priorities. Brady confirms the different perspectives of Member States in relation to the ECIM by referring to the different contributions received by Europol with regard to the same objective (*'one Member State contributed 500 pages of criminal intelligence to Europol's first organised crime threat assessment, another offered only a single page'*). He identifies the fundamental problem of enhanced trans-national police cooperation as being based on the different roles prosecutors and police have across the EU. The solution offered is the creation of a single European law enforcement coordination body consisting of at least Europol and Eurojust to demonstrate uniformity across the EU. This solution does not take into account that such a construct only works if there was also a European Criminal Code and a European Code of Criminal Procedures, otherwise trans-national criminal investigations have to be dealt with in national courts applying the national judicial framework. Both are instruments which would require an even greater transfer of national sovereignty to the EU-level. A paradigm shift which at the moment is still more difficult to imagine becoming a reality than a functioning ECIM. In his final conclusion Brady pledges for a de-centralised ECIM based on a mixture of formal and informal channels as the best set-up to make the ECIM a success. This illustrates that Brady regards the ECIM as a next step in the evolution towards closer law enforcement cooperation, including the European level. He does not consider the ECIM as a new model replacing the existing framework by shifting strategic responsibilities to the European level, taking a holistic perspective on organised crime independent from national priorities. The ECIM approach outlined by Brady is different to the ECIM concept referred to in this thesis, therefore only of limited use in the context of the following discussions. However, emphasising the need to accommodate regional differences reflects the requirements resulting from an ECIM deployed in a post-modern society.

Reiner (1992) discusses the reasons for the change of the image and substance of policing in the United Kingdom.<sup>27</sup> In his article he refers to general social developments as the main driving force for this change. As later outlined in this thesis Reiner also sees the police function as a direct result of the Weber's state concept (pp. 761-762) where only the police is empowered to exercise legitimate force, making the police a fundamental cornerstone for the functioning of a state. Reiner believes that the change towards the police started in the 70ies when several corruption scandals involving Scotland Yard were unveiled to the public (p. 764) and continued into the late 80ies and early 90ies. However, not only the societal perspective towards the police changed, there was also a change of focus within the police. Reiner describes this change as shifting the public order focus from industrial or political conflicts to entirely new areas like curbing joy-riding, targeting acid house parties or taking action in the context of hippy convoys converging on Stonehenge. Although Reiner describes this as a shift by the police it might be more accurate to regard this as a manifestation of the gradual development of a post-modern society where the police, still caught in the Weberian context, was reacting according to the modernist paradigm. The actual face of policing changed from the original concept of preventive patrol by uniformed police officers as the basic function of policing to more specialised and plain clothes units in the 80ies.

Reiner explains this change as the '*consequence of an apparent crisis of police effectiveness in controlling crime*', another indication that a fundamental transformation with regard to the relationship between the police and the citizen was taking place. Although Reiner continues to focus on the actual national perspective of policing in the United Kingdom there is an interesting observation related to the local compared to a more centralised perspective when he states that '*the perceived lack of adequate local accountability has been a major factor undermining police legitimacy in recent years*' (p. 769). Translating the quote in light of this thesis it seems that there is a constant 'clash' between policing at local level, which would refer to national policing and a more centralised policing model, which would refer to the international dimension like the ECIM with the ECIM not taking into account the specific needs at national level (local accountability). If such competing interests are already observed within the national context it is no surprise that introducing similar mechanisms at trans-national level might encounter even stronger resistance, as outlined in more detail later on.

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<sup>27</sup> R. Reiner, 'Policing a Postmodern Society', *The Modern Law Review*, vol. 55, no. 6, pp. 761-781, 1992

Reiner identifies changes in society that represent a major shift with regard to established behavioural patterns. Society has moved away from being a homogeneous structure, simply accepting state authority towards a multi-faceted society characterized by the notion of 'desubordination', also questioning the traditional authority of law enforcement. Accepting the fact that former monolithic structures as described by Weber are replaced by heterogeneous ones points again towards an area which at least is different from a pure modernist perspective. Reiner uses C. Wright Mills public lecture at the London School of Economics in 1969 to support his argument.<sup>28</sup> As a consequence Reiner proposes that in a post-modern society 'grand narratives' cannot fulfil the role they had been given in a modern context, individual solutions are replacing these narratives with the premise that '*all that counts is what works for particular protagonists in specific contexts*' and the Weberian state concept is replaced by a '*multicentricity of sites of social reproduction*'. For the remainder of the text Reiner addresses the question on how the police in the United Kingdom can regain 'old grounds' by adopting new strategies taking into account the challenges posed by a postmodern society. As these aspects are not relevant for the research questions of this thesis due to the focus on a trans-national dimension a further reflection on Reiner's perspective has been omitted.

Christopher Murphy (1998) also focuses on a national perspective.<sup>29</sup> He discusses how the Canadian police best can react to the changes resulting from the development of a society which is moving from modern to post-modern. The article provides a descriptive analysis and overview of current shifts of policing in Canada and suggests that these changes indicate the declining significance of modern policing concepts and strategies and the emergence of a post-modern model of policing in Canada. Murphy cross-references to Reiner's and refers to Sheptycki's work in relation to postmodern aspects of policing. Certain aspects highlighted in the article help to critically reflect on the achievability of the aims and objectives of the ECIM in a trans-national context. Murphy supports the view that '*that the modern policing model no longer provides an adequate explanatory frame of reference and that contemporary changes indicate a new but still developing "postmodern" model of policing*'.

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<sup>28</sup> Mills' characterisation of this 'post-modern period' captures the gist of what contemporary analysts mean: "*Our basic definitions of society and ourselves are being overtaken by new realities*". This is not, argues Mills, merely because of the pace of change and the struggle to grasp the meaning of it. Fundamentally, Mills claims, the explanatory and ethical frameworks which we inherited from the Enlightenment and which have dominated the 'modern' age, primarily liberalism and socialism, "*have virtually collapsed as adequate explanations of the world and of ourselves*".

<sup>29</sup> C. Murphy, 'Policing Postmodern Canada', *Canadian Journal of Law and Society*, vol. 13, no. 2, October 1998, pp. 1-25

Murphy attributes the need for a change in policing to the declining power of the nation state. In addition to Reiner, Murphy reflects on trans-national aspects of policing which he describes as *'a form of state policing concerned with protecting the integrity and security of the nation state by establishing relationships with the policing and security institutions of other nations'* as a consequence of countries realizing that the threat posed by trans-national crime can only be addressed within a trans-national context. However, Murphy does not see this trans-national cooperation as a logical step in trying to develop an effective counter strategy against organised crime, he regards trans-national cooperation as an act by central governments to diminish or off-load some of their domestic policing responsibilities. From a policing perspective Murphy regards this development as providing unique organisational advantages due to the fact that such cooperation is *'almost invisible and (...) therefore largely unaccountable and uncontestable'*. Taking into account the developments at European level over the last years it should be noted that this perception is meanwhile refuted.

Although accountability of trans-national cooperation is sometimes challenged, especially by the European Parliament there is no doubt that trans-national law enforcement cooperation is complying with the requirement of accountability and that accountability continues to be a major concern for the law enforcement community itself. Too great is the fear that criminal investigations, still only followed-up within a national judicial framework are *'spoiled'* due to the use of information or evidence from other jurisdictions which do not comply with mandatory national standards. Murphy develops an interesting aspect of postmodern national policing. Even now, 17 years later this aspect provides a valuable perspective for trans-national policing, especially with regard to the ECIM and the link between operational and strategic goals in policing. Murphy argues that with regard to the role of the Royal Canadian Mounted Police (RCMP) as the centralised law enforcement agency in Canada *'the decline of centralized federalism and the growth of provincial powers ironically may mean that the RCMP's national policing function will be one of the few remaining national, federal institutions in a decentralized Canada, making the federal policing mandate even more important. ... While the modern view of national policing and security in Canada was embodied in a centrally controlled, directed and colonial RCMP, the postmodern national RCMP of the future may be smaller in size but will retain national influence through its exclusive role as the center and source of expensive, highly specialized police services'*. Transferring this perspective into the trans-national concept of the ECIM it can be argued that

the role of the ECIM might well be defined by providing strategic guidance for law enforcement agencies in Member States where the transformation of these strategic findings remains at Member States level. The description of the future Canadian policing model Murphy provides in his conclusions can be looked at as a possible trans-national policing model, including the ECIM and what the ECIM would be able to achieve in a post-modern law enforcement set-up. How current Murphy's thoughts are is finally underlined by the set of questions he formulates at the end of his article. The majority of these questions still are waiting for a conclusive answer in 2015.<sup>30</sup>

## **4.2 Explaining Postmodernity as an influencing factor for implementing the ECIM**

Being able to reflect on the possible success for implementing the ECIM requires an understanding of societal developments as the societal framework defines how an ECIM is received by the parties involved. Since Enlightenment modernity has been an agreed concept for Europe. For quite some time this basic concept has been challenged by a postmodern approach. If modernity as the foundation of our society is challenged the consequences of such a challenge for implementing the ECIM need to be understood. These consequences will influence how the ECIM can be successfully implemented. The roots of post-modernism are linked to areas of architecture and literature. The main characteristic being that there is no universally agreed concept. Postmodernity is multi-faceted and cannot be reduced to a single one-dimensional perspective. Francois Lyotard is widely regarded as the originator for defining postmodernism.

Lyotard (1979, p. XXIV) defines postmodernism as '*incredulity towards meta-narratives*' where meta- or grand-narratives are '*large-scale theories and philosophies of the world, such as the progress of history, the ability to know and explain everything by science, and the*

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<sup>30</sup> There are other publications that cover certain aspects related to the link between law enforcement and the postmodern society, the most notable being the 'Policing, Postmodernism and Transnationalization' by James Sheptycki, published in the *British Journal of Criminology*, Volume 38, Issue 3, page: 485-503, 1998; and 'Transnational Policing and the Makings of a Postmodern State' by James Sheptycki, published in the *British Journal of Criminology*, Volume 34, Issue 4, pages 613-635, 1995. Both articles have been written during the 90ies when the postmodern discussion for law enforcement was at a height. It is obvious that at the date of publication the ECIM was still far from being postulated and even Europol, as the actual enabler of the ECIM as outlined in this thesis was still in an embryonic phase of development, as the entering into force of Europol only took place on 1 July 1999. Therefore, the immediate impact of these articles to this thesis is limited. However, with regard to the postmodern aspects addressed as an important factor to evaluate an overall policing concept are relevant. In addition, all articles referred to allow for a retrospective evaluation of the predicted developments.

*possibility of absolute freedom*'.<sup>31</sup> Meta-narratives are conceptual constructs used to provide a comprehensive explanation on what happens in society and why these things happen.

A meta-narrative describes the mechanisms in society by a single consistent story from start to finish, thereby providing coherent meaning. Once meta-narratives are accepted by society, a self-propelled process starts to support and justify the validity of the narrative as the overall paradigm having sole explanatory power. In a longer process these meta-narratives and the respective symbols representing the conceptual framework for the narrative are reinterpreted and repeatedly codified resulting in a continued reinforcement of the meta-narrative itself.

Best known examples of such meta-narratives and the above described societal mechanisms linked to it are religion, Marxism, nationalism, and science. All these conceptual frameworks are authoritative and offer a full set of answers of how the world works. In addition, they provide a predetermined worldview based on an absolute and unquestioned set of values. Lyotard challenges the validity of such meta-narratives. According to him these singular explanations of human knowledge started losing their power to convince people of their truth-value by the second half of the 20th century. This point in time is closely linked to the emergence of mass media and a rise in education standards. The main idea in postmodernity is that there are multiplicities of truths instead of one all-encompassing truth which makes it difficult to decide which truth to rely upon. Lyotard refers to these multiplicities of truths as 'petit recits' (1979, p. 60). Petit recits have limited validity in place and time, are evolving, progressive, and adaptable with the ability to move in different directions, allowing for diverse interpretations in co-existence.

Before Lyotard it was Nietzsche who provided a first account of a postmodern perspective. In 1873 he questioned the relationship between language and truth. Regarding 'truth' he wrote that '*[truth is] a sum of human relations which became poetically and rhetorically intensified, metamorphosed, adorned, and after long usage seem to a nation fixed, canonic and binding: truths are illusions of which one has forgotten they are illusions; worn-out metaphors which have become powerless to affect the senses; coins with their images effaced and now no longer of account as coins but merely as metal.*'<sup>32</sup>. Nietzsche replaces 'absolute truth' by truth as a human construct, metaphors without true reflection of actual content, a perspective which corresponds to the postmodern concept addressed by Lyotard.

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<sup>31</sup> F. Lyotard, *The Postmodern Condition: A Report on Knowledge*, University of Minnesota Press, 1979

<sup>32</sup> F. Nietzsche, *On Truth and Lies in a Nonmoral Sense*, CreateSpace Independent Publishing Platform, 2015

The concept of postmodernity is present in many areas within today's society, especially the Internet as the most prominent source of information currently available. The Internet is an amorphous entity, consisting of the input from an almost countless number of individual sources, providing fragmented pieces of information to create a constantly evolving and ever-changing truth without a definite right or wrong. In addition, political disparity, sexual liberation, the clash of cultures and even the concept of drug use could be argued to be the result of a postmodern development, lacking universally agreed or absolute values.

With modernity communication moved from oral to written, emphasising that only the written word is reliable; concepts moved from particular to universal and from local to general. Only what was regarded to be universally was seen as true. In addition, concepts were timeless, not depending on context - what is proven as objective truth remains unchanged. Postmodernity started to challenge this system, reverting back to the usefulness of oral communication, particular circumstances, local peculiarities, and the importance of time as the fundamental ingredients of a contextualised reality.

Postmodernity is linked to the concept of deconstruction. Deconstruction describes the process of taking constructs apart, usually without putting them back together.

Deconstruction can be seen as the most powerful tool in a postmodern set-up, although often deconstruction is regarded as merely destructive by only dissembling existing constructs without offering an option to reconstruct them again. Even in a postmodern setting the ECIM has to reconstruct organised crime as a follow-up process. However, this reconstruction based on available information/intelligence from a variety of different sources has to be done under a postmodern perspective.

### **4.3 An overview regarding the history of law enforcement cooperation in the EU**

Alongside the transition of the European Economic Community towards a more consolidated European Union developed a closer cooperation in trans-national policing and security cooperation. This development was fuelled by the fact that moving towards a European Union without internal borders facilitated trans-national cross-border crime, which resulted in a mounting pressure for increased international cooperation for fighting and preventing crime within Europe.<sup>33</sup> Even if there has been the intention to move towards greater ‘Europeanisation’, the core of trans-national law enforcement cooperation remained being defined by the national set-up in Member States based on national sovereignty. As different as individual Member States function, so do national agencies involved in law enforcement. This is even more complicated where Member States have developed more decentralised systems, creating additional and sometimes even competing structures at national, regional or local level. To be able to create a common approach in trans-national law enforcement cooperation it is imperative to consider these differences. Such cooperation is based on an extensive exchange of information and intelligence containing personal data. This exchange could result in unprecedented problems related to accountability for the use of such data, especially in the area of data protection.

Data, exchanged cross borders are further processed and analysed in a different judicial context. Due to different legislation the processing of the data could lead to coercive measures which would not have been possible under any other circumstances. This entails the unwanted risk of the violation of fundamental human rights, if the respective legal framework for the trans-national exchange and use of such data does not exist. In the context of law enforcement related trans-national data-exchange criticism is raised regarding the missing democratic participation in the respective decision making processes applied in this specific area of cooperation.

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<sup>33</sup> The European project to create a single market, in which its citizens can move themselves, their money, goods and services freely around the Union, has dramatically altered the pattern of cross-border crime in Europe. By lifting internal barriers—at least between the full Schengen members, which do not include Britain and Ireland, nor, though it has at least signed the convention, Greece - the EU’s members have pushed their border controls to the outer rim of the Union. By, in turn, tightening up that periphery, they have driven certain cross-border activities underground, sometimes sending even genuine refugees into the hands of criminals, who now traffic them for profit alongside illegal migrants. And, by creating a single internal market, Europe has also created for itself a new single market in crime. Source: *The Economist*, 14th October 1999, <http://www.economist.com/node/248575>, viewed on 3 January 2012

Another aspect related to improved horizontal trans-national law enforcement cooperation refers to a lack of judicial control, especially if such activities fall under the responsibility of the European Union (Europol) rather than law enforcement agencies in individual Member State.

However, the concern of Member States over the possible loss of sovereignty especially in the area of law enforcement, criminal justice, and internal security acts as natural counterweight. Although there have been major changes in trans-national law enforcement cooperation and a much stronger involvement of the European legislator developments in the area of trans-national law enforcement/judicial cooperation have been fragmented rather than comprehensive. Organisations, structures, and procedures for increased law enforcement cooperation in the European Union have rather evolved on an ad-hoc basis in order to cope with new emerging trends or have been limited due to the continued reluctance of Member States to engage in more systematic and far-reaching levels of cooperation.

The following chapter provides an account of the most important developments in the field of increased trans-national law enforcement cooperation within the European Union. During the 70ies and into the late 80ies many European Member States were suffering from acts of terrorism perpetrated by both European and non-European groups.<sup>34</sup> Until this moment in time Interpol was the only existing international mechanism to coordinate cross-border law enforcement activities. However, Article 3 of the Interpol Constitution stipulates that '*it is strictly forbidden for the Organisation to undertake any intervention on activities of a political, military, religious or racial character*'. This limitation resulted in Interpol being a rather ineffective tool for Member States to deal with international terrorism. It also created an obstacle for Member States to cooperate via Interpol in these areas as there was no proper control mechanism in place safeguarding information against unwanted dissemination. As a consequence Member States decided to opt for an enhanced law enforcement cooperation limited to the European context. In December 1975 the Council of Ministers established one of the earliest forms of international police cooperation in the European Union - TREVI.<sup>35</sup>

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<sup>34</sup> E.g. PIRA (UK), RAF (DE), Action Direct (FR), CCC (BE), Brigade Rosse (IT), ETA (ES), GRAPO (ES), 17th of November (GR), FARL, PFLP, Carlos, Abu Nidal

<sup>35</sup> Key texts on justice and home affairs, Vol. 1 (1976-1993), 'From TREVI to Maastricht', *Statewatch Publication 1997*, <http://www.statewatch.org/semDOC/assets/files/keytexts/ktintro.pdf>, viewed on 4 January 2012

The origin of the term TREVI is not entirely clear but it is widely regarded as an acronym for ‘Terrorism, Radicalism, Extremism and Violence’.<sup>36</sup> Although seen as the right move to improve trans-national law enforcement cooperation TREVI has been criticised for not being subject to an independent control mechanism and for being entirely disconnected from other European Union structures.

In 1992 the Maastricht Treaty gave a new impetus regarding the further development of European law enforcement cooperation by establishing the so-called ‘Third Pillar’ related to ‘cooperation in the field of Justice and Home Affairs.’<sup>37</sup> Article K of the Maastricht Treaty mentioned customs and police co-operation as “*matters of common interest... [F]or the purpose of achieving the objectives of the Union*”. Although the wording was vague the Maastricht Treaty is an important milestone in realising that trans-national crime within the European Union should not only be dealt with at national but also at trans-national level. By creating the Third Pillar a first step was taken to start transferring law enforcement competencies that were of common interest among Member States to the European Union level.<sup>38</sup> However, the concept of the Third Pillar entailed that the final responsibility for activities within the Third Pillar remained under the supremacy of Member States.<sup>39</sup>

The Council was only able to consider action if at least one Member State had taken an initiative in the respective area.

With the signature of the Schengen-Agreement on 14 June 1985, the next level of law enforcement cooperation was established, taking into account the need to overcome existing obstacles in trans-national law enforcement cooperation as a result of implementation of the principle of free movement of goods and persons in the European Union which led to the abolishment of internal EU border controls. To balance out the negative impact for law enforcement, still limited to national jurisdiction the agreement also promoted a higher level of law enforcement cooperation among Member States with a specific focus on the exchange of information, operational cross-border cooperation, and controlled deliveries.

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<sup>36</sup> T. Bunyan (ed.), ‘TREVI, Europol and the European state’, *Statewatching the new Europe*, Statewatch, 1993, p. 1

<sup>37</sup> Article K, supra note 1, Maastricht Treaty

<sup>38</sup> These common areas of interests were: (1) asylum policy; (2) rules governing the crossing by person of the external borders of the Member States and the exercise of controls thereon; (3) immigration policy and policy regarding nationals of third countries; (4) combating drug addiction; (5) combating fraud on an international scale; (6) judicial cooperation in civil matters; (7) judicial cooperation in criminal matters; (8) customs cooperation; (9) police cooperation.

<sup>39</sup> The Maastricht Treaty (Art. K.1 and K.3) only provides that Member States shall regard the identified areas as matters of common interest, shall consult one another within the Council with a view toward coordinating their action, and shall collaborate among the relevant administrative departments.

Regarding information exchange Art. 39 of the Schengen-Agreement was an important development as Art. 39 requested from law enforcement agencies in Schengen States to render mutual assistance in providing information upon request to other law enforcement agencies in another Member State for the prevention or detection of criminal offences. In addition, Art. 46 introduced the concept of free exchange of information which may help to prevent future crimes or threats to public order.

The Europol Drugs Unit, the forerunner of Europol, was established in January 1994. Based on a German proposal Europol was envisaged to serve as a centre for information exchange and knowledge and eventually to be empowered to have executive powers which would allow Europol to operate within Member States. Europol was recognised in the Maastricht Treaty under the new title of Justice and Home Affairs.

#### **4.3.1 Europeanization**

The process of European integration started after the Second World War with the reconstruction of the Western European infrastructure focusing on rebuilding economic strength. In 1951 the Treaty of Paris which established the European Coal and Steel Community (ECSC) was signed by Belgium, the Netherlands, Luxemburg, France, the Federal Republic of Germany and Italy. The treaty was valid for 50 years, ending in 2002. The ECSC aimed at regulating the markets for rebuilding European resources (coal, steel and iron) and is regarded as the starting point for the economic integration process of Western Europe. In 1952 Belgium, the Netherlands, Luxemburg, the Federal Republic of Germany, France and Italy signed the European Defence Community (EDC) and the European Political Community (EPC). Again, the EDC was to be in force for 50 years. The EDC was driven by the idea to create a common European army, composed of soldiers stemming from particular countries and to set-up a common headquarters for a European army. However, in 1954 the French National Assembly rejected the EDC and as a consequence the ideas expressed in the EDC and EPC were not followed up further, narrowing European integration mainly to the area of economic cooperation.

Nevertheless, the integration process continued and in 1958 the treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) were signed in Rome. This time, in contrast to the ECSC, to be in force for an indefinite period of time. The Treaties of Rome led to a partial removal of restrictions separating individual markets and economies in the participating countries. The EEC Treaty

also introduced the four freedoms of the common market: the free movement of persons, services, goods and capital. In 1987 the Single European Act (SEA) modified the Treaties of Rome. The SEA transformed the decision-making process in the Communities, laid the foundations for a common European market, which led to the European Union's Internal Market within the Community by 1 January 1993 and enhanced co-operation between the Member States of the European Communities. In 1993 the Treaty of Maastricht on European Union (TEU) entered into force. The TEU introduced changes to treaties establishing the European Communities, e.g. by substituting the European Economic Community by the European Community. In addition, the TEU defined new areas of co-operation among Member States, especially in the area of Common Foreign and Security Policy (Second Pillar) and related to Justice and Home Affairs (Third Pillar). According to the TEU the following objectives were set for the European Union, which did not yet have a legal status:

- (a) to promote economic and social progress ... through the creation of an area without internal frontiers, ... and through the establishment of economic and monetary union, ultimately including a single currency;
- (b) to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy ..., which might lead to a common defence;
- (c) to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;
- (d) to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;
- and (e) to maintain in full the *acquis communautaire* and build on it ... with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.

In 1999 the Treaty of Amsterdam (TA) followed. One of the most important changes introduced by the Treaty of Amsterdam focused on the Second and Third Pillars of the EU. The Common Foreign and Security Policy got linked closer to the European Union and became a common area for all Member States. Activities in this area now were based on supranational cooperation rather than a lighter scale of coordination as it was in the past. Regarding the Third Pillar (Justice and Home Affairs), the Treaty of Amsterdam introduced a division of the pillar into areas which were transferred to the First Pillar (policies concerning visas, asylum, immigration and other regulations related to the free movement of persons), and other areas that exclusively were left within the Third Pillar. These areas remained to be based on the principle of intergovernmental cooperation. As a result of this separation the

Third Pillar also became known as ‘Policy and Judicial Co–operation in Criminal Matters’. The Treaty of Amsterdam also put an emphasis on enhanced cooperation of the Member States and introduced the possibility of invoking sanctions against Member States that would violate existing laws and rules that were binding in the Community. The powers of the European Parliament were strengthened, enabling the Parliament to object legislative proposals put forward by the European Commission.

The TA was succeeded by the Treaty of Nice in 2003 as a result of the rejected Constitutional Treaty, focusing on necessary amendments as a result of the enlargement of the EU by 12 new Member States.

#### **4.3.2 The Constitutional Treaty**

The draft of the Constitution for Europe was prepared by a specially appointed body, the Convention on the Future of Europe, chaired by the former French President Valéry Giscard d’ Estaigne. The Convention completed its work on the draft ‘Treaty establishing a Constitution for Europe’ in 2003. The Constitution was to replace primary law of the European Union. The proposed constitution was to repeal the Treaty on European Community and the Treaty on European Union and all documents amending and supplementing these contracts. At the same time, by virtue of the Constitutional Treaty the European Union was to obtain legal personality. The draft of the Constitution for Europe divided the competences into competences of the European Union, its Member States and shared ones. After adding final amendments to the draft, the treaty was approved by the European Council in June 2004. At the same time the ratification process of the proposed Constitution of Europe by the individual Member States started.

In October 2004 representatives of 25 Member States of the Community signed this historical document in Rome. Countries preparing for European Union Membership, Bulgaria and Romania, as well as Turkey, aspiring to membership in the Community also signed the final act of the Constitution. For the Constitutional Treaty to enter into force, it had to be ratified by all Member States of the Community. Initially it was assumed that the ratification process would last for two years. Depending on the laws of particular countries the Treaty ratification was to be carried out by a vote by the national Parliament or by referendum. In the majority of the European Union’s Member States the ratification was successful. However, the rejection of the document in national referenda by France (May 2005) and the Netherlands

(June 2005) stopped the ratification process and ultimately led to the abandonment of the proposed Constitution for Europe.

After the rejection of the proposed Constitution for Europe discussions for a new treaty for the European Union continued in 2006. In 2007 the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community was signed off and entered into force on 1 December 2009. The word constitution was taken out of the text of the treaty and for the first time a Member State is allowed to withdraw from the European Union based on a defined procedure for such a case. The Treaty of Lisbon introduced a unified structure of the European Union, eliminating the three pillars of the EU. Nevertheless, the treaty kept certain aspects within the Community separate, related to the functioning of the Second and Third Pillar: (a) EU competences - the realisation of the EU's goals and foreign policy and safety; (b) shared competences - EU law takes precedence over national legislation in Member States, except for certain areas which are in the sole competence of Member States; and (c) Member State competences - decisions are made independently by the individual Member State. The Lisbon Treaty assigned legal personality to the EU, defining the EU as the legal successor of the European Community. The treaty introduced a new leadership model in the Council of the European Union by replacing the six months Presidency by a model based commonly on three Member States for a period of 18 months. The treaty further strengthened the role of the European Parliament, providing it with new competences in relation to community law, budgetary issues and political control. One of the most important changes refers to the voting system in the Council of the European Union. By the end of October 2014 a double majority voting system was introduced, which equates to a majority voting system under the condition that at least 55% of the EU States representing at least 65% of the Community's population are voting in favour. Until April 2012 each Member State was able to demand repetition of a particular voting according to the system introduced by the Treaty of Nice.

#### **4.3.3 The European Criminal Justice landscape after the Lisbon Treaty**

In 1994 the Europol Drugs Unit (EDU) came into existence and was renamed into Europol when the Europol Convention entered into force on 1 July 1998. The mandate of the EDU was limited to the processing of non-personal strategic information related to the mandated crime areas. After the Europol Convention entered into force a more operational dimension, including the processing of personal data for the purpose of criminal intelligence analysis was

added. However, no executive powers were conferred to the organisation. Having been embedded in the ‘third pillar’ structures of the EU the Lisbon Treaty considerably changed the role of Europol, now regulated in Art. 88 TFEU. Here, Europol’s mission is referred to as to support and strengthen action by Member State’s law enforcement agencies.

Europol is tasked to collect, store, process, analyse, and exchange information, *‘in particular information forwarded by the authorities of the Member States or third countries or bodies’*. In addition, the article foresees the possibility of operational activities which are defined as *‘coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States’ competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust’*. This wording represents quite a change compared to the initial non-executive nature of the organisation constituting a significant break with the past. Well knowing the far-reaching consequences of this wording Member States put in additional safeguards by stipulating that any future regulations as a result of Art. 88 require in the first place to lay down procedures for scrutiny of Europol’s activities by the European Parliament, together with national Parliaments.

There will be greater need for the scrutiny of Europol if the organisation gets involved in operational activities, interfering with law enforcement activities at national level. It is not for nothing that article 88 (3) TFEU includes the word ‘operational’, requiring that operational action in a particular territory of a Member State depends on the agreement of its national authorities. If coercive measures need to be taken, the national authorities have sole responsibility for their use. But that does not rule out the possibility that the measures could actually be executed by Europol officers.

### **Eurojust and the European Public Prosecutor’s Office**

Although Eurojust and the European Public Prosecutor’s Office (EPPO) only play a limited role in the current ECIM set-up it is important to keep the role of Eurojust and the foreseen role of the EPPO in mind. In the future, these entities will play an important role for the ECIM, especially as a potential source for operational data to be used in the ECIM.

Eurojust composes of national members from all 27 EU Member States. The national members are seconded from Member States’ judicial authorities and can coordinate law enforcement activities in cross-border criminal investigations. The cases concerned are forwarded to Eurojust by the Member States themselves. Eurojust’s mandate is broad and covers a large number of crimes with a cross-border dimension. Eurojust allows Member

States to work together more efficiently and effectively in cases involving cross-border crime. For example, when a national Public Prosecution Service is investigating a case of drug trafficking effecting one or more other Member States and the investigation requires arrests, house searches, or the securing of evidence in those other states involved.

In such a case, Eurojust ensures that these requests reach the right authorities without unnecessary delay and are dealt with immediately, by-passing cumbersome requirements requested by older concepts related to trans-national mutual legal assistance in criminal matters.

In 2002, when Eurojust was set up the organisation handled just 200 cases. By 2010 this number had risen to almost 1.450 per year. Eurojust like Europol demonstrates that a European approach to the problem of cross-border organised crime is both necessary and effective. Eurojust is referred to in article 85 TFEU: *‘Eurojust’s mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States’ authorities and by Europol.’* Eurojust’s structure, mandate and tasks should be determined by regulations. However, Eurojust is not expected to undertake operational activities by running its own investigations. It is unclear whether *‘the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities’*, as referred to in article 85 TFEU will be interpreted a binding activity for national authorities. In any event, resulting prosecutions will be initiated at national public prosecutor level, requiring the national public prosecutor to take part in the underlying decision making processes.

### **The European Public Prosecutor’s Office**

If there is the intention to develop and implement a full-fledged European judicial system being empowered to run its own criminal investigations such a system has to be based on an executive, a legislative, and a judicial branch, where the European Commission together with the European Parliament present the legislator, and Europol the executive arm.

Article 86 TFEU expands on the judicial angle beyond Eurojust. With regard to crimes affecting the EU’s financial interests the Council know may establish a Public Prosecutor’s Office (EPPO) by means of regulations. The European Public Prosecutor’s Office will operate as a supra-national public prosecution service.

The EPPO *'shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests'*. ... *It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences'*. The details on how the EPPO will investigate and prosecute still need to be worked out. It is currently unclear who will be carrying out the tasks of the EPPO, e.g. national public prosecution services or mandated EPPO officials who would not have national powers. Related decisions must be taken unanimously by Member States after obtaining the consent of the European Parliament and after consulting the European Commission. If this happens, the EU will take a significant step towards having its own criminal justice system. Although the EPPO can be mandated to initiate investigations, these investigations have to be carried out by law enforcement agencies in Member States.

Unless law enforcement support for the EPPO is properly defined and structured the concept will remain flawed from an organisational perspective, leaving the EPPO without the necessary executive arm. Nevertheless, the Europeanisation of law enforcement has been advanced quite considerably compared to the limited steps taken over the last decades.

For this supra-national construct in investigating and prosecuting crime the need for strategic guidance is even more important. A well-oiled machinery to provide these strategic insights would be helpful. The proposed ECIM offers the blueprint.

## 5. Reflections on the differences between Intelligence and Information as the basic ingredient for an ECIM

Information or Intelligence - does it make a difference? Before addressing the mechanism of the ECIM it is important to understand the concept of the model which underlines the focus on intelligence rather than information. The quote “*An unread book is just like a block of paper*” by the American author F. Scott Fitzgerald (1896-1940) is a nicely fitting description highlighting the difference between information and intelligence - it is all there, it just needs to be taken in and understood in an appropriate way. Meaning needs to be given to the raw material at hand. The differences are of fundamental importance, especially as this thesis is focusing on a ‘European Criminal Intelligence Model’ and not on a ‘European Criminal Information Model’.

But why this difference? It has to be assumed that the distinction was made on purpose, unless information and intelligence are seen as the same thing to be used interchangeably. Interchangeability seems to be disputable as by now whole schools-of-thought within the law enforcement community have spent time and effort over decades to explain the differences between these concepts. Taking a look into the military context where the concept of intelligence originally stems from, it shows that the difference between information and intelligence is quite fundamental.

The Oxford Dictionary defines information as ‘*facts provided or learned about something or someone*’, whereas facts are defined as ‘*a thing that is known or proved to be true*’.

It follows that information should be seen as ‘something known or proven to be true that is provided or learned about something or someone’. Information is a concept of being descriptive and objective or rather neutral and of an observable nature - as such information does not contain a value judgment.

Intelligence on the other hand is not linked to the same attributes. Instead of being descriptive intelligence is narrative and interpretative. Objective is replaced by subjective, neutral by biased (not in a negative sense), and finally observable by amorphous. The following statement, more than 2000 years old, is attributed to Sun Tzu: “*Know the enemy, now yourself; your victory will never be endangered. Know the ground, know the weather; your victory will then be total*”. This quote is referred to as a description of information requirements which are needed to guarantee a successful battle.

At the same time this quote also can be seen as a first quote on intelligence, the argument being that there is a need to know more than just your own capabilities and those of your immediate opponent to have the upper hand. Sun Tzu refers to embedded, environmental, circumstantial, or ‘soft’ information, which will impact on the overall outcome. And this is what intelligence in a law enforcement context is about. It goes beyond the actual facts or available information. It interprets a situation, providing additional and new meaning by doing so. Intelligence is a specialized activity applying its own techniques and methods.

Over the last decades to equal a modern law enforcement approach to tackle (not only) organised crime equals the use of intelligence. However, it needs to be considered if the existing focus on intelligence does not go against the idea of the ECIM in the end. In general terms, the ECIM bears strong similarities to a large scale Information Management System. From this perspective it could be advisable to exchange the term intelligence for information, even if such a change sounds less glamorous. Taking into account that the term intelligence is not to be found in any penal code or code of criminal procedure makes this idea quite appealing. A lot has been said and written over the concept of intelligence in law enforcement. However, a universally agreed definition on what intelligence means still does not exist. Intelligence is not a law enforcement invention. There is no doubt that the actual concept of intelligence was first expressed in a military context several thousand years ago. The first methodological reference to intelligence is attributed to Sun Tzu. In his book ‘The Art of War’ Sun Tzu describes the concept of intelligence in a short story in the following way *“For 28 days he continued strengthening his fortifications, and took care that spies should carry the intelligence to the enemy. The Ch’in general was overjoyed and attributed his adversary’s tardiness to the fact that the beleaguered city was in the Han state, and thus not actually part of the Choa state. But the spies had no sooner departed that Chao Sen began a forced march lasting for two days and one night, and arriving on the scene of action with such astonishing rapidity that he was able to occupy a commanding position on the “North hill” before the enemy had got wind of his movements. A crushing defeat followed for the Ch’in forces, ...”*. What does this actually mean for the concept of intelligence?

According to Sun Tzu intelligence is a specific piece of information or an activity (strengthening the fortifications) that should be kept from the enemy to not reveal any planned activities to avoid that the enemy can develop and deploy effective counter-measures. Intelligence is generated when the protected information/activity is provided to the enemy ([He] *took care that spies should carry the intelligence to the enemy*). There is nothing

special about the intelligence provided. It is just information that should have not been in the hands of the receiver as the fact that the information disclosed to the receiver gives the receiver an unwanted advantage. Information was turned into intelligence just by the act of disclosure. The story contains another aspect, the conclusions the receiver of the intelligence draws. These conclusions are entirely depending on the perception of the receiver. The Ch'in general was overjoyed and attributed his adversary's tardiness to the fact that the beleaguered city was in the Han state, and thus not actually part of the Choa state. The actual underlying information remains untouched. When it comes to the consequences of the conclusions drawn by the receiver of the intelligence (a crushing defeat followed for the Ch'in forces) the responsibility only lies with the receiver of the intelligence as the receiver did not consider an alternative scenario to balance the intelligence received against (the possibility of being deceived).

With the concept of the nation state intelligence services came into existence.<sup>40</sup> The name of these services already indicates that one of their main activities was and is the acquisition and handling of intelligence. From there it took some time for the concept of intelligence to find its way into law enforcement. The first notable reference would be most likely the publication by Godfrey and Harris in 1971.<sup>41</sup>

According to Ratcliffe (2005) the use of intelligence in a law enforcement context can be described as “*the creation of an intelligence product that supports decision makers in the areas of law enforcement, crime reduction, and crime prevention*”. However, the use of intelligence in a law enforcement context in general terms describes a variety of different manifestations:

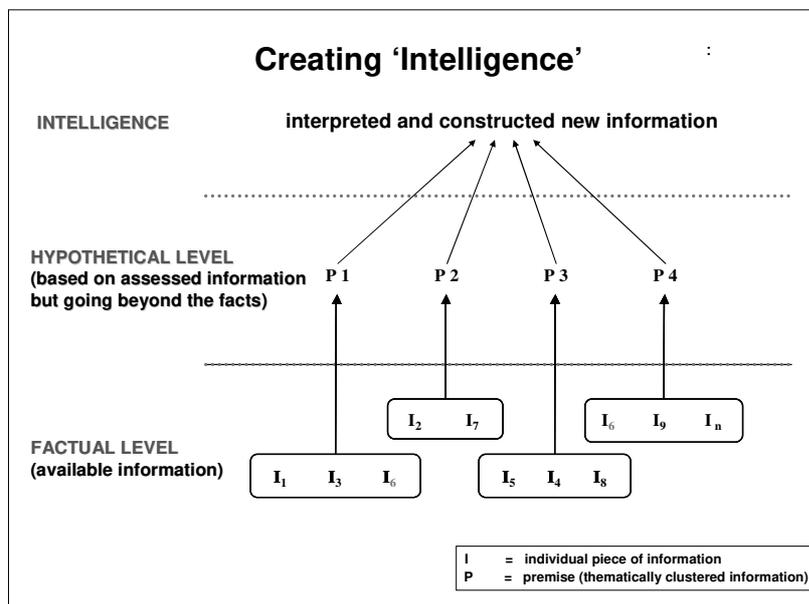
- (a) the specific nature of a piece of information (e.g. when originating from a protected source);
- (b) the entire analytical process at the end of which an intelligence product is derived, including aims & objectives, data collation, data evaluation, data collation, data analysis (integration and aggregation), dissemination, and feed-back; or
- (c) the final intelligence product as a result of the analytical process applied.

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<sup>40</sup> “... the intelligence sector is also a special area of state activity. It has a vital role in safeguarding national security.” H. Born and M. Caparini (2007). *Democratic Control of Intelligence Services*. Ashgate.

<sup>41</sup> E.D. Godfrey and D. R. Harris, *Basic Elements of Intelligence*, Technical Assistance Division, Office of Criminal Justice Assistance, Law Enforcement Assistance Administration, Department of Justice, 1971

What is common to all of these descriptions is the fact that intelligence cannot be used unconditionally in formal judicial proceedings. It is missing the evidential character in contrast to objective information. The concept of law enforcement intelligence is not limited to the simple accumulation of information. Intelligence turns information into another aggregate state through the process of analysis. The underlying information may come from covert (e.g. infiltration, interception, informants, etc.) or open sources (e.g. Internet, public files, criminal investigations etc.). In the next phase collected raw data or information is processed by the analyst and re-arranged (interpreted) to represent an incomplete but plausible jig-saw puzzle of the actual event. Based on pieces of segregated information the available data is synthesized. Possible information gaps need to be filled by assumptions linking the available fragmented information. These assumptions or hypothesis later have to survive a reality-check. As a result of this reality-check the aggregated information is evaluated, which then will result in new knowledge. Intelligence produced should allow for a predictive statement that enables law enforcement to take pro-active steps to prevent an unwanted development from happening. This process, the creation of new meaning using intelligence is summarised in the following chart:



Relying on intelligence implies (Heur, 1998) that the aforementioned information gaps, which are intrinsic to the intelligence process, are filled by means of three different analytical approaches:

- Application of theory, which refers to the use of a generalization by drawing conclusions from the study of many examples related to the same phenomenon;
- Situational logic, which refers to the identification of the logical precedents or consequences of the situation analysed;
- Comparative analogies, which refer to the comparison of the current situation with historic precedents by drawing analogies where suitable, or of comparable situations in other circumstances.

As a consequence, law enforcement intelligence is based on a ‘well-judged opinion’ compared to what traditionally is referred to as investigative or judicial law enforcement which relies on evidence based objective information. There are other basic differences between law enforcement intelligence and investigative/judicial law enforcement, which further widens the gap between the two. These differences have the potential to create misunderstandings when both are used by law enforcement. An investigation is focused on an individual case, trying to get the case to court with the aim to reach the conviction of the accused, provided the respective evidence being available. Based on the principle of ‘due process’ the potential success of each investigation depends entirely on the production of undoubted evidence. Information used in this context is directed towards this aim. Intelligence, on the other hand, does not need to always have such a straight forward purpose. Basically, intelligence can be used in three different ways:

- Immediate operational support - the direct support in a single investigation;
- Associated operational support - the comparison of different investigations focusing either on the criminal group involved or a specific crime type to identify common denominators that will help to cluster investigations;
- Investigation independent intelligence - the identification of new targets for criminal investigations, so far not on the current radar.

In contrast to evidence used in formal judicial proceedings intelligence may be introduced into a formal judicial proceeding, whereas evidence always has to be introduced.

Of course, there is the option to convert intelligence into evidence.

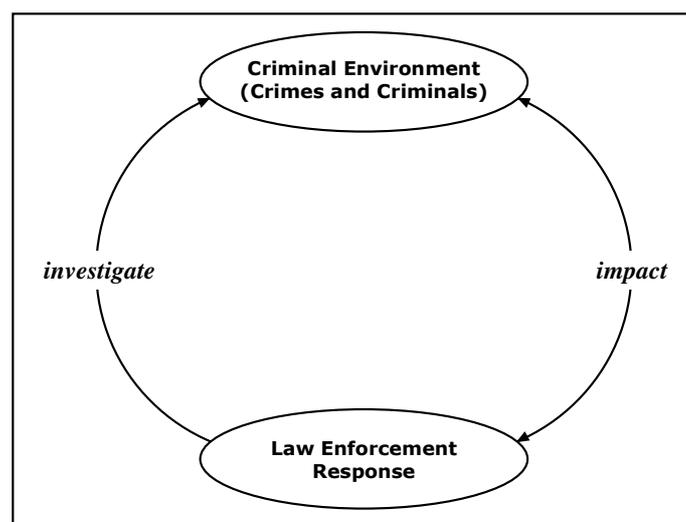
However, often a major hindrance in doing this conversion is linked to the necessary protection of the source. This necessary protection might be contradictory to the requirement of disclosure and can lead to difficulties with regard to the judicial use of the intelligence provided, even if it contains valuable information, in case it cannot be extracted from the intelligence without endangering its origin. Intelligence in law enforcement can be used outside the immediate investigative context, not linked to an investigation. These areas can refer to (a) the forecasting of crime trends where they will occur and how they might develop or even identifying new forms of crime not yet exploited by criminal groups, etcetera; (b) monitoring the daily activities of a criminal organisation to identify patterns that will allow effective countermeasures and prosecution; (c) the identification of potential vulnerabilities of a criminal organisation and potential points for infiltration or the use of possible informants; or (d) the development of an effective disruption strategy of illegal activities of a criminal organisation for a longer period of time. This list is not exhaustive and is meant to just highlight the diversity that is covered under the concept of intelligence.

The huge spectrum covered by the concept of intelligence described above indicates the difficulty that one encounters when proposing the introduction of a common intelligence model at EU level. However, the decision to call for a European Criminal Intelligence Model implies that the founders of the ECIM have taken a conscious decision to promote the intelligence character of the model. It is hoped that this decision also anticipated the potential difficulties the implementation of such a model might entail. A postmodern context supports this decision. By moving away from a purely factual model to a model based on interpretative data the ECIM is better equipped to be embedded in a postmodern setting.

## 6. The basic concept of a ‘European Criminal Intelligence Model’ in light of Ratcliffe’s 3-i-model

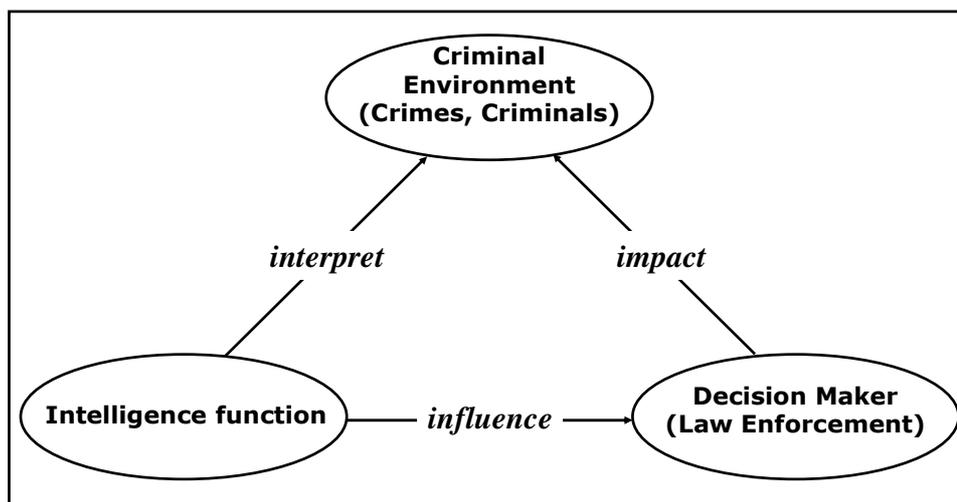
Having addressed challenges regarding the use of intelligence versus information when introducing the ECIM there is need for additional discussions. Does a European Criminal Intelligence Model refer to a ‘Criminal-Intelligence Model’ or a ‘Criminal Intelligence-Model’ or is the place where to put the hyphen irrelevant? At first sight it sounds like an academic discussion which does not seem to bear a practical link to the reality of daily policing. Interestingly enough, the vast majority of literature in this area actually does instead of referring to ‘criminal intelligence’ only refer to ‘intelligence’ as a concept in applied law enforcement methodologies (Ratcliffe, 2003). This could support the argument that the hyphen-problem is just an artificial play on semantics without any substantial meaning. However, taking a closer look at the potential consequences shows that it is indeed worthwhile to spend some more thoughts on the issue.

What then is the difference between criminal-intelligence and intelligence used to tackle organised crime? The difference actually touches the heart of self-perception of law enforcement. Traditional policing revolves around crime and the criminal responsible for committing it.<sup>42</sup> This has been and still is quite a straight forward and two-directional relationship allowing law enforcement to have a well-defined position within society as the only mandated problem-solver when tackling crime:



<sup>42</sup> H. Goldstein, ‘Improving policing: A problem-oriented approach’, *Crime and Delinquency*, vol. 24, April 1979, pp. 236-58

With the emerging of organised crime this situation has slowly but constantly changed. The law enforcement community was in need to develop a different approach for effectively tackling organised crime to incorporate these changes in their response to crime which had become more complex, more organised, and more trans-national. Some 15 years ago a new concept and a new component entered the playing field. This concept introduced the component of intelligence in the law enforcement response to organised crime. The concept is referred to as Intelligence-Led-Policing (ILP). As a result, the existing relationship between law enforcement and organised crime also had to be altered. Ratcliffe (2003) introduced the following basic model including the intelligence component. Introducing intelligence meant that the initial investigative relationship between law enforcement and the criminal environment was split into two different components: (a) interpretation and (b) influence. This model is also referred to as the '3-i Model':



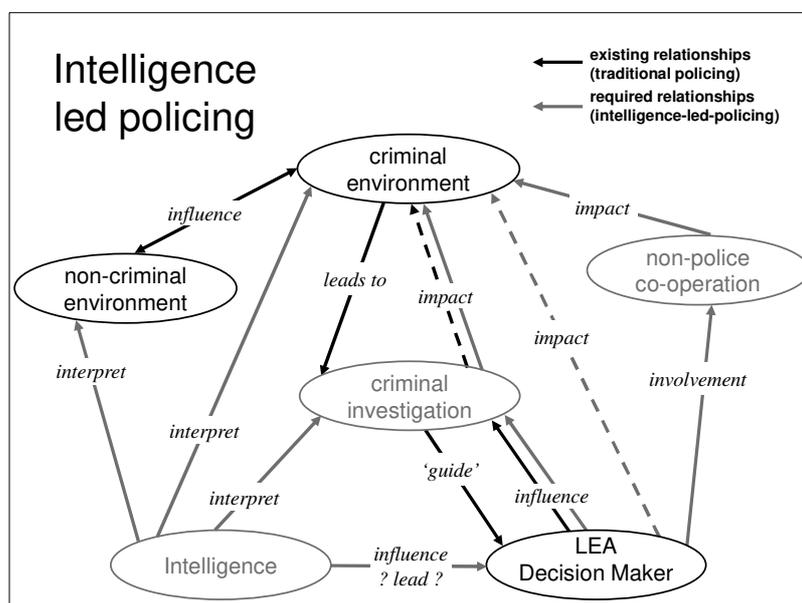
The change in this new model did not seem dramatic, especially as the new triangular concept still represented a straight forward linear relationship between the individual components. However, the consequences were far reaching. Law enforcement was losing its robust foundation based solely on the concept of investigations by allowing space for a new relationship that was not simply based on the concept of evidence - a notion of uncertainty was added to the existing equation. According to the self-perception of traditional policing, introducing ILP represented a quantum leap like accepting that the atom did not represent the smallest parts in the universe. A new paradigm needed to be commonly accepted. In this context it needs to be highlighted that even until today this process has not been finalised.

With regard to the concept of a European Criminal Intelligence Model the '3-i Model' also provides some insight related to the difference between criminal-intelligence and intelligence in a crime related context.

Ratcliffe's model suggests that it is not important to distinguish between these two approaches. In Ratcliffe's '3-i Model' the intelligence function interprets the criminal environment. Therefore, the intelligence function will produce criminal-intelligence - intelligence that by definition is generated from within the criminal environment, focusing primarily on the components of SWOT analysis (strength, weaknesses, opportunities and threats) in relation to the criminal organisation involved. Unless, it is assumed that Ratcliffe's 'criminal environment' was already meant to include additional dimensions like political, economic, social, technical, environmental and legal developments which are known as PESTEL analysis. Not seeing that any further comments can be found by Ratcliffe explaining in more detail why only intelligence instead of criminal-intelligence is used within the '3-i Model' it seems more likely that the model did not include the aforementioned PESTEL components.

Starting from this assumption indicates that the '3-i Model', although providing a new conceptual framework for policing, might need to be further expanded to include non-criminal intelligence components (PESTEL factors) as a vital ingredient to a more complete model based on a holistic perspective. In the context of this thesis this change is also required as a consequence of the fact that current policing models need to take into account that societal changes have moved the world at least into a late-modern or even post-modern set-up as such a development puts the contextual framework in the centre of attention.

An amended '3-i Model' revised in line with these ideas looks as follows:



The revised '3-i-Model' represents a much higher complexity as the original model proposed by Ratcliffe. At the same time this model remains a closed system, taking into account a multi-layer reality when it comes to the relationship between the criminal environment and the law enforcement community embedded in a societal context. In more explanatory detail the revised model keeps the 3-i-triangle but expands the triangle by the non-criminal environment and the 'beyond police cooperation'. In addition, within the traditional triangle the criminal investigation as an independent entity is added. Overall, the revised model is more difficult to be balanced out as more interdependent variables are to taken into account and interpretative aspects take a more prominent role. However, such a model seems to be better suited to reflect the current framework to be looked at when developing a holistic law enforcement intelligence model. Again the proposed extended 3-i-model also reflects a more complex reality including influencing factors that are not always tangible. Although this perspective is different to a traditional law enforcement view which is based on facts it takes into account aspects related to uncertainty as they would be present in a postmodern society.

## **7. The non-criminal environment (relevant contributors beyond the investigative context)**

The criminal environment (the actual criminal investigation) does not exist in a vacuum but is part of a societal configuration which mainly consists of PESTEL variables, variables that define a specific non-criminal environment and influence the criminal environment.<sup>43</sup>

### **7.1 Geographical peculiarities**

From a European perspective these PESTEL variables are not only country specific when it comes to trans-national organised crime. General regional geographical peculiarities are as important. The Baltic Sea Region is an example highlighting the need to reflect on these peculiarities. Neighbouring countries to the Baltic Sea are Germany, Poland, Sweden, Denmark, Russia, Finland, Sweden, Estonia, Lithuania and Latvia, representing a unique mixture regarding size, population, and the aforementioned individual PESTEL variables. Each of the countries represents a specific non-criminal environment as a result of the specific national framework.<sup>44</sup>

However, it would be negligent if the national non-criminal environment was not matched by the specific geographical and geo-political circumstances provided by the Baltic Sea as a common region. On the one hand there are the Scandinavian countries (Denmark, Finland, and Sweden) and the Baltic States (Estonia, Latvia, and Lithuania) already bound by a special Scandinavian respectively Baltic regime which defines a very distinct trans-national non-criminal environment. On the other hand there are Germany and Poland, individual states linked by a special historical relationship. All countries neighbouring the Baltic Sea are members of the European Union except for Russia, the final player in the game who adds another layer to the regional non-criminal environment. All these factors are important when considering the potential success of a European Criminal Intelligence Model. The Baltic Sea Region is a striking example of how complex the non-criminal environment can be. Similar regional differences can be observed all over the European Union.

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<sup>43</sup> One could even argue that the PESTEL variables determine the criminal environment that can be found in a specific region or country.

<sup>44</sup> Although it could already be argued to which extent a big country like Germany can be described as a single entity when it comes to influencing factors generated by the non-criminal environment.

In the end, the European Union represents a melting pot of different geographical regions, all defined by regional relationships, e.g. the Balkan region, the Channel Tunnel region (affecting the Netherlands, France, Belgium and the United Kingdom), the Mediterranean region, and the Atlantic region. These individual regional peculiarities define which shape organised crime will take. It looks as if Europe from a law enforcement perspective is rather a patchwork quilt than a monolithic structure. This needs to be taken into account when implementing the ECIM.

## 7.2 Cooperation beyond the law enforcement context

Policing has changed. The demarcation line between what is part of traditional policing and what is not has been fading for decades.<sup>45</sup> Also the concept of policing as an independent discipline within society, solely functioning by applying the penal code together with the code of criminal procedures is doubted. Society has become too entangled and complex to allow only for a one-dimensional law enforcement perspective. A successful law enforcement response to crime mainly based on modern principles is not sufficient anymore.

Policing has taken on many additional tasks that are beyond traditional policing.

Law enforcement activities nowadays overlap with those that are attributed to a social or a community worker, a mediator, or a health authority. The same goes the other way round. Many institutions nowadays have an extended mandate which in modern times would solely be attributed to traditional policing. Therefore, non-police cooperation cannot be excluded in an updated intelligence model when it comes to effectively tackle all forms of organised crime, e.g. youth gang crime, large scale credit card fraud, contraband, etc. Whatever the law enforcement response might be, law enforcement activities alone will not provide the appropriate means to address and solve the problem. The same applies to organised crime where sometimes only legislative or administrative changes to the overall framework outside the sphere of influence of law enforcement will stop certain types of organised crime. Two examples being the concept of crime proofing of new legislation and the so-called administrative approach taken by the Netherlands.<sup>46</sup>

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<sup>45</sup> See for example: C. Nemeth, *Private Security and the Law (Fourth Edition)*, Elsevier, 2012

<sup>46</sup> T. Vander Beken, *Organised crime and vulnerability of economic sectors*. Antwerp, Maklu, 2005; H. Nelen and W. Huisman, 'Breaking the Power of Organised Crime? The Administrative Approach in Amsterdam', *Organised Crime: Culture, Markets and Policies, Studies in Organised Crime*, vol. 7, 2008, pp. 207-218

Non-police cooperation in the public domain should not be too difficult to be developed. However, there is also the private domain which needs to be included in these thoughts. It might be just a private insurance or credit card company that has the actual means to disrupt or stop criminal activities, e.g. by introducing of an electronic engine immobiliser in cars or by replacing the magnet strip on a credit card with a microchip. Like with the non-criminal environment, an intelligence model to work at European level depends on successful non-police cooperation in the public and the private domain, taking into account that the global economy has abolished national borders decades ago, making economic drivers an important player in any trans-national organised crime setting. The specific role of the private sector will be explained in more detail in the following pages. An ECIM with the Organised Crime Threat Assessment (OCTA) as its core component has to integrate a variety of non-traditional law enforcement sources with the law enforcement community in Member States remaining its major contributor.

### **7.3 Trans-national law enforcement**

Other contributors at European level need to also contribute to a holistic ECIM. Such multi-layer input further highlights the exposure of law enforcement to the impact of a post-modern society. The traditional role of national law enforcement as the only entity to centralise information related to organised crime is vanishing. Trans-national organised crime is more and more dealt with in a trans-national context. As a result of the evolution towards the EU and especially after the entry of the Lisbon Treaty the European Union has given the mandate to tackle organised crime to a variety of different players like Eurojust, Frontex (European Border Management Agency), or OLAF (European Anti-Fraud Agency). Current discussions with regard to the proposed setting-up of a European Public Prosecutors Office add yet another layer to the model. It would be careless to not include these agencies as potential contributors for the OCTA. The specific context for Eurojust and the European Public Prosecutor's office is further elaborated in chapter 7 on 'Europeanization'. All these European agencies have a mandate to tackle organised crime. Eurojust is supposed to take a European perspective on prosecutorial aspects, whereas Frontex focuses on illegal immigration and trafficking of human beings. OLAF is mandated to investigate fraud cases where the interests of the EU are concerned. In addition, OLAF has the mandate in the area of contraband goods, specifically the smuggling of cigarettes.

This brief outline shows that there might also be some overlap with the findings generated by the police at national level. The diversification of responsibilities for investigating organised crime fits into the concept of a post-modern society where monolithic and one-dimensional concepts - investigating organised crime as the sole responsibility of law enforcement agencies at national level - are replaced by multi-faceted concepts all addressing the same problem but from and with a different perspective. For developing a holistic European perspective in the ECIM input also from these agencies is important.

What applies to the national perspective also applies to the trans-national level. There is a variety of different agencies involved in the fight against organised crime at European level. In addition to Europol, Eurojust, OLAF, and Frontex other organisations like the European Central Bank (ECB), the European Intelligence Centre (INTCEN), or the Baltic Sea Task Force have their share. Again this variety requires a joint understanding on the necessary information to be provided to feed the ECIM, including common data standards for these agencies based on the requirements outlined in the ECIM concept. It will be an individual decision to which extent which agency will be able to provide such information.

The development of organised crime in Europe is also influenced by factors which are based outside the European Union. The holistic strategic dimension of the ECIM does not stop here. To identify new emerging trends in organised crime it is also necessary to integrate information from 'non-EU'-sources. Although the ECIM and therefore the OCTA focus on the European Union the European Union cannot be looked at in isolation.

Taking globalisation into account leaves the European Union in a spider web of influencing factors which to a large extent originate from outside the European Union. When it comes to organised crime impacting on Europe information/intelligence regarding groups based in South America and West/North Africa is vital for being able to analyse and evaluate the developments and the actual threat posed by illegal drugs trafficking. In the area of organised contraband information from China and other South East Asian countries is crucial.

Trafficking of human beings can hardly be attributed to a specific region on the globe.

The same limitlessness applies to fraud, especially when committed via the Internet.

Consequently, input from non-EU countries, other international organisations like Interpol, Aseanapol, Ameripol, Liaison Officers from EU countries based outside, Liaison Officers from non-EU countries based in the EU, and the World Customs Organisation (WCO), has to be included in the data collection plan for the ECIM. It could be easily said that the

conceptual model of the ECIM and the OCTA is a striking example to give credit to the often used phrase ‘Think global, act local’.

#### **7.4 Integrating non law enforcement sources**

The next set of sources to be integrated in an OCTA falls into a different class: information available from academia, non-governmental organisations, and the private sector.

Academia approaches the world of law enforcement from a scientific perspective, offering another perspective on the same subject area. In addition, academia does not limit itself to the crime side of things. Academia is also researching the role law enforcement plays related to the crime phenomena, providing an alternative insight in relation to what and how law enforcement is doing. This approach helps to better understand if law enforcement is doing things right or the right thing, and it is this reflection that brings law enforcement into a social context. The resulting discussions and challenges might be uncomfortable but are necessary for an ECIM to take a holistic perspective.

The private sector as a source of information is of specific interest as the business sector is at the same time direct victim to many organised crime activities (e.g. fraud, contraband).

This of course makes the role of the private sector ambiguous as the business sector pursues its own aims and objectives and not always has an unbiased agenda. Information related to organised crime activities is collected and analysed by private companies to allow them to better understand and plan their business activities and to develop successful non-law-enforcement counter-strategies. In many cases the information available to the private industry is not coordinated with or communicated to the respective law enforcement agencies. Reasons for not-reporting might be that the success rate of a criminal investigation is low, the private sector has no interest to make a specific vulnerability known to the public, the private sector has a functioning internal sanction mechanism in place, or going public might simply have a negative impact on profits.

At the same time the private sector wants to receive maximum attention from the law enforcement community to protect its specific interests. To achieve these goals the private sector might be inclined to provide skewed information to turn its agenda into tangible results. The lack of institutionalised co-operation between law enforcement and private industry can also be observed in the context of continued privatisation and segregation in the security sector, a domain so far exclusively dealt with by law enforcement agencies in

Member States. Often, these new relationships are better described as competitive rather than cooperative. Collecting available data on organised crime from the private sector provides another dimension in the holistic approach for analysing organised crime adding another qualitative and quantitative element by taking a different perspective on organised crime activities in the EU and beyond. The following two examples will illustrate these aspects.

Credit card fraud is a criminal activity, which for example is committed in a banking environment when opening an account under a false name. Depending on the country the opening of a bank account requires a valid ID-document to prove the identity of the applicant. In case the bank has doubts about the authenticity of the ID-document the bank will stop the opening of the account. The applicant will then not further pursue the opening of the account and just move to another bank to get the account opened. The applicant, if using a false ID-document will have no interest to report the incident to the police. Unfortunately, also the bank will have no interest in reporting the attempt to open an account by using a false ID, as there was no negative consequence for the bank and an involvement with law enforcement would only entail additional work without any additional benefit for the bank. As a result, in many cases the respective information related to false ID-documents used remains with the bank. For those reasons, the actual dimension of potentially fraudulent accounts remains off the radar of law enforcement unless the bank has an interest to make the problem public.

Another interesting crime area is linked to the credit card itself. By introducing the so-called EMV card<sup>47</sup> the common magnetic strip on the card was replaced with a chip. The EMV card is no cure-all for credit card related crime as the introduction of the chip was not intended to eliminate fraud if a card is lost or stolen. Introducing the chip was mainly aimed at reducing counterfeiting. In back-tracking this change initiated by the credit card industry it can be deduced that the problem of counterfeit credit cards must have had a considerable financial impact on the business of banks and credit card companies that was not to be neglected. However, the dimension of the problem never made it to the (law enforcement) headlines, even as the law enforcement community was aware of the potential vulnerability of the magnet strip to counterfeiting. The magnet strip enabled fraudsters to retrieve individual credit card numbers and expiration dates from the card to manufacture counterfeit cards. The business sector was in a kind of dilemma.

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<sup>47</sup> Named after three organisations introducing the card: Europay, MasterCard, and Visa

On the one hand they needed the attention of law enforcement to prioritise the fight against counterfeit credit cards on the other hand the sector could not really publish available figures. In a postmodern setting the private sector has to consider which information is shared as the sharing will trigger a variety of different reactions. Taking on the 'profit hat' publishing these figures would have resulted in a sharp decline of the credit card business as customers would have been aware of how vulnerable the cards were.

The second example refers to the counterfeiting of goods like cigarettes, music CDs, or medical products. Again, the business sector has conflicting interests in addressing these crimes with the law enforcement community. These types of crime belong to the category of 'low risk - high profit' crimes, due to a relatively low detection rate and a low sentence in case of being investigated and brought to trial. Knowing about these facts, the business sector prefers to keep the matter in its own hands by employing private investigators to track down illegal production sites and to stop illegal goods from entering the market. Related activities often take place without the involvement of law enforcement, which leaves law enforcement as second hand receiver when it comes to quantifying and qualifying the problem.

Law enforcement agencies have to assume that the data reported by the business sector in relation to those crimes mirror the real situation and are not biased by business interests.

There is yet another source of information to be considered to complement the picture: open source information. To include open sources in the data collection plan for the OCTA can be disputed as reliability and validity of open source information, especially in the area of law enforcement and organised crime is difficult to assess. Nevertheless, can such difficulty be reason enough to exclude open source information? Evaluation of information represents the core of the intelligence cycle. Going back to the original 4x4 system for the evaluation of information it needs to be remembered that this evaluation mechanism always considered that information cannot always be taken at face value. Therefore, the value of the information is downgraded accordingly but not excluded. Even isolated information from unknown source is included in the intelligence cycle and coded respectively. The source is evaluated 'D4' or 'X4' (depending on the matrix used), which indicates that the reliability of the source cannot be assessed and that the actual information is not known personally to the source and cannot be corroborated. What is required is that premises drawn from such sources are carefully counter-checked during hypothesis testing. The potential usefulness of open source information to be used for the (S)OCTA is illustrated by the availability of a variety of personal interviews of high profile criminals in the media. As a human being also a criminal

likes to receive attention by the public and talking to the media provides such a platform. In addition, the media is willing to pay money for these interviews, which explains that open sources sometimes have direct access to criminal information which otherwise would never be available to law enforcement.<sup>48</sup> As said before, such information has to be treated with caution but ignoring such information would be unjustified.

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<sup>48</sup> E.g. various interviews with members of the Hell Angels or the Mafia

## **8. Missing out on non-factual data available to law enforcement**

Data from ‘unsuccessful’ investigations do not appear in the existing data collection process. Unsuccessful investigations can be defined as investigations that did not make it through to court, either because the prosecutor was not convinced of the evidence provided or because the investigation was dismissed by the investigators half-way due to the unavailability of sufficient information that would offer an chance for a possible conviction. This might be a relic from traditional law enforcement concentrating on facts. An investigation that was not pursued does not equate to such a concept. However, discarding the potential value of such information is missing the point with regard to ECIM being based on an intelligence component. A review of the relationship between investigations and resulting court cases and convictions will explore the argument by highlighting the potentially available law enforcement data that remains unused until today.

In 2011, according to the official German crime statistics the German police recorded just over 6 million individual crimes. Out of these 6 million cases around 3.4 million cases could be linked to one or more individual suspects. After reducing these cases by cases committed by the same suspects there were just over 2 million individual suspects identified. Only 42.000 individuals out of the 2 million identified suspects received imprisonment as the final sentence.<sup>49</sup> Not too impressive a figure taken into account the efforts put into investigating 6 million cases to start with. These figures demonstrate a striking difference between the data initially available to law enforcement and the refined data available after the judicial process has taken ‘its toll’. It remains the need for another research project to be able to establish which of those two figures in the end is the better representation to reflect a law enforcement reality.

These statistics do not distinguish between ordinary and organised crime. Interesting enough, the available data on organised crime for the same year, published by the BKA in the ‘Lagebild Organisierte Kriminalitaet 2011’ (Organised Crime Situation Report) does not contain any reference to a conviction rate. However, older reports contain references that are similar to the explanations just provided for the meaning of the aforementioned statistics.

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<sup>49</sup> A more detailed account regarding these statistics will follow on page 54.

The German 2004 Organised Crime Situation Report states that *'taking into account the problems linked to dark figures in the area of organised crime awareness needs to be raised that the organised crime situation report rather describes the current law enforcement approach to organised crime than the actual trends and developments of organised crime in Germany'*. There is no information to be found why this statement in more recent publications is omitted. For the ECIM this quote reveals a major deficiency of the OCTA as the basic ingredient. Law enforcement data only refers to data where a suspect has been identified and an investigation has been launched. The majority of these investigations is based on crimes that have become known to the police.

## **8.1 Strengthening the intelligence component in law enforcement**

Over the last decade this re-active law enforcement approach has been complemented by a more proactive analytical intelligence function focusing on identifying new investigative leads without a crime being reported in the first place. This type of intelligence was developed to enable law enforcement agencies to take a more pro-active approach based on general patterns which might point towards a criminal activity involved. For example, a non-crime related situation of interest to be further analysed could refer to the revenues of restaurants in a city that are known to have only a limited number of customers over several years but have not changed ownership (something one would expect if business is not going very well). Now, it might turn out that the same restaurants have an annual tax declaration which is contrary to the aforementioned business picture. At face value, there is no immediate criminal activity involved as there might be a plausible explanation for the described discrepancy but it might also be that such a plausible explanation does not exist. If the latter is the case there is the possibility for the restaurants to be used as a money laundering scheme for assets gained from criminal activities. Intelligence analysis units will spend time and resources to collect necessary background information and intelligence to be able to determine which business relations these restaurants maintain, what the actual owners of the restaurants do in addition to running the restaurant, with whom the restaurant owners have contacts, what these contacts do, and if there is somewhere along the line information that could further substantiate the possibility that money laundering involved. Even if it was possible to obtain the respective information the next step needs to be taken, to establish the criminal offence triggering the money laundering activity. Otherwise it will be difficult to open a criminal investigation as the existence of a predicate offence is the prerequisite for

establishing a money laundering offence in most Member States. Giving credit to the analysis unit involved and the available information it might be possible to construct this link.

The final step to transform the analytical approach into a criminal investigation is often much more difficult to take. To open a criminal investigation most jurisdictions in Member States of the European Union require ‘facts’, especially civil law countries.<sup>50</sup> In general terms, a hypothesis as a result of the aforementioned analysis could satisfy these requirements.

The difficulty is that it is still possible that the evolving investigation will not produce the necessary factual evidence to get the case watertight. On the other hand there are numerous other cases available where on top of the crime committed the potential suspects also are ‘readily available’. This is where the dilemma starts. Why taking a risk and investing resources in a case that can turn both ways, if the ‘stress-free’ alternative is in the same basket? From an effectiveness-only perspective no one can be blamed for choosing the easy option. The efficiency-perspective looks slightly different and takes into account the equation of doing things right instead of doing the right thing. The fact that there is so much ‘obvious crime’ to choose from brings law enforcement in a kind of Catch-22 situation. Although there are other choices available like investing in the uncertain analytical endeavour which can result in new knowledge it is almost impossible to make this choice. If such a choice does not result in a conviction law enforcement will be judged as being ineffective. Media will be quick to demonstrate that there have been enough other ‘obvious crimes’ that were not investigated although the necessary evidence would have been easy to be obtained; that law enforcement wasted precious resources. Not an unexpected behaviour in a post-modern society, where judgements on specific situations are taken in an opportunistic manner if it serves the own purpose (although this would already represent an abuse of the principles of such a society as the actual post-modern aspect would be simply to judge the same situation from a different perspective and this different perspectives being neither better or worse). Perhaps it is this dichotomy law enforcement has to deal with which is the reason that the priority list of crime areas representing the highest threat potential has remained almost unchanged over the last decade.

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<sup>50</sup> Decision by the German Constitutional Court 2013 regarding the requirements to start a criminal investigation (BVerfG 2 BvR 389/13): *The initial suspicion to start a criminal investigation has to be based on facts which can explain the possibility that the suspect has committed the crime under investigation. Indications and speculations are not sufficient ([der] Anfangsverdacht muss eine Tatsachengrundlage haben, aus der sich die Möglichkeit der Tatbegehung durch den Beschuldigten ergibt. Vage Anhaltspunkte oder bloße Vermutungen genügen nicht).*

This discourse indicates that information used for the OCTA is to a large extent based on information deduced from investigated and previously reported crimes and does not consider the value of information related to investigations that from a result-driven perspective would be judged as failure.

## **8.2 Setting strategic priorities based on behavioural patterns**

As mentioned, the new methodology for the OCTA, developed for the new Serious and Organised Crime Threat Assessment (SOCTA) puts an emphasis on qualitative data exploring the 'behaviour' of an organised crime group. Information related to the behaviour of an organised crime group normally is not captured in great detail by a criminal investigation. The subject of a criminal investigation is an individual as only an individual can be convicted for committing a specific criminal offence. Although in many jurisdictions an offence related to conspiracy exists the application of the respective penal code provisions is rarely used. For an organised crime group it is not important which final stage the criminal investigation reaches unless an investigation has the potential to completely dismantle the criminal organisation involved. Organised crime groups know that if their members come under the law enforcement radar these members might end up in prison. What is important for the organised crime group is the fact that their activities have triggered the interest of law enforcement. As a result the members of the group might suspend their criminal activities, and will start to destroy possible evidence linking an individual to a criminal activity. What members of an organised crime group will do for sure is analysing the reasons why their criminal activities have created a law enforcement interest in the first place. If there is no informant or an undercover agent involved it is likely that it was exactly the behavioural pattern of the members of the organisation which led to an investigation. As a consequence of the analysis, the criminal organisation will learn and change their behavioural pattern accordingly.

For the ECIM to be a success it is of utmost importance to be able to identify the group's behaviour. Analysing the behaviour and identifying possible means to exploit these established patterns will lead to more successful investigations and provides the needed insight to be able to determine the actual threat level presented by the group. If a criminal investigation is successful leading to the disruption or in an ideal scenario to the dismantling of the group the usefulness of related data for the (S)OCTA might even be limited. In the case of disruption the organisation will have lessons learned and a new adapted modus operandi

will be considerably different to the one established during the investigation. If the group has been dismantled the criminal business has failed. This of course does not mean that the crimes associated with the group's activities will cease to exist. The generated gap will be closed by another criminal group taking over. To which extent this new group is an existing group that just expands its criminal activities, a group which combines the branches of different groups or a group that is really new remains to be determined. However, data available related to the dismantled group will not be helpful in developing future-oriented counter-strategies. The old Serious Crime Report was heavily criticised because it was relying on historical data, in some instances relying on information even older than one year. As a consequence, the new (S)OCTA is supposed to integrate almost live data, data related to investigations which are currently ongoing. This is a great step in the right direction. However, as the (S)OCTA is meant to be able to identify specific types of threat posed by organised crime and organised crime groups involved, it needs to be considered if timeliness of information is the only crucial variable in the equation to develop a future oriented ECIM. As argued, identified behaviour of an organised crime group is as crucial as timeliness and therefore the (S)OCTA could miss out on an important ingredient if the data collection plan does not include data from 'embryonic' investigations. This refers to investigations that yet have not been formally opened or investigations that were stopped at an early stage in the process due to a missing prospect of success from a law enforcement perspective. It is exactly those 'non-investigations' which can provide the necessary insight to make the (S)OCTA a much more effective tool.

For analysing the threat level attributed to individual organised crime groups the (S)OCTA relies on the following indicators: international dimension, corruption, adaptability and flexibility, resources, legal business structures, multiple crime areas, cooperation, expertise, external violence, and countermeasures. This list goes beyond the original list used for the initial OCTA methodology. Information related to these indicators will also be available from investigations that have not been further followed up. It can even be argued that data from these investigations is more important to develop an understanding of the actual threat posed by organised crime groups as the group was able to avoid a successful investigation against its members and its illegal activities. This could be one of the main reasons to promote a European Criminal 'Intelligence' Model instead of a European Criminal 'Information' Model. Taking a holistic approach for the ECIM can only work if data collection in Member States follows the same principles. To see to which extent these efforts are streamlined the

website of the National Crime Agency (NCA) in the UK provides some indications. The website offers a 'crime threats' section.<sup>51</sup> The section refers to crime types; organised crime groups are not mentioned. Further reading with regard to very traditional crime types like drugs trafficking reveals little more information on organised crime groups involved. Much is written about different types of drugs and where they originate from, but again, the section on 'organised crime involvement' in drugs trafficking does not contain specific information regarding these organised crime groups. The reason for such a limited reference to organised crime groups might be based on the fact that law enforcement in the UK does not want to give away indications on which groups are the main focus of law enforcement activities. If that is the case the question remains why much more detailed information on organised crime groups is accessible on Europol's Website via the public version of the EU Serious and Organised Crime Threat Assessment (S)OCTA. Another reason for a limited reference to organised crime groups could be based on the fact that the actual organised crime group involved in a criminal activity is only of secondary importance. In the end for the society suffering from a specific crime phenomenon it does not make a real difference if heroin is imported and distributed by a British, a Columbian, or a mixed group with a hierarchical or flat command structure, that used violence to maintain its prominent position in the market and which uses legal business structures to disguise its illegal activities.

The availability of heroin has been and remains a major problem in the European Union. It is not surprising that the NCA as the successor to the Serious Organised Crime Agency (SOCA) focuses on the actual criminal activity and not so much on the organised group involved. The primary objective of SOCA was to reduce the harm organised crime inflicts on society and the crime type plays a much more prominent role in when harm is in the centre of attention. In Germany, aims and objectives of the Bundeskriminalamt (Federal German Police Headquarters) are different. The national Organised Crime Situation Report focuses on the organised crime groups. The report is produced annually since the early 90s and evolved over the years from being purely quantitative to include qualitative components, although the actual title of the report never changed (Bundeslagebild Organisierte Kriminalitaet).

However, the focus of the national German report does not really overlap with the data collection requirements outlined for the (S)OCTA.

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<sup>51</sup> Natioanl Crime Agency – NCA, Crime threats, <http://www.nationalcrimeagency.gov.uk/crime-threats>, viewed on 12 May 2015

Some arguments have already been provided to explain these discrepancies but there could be a more fundamental problem: the (S)OCTA and the ECIM exist in a ‘parallel world’ in comparison to national approaches taken to tackle organised crime. It is also possible that the conceptual model is simply too detached from a national law enforcement perspective or the (S)OCTA is focusing on the wrong variables. To a certain extent all of this plays a role. At national level law enforcement has to produce tangible results in acting against organised crime (e.g. seizures, arrests, or convictions). National law enforcement activities are operationally driven and strategic assessments need to be directly linked to the operational environment. If this link is not imminent it is difficult to demonstrate its added value, especially if strategic findings cannot be easily transformed into operational activities (or an investigation). In this case a strategic assessment is regarded as a ‘luxury’ that not many national central law enforcement agencies can afford without risking their credibility by spending resources on issues that do not have an outcome. The possibility that the conceptual model for the (S)OCTA and the ECIM is based on wrong premises can also not be ruled out. Although the conceptual models for both were developed in close cooperation with Member States it has to be admitted that the input from Member States also came from colleagues who were working in the strategic section within their national settings. It should be expected that there was a close coordination process between the representatives from Member States and the operational side of the house at national level but the experience gained by the author in this process rather points in the opposite direction. A critical reflection shows that the exercise for developing the (S)OCTA and the ECIM resembled more a ‘playing field’ for strategic analysts to put into action those ideas that were not possible to implement at national level. The result might be like the blueprint for a perpetual motion machine which turns out in the end to be a blunder.

The last aspect, focusing on the wrong variables, can also not be discarded as a lot of the necessary information required for the (S)OCTA simply is of limited or even no importance from an operational perspective as explained earlier in this paper. In addition, the variables used start from the old premise that organised crime in principle behaves like a business enterprise, as organised crime is profit oriented and only differs from ordinary business models by the fact that the commodities traded are illegal (Sellin, 1963, p.13).<sup>52</sup> To make a business enterprise model work for organised crime the variables used for the (S)OCTA also

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<sup>52</sup> T. Sellin, ‘Organised Crime as a Business Enterprise’, *Annals of the American Academy of Political and Social Science*, vol. 347, 1963, pp. 12-19.

include aspects which deal with the illegal aspects of crime like ‘use of countermeasures’ or ‘use of violence’. This approach is complemented by the assumption that criminals are rational actors. Combining a business enterprise model with the rational actor model allows defining a conceptual framework to explain how the criminal enterprise works. These two premises provide a logical framework that enables to fill in conceptual gaps in organised crime behaviour by an already well-established body of knowledge in these two areas. But can these two basic assumptions really be used to define the needed variables to get a better understand of how organised crime works?

### **8.3 Organised crime as a rational actor acting business like?**

The equation that the behaviour of organised crime groups equals a general business enterprise model is appealing and the fact that legal business and organised crime groups have the same overall goal in maximising profit favours such comparison. Still, organised crime is rooted in considerably different context. The first known organised crime groups were mafia-type groups. In this context, mafia-type is used as an umbrella definition for groups that follow very distinct rules and procedures, making them insulated groups that can hardly be penetrated from outsiders. Mafia-type is not exclusively referring to the traditional Italian Mafia. For the ease of the argument mafia-type includes also traditional Russian organised crime groups (e.g. Vorovskoy Mir) and traditional Chinese organised crime groups (e.g. Yakuza, Triads) and other organised crime groups which are also defined by a strong ethnical cohesion. Current national threat assessments available from EU Member States still refer to these mafia-type organised crime groups as playing an important in the organised crime landscape, even if these traditional organised crime groups have been complemented by multi-ethnic, non-hierarchical, fluent organised crime structures acting mainly on opportunities independent from a specific crime type. To stick to the business enterprise model it would be easy to add the attribute ‘family’ to the business enterprise model when referring to mafia-type organised crime groups. By doing so the conceptual model could still be maintained for mafia-type organised crime groups. However, existing research into these groups shows that the origin of all of these groups goes beyond the family-business concept. These groups are based on extreme secrecy, extensive procedures to become a recognised member of such an organisation, the overarching principles of absolute obedience, confidentiality, and trust. These groups did not come into existence as an alternative model to

existing business or family-business structures, these groups developed as a sub-culture within an existing society.<sup>53</sup>

Another example illustrating the skewed ‘similarities’ between the business enterprise model and organised crime can be found when focusing on Outlaw Motorcycle Gangs (OMG). OMGs might do not come immediately to mind when talking about organised crime, especially as these groups do have different reputations in different countries. Although OMGs in the UK are under investigation for alleged organised crime activities a member of the Hells Angels participated in the Queen’s golden jubilee celebrations in 2002. This illustrates a certain contradiction between the actual criminal activities of OMGs and public perception. In Germany OMGs are closely linked to organised crime. A little over 10% of all organised crime investigations were associated with the criminal activities of OMGs. In 2012 the Bundeskriminalamt noted in its annual organised crime situation report that *‘with regard to organised crime committed by Germans OMGs play a significant role and their involvement has been on the increase’*. From this perspective it would be negligent not to consider OMGs when looking at the business enterprise model as an explanatory working model for organised crime. Becoming a member of an OMG is not a straight forward activity. The trajectory to full membership in an OMG has several phases and lasts over many years. As the ‘Hells Angels’ are one of the best known OMGs the following outline briefly describes the process for becoming a member of this group. The potential member goes through different phases and needs to earn his credentials to get closer to be accepted as ‘Full Member’. The starting point would be a ‘Hang-Around’, a status that allows a prospective member to attend some of the club events; next the potential member becomes an ‘Associate’, if actual members take an interest in the ‘Hang-Around’; reaching the ‘Prospect’ status is the following step (This status includes the full-acknowledgement that an individual is in the process of being considered to become a ‘Full Member’. The individual concerned may participate in club activities but is not entitled to club voting privileges.); at the end the individual will be a ‘Full member’ or ‘Full-patch’. Full-Patch, or being patched refers to the fact that the member now has the right to wear all the sanctioned jacket patches, including amongst others the Hells Angel ‘death head’ logo as well as the words ‘Hells Angels’ on the top patch panel.

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<sup>53</sup> For a detailed description see: K. Barksby, *Constructing criminals: the creation of identity within criminal mafias*, Keele University, 2013

The mafia-type and the OMG example put a question mark behind the business enterprise model as a fitting explanatory working model to understand and describe the mechanisms applicable to the activities of organised crime groups. There is no doubt that over the years traditional organised crime groups have been complemented by other forms of organised crime groups that show a behaviour where it is easier to draw parallels to the business enterprise model but this model is not universally applicable when trying to understand organised crime. Even for the more business like organised crime groups it cannot be ignored that these groups do act in a criminal environment. The link to the non-criminal environment is only made when there is a need to launder criminal proceeds to get these proceeds into the legal economic cycle to be able to use the money without running the risk to have the money confiscated due to its illegal origin. The (S)OCTA indicates that the use of legal services and legal business structures plays a crucial role in this process. However, this process only reflects one facet of the criminal activities involved. For this process the basic analogy stemming from the business enterprise model, the assumption that also organised crime groups act rational, is valid. The business enterprise model has gained importance over the years to explain the activities of organised crime groups. According to Teece (2010) *'the essence of a business model is that it defines the manner by which the business enterprise delivers value to customers, entices customers to pay for value, and converts those payments to profit: it thus reflects management's hypothesis about what customers want, how they want it, and how an enterprise can organise to best meet those needs, get paid for doing so, and make a profit'*.<sup>54</sup> The development of this business model is based on the rational choice theory which revolves around the idea that human behaviour is guided by an individual's interpretation of what is in his best interest. Rational choice theory supposes that every individual evaluates his/her behaviour by that behaviour's worth, which is the result of the calculation of rewards minus costs.<sup>55</sup>

The business enterprise model will work where the partners involved, especially the service provider and the customer buying the service have equal rights. Within the context of organised crime the service provider would be the organised crime group and the customer would be the victim. It is difficult to assume that there is an equal relationship between the organised crime group and the victim.

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<sup>54</sup> D.J. Teece, 'Business Models, Business Strategy and Innovation', *Long Range Planning*, vol. 43, no. 2-3, 2010, p. 174

<sup>55</sup> J. Elster, *Rational choice*. New York University Press, 1986

This is exactly the nature of organised crime: there is someone who will have to pay the bill against his or her will. Where organised crime is involved there will be an aggrieved party. 'Customer care' is limited to not destroying the illegal market in which an organised crime group is making its profit. In addition, the validity of business enterprise models based on rational choice in a postmodern society might have to be questioned entirely. Analysing the collapse of the Lehman Brothers in 2008 provides an indication that even in legal business structures the rational choice assumption could be short-lived nowadays, not entirely refuting the rational choice model but making the rational choice model just one of several possible models that might be as valid to explain organised crime.<sup>56</sup> Although these arguments question the value of using the enterprise business model as a model to explain organised crime it would be going too far to resort to the opposite assumption and to treat organised crime groups and their behavioural pattern as entirely non-rational. Yet, there needs to be a more distinct approach which takes into account that it will be a dead-end to solely trying to understand organised crime groups by referring to the business enterprise model.

There is still the need 'to understand' how organised crime groups work. Only 'understanding' will provide the tools necessary to develop effective and efficient counter-strategies which can be transformed into operational success. Of course, there is also another option to tackle organised crime by simply investigating and analysing reported crimes in line with the respective provisions in a national penal code. Reality demonstrates that this approach which has dominated the law enforcement world for many decades (and still does) is not addressing all dimensions necessary for the strategic problem-solving puzzle.

The development of the drugs market serves to illustrate the case. For decades the 'fight against the illegal drugs market' has been priority number one for law enforcement not only in Europe but around the globe. The report 'War on Drugs' by the Global Commission on Drug Policy published in June 2011 paints a very sobering picture of the successes achieved.<sup>57</sup> The report shows the following figures in relation to the worldwide consumption of opiates, cocaine, and cannabis based on the United Nations estimates of annual drug consumption 1998 to 2008. The consumption of opiates increased from 12.9 million to 17.35 million, a plus of 34,5%; Cocaine from 13.4 million 17 million, a plus of 27%; and cannabis from 147.4 million to 160 million, a plus of 8,5%.

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<sup>56</sup> For further details regarding the unfolding of the Lehman Brothers Crisis see: 'The origins of the financial crisis - crash course', *The Economist*, September 2013

<sup>57</sup> The Global Commission on Drug Policy, *War on Drugs*, <http://www.globalcommissionondrugs.org/reports/>, 2014, viewed on 15 March 2014

In October 2013 the British Medical Journal Open published a report that concludes that global efforts to combat illegal drugs have failed to curb supply based on a review of drug surveillance databases.<sup>58</sup>

According to the authors, the average inflation-adjusted prices of heroin, cocaine and cannabis in the United States decreased by 81% (opiates), 80% (cocaine) and 86% (cannabis) between 1990 and 2007. At the same time, their average purity increased by 60%, 11%, and 161% respectively. Similar trends were observed in Europe, where the price of opiates and cocaine decreased by 74% and 51% respectively during the same period. According to the United Nations World Drug Report 2013 the inflation adjusted retail price for one gram of cocaine fell from EUR 150,00 in 1990 to EUR 62,00 in 2011, and the inflation adjusted retail price for one gram of heroine fell from EUR 136,00 to EUR 52,00. These details do not really encourage a positive view when it comes to evaluating the success of the aforementioned law enforcement efforts to win the fight against illegal drugs. The statement by the Global Commission on Drug Policy ‘the war on drugs has failed’ does not seem to be too far-fetched. Returning to the starting point, investigating the illegal drugs trade does not result in the promised success. A more strategic approach focusing on understanding the organised crime group and the criminal market can offer a different perspective for tackling organised crime groups and criminal markets.

It is difficult to see that anyone would start to repair an engine or a computer if there was not an understanding about how the engine or the computer works. In the same line of thinking it is also difficult to see that anyone will be able to find the appropriate means to tackle organised crime groups or criminal markets without a basic understanding about how these groups and markets work. The need for a strategic perspective is back, even if the paradigm might be different. Therefore, the initial methodology chosen by the OCTA/SOCTA and by the ECIM is a step in this direction. Organised crime groups and the related criminal markets are a difficult subject to research, too many variables cannot be observed directly and it is difficult to obtain independent confirmation if the chosen variables are valid and reliable. Thus, the usefulness of these variables is something that has to be continuously challenged and the variables need to be adjusted in line with the outcome of these critical reflections.

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<sup>58</sup> D. Werb et al, ‘The temporal relationship between drug supply indicators: an audit of international government surveillance systems’, *The British Medical Journal Open*, 2013, <http://bmjopen.bmj.com/content/3/9/e003077.full.pdf+html>, viewed on 16 May 2015

It would be a strength of the ECIM to state clearly that the variables used for data collection are not a tablet of stone - a tribute to be made when trying to perform a complex task in a society leaning more towards the postmodern angle.

#### **8.4 The volume of law enforcement data available to the ECIM**

The ECIM offers a new approach for tackling trans-national organised crime, emphasising the need to rely more on the intelligence component as the qualifying attribute within available law enforcement information. The possible difficulties with regard to relying on the intelligence concept which still is not undisputed within law enforcement have already been reflected upon. The following chapter will highlight another aspect in relation to the information/intelligence used for 'feeding' the ECIM - data completeness. Processing data provided by 28 Member States offers a plethora of information, even to the extent that the available information becomes difficult to handle. However, such information overload can be deceptive. Quantity does not replace quality, especially not where information is used for strategic purposes. There is a danger that the amount of available data blurs the view regarding its quality. Especially in trans-national law enforcement this danger is apparent. Joining forces beyond national level to tackle organised crime has for one not a too long tradition and second is still flawed by the fact that initiating criminal investigations remains within the legal framework set-out by national legislation. The shift promoted by the ECIM to divert from information to intelligence could result in overlooking these challenges, which could lead to a skewed ECIM not reflecting the actual purpose the ECIM was initially developed for.

Information/intelligence available to law enforcement is generated from either criminal investigations, which provide the necessary legal framework for the collection of such data or where the legal framework provides for such an option from the pre-investigation phase. The mechanism is straight forward. Law enforcement agencies will only be able to pursue a criminal case if facts are available indicating unlawful behaviour. However, there is a long process involved from suspicion to prosecution and conviction which influences this data. In criminological terms this is referred to as the funnel model.<sup>59</sup> The funnel model describes the process from reported cases to final conviction.

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<sup>59</sup> P. Eglin and S. Hester, *A Sociology of Crime*, London: Routledge, 1992

As mentioned before, the German crime statistics of 2011 make reference to around 6 million crimes with a total of 2.2 million individual suspects identified, with 2.1 million suspects being older than 14 years of age.<sup>60</sup> Going through the investigation funnel only 42.000 of the convicted suspects were finally servicing a prison sentence. This means that from the initially identified number of suspects only 2 percent were convicted. With regard to the number of suspects identified and those that were subject to a court case the percentage moves up to almost 39%. Available data from the German crime statistics between 1993 and 2011 show that these figures have been rather stable.<sup>61</sup> These figures indicate that only information from investigations related to 20% of the suspects identified reached the stage of formal judicial proceedings. These figures refer to all forms of reported crime. With regard to organised crime these figures might represent different ratios. Reporting crime generally depends on a victim, but not every victim reports a crime to the responsible law enforcement agencies. Crimes committed and not reported are referred to as 'dark figures'. Although researching dark-figure crime is receiving more attention, reliable results are hard to find. The best estimates range between a 1:1 ratio for aggravated theft and a 1:8 ratio for simple theft or bodily assault.<sup>62</sup> Existing results of dark-figure research indicate that the overall number of crimes committed is at least twice the number of crimes reported. As outlined, organised crime in many cases remains (a) victimless or (b) has victims who for a variety of reasons have no interest in reporting these crimes to any authority. Therefore, it does not seem unlikely that dark figures related to organised crime are even higher than those for 'ordinary crimes'. Reflecting on organised crime related figures made available in the 'German National Organised Crime Report 2013' shows that there was a total of around 10.000 suspects identified. Unfortunately, no further information is provided with regard to the outcome of any of the organised crime related investigations. Hence, it is difficult to estimate if this figure related to the 2.2 million identified mentioned in the National Crime Statistics or if the figure is the equivalent to the 850.000 suspects who became subject to a criminal investigation that was followed by a formal judicial proceeding. Both options are not promising with regard to the data made available for the ECIM. Given the first case this would refer to a figure of around 2000 suspects, representing just 20% of the initial figure of identified suspects that would be further investigated.

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<sup>60</sup> In Germany the minimum age to have criminal responsibility in front of a court is 14 years of age.

<sup>61</sup> Polizeiliche Kriminalstatistik 2011, p. 17, published by the Ministry of Interior (German National Crime Statistics 2011)

<sup>62</sup> 'Dunkelfeldforschung in Bochum 1986/87', *BKA Forschungsreihe*

In the latter, the figure would refer to 25.000 identified suspects, representing 39% of this figure which equals the 10.000 suspects mentioned in the German Organised Crime Report.

For the ECIM, group related figures are more relevant, even when the actual criminal investigation is directed against individuals. Taking that perspective into account the German Organised Crime Report offers the following figures: on average, looking at the figures from 2004 to 2013 there are on the average 600 organised crime group related investigations per year. Applying the above mentioned percentages this refers to roughly 1540 organised crime groups being active, of which 600 come under further investigation (39%). Doing the maths for all 28 EU Member States these numbers become enormous and there is no reason to believe that the situation in Germany is not representative for the EU. Although there are many historical, cultural, and political differences within the EU, the distribution of organised crime groups should be similar; especially taking into account the EU represents a common political and geographical area, with no internal borders. If there is a relation between the population and the organised crime groups active in a country the overall figure for the EU would be around 8500 active organised crime groups with roughly 3300 of these groups being subject to a criminal investigation (39%). Knowing that organised crime groups being trans-national in their activities it is obvious that several of these groups will be under investigation in different Member States. The question is: Do Member States know that there are 'complementary' investigations in other countries? Without having respective research in this area an experience from Germany can shed some light on this question. In 1997 when working at the Bundeskriminalamt as strategic analyst we wanted to know to which extent information about ongoing activities by organised crime groups was exchanged between the 16 federal states in Germany. Here it needs to be understood that the internal federal set-up in Germany bears quite some similarity with the set-up of the EU. Regarding law enforcement the 16 federal states are acting autonomous with the Bundeskriminalamt acting as a federal umbrella, being largely dependent on the will to cooperate from the individual federal states. The current concept of the relationship between Europol and the Member States works within the same paradigm. To research the existing knowledge transfer it was decided to map investigations related to drugs trafficking attributed to the so-called Cali-Cartel, at that time the most influential Columbian based organised crime group in Germany. Out of 16 federal states 7 had investigations running that were targeting the Cali-Cartel. Even with the reunification of Germany in 1990 it was unlikely that in 1997 the Cali-Cartel had already expanded to the 5 new federal states, respectively it was still unlikely that the new federal

states would have the professional capacity to investigate the Cali-Cartel. This means that the criminal structures of the Cali-Cartel were ‘well-established’ in the West Germany with 7 out of 11 federal states affected. Although the German Organised Crime Report refers to the average group size of an organised crime group being 16 the researched Cali-Cartel in 1997 included between 35 to 70 suspects, of which only a limited number of individuals became subject to formal judicial proceedings. The results of the research were striking. It turned out that all investigations were linked by at least one individual. However, the quality attributed to these ‘linking individuals’ in the respective investigations at federal state level varied greatly. The common denominator was that ‘linking individuals’ were assigned different roles across the different investigations. Knowledge about these individuals being part of an investigation in another federal state was limited or none existing. It was difficult to provide an explanation for these findings. However, the following possibilities were considered:

- (a) input of personal details into existing data databases was limited/not consistent;
- (b) the ‘quality’ of the ‘linking individuals’ was underestimated and therefore the ‘linking individual’ was not considered relevant for the actual investigation;
- (c) the ‘linking individual’ was not identified as the main link between the investigations and due to the different foci of the investigations the role of the ‘linking individual’ was not further analysed or
- (d) there was no interest by the investigating unit to explore the link to other investigations.

Whatever the reasons, the example shows the difficulty of taking a wider perspective in an investigation if the investigating team is has to focus the inquiry on specific criminal offences committed by specific individuals as defined in the penal code.

The driving force to focus on certain individuals is based on the likelihood of a possible conviction in a court case. This was the result of a non-investigative driven analysis at national level.<sup>63</sup> How the outcome of such research would look at trans-national level remains a speculation but respective results could look pretty similar. Own experience at Europol supports this statement. Even in very sensitive terrorism-related investigations Member States are often not aware to which extent these investigations are potentially interlinked to other investigations or different groups of individuals not currently in the focus. If such behaviour can still be observed in counter-terrorism investigations where the trans-national exchange of information and intelligence is crucial the situation related to organised crime related investigations might even be worse.

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<sup>63</sup> Additional analysis regarding the choice of an individual to become the subject of a criminal investigation can be found on page 81 of this thesis.

In the end, it does not really matter. The figures and the examples just show that there are large dark figures or unexploited areas in criminal investigations, which from an intelligence perspective might provide a much more valuable insight into the phenomenon of organised crime compared to the information that can be drawn from the reported and investigated crimes. The ECIM collects, processes and analyses information/intelligence from 28 Member States, facing the challenge that just the available volume of data might be deceptive with too much data but not the right data. The reference to the crime statistics highlights another challenge. Information/Intelligence to be useful needs to be complete, accurate and up-to-date.<sup>64</sup>

## **8.5 The criminal investigation is an artificial abstract of the criminal reality**

A criminal investigation is the means to investigate a crime, to identify a suspect and to finally prepare the court case. It is a factual based exercise. By definition, the findings derived from represent the basic input for an intelligence model. Criminal investigations provide a huge amount of information that cannot be obtained from any other source. Perhaps even more important is information that can be gathered from investigations which did not find their way into a court or were dropped by the investigators in agreement with the prosecution service half way through the investigation phase. Only a reported or known crime triggers a criminal investigation.<sup>65</sup> However, the more complex an investigation the more likely it is that the criminal activity will be chopped into bits and pieces due to the fact that these activities need to be subsumed under the existing national penal code in court.

This re-shaping results in certain criminal activities to be prosecuted as available evidence allows for such a prosecution. Other activities may be excluded from further prosecution because evidence is not available or too difficult to be obtained to prove a crime, or simply because the activity as such does not constitute a crime in the true sense of the word (e.g. if drugs are seized on a ship and the actual involvement of the Reeder is unknown, the initial acquisition of the ship does not play a role in the criminal proceedings,

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<sup>64</sup> The need for a strategic document to be based on up-to-date information and the need for data to be accurate refers to the basic data collections requirements focusing on behavioural patterns as outlined on p. 47 et seq. of this thesis.

<sup>65</sup> Within the EU Member States this concept is not universally applied. There are Member States that work on the concept of a mandatory prosecution of crime whereas others apply the principle of opportunity.

although this process might be of utmost importance from an intelligence perspective regarding the understanding of the criminal activity as a whole). What happens when a crime is investigated is some kind of artificial compartmentalization. In addition, available data related to the administrative framework of criminal investigations contain useful information for an intelligence model: the number of investigators used, the length of the investigation, the actual charges compared to the initial charges, the number of suspects finally prosecuted, the conviction rate, the average length of the sentences for certain crimes, the requests for appeal, the actual profit made compared to the confiscation of assets, etc. All this information needs to be included in a revised intelligence model, as the interpretation of this data will enable law enforcement to fine-tune future counter-strategies to be more successful. Limiting data collection to the criminal act only provides half the picture as such a perspective does not consider how law enforcement agencies by performing or not performing considerably influence available data as the basics for the intelligence function. The proposed revised '3-iModel' not only adds complexity to the concept of intelligence led policing.<sup>66</sup> The new model also illustrates that intelligence as a core ingredient of the model does not exclusively consider intelligence derived from the criminal environment. Therefore, the initial question if the ECIM is referring to criminal-intelligence or to intelligence used in a crime-related context is an issue. If the latter is intended then an ECIM has to be based on the revised 3-i-Model. The initial 3-i-Model does not provide a comprehensive conceptual model to accommodate today's law enforcement strategic needs in a more complex reality. However, it might be doubtful to which extent such a revised model can be implemented at EU-level, taking into account that even the basic 3-i-Model is still far from being universally accepted and implemented in the law enforcement community across Member States. This challenge is discussed further within this thesis and should not be used as an excuse to limit the actual scope of the envisaged ECIM. For this reason it is suggested that for a European Criminal Intelligence Model no hyphen is used between criminal and intelligence to avoid limiting the scope of such a model. At first sight expanding the concept of intelligence beyond the criminal context of the model might be overambitious, which could lead to an unwanted early failure of the model. Nevertheless, the further discussions demonstrate that an ECIM will only be successful if such a broad perspective is chosen. A more limited scope will only lead to 'running around in circles'.

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<sup>66</sup> As outlined in chapter 6 of this thesis.

### **8.5.1 Different perspectives when evaluating investigations from a national, operational or a trans-national, strategic perspective**

The rationale of the European Criminal Intelligence-Model is based on the fact that it is well understood that certain crime phenomena are common across Member States. It is equally understood that this requires a focused trans-national approach due to the scale, significance and negative impact of these crimes.<sup>67</sup> There are obvious crime areas which will show up as the ‘usual suspects’, like drugs trafficking, trafficking in human beings, facilitating illegal immigration, money laundering, and cybercrime. But it also obvious that a changing environment, not only the criminal environment also creates new forms of crime which currently are not on the radar or are regarded as low priority. It can be argued that (a) there is no need for a new mechanism at EU level to address these new developments as the most important crime areas are well known and have been on the priority list of Member States for several years already and it is unlikely that the list of ‘usual suspects’ will considerably change over the next years to come; and (b) new trends have always been there and have been picked up by the law enforcement community once these trends have really manifested themselves as a phenomenon that requires the respective attention. Cybercrime being one of the striking examples over the last decade which has managed to get into the list of ‘usual suspects’ and might even have managed to be on top of the list by now. Therefore, it might not be necessary to have a different early-warning-system in place which indicates that there is already a self-regulatory mechanism within the law enforcement community that guarantees that priorities will be re-adjusted once the magnitude of the crime phenomenon has been established. In addition, the European Union has already provided the necessary tools to tackle these problems effectively if an orchestrated trans-national response is required. These tools can mainly be found in a variety of different decisions taken by the EU (e.g. the Schengen Acquis, the Prüm Treaty, the legal framework for setting up Joint Investigations Teams, or the so-called Swedish Initiative). This sounds reasonable. Unfortunately this perspective mirrors the wishful-thinking of law enforcement rather than reality.

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<sup>67</sup> In this context it does not matter if these consequences are described as harm, damage, or impact. There should be agreement that any consequence has an unwanted negative effect on society, which constitutes the common denominator.

The fact that police or law enforcement agencies are resistant to change has been researched widely. For example Cope (2004) emphasizes that police culture is likely to represent a serious obstacle to implementing a new model of policing.<sup>68</sup> This specific police culture is easy to be explained as the police in the concept of the nation state have been assigned a specific role as already mentioned in the previous chapter. This role remained unchallenged for decades and was further strengthened by a modern approach enforcing a 'grand-narrative'. The grand-narrative puts law enforcement into a unique position as the guardian of society and the upholder of basic universal societal values. The role of law enforcement has been inviolable for decades and there was no discourse if the police was possibly in the wrong. This in return had an impact on the self-conception of the police, which can be summarized by stating that the police had the tendency to be sure to have all the answers to all the questions and that there was no need to adapt to a changing environment as the police response would still be valid. To a certain extent this sounds re-assuring as it provides at least a constant in a time which mainly is characterized by change. Having said this, the possible change from a modern society in which these arguments make sense to a postmodern society where these arguments do not hold or are even to be considered anachronistic might distort such a perspective. Already the initial findings in the first 2006 OCTA contradict this perspective and so does the latest SOCTA 2013. Of course, also the 2006 OCTA resorts to the 'usual suspects'. However, the 2006 OCTA tries to look at the 'usual suspects' from a different perspective. That crime is evolving is a natural process. The analytical perspective of the 2006 OCTA tried to answer the question if there were major differences in the set-up of organised crime groups, which made them also different with regard to the strategy law enforcement would have to deploy to successfully tackle these groups according to these differences, if they exist. In line with the argument made above the first assumption would be that organised crime group do mainly differ with regard to their nationality mix, the crimes they are focusing on, and the geographical influence they would have. So far, the traditional concept. The 2006 OCTA showed differences in areas that did not fall into the aforementioned categories and which until this point in time were not considered when developing law enforcement counter-strategies.

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<sup>68</sup> N. Cope, 'Intelligence led policing or policing led intelligence?', *The British Journal of Criminology*, vol. 44, no. 2, 2004, pp. 188-203.

Strategic analysis of available non-law-enforcement data can lead to different priorities compared to those traditional law enforcement at national level has been comfortable with. A good example in this context can be found in the 2011 OCTA. The report mentions missing-trader-intra-community-fraud (MTIC) as generating multi-billion Euro losses to EU Member States each year. A couple of years earlier, a reference to this type of crime was nowhere to be found. Law enforcement agencies in Member States did not have had a single investigation into the subject matter, at least not within the reporting mechanism to the OCTA. Instead, traditional forms of organised crime (drugs, illegal immigration, trafficking in human being, counterfeiting the Euro and other counterfeits) were the only types of investigations that were reported to the OCTA. Empowering European Agencies to investigate into crime areas from a European rather than a national perspective has changed the landscape of crime. Other non-traditional crime areas are prioritised due to new mandates that do not focus on a national Member State's perspective and the actual information needed to further investigate new priority areas like MTIC fraud is not available within the traditional concept of policing.

The 2006 OCTA covers known territory when it comes to describing the organised crime environment in the EU by taking a traditional approach regarding the ethnic origin of the criminal groups and their criminal activities. Nevertheless, the chapter 'The threat from organised crime' enters new territory. Here the 2006 OCTA starts to deconstruct organised crime groups into their individual components. Components which evaluated individually and then combined define the threat level of the group. In this context the first two criteria, 'international dimension' and 'group structure' are of specific interest as these two criteria for the first time take a perspective on organised crime groups that is more leaning towards a social science like approach. These two criteria start to interpret the behaviour of an organised crime group as a single entity. International dimension is defined as '*the international dimension of OC can be captured as international co-operation, between non-indigenous groups or between an indigenous and a non-indigenous group, or as international operations carried out directly by an OC group*'. The chapter dwells further into this concept and adds aspects related to where the actual 'strategic level members' are physically based (e.g. inside or outside the European Union) and how organised crime groups secure their assets. The next section discusses group structure stating that '*the existence of criminal organisations or networks should not be taken for granted; attention should instead be paid on the conditions under which patterns of criminal association and co-offending emerge and*

*exist*'. In retro-perspective and taking into account the self-perception of modern law enforcement as described before it is not surprising that the first OCTA was met with huge scepticism by law enforcement agencies in Member States.

### **8.5.2 The need to operationalise strategic findings**

Before the OCTA the law enforcement community was used to be confronted with similar amorphous approaches stemming from the academia, which was mainly recognised as another social science based perspective on organised crime without practical implications. Now, for the first time such an approach is coming from within. A strategic analysis originating from Europol, the European Police Headquarters, bringing new typologies of organised crime groups into play which were far from the traditional concept of 'law enforcement agency A in country B is investigating the members of an organised crime group for illegally smuggling and distributing commodity C based on crimes committed and potential offenders identified'. The reaction from those focusing on operational activities was simply to declare these initial OCTA findings to be useless in an operational context as these findings did not support a criminal investigation in any way. Unless there is no link between strategic direction and operational activity this is the wrong conclusion. It is undoubted that 'there is enough organised crime 'around' for law enforcement agencies in Member States to have the luxury to decide which investigations are run and which are not due to limited resources. This puts an emphasis on the need to choose the right operational activities. It also has led law enforcement agencies to a 'dangerous' selection process of these investigations. If there are enough potential investigations to choose from it is tempting to concentrate on those investigations which will produce the 'best results' (e.g. amount/value of commodities seized, likely conviction rate). There is nothing wrong if these investigations also tackle those organised crime groups that represent the greatest threat, at least at national level. That is where the problem starts. Such an evaluation can only be made if there is a strategic assessment which identifies those organised crime groups or crime areas that constitute the greatest threat from a holistic perspective. Law enforcement agencies have to ask themselves more often 'Does law enforcement do things right or is law enforcement doing the right thing?' Strategic analysis offers the answer, especially as strategic analysis is not immediately result driven in contrast to operational activities. Strategic analysis cannot only afford to take a step back from being directly involved in investigative activities it is the prerequisite for the strategic perspective.

However, strategic findings are not always welcome as the findings might identify crime areas that so far have not scored high in the operational success story ratings or require a re-thinking in how to effectively tackle a specific organised crime group. Both options do not neatly fit into a law enforcement environment which is shaped by a general resistance to change and a focus on immediate operational success.

To illustrate the need for the close relationship between operational activities and strategic findings the 2006 OCTA again serves as an example. The report identifies organised crime groups to be distinguished with regard to where these groups keep their assets. Available options for law enforcement to seize such assets are fundamentally different if assets are kept inside or outside EU jurisdiction. For years, in criminal investigations, including investigations into organised crime, the component of financial investigations was not very high on the agenda. The reason for financial investigations being neglected was simple: A detective is not an accountant; a detective tackles crime and brings criminals behind bars. With recognising the existence of organised crime this perspective slowly changed. Money laundering legislation including suspicious transactions became an important tool in tackling organised crime and financial investigation units were becoming part of every re-organisation that took place when modernising law enforcement organisations. It has been said before that law enforcement prefers to act in a comfort zone. Once financial investigations were established as the appropriate means to be successful in investigating organised crime groups it became an automatism to include a financial component into each organised crime investigation or to have the investigation even be led by the financial investigation team. Financial investigations became a Pavlov reaction in relation to organised crime. When the 2006 OCTA introduced a new perspective on how organised crime groups are organised the meanwhile established routine was disturbed. The automatic link between the activities of an organised crime groups and the necessity to focus on financial investigations was not so obvious anymore. Due to different behavioural patterns there was now a need to actually try to understand in which typology a certain organised crime group would fit to decide to which extent financial investigations would provide the necessary evidence to have a successful investigation. As academic as the strategic finding in the 2006 OCTA seemed, taking a second look shows that the strategic assessment has added a new dimension into the discussion on what makes an investigation into an organised crime group effective. At the same time it needs to be highlighted that these strategic findings would need

further research to evaluate their actual validity. Nevertheless, there are sufficient indicators in the available data to draw such an initial conclusion.

Discarding the 2006 OCTA as not being operationable misses the point. To accept that a strategic assessment has its value just because it is a strategic assessment falls short from providing the right framework. If it is not possible to translate a strategic assessment into operational activity the strategic assessment does not serve its purpose. The link between strategy and operational activity has to run both ways. However, there is still some way to go to convince the law enforcement community, used to be mainly measured by operational success, to recognise the value of strategic assessments as the appropriate guide to direct operational activities, especially when the strategic assessments challenges the actual value of an established law enforcement comfort zone.

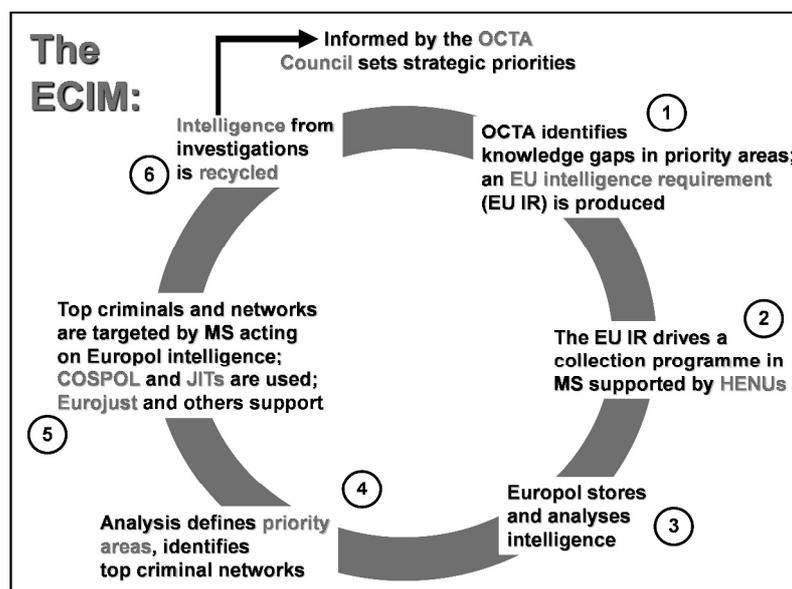
Moving to the findings of the current 2013 OCTA again shakes the assumption that law enforcement agencies will be effective if they continue to follow old patterns dominated by operational success. With regard to organised crime groups the report mentions that there are currently 3.600 international organised crime groups active in the EU. This number is the sum of organised crime groups reported upon by 27 Member States, which means that there has already been a selection at national level with regard to the groups that would be subject to the national OCTA contribution and which would not. Looking at the actual definition for organised crime groups to be relevant for the OCTA it is obvious that the number of reported organised crime groups for the 2013 OCTA only represents a fraction of the overall number of organised crime groups law enforcement communities in Member States have 'to handle'. The respective calculations were made with regard to the extrapolation of dark figure data on p. 56 et seq. of this thesis. In this context it is irrelevant if reference is made to Enfpol35/1997 or the more flexible definition used with the introduction of the OCTA in 2005. Analysing quantitative data is not the prime strength of a strategic assessment. This explains that the major part of the 2013 OCTA is dedicated to qualitative analysis.

Nevertheless, a reflection on available quantitative data is sufficient to demonstrate the need for strategic guidance beyond the national perspective. 3.600 organised crime groups qualify for the OCTA based on their international dimension, indicating that the activities of these groups are not limited to one specific Member State only. Which activities do constitute the 'international dimension' is not entirely clear. The 2006 OCTA outlined that 'international dimension' can be attributed to a variety of different characteristics. To tackle these organised crime groups effectively cross-border cooperation between different law enforcement

agencies is a prerequisite but law enforcement resources are finite and finite resources have to be deployed carefully to achieve best results.

This leads to very simple questions: Which of these 3.600 organised crime groups are to be tackled first? Who takes the lead in tackling the respective group? Which offences should be prioritised? Which resources by whom are required to tackle the group successfully? How do these groups compete with other organised crime group that were not reported upon from a national perspective? Trying to find appropriate answers by continuing the traditional national perspective is bound to fail. However, such failure might not be obvious as law enforcement agencies will continue to produce successful operational results that will make it to the headlines. It is coming back to the question ‘Are we doing the right things?’

To be able to effectively tackle organised crime strategic guidance is needed. Not only to orchestrate a trans-national response which will fall into the responsibility of different jurisdictions therefore requiring a higher level of coordination but also to take the right priority decisions at national level. The ECIM is intended to provide the respective framework. Unfortunately, the ECIM alone will not be able to achieve these goals due to the role national law enforcement plays in getting this concept to work. This requires a strong link between the ECIM and national intelligence models. The ECIM is a cycle build on the following components: (a) define priorities areas; (b) identifying knowledge gaps in priority areas; (c) develop a data collection plan to fill the identified knowledge gaps, (d) analysing newly obtained information; (e) define action plans for prioritised areas; (f) Member States target organised crime groups in line with identified priority areas; (g) information/ intelligence obtained from Member States investigations is fed into the data collection phase for the new (S)OCTA (h) the EU decides on strategic priorities based on the new (S)OCTA:



What looks nicely like a closed system turns out to be an open one. Identifying knowledge gaps in priority areas (b), Member States target organised crime groups in line with identified priority areas (f), and information/intelligence obtained from Member States investigations is fed into the data collection phase for the new (S)OCTA (g) make the ECIM a Member State dependent exercise. As mentioned above, the ECIM only works if Member States internalise the concept by investing in a national intelligence model that will serve the requirements of the ECIM. In addition, Member States will be required to align their investigative efforts with the findings stemming from the ECIM.

According to Project Harmony, initiated by the Belgian EU Presidency outlining the foundations for turning the ECIM from a theoretical concept into an applied methodology in law enforcement across Europe, Member States have several years to develop and to implement these steps. The final and full implementation for the ECIM at EU level and Member States is foreseen for 2017.

Project Harmony also foresees in the planning from 2011 to 2017 the development and the delivery of training/awareness packages to further support Member States in implementing National Intelligence Models and to compile good practices/lessons learned for the implementation of Member States' National Intelligence Models aligned with the ECIM. In 2014 Member States were still far from developing such National Intelligence Models. The data collection for the (S)OCTA is an obligation which Member States cannot bypass due to the commitment expressed at political level in Brussels. Nevertheless, the implementation in Member States and at EU level follows different speeds. In an ideal situation the speed would have to be synchronised to achieve the expected outcome, in particular if the importance of existing regional or local aspects becomes more important in a postmodern Europe.

## **8.6 Support of the ECIM by Member States and the ECIM leaning itself towards a more postmodern concept**

There are some Member States which have undertaken considerable efforts to streamline activities at national level with those at EU level, especially Belgium, the Netherlands, and the United Kingdom. These countries were also the main players in bringing project Harmony to life. In addition, Denmark and Sweden have closely followed the idea of developing a national intelligence model. It could also be observed that Germany has been very active in the preparation phase. However, the interest of Germany was to a large extent driven by making sure that the new methodologies for the OCTA/SOCTA and the ECIM would not divert too much from the existing national framework for producing the German National Organised Crime Situation Report (Bundeslagebild Organisierte Kriminalitaet). The history of the German 'Bundeslagebild' provides an explanation for the caution in the German approach. Addressing the phenomena of organised crime from a national and strategic perspective goes back for almost 25 years when the first definition of organised crime was agreed upon between the German Federal Criminal Police HQ (Bundeskriminalamt), the respective representatives from the Regional Criminal Police HQs (Landeskriminalaemter), and the German Customs Police HQ (Zollkriminalamt). Having to build consensus between the Bundeskriminalamt, the Landeskriminalaemter (11 at that time) and the Zollkriminalamt was a major achievement in a state where the federal states (Bundeslaender) are almost autonomous when it comes to law enforcement. Ever since 1990 the Bundeskriminalamt is producing the 'Bundeslagebild' based on the aforementioned agreement. It is not difficult to understand that even with such an agreement it took the Bundeskriminalamt considerable efforts to convince the Landeskriminalaemter (11 before, and 15 after reunification) to provide the requested data.

To a degree the German experience in developing the Bundeslagebild could be compared with the implementation efforts of the ECIM discussed in this thesis. From a national German perspective, the Bundeslagebild methodology works and there is even some literature discussing the possibilities for a European Organised Crime Threat Assessment that refers to the methodology of the Bundeslagebild as a potential blue-print.<sup>69</sup> Over the years, the Bundeslagebild has developed from a quantitative/statistical assessment to an assessment that also includes qualitative analysis.

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<sup>69</sup> T. vander Beken, *Measuring Organised Crime in Europe*, Maklu, 2006

The German law enforcement community has incorporated the Bundeslagebild in its annual national law enforcement planning cycle with the German Minister of Interior presenting the key findings of the Bundeslagebild to the public before the report is officially released. The German methodology for the Bundeslagebild being so deeply anchored within a German context it is not surprising that the German approach to the OCTA/SOCTA and finally the ECIM had to be sceptical as there is no obvious reason to change a winning team'. The Bundeslagebild does not really try to provide an understanding of how organised crime groups or criminal markets work. Even with the improved qualitative angle the Bundeslagebild still focuses on identified facts and figures. Interpreting these findings is not a priority. With the OCTA/SOCTA turning towards a more interpretative approach the existing Bundeslagebild-methodology would have to be revised considerably. The experience gained by the BKA in developing the Bundeslagebild and the resistance met at national level in the process was reason enough to try to model the OCTA/SOCTA methodology as close as possible to the existing Bundeslagebild-methodology. This example shows the importance for the ECIM to be successful to reach out to Member States to make sure that national law enforcement perspectives concur with the ECIM or can be streamlined accordingly.

Operational law enforcement activities are implemented at national level, following national interests and a national political agenda. As long as Member States remain sovereign states within the European Union this will not change. To further illustrate the discrepancy between the European and the national level also the United Kingdom can serve as an example.

In 2013 the National Crime Agency (NCA) became operational replacing the Serious and Organised Crime Agency (SOCA). In the first half of 2005 the United Kingdom had been the driving force for the ECIM, just before taking up the Presidency of the European Union.

Therefore, a strong link would be expected between the SOCA/NCA and the ECIM.

However, referring to the NCA's Website leads to a rather disappointing result. There, the NCA is described as a '*crime -fighting agency with national and international reach, mandated and empowered to work in partnership with other law enforcement organisations*'.

Within the NCA the 'Organised Crime Command' (OCC) is the most relevant entity for the ECIM. Unfortunately, when the work of the OCC is described in more detail not a single reference can be found to the European context much less the ECIM. The OCC focuses on the national perspective. The OCC even refers to the establishment of strategic oversight of individuals and groups utilising Organised Crime Group Mapping, a concept which seems to be entirely different from the ECIM methodology.

In addition, the OCC bases its work on strategic action plans focusing on five threats: Drugs; Firearms; Organised Acquisitive Crime; Organised Immigration Crime and Prisons and Lifetime Offender management. The link to the ECIM or the priorities identified by the OCTA/SOCTA seems, to put it mildly at least to be fragmented. The German and the UK example both illustrate that implementing an ECIM cannot be achieved by simply defining a principle road-map and a timeline (project Harmony) which is endorsed by the political stakeholders in Brussels

As the ECIM is intended to be the overarching mechanism for the law enforcement community across Europe the number of national law enforcement agencies mentioned actively participating in developing the ECIM is rather low in relation to the 28 Member States of the European Union. At face value there is a general division between the Northern and the Southern hemisphere within the European Union when it comes to the 'active agents' pushing the ECIM. Germany, already trying to contain the ideas presented in the ECIM in line with the existing national approach, is the country the furthest south from a pure geographical perspective that has joined the ECIM efforts. There is a need to find a way to create a common platform including all Member States. National law enforcement agencies remain the stakeholders of operational data that is necessary to be processed and analysed at European level to generate strategic findings that can be used to define priorities for law enforcement in a trans-national and European setting. At the same time, the authors of the OCTA/SOCTA have realised that there are too many differences across Europe to be able to provide a consolidated homogeneous European perspective on organised crime groups and the priorities in tackling them. At the political level the need for such a diversified perspective is not immediately obvious. The Council conclusions on setting the EU's priorities for the fight against organised crime between 2011 and 2013, agreed upon during the 3096th Justice and Home Affairs Council meeting in Luxembourg in June 2011 solely

talk about general EU priorities.<sup>70</sup> The Council conclusions do not reflect the complex conceptual model the OCTA has developed to produce a more in-depth and differentiated picture of the threats identified. The OCTA does not focus exclusively on a European perspective.

The first OCTA published in 2006 contained an initial reference to the existence of 'regional hubs' in Europe. Besides the expected priority crime areas like drug trafficking, trafficking in human beings and illegal immigration, fraud, counterfeiting, intellectual property theft and money laundering the report identified 'regional patterns' that have distinct features which make it noteworthy to point out their specific 'peculiarities' requiring an individual strategic approach to counter the particular forms of organised crime revolving around these regional centres. The 2007 OCTA not only confirmed these findings, the report further exploits the regional hub concept as an important characteristic when analysing the manifestation of organised crime in Europe. The importance of regional hubs to take a more diversified approach on organised crime in Europe was further developed in the following years.

The 2007 OCTA recognised that the European Union is not a homogeneous structure, especially not for law enforcement, even not from a strategic perspective. A one-size-fits-all strategic approach does not work. Different influencing factors identified and present in one and absent in another region inevitably leads to different manifestations of organised crime therefore requiring a tailored regional strategic approach which takes these differences into account. At first sight such a distinction might be contrary to the idea of a European Organised Crime Threat Assessment and the ECIM as this distinction results in a more scattered European approach, moving away from the idea of streamlining trans-national law enforcement activities into a more homogeneous, European-minded perspective. Regarding this diversity as contradicting can only be done if looked at from a modern perspective.

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<sup>70</sup> These priorities read as follows: (1) weaken the capacity of organised crime groups active or based in West Africa to traffic cocaine and heroin to and within the EU; (2) mitigate the role of the Western Balkans, as a key transit and storage zone for illicit commodities destined for the EU and logistical centre for organised crime groups, including Albanian-speaking organised crime groups; (3) weaken the capacity of organised crime groups to facilitate illegal immigration to the EU, particularly via southern, south-eastern and eastern Europe and notably at the Greek-Turkish border and in crisis areas of the Mediterranean close to North Africa; (4) reduce the production and distribution in the EU of synthetic drugs, including new psychoactive substances; (5) disrupt the trafficking to the EU, particularly in container form, of illicit commodities, including cocaine, heroin, cannabis, counterfeit goods and cigarettes; (6) combat against all forms of trafficking in human beings and human smuggling by targeting the organised crime groups conducting such criminal activities in particular at the southern, south-western and south-eastern criminal hubs in the EU; (7) reduce the general capabilities of mobile (itinerant) organised crime groups to engage in criminal activities; (8) step up the fight against cybercrime and the criminal misuse of the internet by organised crime groups.

In a postmodern society this diversity would even be welcome. The fact that the concept of 'regional hubs' did not get a prominent role when defining priorities at EU level can be seen as another indicator highlighting the difficult situation trans-national law enforcement finds itself in: Combining the requirement for an overarching European approach to more effectively tackle trans-national organised crime with a reality which requires a more individualised approach at regional level. Law enforcement again might be trapped in an outdated understanding of having to find that one equation which provides the answer to all law enforcement related questions to be able to 'eradicate' organised crime once and for all. An unrealistic conceptual model, challenged by the aforementioned regionalised OCTA findings. Nevertheless, at European level there is still a certain reluctance to address those apparently contradicting European-centred and regional-focused models.

## **8.7 The ECIM depends on the successful implementation of National Intelligence Models in Member States**

It has been said before that the ECIM cycle is not so much as a cycle when it comes to the different entities involved in implementing the concept. Strategic findings of the ECIM have to be translated into operational activities. In an ideal world the results of translating strategic findings into operational activities will confirm the strategic perspective taken. This requires that the ECIM is replicated at national level. In project Harmony this is referred to as introducing an ECIM-based National Intelligence Model (NIM) in Member States.

And again, the geographical split between the Northern and the Southern hemisphere of the EU comes into play. To provide an explanation why law enforcement approaches are different in these two major regions of the EU would be subject for another thesis.

The approach can be summarised as proactive versus reactive. Crimes are committed and need to be investigated and offenders identified in committing these crimes have to be brought to justice. Researching cause and effect does not fall into the basic mandate of law enforcement; the main mandate of policing is to enforce the law. This has two consequences for the OCTA and the ECIM: (a) if analysing cause and effect does not play a major role in law enforcement it will be difficult to obtain the necessary information for the OCTA as the policing paradigm does not reflect on such information, and (b) if the ECIM defines certain priorities that do not correspond to existing priorities it will be difficult or almost impossible to direct law enforcement from the existing path. The concept of regional hubs as outlined in the 2007 OCTA for the first time becomes even more important, with or

without a NIM in place. To get the law enforcement agencies in 'passive' Member States to buy-in into initiating operational activities based on the ECIM there needs to be an incentive. In a conservative, reactive law enforcement set-up this incentive can only be related to operational success as success of law enforcement is measured by tangible results, especially arrested suspects and seized commodities. Considering this mechanism it becomes obvious that any proposed operational activity based on ECIM priorities that does not take into account the specific interest of the Member State concerned is doomed to fail. This does not mean that the OCTA or the ECIM have to do a backward-roll but it underlines the value of the concept of regional hubs as a vital component which will considerably impact on the overall acceptance and validity of the ECIM.

With the new SOCTA methodology the regional hub concept was given up as it was felt that the dynamics within organised crime had again taken a different direction. The original regional hub concept had become too static, not keeping pace with organised crime that had become more fluent and driven by opportunity in an ever changing environment. Even the regional perspective might have been too large. Without further evaluating this new approach it should be pointed out that what has been written so far in this thesis might question this perspective. Organised crime might not be as amorphous as proposed. This does not discard the fact that new opportunities for organised crime will be exploited by organised crime groups that are able to seize these opportunities. However, there is still a large number of traditional organised crime areas around which will continue to be the focus of a large number of more traditional organised crime groups.

The fact that the OCTA/SOCTA has identified the need for a multi-faceted approach when taking a strategic perspective with regard to organised crime in Europe is an achievement as such which should make the law enforcement community in Member States more comfortable with the OCTA/SOCTA. Unfortunately, as the example for the United Kingdom demonstrates the existing relationship between law enforcement agencies in Member States and the OCTA/SOCTA still is rather alienated. The same is applicable for Germany. A search of the Website of the Bundeskriminalamt produces similar results with no reference to the OCTA/SOCTA findings to be found. So, where is the OCTA/SOCTA going wrong as even Member States that do have a National Intelligence Model in place to not further incorporate the findings of the OCTA/SOCTA in their national strategy? The ECIM cycle gets broken up when strategic findings are transposed into operational activities. This should happen at national level when the ECIM with the help of the OCTA/SOCTA has identified priority

areas and top criminal networks. The problem is that the OCTA/SOCTA described so far does not allow for the identification of top criminal networks. For the time being, the ECIM can be compared to a Management Information System focusing on providing aggregated strategic information derived from operational data.<sup>71</sup> Such aggregated data cannot be attributed to a specific criminal network.

Data collection for the OCTA/SOCTA is based on non-identifiable data and focuses on 'conceptual data' which enables the ECIM to understand organised crime and the groups involved. The ECIM describes the general behaviour of organised crime groups and has identified the need to further break down Europe into regional hubs. These findings do not themselves translate into operational activities. In addition, it was already stated that the relationship between the ECIM and the law enforcement community at Member State level is not at its best. In the current situation, the cogs between European and Member State level are not properly interlocked. To simply limit the added value of the ECIM to prioritised crime areas would not justify the efforts put into developing such a model. Reflecting only on these priorities just leads to the question 'where is the news?' Taking the actual order aside, these priority crime areas are identical to the priority crime areas already identified for years by the majority of Member States in their national strategies to tackle organised crime. To be able to go beyond these basics and to identify specific organised crime groups posing a concrete threat to Member States within the European Union takes the ECIM a step further.

Still, the question needs to be answered how such findings can be operationalised. The ECIM currently does not provide a respective mechanism. The ECIM leaves complete discretion to Member States with regard to how the strategic findings are operationalised at national level. Nevertheless, due to the large number of organised crime related investigations in Member States a steering or selection mechanism needs to be in place to identify those trans-national investigations that would really allow obtaining additional information necessary to support or refute the premises developed by the OCTA/SOCTA. For the ECIM to be effective in this respect data collection requirements have to reach a different level to establish a direct link between strategic findings and operational activities. To have these decisions taken only at Member State level leaves the risk that law enforcement agencies remain in the trap of choosing investigations that fall into the mentioned 'investigation comfort zone'.

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<sup>71</sup> The concept of a Management Information System is further elaborated on p.100 et seq. of this thesis.

For a strategic function to be effective the strategic function must be independent of such thinking and in a position to direct operational activities according to the strategic findings, not according to convenience. Directing operational activities does not include an immediate involvement at operational level but the underlying decision regarding the actual investigation has to be taken based on the strategic assessment. Therefore, besides for the ECIM to provide the overall strategic framework for tackling organised crime the ECIM has to play an active role in the operational decision making process. This requires including an additional layer of data into the process that is closer to identifiable personal data than the initial strategic data used within the concept of the ECIM as an information management system.

In the chapter on data protection requirements it is said that the ECIM as such will have no need to analyse personal data therefore declaring data protection concerns as outside the scope of the current discussions. For the ECIM to be fully functional and to be able to operationalise the respective strategic findings at national level this perspective might have to be revisited. In the current set-up with only aggregated strategic data the ECIM will be unable to identify a specific target. However, due to the described gap between the ECIM and operational law enforcement activities at Member State level the identification of specific targets is crucial for the success of the ECIM. With the establishment of 'behavioural patterns' of organised crime groups the ECIM has to be able to decide which investigations at Member State level best match these patterns. To make the model work the ECIM will have to include an additional layer or discussion process between the ECIM at European and law enforcement at national level. At national level law enforcement agencies need to cross-check their investigations against these patterns. These patterns are the result of the strategic analysis undertaken at EU level and it cannot be expected that national law enforcement agencies take the same perspective. Many of these strategic considerations are not considered during the investigation phase - for the right or wrong reasons as explained before.

Hence, national law enforcement agencies have to assign the respective 'strategic tags' to their investigations. In addition, the international dimension of the organised crime groups involved will have to be elaborated extensively. Although organised crime activities in a Member State are committed to a large extent by indigenous organised crime groups acting at national level with limited trans-national exposure it is important to focus on those groups (indigenous or non-indigenous) that have a more distinct trans-national dimension putting them on the 'European radar'. This matching exercise will produce a number of potential

target investigations to choose from, once all 28 Member States go through the same exercise. How then best to translate ECIM's strategic findings? Law enforcement success is measured by its operational impact. It is the overall security level 'produced' by law enforcement that will determine its perceived value.

### **8.7.1 Trans-national cooperation in a NIM context**

There is an additional difficulty to be considered when using international dimension as the decisive variable to prioritise investigations at national level. An organised crime group acting internationally has different parts of its organisational structure active in different countries. Running a criminal business basically requires (a) the acquisition of the commodity, which can include a production process and the acquisition of the respective raw material; (b) the transportation and distribution of the commodity to the 'customer'; and (c) the accumulation of profits.<sup>72</sup> In an international set-up these activities are assigned to different groups of individuals having different functions and positions within the criminal organisation. Consequently, an organised crime group will look different in different countries. This is where the difficulty starts. If an organised crime group is targeted in a trans-national context the contributions by national law enforcement agencies have to focus on the specific activity of the organised group. In a best-case scenario these individual activities will lead in individual Member States after successful investigations to the conviction of the respective group members. In a worst-case scenario law enforcement activities in several Member States will only help to support the conviction of certain group members in another Member State. Taking into account that law enforcement has to show tangible results the latter rather altruistic law enforcement approach will not receive a lot of support. Supporting the success of a law enforcement agency in another country means available resources at national level are diverted to an activity that will not offer a direct reward - the expected tangible 'return on investment' will not happen. In an environment where resources get scarcer with the portfolio of tasks widening at the same time this is a difficult 'seller'. Therefore, the decision making process regarding specific targets has to reflect these discrepancies.

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<sup>72</sup> With a reflection on the disputed business-like model to be applied to organised crime it is recognised that these steps indeed do reflect a business-model and could contradict what was argued earlier on. However, what is described here is a very generic business-model. In contrast to the earlier discussion this model does not refer to the experiences gained when looking at mafia-type structures. Beyond the generic business-model there is no further similarity with legitimate business models.

The following example illustrates the complexity and the resulting difficulties for national law enforcement agencies involved. Smuggling cocaine is a well-established and still lucrative criminal activity for organised crime groups. The majority of cocaine is coming from Central and South America. The main entry and distribution points for cocaine trafficked from this region are major ports in North West Europe, the Iberian Peninsula, and the Black Sea. In the past the trafficking was mainly dominated by Colombian organised crime groups. Over recent years Mexican organised crime groups are also emerging as traffickers to European markets. These groups use sophisticated trafficking and concealment methods. Improved techniques of incorporating cocaine into other materials makes detection more and more difficult. However, investigations into the trafficking of cocaine are still prominent in Member States and law enforcement agencies have invested for decades to know the playing field. In the given example intelligence has been received that a considerable amount of cocaine is trafficked into the European Union originating from Colombia. The amount is estimated to be 150kg of cocaine. If the cocaine can be seized and the individuals involved in the trafficking and/or the distribution are arrested the final sentence after conviction will result in the maximum sentence foreseen in the penal code of the Member States concerned. Intelligence further indicates that the cocaine is intended for distribution to the illegal market in Denmark. It is unknown if the cocaine is immediately distributed or warehoused. The cocaine is trafficked from Colombia via Spain, France, Belgium, the Netherlands, and Germany to reach its final destination in Denmark.

The cocaine will be trafficked via ship from Colombia to Spain. The individuals responsible for delivering the cocaine to a sea port in Spain are Colombian nationals, who also have Spanish nationality. In Spain the cocaine will be taken over by a lorry. The lorry belongs to a French company and the individuals driving the lorry are French nationals. The lorry will be driving from Spain to the Netherlands via France and Belgium. In the Netherlands the cocaine will be reloaded onto a lorry which belongs to a Danish company. The driver is a Danish national. To reach the final destination in Denmark the lorry will have to cross Germany. Available intelligence does not provide an exact date for the actual delivery to Denmark. The only information available refers to a day/time of the expected arrival of the cocaine in Spain. The details of the vehicles and the identity of the individuals involved in the trafficking activities are known. It is not known if all the cocaine is supposed to be delivered to Denmark or if the delivery gets divided into smaller portions during the reloading.

These details refer to a slightly simplified real case which contains all the ingredients of a criminal investigation linked to an organised crime group acting at an international level and is a classic example of a trans-national criminal investigation as the result of the priority settings of the ECIM when strategic findings are operationalised. Denmark as the final destination for the distribution of the cocaine has the greatest interest to run a coordinated operation involving law enforcement agencies in Spain, France, Belgium, The Netherlands, and Germany. Necessary cooperation with the Colombian authorities is excluded from the example for reasons of simplification, although the Colombian authorities would have a crucial role to play when it comes to the money-trail. After initiating such a coordinated operation decisions have to be taken at national level regarding the resource planning.

In the beginning especially the French authorities are carrying the burden. Although it is known when the cocaine will arrive in Spain it is not known when the cocaine will be picked up. In the given case the French surveillance team had to follow the French lorry when it was heading for Spain around the time of the expected arrival of the cocaine in Spain. Taken into account that operational law enforcement activities remain in the hands of the Member State concerned it is impossible that a Spanish surveillance team takes over this task on French territory. To directly engage with the French company owning the lorry would have entailed the risk that the operation gets leaked to the organised crime group involved. At the French/Spanish border the surveillance is handed over to a Spanish team. The French team has to be on standby as they will have to take over once the lorry has picked-up the cocaine and is on its way to the Netherlands. When the cocaine is picked-up at the seaport in Spain it turns out that the lorry is not immediately returning to France. The lorry is delivering other commodities on the way back from Spain to several cities in Spain, delaying the expected return. After three additional days the lorry heads towards the French border, an unforeseen extension of the initial operation. French authorities have to decide to keep the surveillance team in place or to deploy the team to another operation. After the lorry has crossed the border and is under French surveillance the drugs are transported to the Belgian border where the surveillance is taken over by the Belgian authorities. The same principles apply when entering the Netherlands. In the Netherlands the French lorry stops at a parking space at the motorway and the driver is met by an individual who had arrived in a Danish lorry. Unforeseen the individuals under surveillance are joined by a third unidentified individual who had arrived in a Dutch lorry.

It is impossible for the Dutch surveillance team to determine the role of the unidentified individual. In the course of the action it becomes clear that something is reloaded from the French to the Danish and the Dutch lorries. The Dutch surveillance team has to bring in a second team to follow the Dutch lorry in case that some of the cocaine had been reloaded onto this lorry. The Dutch lorry then heads towards the German border which requires an extra German surveillance team to take over the surveillance. The Danish lorry continues to drive to Denmark via Germany. Finally the Danish lorry is taken over by the Danish authorities from the German surveillance team. During the night the Danish lorry gets unloaded. The circumstances of the unloading indicate that the cocaine has reached its final destination before distribution. The Danish law enforcement authorities arrest the driver and the people present during the unloading. It turns out that all the cocaine was delivered to Denmark. The final court trial is limited to the individuals arrested in Denmark. Denmark did not request the extradition of the individuals involved in the trafficking which is due to the expected non-proportional efforts needed (conforming with the requirements set out in the European Convention on Mutual Legal Assistance in Criminal Matters) and the expected low sentencing. These individuals are also not subject to an investigation in the respective Member States concerned as a result of striking the balance between. The expected efforts required and the expected outcome in court as there would be a need to prove that these individuals knowingly were part of the organised crime group involved in the trafficking of cocaine to Denmark.

Each national law enforcement agency had to take decisions regarding the actual offence under which the case was investigated to allow for the respective deployment of resources. Another aspect the involved prosecutorial services had to decide was the question if it was legal that 150kg of cocaine were transited through their country without having the final control over the drugs. Again, in a worst-case scenario the drugs might have gone missing in a different jurisdiction - how could that be justified? In addition, it is not clear if all individuals involved are actually members of a single organised crime group or were an amalgamation of different groups taking an opportunistic approach to benefit from the need to have a lengthy supply chain in place. The example might look complex at first sight; however, these trans-national organised crime cases are the rule not the exception, especially in a Europe without internal borders when it comes to the free-movement-of-goods-principle.

Unfortunately, law enforcement has not gone through the same kind of harmonisation in cross-border cooperation. The law and related rights and obligations for those enforcing it still end at the border. The ECIM when operationalising strategic findings has to accommodate these difficulties. Returning to the need of law enforcement agencies for producing tangible results to be regarded as successful the example does not offer too many of these tangible results. Of the countries involved only the Danish law enforcement authorities were able to achieve such a result, Spain, France, Belgium, The Netherlands, and Germany were not. Nevertheless, without the support of these countries the Danish success would not have been possible. Had the Spanish decided to seize the cocaine at the border crossing to France the success would have been for Spain but the further trafficking route and the identification of the individuals involved would have remained unknown. From the perspective of disrupting organised crime groups effectively it was important to let the whole operation run from start to finish as the information obtained during the investigation (a) confirmed the intelligence received, and (b) enabled law enforcement agencies in an orchestrated operation to disrupt activities of the organised crime group or groups involved. In the given example the will to cooperate was fuelled by the amount of cocaine trafficked and the fact that the crime area concerned was within the already described law enforcement comfort zone. It remains questionable to which extent such cooperation would be possible in cases related to missing trader intra community fraud, illicit waste trafficking, or the trafficking in endangered species - all crime areas that have been identified by the (S)OCTA as priority crime areas.

To make the ECIM an institutionalised success targeted operationalisation in a national context is crucial. This requires the use of personal data. At which level such personal data is analysed is secondary. One option could be that the ECIM is supported by an operational Analysis Work File at Europol where relevant data is stored by Member States and accessed at a later stage to identify potential trans-national investigations to 'fill the ECIM with (operational) life'. A second option would be that the data stored in an Analysis Work File is analysed by Europol using the strategic findings of the (S)OCTA as a paradigm to identify those investigations that best fit the respective (S)OCTA variables. Both options do have their short-falls. When leaving the decision to Member States it is mandatory to establish a mechanism to prioritise 'competing' investigations. Such competing situations are not unlikely to happen. Organised crime groups acting trans-nationally will in many cases have been on the radar of law enforcement agencies at national level.

The actual threat posed by the individual branches of such trans-national organised crime groups active in different Member States will be evaluated differently. This is illustrated by distinguishing between the actual criminal activities of a group committed in one Member State (e.g. the selling of drugs, to stick to the more traditional organised crime phenomena) and the laundering of the criminal proceeds in another country. Whereas the country where the drugs are sold has a major interest in disrupting these activities the country in which money laundering activities have been identified might not be inclined to invest resources into the case as it could be too difficult to obtain the necessary evidence or even worse, the prosecution service might not even be convinced of the presence of a money laundering offence in the first place.

Individual roles attributed to specific members of these organised crime groups will also differ, depending on the investigative focus applied in the national context. The earlier example from Germany regarding the Cali-Cartel again helps to understand the challenge. Regional federal states were requested to provide all information that was obtained during their investigations related to cocaine trafficking that could be attributed to activities of the Cali-Cartel. In this context it is repeated again that regional federal states in Germany are highly independent from central federal structures, especially when it comes to law enforcement ('Polizei ist Laendersache' - policing is the sole responsibility of the federal states). In the following, regional federal states provided raw/generic data that was obtained during their investigations. The fact that raw/generic data was provided was vital for an unbiased analysis as aggregated data has already been evaluated and decisions were taken to assign a specific meaning to individual pieces of information and intelligence. It is this process at national level which shapes the focus of an investigation and identifies suspects to focus on. At the same time this process leads to other pieces of information and intelligence to be regarded as irrelevant for the investigation, either the information/intelligence is simply not needed within the investigative context or the efforts needed to obtain such information/intelligence would largely outweigh the expected results once the investigation gets to the court. Analysing aggregated data with a different focus is impossible as the data has been stripped of other potential links. The same applies to data from investigations at national level which would be needed within the ECIM to operationalise strategic findings. In a next step the data received from the regional federal states was pooled together and analysed with the objective to identify where information overlapped.

A first result showed that all investigations had entities in common data linking them. Now, there was a need to identify the nature of these entities, which required going back to the actual investigating unit.

The interesting finding was that the nature of the linking entities differed considerably depending on the individual investigation. In some cases the same individual was regarded as a main suspect whereas in other cases the same individual in different investigations was only considered to be in the margins of the investigation. Although some variance was expected the magnitude of these differences surprised.

The analysis revealed that the need to match the subject of an investigation with the respective offences in the penal code and consequently to identify the major targeted suspects led to an early selection process regarding the role of these individuals within the criminal organisation. Once the main subjects had been selected for the investigation there was only little room to change the assigned roles. Although it cannot be excluded that an individual has different roles in different investigations it is difficult to understand that a main suspect in one investigation only is regarded as of marginal interest in another investigation. This seems rather to be based on the initial selection process than on available information/intelligence.

The analysis helped to improve the general information exchange related to ongoing investigations at national level. However, the magnitude of the discrepancies identified at national level gets multiplied in an international context. Changing the role assigned to an individual in an investigation, being a suspect or an individual who is regarded as not important for the investigation based on information from other Member States outside the national investigative context is difficult as the national law enforcement and prosecutorial machinery has already decided on the path of action.

Europol provides an institutionalised framework to exchange data in mandated crime areas at European level - Analysis Work Files. Also here, Member States have total discretion in deciding to which extent this framework is used and which data they provide. The selection process will even be stricter when data related to ongoing investigations is concerned.

Too great is the fear that an investigation at national level could be compromised if data linked to the investigation 'gets out of control' of the investigating unit. But for operationalising strategic findings it is essential that the ECIM has access to all the raw/generic data available in Member States related to the investigations run in a prioritised crime area or regarding a prioritised organised crime group. Not to acquire the raw/generic data would be a mistake.

As mentioned above working with aggregated data will only result in self-fulfilling prophecies as the fixed value-tag provided together with the information/ intelligence will make it literally impossible to allow for a different perspective on the data. Another requirement is that information provided originates from the most current investigations. Reflecting on past investigations does not help to confirm or refute future oriented strategic findings of the (S)OCTA as the core of the ECIM. Both requirements are a challenge for Member States as they need to give up the national prerogative for a European respectively international perspective. Nevertheless, the already mentioned paradigm shift needed for an ECIM to work requires such fundamental changes. In a postmodern society these changes might just come 'natural'. For law enforcement still best described as being deeply rooted in a modern self-conception this might turn out to be the most difficult steps to take.

## 9. The OCTA as the engine to drive the ECIM

The main component fuelling the ECIM is the Serious and Organised Crime Threat Assessment - SOCTA.<sup>73</sup> So far, it has been demonstrated that there is still some way to go to harmonise operational law enforcement efforts at national and the strategic law enforcement perspective at European level. According to the conclusions of The Hague Programme in 2004 the ECIM represents the core concept to tackle organised crime with the (S)OCTA as key element of the model based on synchronised national assessments.<sup>74</sup>

This objective remains valid. For national assessments to be synchronised to feed the (S)OCTA Member States need to understand what the (S)OCTA actually is and what it is not. Only if the (S)OCTA is conceptualised at national level a targeted synchronising process can be developed. However, there is no universally agreed definition of what constitutes a threat assessment. A threat assessment can be based on quantitative or qualitative data only or it can combine both elements. With regard to the (S)OCTA Grabosky and Stohl (2010, p. 33) conclude that the (S)OCTA is more qualitative than statistical (quantitative). They finish by stating that *'neither qualitative nor quantitative data provide perfect knowledge of organised crime ... But they do provide complementary information that enhances our understanding of patterns and trends'*. According to Europol's Analytical Guidelines a Threat Assessment *'goes beyond the scope of a 'traditional' Situation Report and is defined as a product which analyses and evaluates the character, scope and impact of criminality. Most often a Threat Assessment will be long term, future oriented and therefore has the most difficult level of analytical ambition.'*

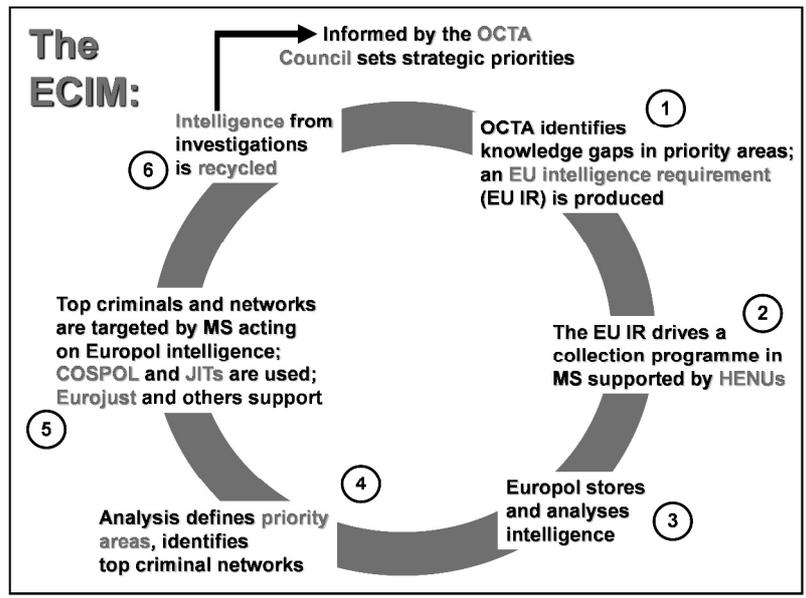
Assessing threat includes concepts related to risk, harm, impact, and vulnerability (these concepts will be discussed in more detail at a later stage in this thesis). As the concept for a threat assessment is complex the following charts should provide a better understanding for the discussion. The charts also explain the conceptual model underlying the threat assessment used for the (S)OCTA and the requirements for implementing the ECIM at national level.

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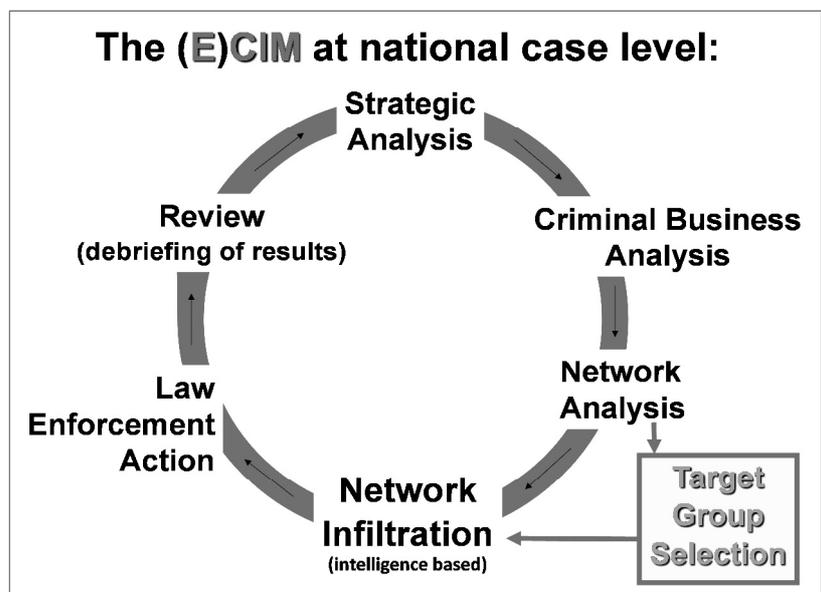
<sup>73</sup> Initially referred to as the Organised Crime Threat Assessment (OCTA)

<sup>74</sup> COM(2005) 232 final

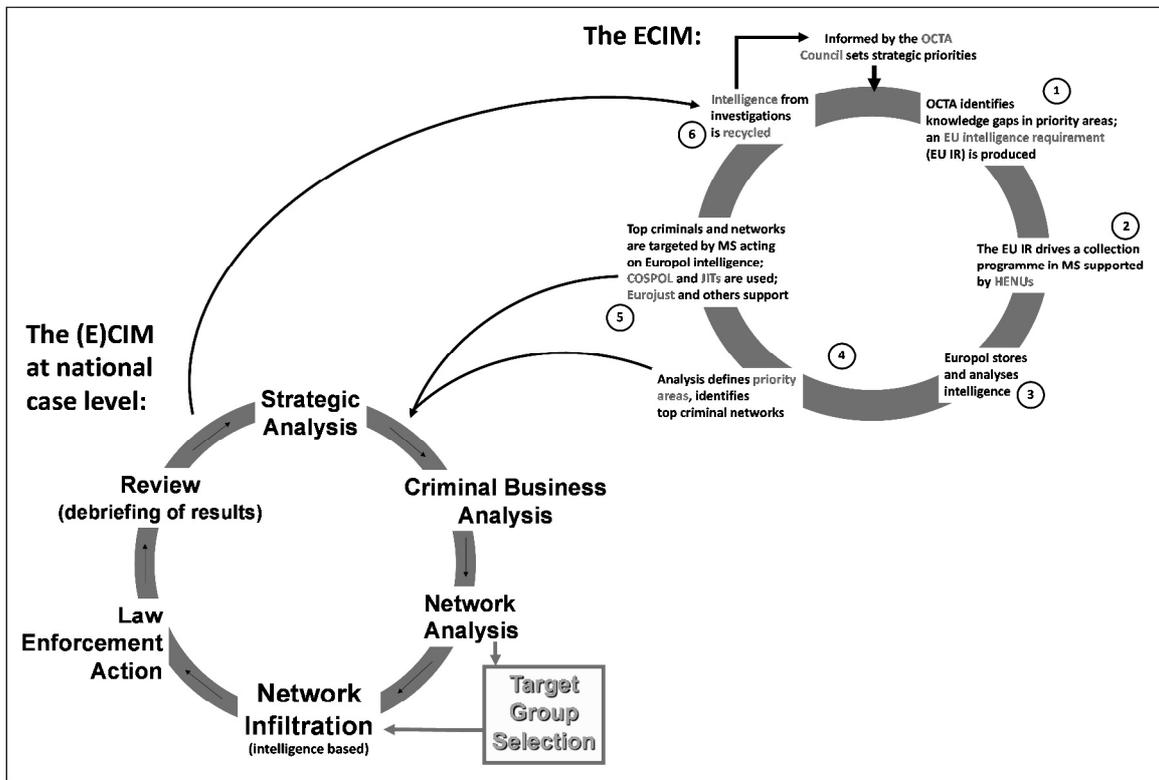
To develop a common framework for a qualitative data collection mechanism at Member State level assimilating the requirements of the (S)OCTA is challenging but achievable, even if it is difficult to define and to agree on common qualitative criteria to be collected across Member States.



Once targets have been identified as mentioned under (5) the ECIM will trigger activities at national level:



Combining the strategic findings of the ECIM after operationalisation with the activities at national level results in the following relationship:



## **10. The importance of societal developments - the postmodern link**

To be able to introduce and implement a European Criminal Intelligence Model it is important to understand in which societal environment such a model is embedded.

To understand to which extent law enforcement agencies at Member State level do represent a homogeneous set-up in which such a model can be applied is as important.

Having addressed these questions it remains to evaluate if such a model has to stay at a generic level, allowing for individualised approaches when implementing the model or if the model needs to be more detailed down to the level where strategic findings are operationalised to allow for a unified approach at national level, which in return will result in a unified European approach for tackling organised crime. Law enforcement does not exist in a vacuum. Being at the heart of what constitutes a state policing and law enforcement are heavily influenced by existing social, cultural and historical variables present at national level. Moving up to the European level these considerations are even more important as it currently still is unclear which role the EU can play when it comes to defining common law enforcement strategies based on a universally applicable criminal intelligence model.

In this context it is necessary to analyse the state society is currently in. Another aspect to be considered refers to the question if societal developments are mirrored in the law enforcement community or if the change-rate of the law enforcement community is of a different speed, which might result in conceptual models that do not reflect the needs of an existing reality.

Law enforcement is regarded as one of the cornerstones that are central to the concept of a state and the state for a long time has been regarded as the smallest indivisible entity - to a certain extent comparable to the concept of the atom as the smallest part of matter before scientific advancement showed that this concept has been considerably wrong. Along these lines it might be that also the traditional Weberian state concept has reached a cross-road, where it remains to be seen if the state continues to represent a single unified entity or will have to be looked at as a 'discontinued model' which is replaced by a more fluid concept. Continued globalisation and virtual realities introduced by the ever expanding cypher-space have already impacted on the understanding of the nation state concept already.

## **10.1 Modern, postmodern - does it play role for the ECIM?**

Society has gone a long way. During the Middle Ages life in Europe was dominated by religious beliefs. When moving out of the Middle Ages new ways of thinking started to challenge this view. In the sixteenth century the Reformation movement and new scientific discoveries led to a different perspective on the nature of the world. The outcome of these developments is generally referred to as Enlightenment or modernity.

The main characteristics of modernity are referring to the acceptance of the explanatory power of the natural sciences and the existence of meta-narratives, providing a logical and holistic perspective of the world. However, modernity is not the final state of the art.

On the contrary, the certainties of modernity have led to the uncertainties picked-up by postmodernism. Modernity can be described as the intellectual and cultural conceptualisation of the era of Enlightenment, especially the rejection of traditional sources of authority in favour of reason and knowledge as the actual corner stone to explain and understand the world. Modernity has produced a variety of social, political, legislative, technological and economic developments, including democratization and consumerisation.

Another key element of modernity is linked to the concept of progress.

With modernity moving into a societal context of consumerisation compared to production before, rational certainty and self-awareness more and more have developed into scepticism and fragmentation. These developments have considerably changed the paradigm of modernity. Some refer to this shift as 'late modernity', implying an existing continuity with the concept of modernity, whereas others have taken a step further by arguing that postmodernity has ended modernity, introducing a new conceptual framework.

Postmodernity refers to the increasing number of questions marks regarding the era of Enlightenment and its conceived ability to provide overarching answers in a more complex growing world after the Second World War. The development gained further momentum from the seventies to the nineties as the negative consequences of modernity became more apparent, e.g. climate change, dominance of economic interests, exploitation of natural resources, experienced social and judicial injustice.

Postmodernity is characterised by Relativism, Pluralism, Subjectivism and Fragmentation. Relativism means that what is regarded as valid (true) for a specific group may not be valid (true) for others. Pluralism, accepts that diverging opinions are equally valid.

Claims of exclusivity are not substantiated. Subjectivism, as opposed to the modern concept of objectivism, allows for the fact that a specific truth value can alter depending upon the perspective of the observer. In addition, a judgement which perspective is right or wrong cannot be made. Fragmentation takes into account that an overall cohesiveness amongst different groups does not exist, rather the opposite, there is a tendency towards smaller groups trying to lobby for their individual course. These groups are characterised by their single dimension, which is often expressed by one-dimensional attributes like ecological, gay, feminist, or fundamentalist. Consumerism is the role model for the priority of freedom of choice. Opinions and preference change quickly and are to a large extent influenced or defined by the media. In the sense that modernism focused on human self-confidence and an overarching contextualisation, postmodernism focuses on instability. Not only time is relative, everything else is: truth, reasoning, civilization, or justice. Postmodernity regards knowledge as contextual in scope and interpretation. Contexts are not universal, rather local, depending upon time, place, and culture. Objectivity is seen as an attempt to present an ideological perspective hidden as an established fact. The difficulty that came to light with modernity was that modernity after the Second World War offered a world without a constant. The ultimate belief that technological progress would be able to solve whatever problem in a positive way could not be turned into reality. Modernity was a way of making sense of the world, to finally close in on the 'Theory of Everything'. Modernity was convinced that science based entirely upon undisputed and objective facts would replace the need to rely on any other kind of value systems, especially those based on belief.

The concepts of epistemology and hermeneutics in modernity were clear and straight forward, only scientific methods were able to detect objective truth and when interpreting the significance of such findings again only science was able to do so. Postmodernity disputes such an approach, instead of striving for a holistic answer postmodernity is trying to find a tailored approach for coping with life. Postmodernity recognizes the limitations of the human condition and the difficulties of a value free approach in a contextualised reality. It accepts that truth can be generated from a variety of different sources, acknowledging at the same time that truth as such does not exist. Truth is rather perceived as of a subjective nature depending on perspective - what is true for some may not be true for others.

Nietzsche (1886) described this approach much earlier when he referred to his perception that so-called objective truth claims have to be seen as merely covert assertions of power.<sup>75</sup>

Criticism linked to postmodernity is often based on the underlying theoretical concept of denying objectivity. By insisting that all truth claims are relative and that no single truth system can claim singular objectivity postmodernity again has just created another absolute truth system, although based upon pluralism and tolerance. This criticism is reflected by Best and Kellner (1997) when they conclude: '*does not the very concept of postmodernity presuppose a master narrative, a totalizing perspective.*'<sup>76</sup>

There are no universally agreed definitions regarding the meaning of postmodernity. Different authors express different ideas. Some even prefer the term 'late modernity' to 'postmodernity'. However, there seems to be a broadly accepted general understanding that there are fundamental differences when talking about modernity and postmodernity. Modernity is changing, the degree of which still subject to ongoing discussions.

To be successful the ECIM has to take these developments into account. The validity of traditional law enforcement approaches placed within a Weberian state concept are questioned. Even if the EU structures in Brussels are requesting an overarching OCTA to define strategic priorities there seems to be too much of a modern perspective believing in a grand-narrative as the appropriate answer to tackle organised crime. There are many indicators pointing in a postmodern direction which require from the ECIM to be more diversified. The regionalisation of the OCTA (hub approach) and the focus on the individual set-up of organised crime groups are the first step to align a European perspective with the needs resulting from a more postmodern societal context. To be clear on the modern or more postmodern nature of society plays a decisive role for the ability to effectively implement the ECIM.

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<sup>75</sup> F.W. Nietzsche, Chapter I: Prejudices of Philosophers (no. 9), *Beyond Good and Evil*, Aziloth Books, 2010

<sup>76</sup> S. Best and D. Kellner, *The Postmodern Turn*, Guilford Press, 1997

## 11. Data protection needs for a European Criminal Intelligence Model

As described in detail in this thesis the European Criminal Intelligence Model is meant to provide a ‘steering wheel’ for decision makers to direct law enforcement efforts to be more effective in tackling organised and serious crime beyond the national perspective by taking a holistic approach in identifying law enforcement priorities. As such, the ECIM is a strategic tool based on a strategic concept. In the area of strategic intelligence analysis questions related to data protection do not arise as strategic information is generated from aggregated or anonymous data, not identifying the actual individual data it is derived from.<sup>77</sup>

However, taking into account currently available technical means the question remains if aggregated/anonymous data is really safe against re-constructing the underlying raw data and more important if the ECIM really can work if the model only is based on aggregated non-personal data. Regarding the question if aggregated data can be re-constructed to give away the underlying personal data and therefore requiring specific data protection safeguards it will be necessary to take closer look at the data needed to keep an ECIM ‘running’ with a focus on the operationalisation of strategic findings and how the ECIM actually needs to function to be able to direct trans-national investigations within the EU and beyond.

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<sup>77</sup> According to the Opinion 4/2007 on the concept of personal data by the Article 29 Data Protection Working Party ‘anonymous data’ can be defined as any information relating to a natural person where the person cannot be identified, whether by the data controller or by any other person, taking account of all the means likely reasonably to be used either by the controller or by any other person to identify that individual. “Anonymised data” would therefore be anonymous data that previously referred to an identifiable person, but where that identification is no longer possible. Recital 26 also refers to this concept when it reads that “the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable”. Again, the assessment of whether the data allow identification of an individual, and whether the information can be considered as anonymous or not depends on the circumstances, and a case-by-case analysis should be carried out with particular reference to the extent that the means are likely reasonably to be used for identification as described in Recital 26. This is particularly relevant in the case of statistical information, where despite the fact that the information may be presented as aggregated data, the original sample is not sufficiently large and other pieces of information may enable the identification of individuals. Article 29 Data Protection Working Party, ‘Opinion 4/2007 on the concept of personal data’, [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf), viewed on 7 October 2015

## 11.1 Data needed for ECIM

The ECIM representing a strategic intelligence cycle requires data input to initiate the analytical process. Data is generated at Member State level as a result of data extracted from ongoing and past criminal investigations. To be able to have a homogeneous data base across 27 Member States it is necessary to define the actual data that needs to be collected and reported for the ECIM. Standardised data transmission is of key importance if the analysis of this data is supposed to produce a reliable and valid outcome. What now constitutes such a standardised data set? The ECIM shows some striking similarity to a large scale Management Information System (MIS). According to Gupta (2011) Management Information Systems can be defined as systems that among other functionalities provide support to managerial functions like planning, directing and controlling and collect information in a standardised manner. In other words, MIS consist of interrelated components which collect, process and distribute information to support the decision making process of managers in an organisation. Management Information Systems supply decision makers with facts, support and enhance decision making processes. At the most senior levels, they provide strategic data and information to help to take strategic decisions. To be effective a MIS has to facilitate the decision making process by providing information within an appropriate time frame to help the decision maker to select the best course of action. This description reflects what has been said so far about the reasons for promoting an ECIM. If the analogy between the ECIM as a MIS is valid there should also be a similarity regarding the information required within the ECIM and information required in a Management Information System.

Kanter (1996) defines strategic information needs as unstructured, futuristic, non-programmed, inexact, and external. In the framework of an ECIM these attributes can be related to attributes used for the ECIM: Prone to a constantly changing criminal environment (unstructured), future oriented (futuristic), depending on identified intelligence gaps (inexact), and driven by the activities of the criminal counterparts (external).

The non-programmed feature does not really come into play, as the overall concept of Management Information Systems focuses on mainly computerized systems, whereas the ECIM due to the focus on the intelligence component relies on the human interface, the analyst. In line with Kanter's definition, strategic information needed for the ECIM can rely on aggregated, non-personal data. The required data has to mirror the concept of what constitutes the main characteristics of organised and serious crime groups.

These characteristics have changed over the last 20 years. The fact that such changes have taken place over two decades is not surprising; however, examining these changes under the premise of moving from a modern to a post-modern perspective makes these changes more interesting. It took time to agree on a European definition of organised crime.

In 1997 Enfopol35rev2 was adopted by the Council of Ministers.<sup>78</sup> This document defined that in order to speak about organised crime at least six of the following characteristics needed to be present, four of which must be those numbered 1, 3, 5 and 11 (mandatory requirements):

1. Collaboration of more than 2 people;
2. Each with own appointed tasks;
3. For a prolonged or indefinite period of time (refers to the stability and (potential) durability);
4. Using some form of discipline and control;
5. Suspected of the commission of serious criminal offences;
6. Operating at an international level;
7. Using violence or other means suitable for intimidation;
8. Using commercial or business-like structures;
9. Engaged in money laundering;
10. Exerting influence on politics, the media, public administration, judicial authorities or the economy;
11. Determined by the pursuit of profit and/or power.

From today's perspective the mandatory requirements to be fulfilled seem somewhat odd, as except for the need to be in existence for 'a prolonged or indefinite period of time', the other mandatory requirements are begging the question of what is regarded as the underlying principles to qualify as organised crime group. The qualifying aspects would exactly have been those that were mandatory. Especially the last requirement referring to being 'determined by the pursuit of profit and/or power' is superfluous. What other intention would one expect to find in whatever criminal set-up? To be criminal for the sake of being criminal seems a rather unlikely concept. However, this discussion will not be further pursued as such a discourse would go beyond the scope of this thesis.

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<sup>78</sup> Council of the European Union (1997) Doc 6204/2/97 ENFOPOL 35 REV 2 of 21 April 1997

What is interesting in the aforementioned choice is the approach underlying this selection. The approach finds its origin in a law enforcement concept which is marked by ‘modernism’. As explained the main characteristics of ‘modernism’ are attributed to a grand-narrative and the ability to fully account for a given situation by a single perspective which at the same time is regarded as the only perspective possible. Enfopol35rev2 is a good example for such a modern approach and the changes that have taken place in the way this definition is applied underline the statement. Enfopol35rev2 has provided the framework of the data collection requirements for the Organised Crime Situation Report (OCSR) and the Organised Crime Report (OCR). With the introduction of the new methodology for the Organised Crime Threat Assessment in 2005 (Crimorg56/2005) the conceptual framework regarding data collection requirements changed. However, it has to be acknowledged that Enfopol35rev2 has never been officially revoked. The changes might look subtle but a detailed reflection will show that the changes indeed were fundamental reflecting much more a post-modern approach. The 2007 OCTA starts by outlines the characteristics that have been chosen to evaluate organised crime groups with regard to their actual threat potential: <sup>79</sup>

1. International dimension;
2. Group structure;
3. Use of legitimate business structures;
4. Specialisation;
5. Influence;
6. Use of violence;
7. Counter-measures.

None of these characteristics refers to the mandatory requirements set-out in Enfopol35rev2. ‘International dimension’ is close to ‘operating at an international level’; ‘group structure’ combines ‘collaboration with own appointed tasks’, and ‘engaged in money laundering; ‘Use of legitimate business structures’ equals ‘using commercial or business-like structures’; ‘specialisation’ shows some similarity to ‘collaboration with own appointed tasks’; ‘influence’ refers to the concept of ‘exerting influence on politics, the media, public administration, judicial authorities or the economy’; ‘use of violence’ is the same as ‘using violence or other means suitable for intimidation’ and ‘counter measures’ is a new perspective not looked into before.

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<sup>79</sup> <https://www.europol.europa.eu/sites/default/files/publications/octa2007.pdf>, viewed on 12 June 2013

Although this comparison shows some similarity between the concept used for the 2007 OCTA and Enfopol35rev2 it is evident that perspectives have changed. The fact that individual descriptors have become more a heading than a description in itself is an indication that the underlying conceptual framework is more flexible respectively broader than before. In addition, the new descriptors are more focusing on establishing a behavioural pattern rather than ticking boxes to identify an individual organised crime group as being an organised crime group. The new approach moves away from a descriptive reporting by trying to develop an understanding how organised crime manifests itself. The basic assumption is that organised crime groups do differ from each other in their behaviour, at least with regard to the internal set-up, the area of criminal activity, and the geographical situation. The new approach does not accept a one-size-fits-all organised crime landscape, especially not with a European perspective in mind. The shift as a result of the new OCTA methodology can also be recognised in chapter on the structure of organised crime groups. Of course, one would expect such a chapter in any analytical report focusing on organised crime. However, the perspective chosen points towards the new conceptual framework by creating four basically different structures for organised groups: (a) oriented clusters, (b) non-EU cell-like criminal groups, (c) mainly ethnically-based, trying to exert influence over a non-integrated ethnic community residing in the EU, and (d) loose networks. Without going into further details, these groups are different because they show a different behaviour in how they are organised and how they are active in the EU.

These characteristics are unrelated to the actual origin of the group. Organised crime groups are rather looked at as organic structures which can be best described by their general behavioural pattern. Although these simplified categories might look like a typical 'modern' perspective it has to be realised that this perspective is far away from a much more monolithic view taken on organised crime groups in the past. The question that remains to be addressed is how and if such a perspective really does help law enforcement to be more effective in tackling organised crime. For the time being, it seems that such a broad perspective makes law enforcement rather more difficult and amorphous without providing a tangible outcome. It is central to strike a balance with the evidential necessities requested by the respective penal codes in Member States. To prove a suspected offence in court leads to a conviction, nothing else. However, an approach going beyond a purely legalistic perspective seems to be more effective in developing successful counter-strategies. Such an approach

starts from the premise that not only a successful conviction disrupting a criminal activity provides the repository for the data collection for the OCTA.

## **11.2 Data protection implications for strategic products**

By definition a European Criminal Intelligence-Model is not limited to national boundaries. The model takes a bird's eye view on the crime situation in Europe. The model also needs to take into account available information from other parts of the globe as additional input to be able to provide a holistic picture aimed at strategic decision making. In addition, the ECIM not being limited to criminal-intelligence as described before relies on data that is available from third parties and private entities. Now, the question to be answered refers to the nature of this information as the origin of the information used will define the need to consider data protection requirements as a result of existing regulations.

In the past, there was an easy distinction applicable: personal-related-data requires data protection whereas non-personal-related-data did not have to comply with such requirements. To be more precise, this distinction is still valid. What has become more complicated is defining the dividing line between what constitutes personal data and what does not. The reason for this blurring line can be found in new technologies which provide for advanced means to re-construct personal data from non-personal or aggregated data. For the bird's eye view the ECIM it seems obvious that no personal data is required as such, given there is a commonly agreed understanding of what constitutes personal data. Unfortunately, such a universal definition does not exist. In general, personal data refers to data that can be attributed to a specific individual, allowing the identification of the individual. As the EU consists of individual Member States the definition of personal data differs from Member State to Member State. And with the EU having a legal personality on its own, definition number twenty-eight is added to the menu. A quick reflection on some of the existing definitions in the EU illustrates the existing diversity. The definitions are not fundamentally different, however, in a sensitive area like personal data the devil lies in the details.

- Austria: Information relating to data subjects who are identified or identifiable.<sup>80</sup>

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<sup>80</sup> Austrian Federal Data Protection Act 2000, Data Protection Directive (95/46/EC)

- Italy: Any information relating to natural or legal persons, bodies, or associations that are, or can be identified, even indirectly, by reference to any other information including a personal identification number.<sup>81</sup>
- Ireland: Data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or likely to come into, the possession of the data controller.<sup>82</sup>
- Poland: Any information relating to an identified or identifiable natural person, where identifiable natural person is defined as one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his/her physical, physiological, mental, economic, cultural or social identity. ... A piece of information shall not be regarded as identifying where the identification requires an unreasonable amount of time, cost and manpower.<sup>83</sup>
- United Kingdom: Any data relating to an identified or identifiable living individual, where data is defined as automatically processed data; data forming part of a relevant filing system; data forming part of an accessible record; and data recorded by a public authority.<sup>84</sup>
- And finally, the European Union: Any information relating to an identified or identifiable natural person; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural, or social identity.<sup>85</sup>

Although all definitions are reference the European Data Protection Directive the actual wording deviates from the Directive. What all definitions have in common is that one way or the other personal data is regarded as data which identifies the individual behind the data. Hence, non-personal data is data which does not allow the identification of an individual. Such data can be either non-personal from the outset, not containing any personal data or the initially personal data becomes non-personal when the data is aggregated, de-identified or anonymised.<sup>86</sup>

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<sup>81</sup> Legislative Decree No. 196, Italian Data Protection Code, Data Protection Directive (95/46/EC)

<sup>82</sup> The Data Protection Acts, Data Protection Directive (95/46/EC)

<sup>83</sup> Act on the Protection of Personal Data, Data Protection Directive (95/46/EC)

<sup>84</sup> Data Protection Act 1998, Data Protection Directive (95/46/EC)

<sup>85</sup> Data Protection Directive (95/46/EC)

<sup>86</sup> See 'Opinion 06/2013 on open data and public sector information ('PSI') reuse' by the Article 29 Data Protection Working Party (1021/00/EN), adopted on 5 June 2013

The ECIM as the strategic tool at EU level to decide upon law enforcement priorities for tackling organised crime needs to be based on data generated from criminal investigations. Criminal investigations in any EU Member State are directed specifically against individuals for the suspected violation of existing laws. The link between criminal investigations and personal data is evident. However, it will be necessary to determine if the data used for the ECIM when transferred from the national to the European level qualifies as personal or aggregated data which eventually could be reconstructed to equal personal data. The ECIM is supplied with data generated at national level. If this data corresponds to personal data obtained at Member State level there is no doubt that the ECIM has to comply with existing data protection regulations. But the ECIM does not need this kind of data.

At least not in the current set-up for the ECIM as mentioned before.

As the ECIM is the result of information available in 27 Member States, at EU level, from outside the EU, and from private partners there is a need to reach a common level of abstraction to harmonise the data provided. This requirement is based on the fact that the data to be analysed needs to be manageable in volume and even more important, the data needs to be of the same quality to be comparable. Criminal investigations in Member States are based on provisions provided for in the national penal code and the actual procedural framework is defined by the respective national code of criminal procedures. Both, the penal code and the code of criminal procedures, are reflections of a specific national set-up, taking into account specific social, cultural, and historical conditions in Member States. The aforementioned illustrated difference regarding the definition of what constitutes personal data in a European context is magnified when it comes to national provisions related to the use of personal data applied in the context of a criminal investigation. As a result, available raw data in Member States is difficult to compare. Therefore, data input for the ECIM has to be based on more aggregated data. Data which reflects the information needed to allow for a comparative analysis, to set strategic direction and to enable decision making. It was said that stripping the ECIM to its core as a strategic tool to support and direct decision making bears similarities to a Management Information System (MIS) at EU level (as referred to on p. 100 et seq.). The underlying not aggregated raw data will be important when the findings of the ECIM are channelled back into the national intelligence model and turned into operational and tactical activities. However, this process takes place at national level and is not central to the main objectives of this thesis.

The need for data protection considerations within the core ECIM cycle itself is limited. Maintaining this perspective is also valid as resulting national operational activities will trigger the exchange of information across borders when strategic ECIM findings are operationalised at national or trans-national level.

A guiding reference of the data needed for the ECIM as a Management Information System can be found in CrimOrg56 (2005) ADD2. The document describes the data requirements for the Organised Crime Threat Assessment (OCTA) and highlights the differences between the raw data available at national level stemming from criminal investigations and the data requirements for the ECIM. Where the criminal investigation at national level is directed against specific individuals the ECIM focuses on the comprehensive behavioural pattern of the organised crime groups involved. The importance of the individual for strategic decision making is limited. Consequently, CrimOrg56 (2005) ADD2 refers to data that can be attributed to the group and not the individual group members. The cover note of CrimOrg56 ADD2 stressed that data collection focuses on qualitative data in the already mentioned areas: international dimension of the group, the group structure, the use of legitimate business structures, existing specialisation, the ability to influence, the use of violence, and applied counter measures to counter law enforcement activities. Here, personal data as the key ingredient used for criminal investigation is of less importance although judicial proceedings in Member States will focus on trying to prove that a specific individual will have committed a specific offence defined in the respective national penal code. These offences are technical terms which define certain activities as being unlawful and that is what is judged by the judge. Other underlying conceptual models related to a more holistic perspective regarding organised crime are not relevant. Nevertheless, criminal offences do contain components related to the aforementioned qualitative strategic aspects considered by the OCTA but these aspects are not in the centre of attention during the investigation. These aspects do not influence the outcome of the trial.

CrimOrg56 ADD2 contains a total of 52 different questions including sub-questions. None of these questions goes below group level. This level of aggregation has also been maintained in the (S)OCTA, the successor of the OCTA. The information required by the questionnaire underlines again that the OCTA and the (S)OCTA do not rely on personal data. A couple of years ago, this would have been sufficient reason to argue that there was no need to further consider data protection regulations with regard to these strategic decision making tools.

However, public opinion has changed and data protection regulations today devote quite some considerations to so-called non-personal data. As the ECIM will be applied in a European context the most relevant considerations are coming from the ‘Article 29 Data Protection Working Party’. The Article 29 Data Protection Working Party is composed of a representative of the supervisory authority(ies) designated by each EU Member State, a representative of the supervisory authority(ies) established for the EU institutions and bodies, and a representative of the European Commission. In its opinion on ‘Open data and public sector information (PSI) reuse’ the Working Party concluded that the most effective solution to minimize the risks of unwanted disclosure of personal data is the use of statistical data derived from personal data under the condition that these anonymised and aggregated datasets do not allow re-identification of individuals. Although the PSI Directive<sup>87</sup> aims at facilitating the re-use of public sector information by harmonizing the conditions for re-use across the European Union and removing unnecessary barriers to re-use in the internal market the opinion by the Working Group is of general importance for the data used within the ECIM. This opinion needs to be seen in conjunction with the Working party’s opinion on the draft Police and Criminal Justice Data Protection Directive which was adopted on 26 February 2013.<sup>88</sup> Here, the Working Group specifically refers to the use of data on non-suspects and underlines the need for a distinction in the aforementioned Directive between categories of persons that have a direct or (possible) indirect link with a specific crime or suspects and other persons. In 2005 the European data protection authorities had already highlighted the need to distinguish between the processing of personal data of non-suspects with data of persons related to a specific crime. Processing of data of persons who are not suspected of having committed any crime (other than victims, witnesses, informants, contacts and associates) “*should only be allowed under certain specific conditions and when absolutely necessary for a legitimate, well-defined and specific purpose*”. Furthermore, such processing should in the view of the data protection authorities “*be restricted to a limited period and the further use of these data for other purposes should be prohibited*”.

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<sup>87</sup> Directive 2013/37/EU of the European Parliament and of the Council of 26 January 2013 amending Directive 2003/98/EC on the re-use of public sector information, in OJ L 175

<sup>88</sup> [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinionrecommendation/files/2013/wp201\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinionrecommendation/files/2013/wp201_en.pdf), 2013, viewed on 31 October 2013

The current (S)OCTA used for the ECIM does not refer to personal data as the data collection plan focuses on a group based approach. However, this encompasses an additional aspect in relation to the existing data protection paradigm. A group based approach requires a holistic perspective and cannot be limited to the definitions of a suspect as provided for by the respective national criminal codes. In many cases it might even not be possible to clearly identify the specific role an individual plays in the overall set-up of an organised crime group. Considering that the recognised strength of an organised crime group is based on specialisation, the division of tasks and the use of legitimate business structures it becomes quite obvious that the distinctions as requested by the Art. 29 Working Group are more than difficult to comply with. Unless individual members of an organised crime group are charged with the offence of conspiracy or of building a criminal organisation<sup>89</sup> it will be almost impossible to take a group-centred approach without including information regarding non-suspects in the judicial sense.

The situation is even more difficult when the processed data is referring to an organised crime group where law enforcement authorities involved in the investigation might not yet have been able to establish the actual 'judicial label' (suspect, accomplice, associate, witness) regarding individual group members. However, to limit the personal data character of the information provided for the ECIM to only group related information once a criminal investigation has been turned into formal judicial proceedings would undermine the underlying idea to make the ECIM a pro-active and future-oriented tool for strategic decision making - the ECIM again would only look into the past. Unfortunately, there are no EU-wide reliable data available regarding the average time for a criminal investigation into an organised crime group. In Germany this period has varied between 14 and 23 month over the last decades.<sup>90</sup> Even if these figures may not be representative for all EU countries it shows that criminal investigations into organised crime are time consuming. Relying only on data derived from investigations that are actually closed would make all ECIM related information anecdotal, the information referred to reflecting knowledge of the past not taking into account current and emerging trends.

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<sup>89</sup> In those jurisdiction of the EU Member States where such offences do exist in the criminal code

<sup>90</sup> See for example: L.J. Gerdes, *Organisierte Kriminalität und regionale Konflikte: die organisierte Kriminalität in Deutschland zur Zeit der Konflikte im ehemaligen Jugoslawien*, Josef Eul Verlag GmbH, 2007 or H.J. Albrecht and H.E. Entorf, *Kriminalität, Ökonomie und europäischer Sozialstaat*. Springer, 2003

On the contrary, the ECIM has to rely on information stemming from investigations that are currently ongoing or still in a pre-investigative embryonic state when it comes to defining who is a suspect and who is not, still far away from any formal judicial proceeding. Although the ECIM will not be based on personal data the use of non-personal data is nowadays subject to data protection considerations, especially with regard to the risk of potential re-identification of aggregated data.

To make the ECIM useful as a forward looking tool in strategic decision making a specific reflection is required when it comes to the use of the required aggregated data. Complex criminal investigations into organised crime make it difficult to limit the transfer of aggregated data to data that can only be attributed to suspects. In addition, the Serious and Organised Crime Threat Assessment is not only distributed among the EU law enforcement community. The (S)OCTA is distributed to a variety of different non law-enforcement stakeholders within and outside the European Union. Although Europol is trying to keep control of the individual copies that are distributed, a proper control regarding possible 'second level onward transmission' by the initial receivers of the threat assessment is difficult to achieve.

Another challenge with regard to the anonymised data used for the (S)OCTA is the decision regarding the level of aggregation that would be appropriate to make re-identification impossible. If data aggregation and anonymisation are not done effectively, this might result in the risk that individuals may be re-identified from these datasets. Therefore, data protection law has an important role to play in helping to determine the threshold at which it is safe to release anonymised and aggregated data. For the time being, the actual data requested from Member States is group-focused and does in principle not allow for the re-identification of an individual. As a result, data protection requirements in light of the datasets used for the ECIM/(S)OCTA currently do not constitute a major hurdle for the implementation. However, as the ECIM will also be fed-back into the national or trans-national law enforcement context the question of data protection becomes an issue once the strategic information is transferred into operational and/or tactical activities. Here another aspect needs also to be considered further: the question to which extent personal data will be used for the same purpose for which it was collected in the first place, but this aspect needs to be addressed in a different thesis focus in on the use of operationalised data from trans-national sources in a national context.

## **12. Assessing the threat - the underlying concept for the Threat Assessment component within the ECIM**

A comprehensive report addressing the impact of organised crime activities is based on the development of a common understanding with regard to the relationship between threat, risk, harm, and vulnerability. However, there are no universally agreed definitions when it comes to the concepts of threat, risk, harm, vulnerability, and their respective assessments.

Europol's 'Analytical Guidelines' provide a first indication with regard to the meaning of different forms of such analytical assessments even if the list is not exhaustive. According to the guidelines a Situation Report is mainly descriptive, oriented towards the current crime situation. As a consequence, a situation report is not as analytically ambitious or as difficult to conduct as a threat assessment.

In a situation report the ambition is not to evaluate the impact of criminality, rather to provide a description of the current and past situation.

Threat Assessments are written to analyse and evaluate the character, scope and impact of crime. They are mid to long term, future oriented, and have a more difficult level of analytical ambition. Risk Assessments try to identify and examine vulnerable areas of the society that are, or could be exploited. By examining weak and vulnerable areas, for instance within a certain business sector, it will be possible to give recommendations with a focus on potential counter measures to mitigate the risks identified. The basis for a risk assessment is a related threat assessment.

From these definitions the fundamental difference between a Situation Report and a Threat Assessment is obvious. Situation Reports focus on the descriptive component referring to past incidents whereas Threat Assessments focus on identifying current and future threats. The evaluation of existing and potential threats posed by organised crime groups and/or crime phenomena leads to a prioritisation with regard to these groups/phenomena, which require targeted action from the law enforcement community to reduce or eliminate these threats. Law enforcement activities are mainly re-active when the threat already exists whereas in the area of identified new and potential threats law enforcement agencies are in a position to develop effective pro-active counter strategies.

To be able to identify anticipated future threats purely quantitative descriptive information about an organised crime group or a crime phenomenon is not sufficient. This is where the main difficulty lies: Information requirements for traditional policing are focused on numerical and empirical data. Existing data collection mechanisms in Member States are specifically constructed to obtain such quantitative statistical data (number of crimes committed, number of groups, group seize, etc.). Predictions of future developments are primarily based on the extrapolation of existing data. New emerging trends are hardly detected in such a data collection setting. As a consequence, new emerging trends will only be acted upon after the trends have already manifested themselves as a proven change within the criminal environment. Law enforcement agencies are facing difficulties in preparing themselves for new emerging trends. Such trends are only picked up in advance by introducing early warning systems like continuous pro-active environmental or horizon scanning in the area of organised crime. Then again, the phenomenon of organised crime will not disappear, it will continue to evolve. The challenge faced by law enforcement rather refers to the ability to evaluate organised crime activities with regard to the impact of these activities. There are no standard measures available that allow to directly measure and compare the impact of organised crime it will be necessary to measure the impact of organised crime by the use of indicators - indirect measuring. A combined list of common indicators, describing the impact of organised crime groups enables the possibility of comparing individual organised crime groups allowing for the prioritisation of groups with a focus on the identified threat levels.

What makes the activities of a criminal group more dangerous to society than the activities of another one? The SLEIPNIR project<sup>91</sup>, initiated by the Royal Canadian Mounted Police in Canada tried to develop a measurement based on indicators to provide an answer to this question for the organised crime situation in Canada.<sup>92</sup> Project SLEIPNIR identified 19 indicators with different individual weights, which are used to rank organised crime groups with regard to their impact. The higher the final score, the greater the overall impact of the organised crime group. SLEIPNIR gives the highest weighting within the list of indicators to the ability of an organised crime group to corrupt, to the level of violence used by the group and their use of business-like structures.

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<sup>91</sup> Simply named after Odin's horns

<sup>92</sup> S.J. Strang. Project SLEIPNIR: An Analytical Technique for Operational Priority Setting. RCMP [available at: [https://www.e-education.psu.edu/drupal6/files/sgam/Project% 20SLEIPNIR% 20An%20Analytical%20Technique%20for%20Operational%20Priority%20Setting.pdf](https://www.e-education.psu.edu/drupal6/files/sgam/Project%20SLEIPNIR%20An%20Analytical%20Technique%20for%20Operational%20Priority%20Setting.pdf)]

There is no doubt that information related to these three areas is of major importance to identify the potential impact of an organised crime group. However, taking a European perspective it has been demonstrated that exactly in these areas information available from law enforcement agencies in Member States is rather scattered, which is due to the fact that there is hardly any related 'hard data' available as such information is not required to substantiate a crime as defined in national penal codes. It is unlikely that a focus on these three indicators provides a homogeneous framework for the evaluation of the individual impact of OC groups active in the European Union. Hence, the list of indicators introduced for the OCTA is different, reducing the weight of the aforementioned indicators and expanding on other indicators. The related information, from a European perspective is easier to be obtained and lends itself to a more homogeneous data collection plan.

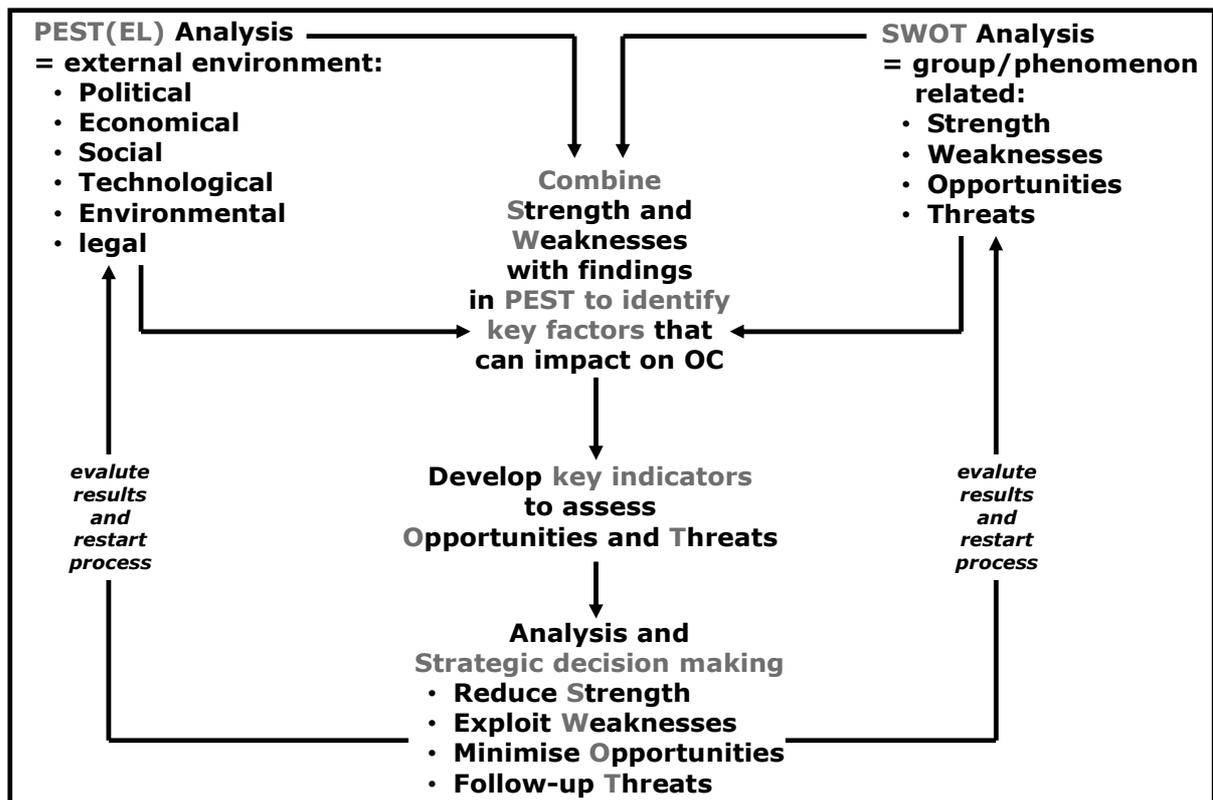
Although the collection of qualitative data in Member States needs to be homogeneous there are no agreed standards on how such data is collected and included in the national contributions from Member States. In addition, there was also no agreed mechanism in place with regard to an individual weighting of the indicators on which data is be collected. These realities had to be taken into consideration when developing a new methodology for the writing of a European Organised Crime Threat Assessment. Consequently, the new methodological approach needed to avoid being overambitious to allow for a realistic implementation and tangible results. Further adjustments to the methodological concepts have to be introduced step by step during the years to come, taking into account the resulting evaluation of the existing data collection mechanisms and the potential feasibility of introducing such adjustments. A starting point to be able to develop an understanding of the developments in organised crime is linked to the scanning of external factors organised crime is embedded in. The most relevant influencing external factors are related to political, economic, social, technological, environmental, and legislative developments. The analytical tool used for this exercise is known as PESTEL analysis.<sup>93</sup> A PESTEL analysis examines the impact of the aforementioned external factors on organised crime (group and phenomenon related) and the findings are used to identify potential opportunities for and existing/potential threats that could be exploited by organised crime groups. Understanding the organised crime environment can be transformed into counter-strategies to reduce the impact of organised crime.

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<sup>93</sup> See also earlier reference on p. 35 et seq.

As it will be difficult to directly measure the impact or respectively the threat posed by organised crime activities in the EU indirect measurement enables the analysts to describe potential strength, weaknesses, opportunities, and threats (SWOT Analysis) of organised crime groups as the main ingredients of a Threat Assessment. PESTEL and SWOT analysis are interlinked where PESTEL analysis describes the environmental framework for a SWOT analysis which focuses on organised crime groups. Not all opportunities and threats identified in a SWOT analysis have a real impact on the threat posed by organised crime groups. Real impact depends on the capabilities of organised crime groups to exploit such opportunities or to counter possible threats.

The following chart displays a visual representation of the relationship between PESTEL and SWOT Analysis as proposed for the (S)OCTA:



## **12.1 Other indicators to be used for writing a Threat Assessment**

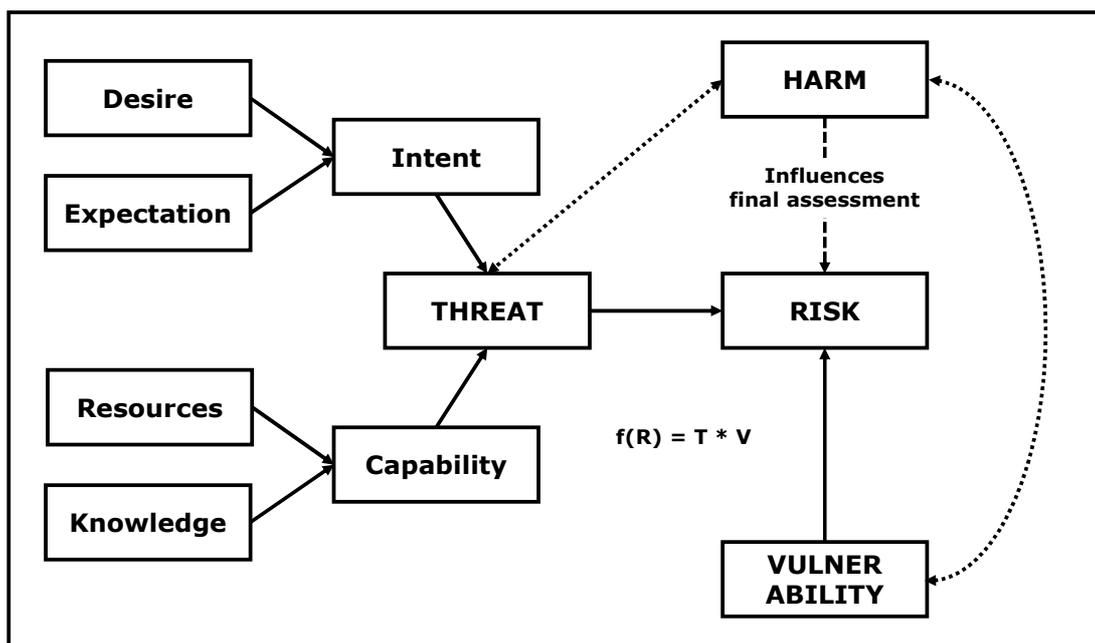
Law enforcement agencies in Member States provide information related to the aforementioned indicators based on existing knowledge. Nevertheless, information available from law enforcement agencies only represents a specific and one-dimensional facet of information related to organised crime. The basis for writing a comprehensive threat assessment is a holistic approach trying to incorporate as many different information sources as possible to come up with a consistent and complete evaluation of the situation after the analysis of the available information. Understanding developments relevant for organised crime requires continuous scanning of the 'organised crime scene'. Continuous reporting as a result of continuous scanning is an important source of information enabling an early warning function. Continuous scanning and reporting offers the possibility to identify new emerging trends and patterns relevant for an Organised Crime Threat Assessment at an early stage. Such a mechanism also provides a framework to monitor and report upon organised activities in a structured and systematic format. Implementing such a tool requires a systematic and enhanced feed-back mechanism with Member States. Information obtained from the scanning process, often based on open sources needs to be evaluated and cross-checked by Member States concerned. Only Member States are in a position to finally confirm or refute the analysis provided for in this organised crime scan based on the information collected from secondary sources.

To be able to produce a comprehensive European OCTA the data collection phase needs to be all-inclusive by incorporating information from as many entities involved in countering organised crime activities as possible. This requirement has to be reflected at national and trans-national level, within the European Union and outside. Integrating national law enforcement agencies is the first step. Law enforcement responsibilities at national level in Member States exist at national, regional, and local level, within often independent or semi-independent structures and lines-of-command. In addition, law enforcement responsibilities are dispersed amongst a variety of different agencies, e.g. police, border police, customs, financial/tax authorities. The set-up indicates that available law enforcement information which could be used for the production of a European OCTA is very much spread in Member States. To paint a realistic picture of the current organised crime situation it is important that all available law enforcement information is compiled at national level. Otherwise the information to base a threat assessment on is likely to be incomplete, skewed, and misleading.

It will be necessary for the ECIM to provide added-value to rely on agreed working definitions for the concepts of threat, risk, harm, and vulnerability as well as their interrelations and their interdependences. For the purpose of the ECIM the following definitions are used:

- Harm, Impact, Consequence (used as synonyms) refer to a negative or unwanted effect resulting in some kind of damage which can be of a physical or psychological nature;
- Threat is the existing potential of an entity to cause harm;
- Vulnerability is an existing weakness which allows a threat to cause harm, to have a negative impact or to result in negative consequences;
- Risk refers to a statement of probability that a threat is able to exploit a vulnerability to cause harm, to have a negative impact or to result in negative consequences;
- Probability attributes a level of likelihood to something to happen.

The relationship between these different terms is displayed in the following chart:



As displayed in the chart, a threat is the result of an existing intent combined with an existing capability. Both can vary and the product of the two determines the final threat-value. Intention is the product of an existing desire (to act) and an existing expectation (to achieve something), whereas capability- is composed of existing knowledge (to be able to make adequate use of available resources) and existing resources. Vulnerability depends on an existing threat and is counter-balanced by existing defence mechanisms. Vulnerability is

influenced by the harm a negative impact can inflict. The actual harm is established by using a scenario-technique related to identify potential threats. The final outcome, the risk-value is the product of the calculated threat-value and the identified vulnerability-level.

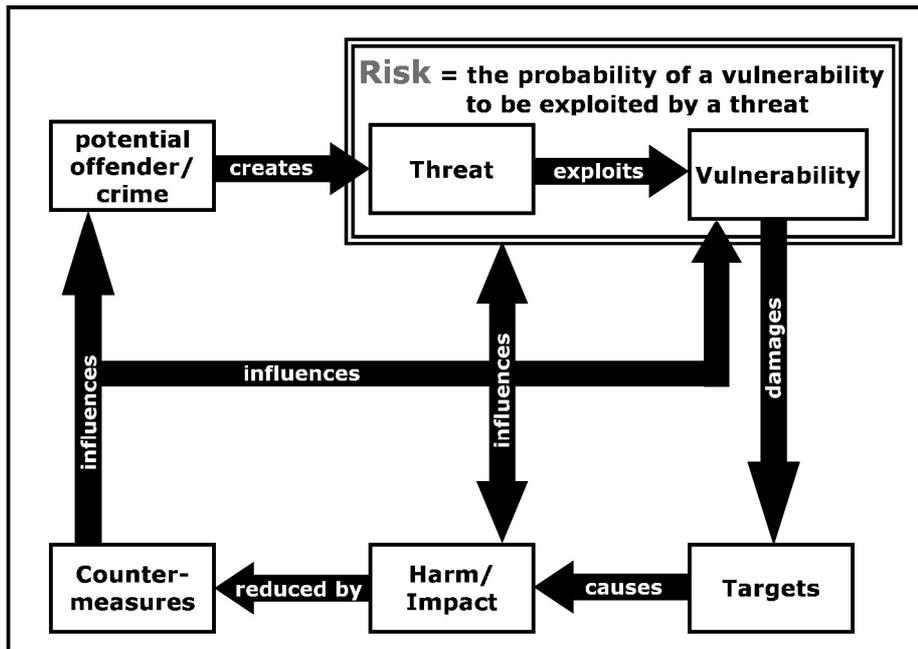
If a serious threat has been identified but at the same time the related vulnerability is close to zero because of an existing defence mechanism the overall risk-value will also be low.

Dealing with existing threats in a vulnerable environment by implementing successful counter-strategies and actionable counter-measures is the challenge law enforcement agencies and policy decision makers have to face. To achieve this law enforcement agencies and policy decision makers have to consider all the individual phases linked to the aforementioned process. Phases in this process are interlinked and need to be responded to. As mentioned, the first step in the process is to identify an existing threat. A 'threat can be regarded as existing, if there is a confirmed risk that a potential threat is able to exploit an existing vulnerability. The final step in the cycle is the successful mitigation of the threat by developing an effective counter strategy. The cycle can be described as follows:

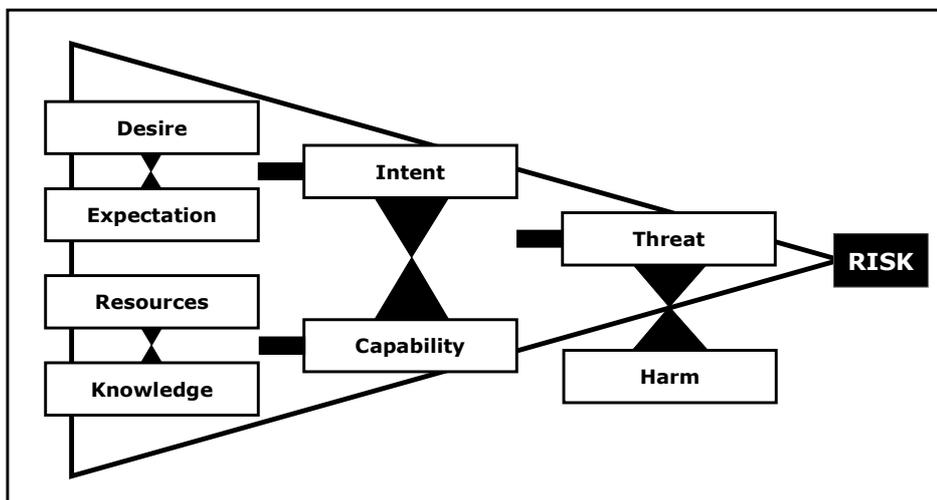
1. Preparation Phase = Gathering available information on potential targets
2. Qualify critical targets = 'Understanding' the identity of the potential targets
3. Target collation = Clustering of critical assets and potential undesirable events
4. Threat Identification = Gathering information to determine the possibilities of undesirable events to materialise
5. Impact Assessment = Determining the impact of the potential undesirable events
6. Vulnerability Assessment = Listing existing counter-measures, determine the effectiveness and the weaknesses of these counter-measures
7. Risk Assessment = Calculating the probability posed by undesirable events in relation to the identified threats and existing vulnerabilities
8. Countermeasure Selection = Identifying measures that could mitigate the identified risk
9. Risk Re-assessment = Reassessing the risk assuming new counter-measures are implemented
10. Security Upgrade = Agreeing on new required counter-measures (including an implementation plan and resource allocation)

11. Implementation decision = Final agreement on ownership and implementation planning (assigning responsibility for implementation)
12. Implementation Phase = Preparing a schedule for implementing measures as planned
13. Feed-back and evaluation of the implementation
14. Adjustments and taking into account new developments/changes in the environment

The chart below summarises the existing links:



The chart related to the relationship of threat, vulnerability, risk and harm is similar to the approach taken Vander Beken (2004), which is based on a model presented by J. Brown in 1998 when addressing the 'Optimising Open Source information Conference' in Canberra. However, the relationship elaborated by Vander Beken shows different relationships between individual components:



According to this model risk is the result of a threat combined with harm. This relationship is referred to as 'Risk Assessment Matrix'. Compared to the proposed working definitions and the relationship between threat, vulnerability, risk and harm in this thesis the identified difference regarding the conceptual approach is fundamental. The 'Risk Assessment Matrix' does not account for vulnerability as a variable to define risk. Although the analysis highlights the importance of sector vulnerability the vulnerability assessment is regarded as an independent tool within the strategic approach towards organised crime. For the ECIM and the (S)OCTA to work the vulnerability assessment has to be an integral part of the model as described in this thesis. On the other hand, the conceptual model chosen by Vander Beken emphasises the variable of harm to define the final risk level. Unfortunately, harm is a subjective variable which depends on societal and political perception. To integrate harm as a significant variable in a conceptual threat assessment model is promoting a model which depends on developments that might be completely unrelated to the objective situation. In a post-modern society such a model might better be suited to accommodate individual and relative positions. If such a model is supposed to be successful at a trans-national level, the impact of these positions should be minimised as much as possible.

The 'Dover-Case' helps to understand the argument. 58 Chinese illegal immigrants were found dead in an airtight 18 metre-long container in the back of a lorry at the port of Dover on the 19 June 2000. The driver of the Dutch-registered lorry had just made the crossing from Zeebrugge, Belgium, when his vehicle was pulled over for a random inspection by a customs official. This tragic event dominated the media for the next couple of weeks, highlighting the desperate situation faced by asylum-seekers and refugees. The loss of life is undoubtedly the most severe harm that a victim of organised crime can suffer. In addition, the fact that in the 'Dover case' the victims must have gone through the worst ordeal adds to the harm inflicted. There is also no doubt that everything needs to be done to disrupt such criminal activities to protect the life of others. As a consequence of the case tackling illegal immigration from China moved up on the priority list to become number one. Every effort was made to be more successful in the fight against illegal immigration and trafficking of human beings. What was not reflected was the magnitude of these forms of crime from a strategic perspective. As tragic as the 'Dover Case' was, the strategic assessment regarding illegal immigration and trafficking of human beings remained unchanged. The death of

58 individuals brought the problem back into the focus of the media and the political decision makers based on harm but a decision to change strategic priorities based on singular incidents is exactly not what should happen in strategic priority setting. As a matter of fact the dimension of the problem of illegal immigration from China was the same before and after the Dover case. Harm cannot be neglected but the weight attributed to harm as proposed in the 'Risk Assessment Matrix' invites skewed decision making. 15 years later, Chinese and Asian organised crime groups have continued to manifest their positions in other multi-crime areas with trafficking in human beings still a major trade. The involvement in Cocaine smuggling from South America via West Africa due to the increase of Chinese economic interests in the region just being one example. The Dover case and the focus on harm in strategic priority setting did not change the impact of law enforcement activities in the related organised crime activities. The basis for a long-term strategic planning tool like the ECIM is having an independent threat assessment methodology in place that is independent from tactical considerations and not driven by short-lived political interests is. Conceptualising the concept at European and national law enforcement level is a key factor for the implementation of the ECIM.

### **13. Conclusion**

As a result of a stronger Europeanisation in trans-national law enforcement cooperation since the Treaty of Nice the European Criminal Intelligence Model (ECIM) is regarded as a milestone to prioritise, harmonise, and coordinate the fight against organised crime in the EU. By moving towards a more prominent role at EU level law enforcement agencies in Member States have to adjust the current framework of trans-national cooperation in the light of these developments. It is impossible to separate national from trans-national law enforcement when addressing counter-strategies to tackle organised crime. Organised crime investigated at national level also has a trans-national dimension that needs to be taken into account if counter-measures are to be effective. As a consequence, the ECIM and national law enforcement perspective have to be aligned.

The ECIM is based on the concept of ‘intelligence-led policing’ as a pro-active approach to enable law enforcement to be in the driver’s seat when being challenged by organised crime. There is a basic concern regarding the use of ‘intelligence’ for the ECIM. Using the concept of intelligence in policing is not new but the concept of intelligence in policing also is disputed. There is no universally agreed definition of what constitutes intelligence in a law enforcement context and the term cannot be found referenced to in any of the national penal codes or codes of criminal procedures in Member States. The focus on intelligence can be misleading, moving the ECIM in an unwanted direction, away from the self-perception of traditional law enforcement based on a modern understanding of our societies. This magnifies the difficulties for the use of the concept of intelligence, especially when used in a trans-national context. Bridging this gap remains a major challenge for the ECIM and only possible if the ECIM can demonstrate that the model is able to translate strategic findings into operational activities, providing a real added value to law enforcement agencies in Member States. From this perspective it would be advisable to relate the ‘I’ in the ECIM rather to information than to intelligence, even if the intelligence component is regarded to be an integral part of the exercise. The emphasis of the ECIM should be on the analysis of available information (be it ‘hard’ or ‘soft’ information) and the subsequent assessment of this information without predetermined outcome. The ECIM has to free itself from being mainly a political tool owned by the political decision makers in Brussels.

On the other hand, restricting the ECIM to information reduces its usefulness. Relying on information (or facts) is very much attributed to modern law enforcement. The thesis has demonstrated that the ECIM as a tool for strategic decision making and priority setting is of better use if the model can rely on interpretative data (intelligence) which allows for an understanding of phenomenon or group related organised crime. Only understanding organised crime enables a holistic perspective to develop successful and 'sustainable' counter-strategies against organised crime which make the difference. Law enforcement agencies in Member States and Europol as the responsible entity to produce the (S)OCTA have to come to a final agreement on the actual 'I' in the ECIM.

A holistic ECIM also requires to broaden the variety of sources used. The former exclusive role of law enforcement in tackling organised crime has changed and additional players have 'entered the game'. In this context it is vital to accept that looking at organised crime from a different perspective does not water down the focus, on the contrary different perspectives if integrated and analysed within the ECIM add additional dimensions to the understanding of organised crime. In a societal set-up that is evolving beyond the classic modern paradigm such multi-dimensional are not only a given fact they also add to the ability of the ECIM to provide tailored strategic guidance.

It cannot be ignored that criminal investigations are set-up within a national framework. National interests in law enforcement will be the dividing line for the success or the failure of the ECIM for the foreseeable future. In the same way that national law enforcement has to adapt to the ECIM the ECIM has to consider the national perspective. Otherwise the ECIM continues to be regarded as a theoretical exercise that has no impact on how trans-national organised crime is tackled at operational level.

The concept of the ECIM goes back to Radcliff's 3-i-model as the basic concept of intelligence-led-policing. Looking at the complexity of the ECIM the 3-i-model does not provide enough detail. As the ECIM is intended to serve as a holistic approach including non-law-enforcement information and/or intelligence, the 3i-model has to be extended to reflect the relationship amongst these additional players. The extended 3i-model shows that the successful implementation of the ECIM will depend on more than integrating law enforcement agencies at Member State level into the process of strategic decision making at European level. This inter-disciplinary integration is a fundamental prerequisite for successfully implementing the ECIM.

The ECIM is based on 'all-source' intelligence (if the emphasis on intelligence remains) which requires that the ECIM is referred to as an intelligence-model focusing on the criminal environment and not an intelligence-model based on criminal-intelligence only. The focus on the latter would limit the value of the ECIM as a holistic tool. Law enforcement in Member States has to understand that tackling organised is not an exclusive domain anymore. Too many other actors from other sectors are able to contribute to a European Criminal Intelligence Model. Only if law enforcement accepts that these information sources are included into the process the ECIM is able to produce a holistic trans-national perspective on organised crime which might be different from a perspective driven by the need show immediate tangible results.

Once successfully implemented the ECIM will fundamentally change the trans-national fight against organised crime in the European Union. With the ratification of the Lisbon Treaty in 2009 it was only a question of time until trans-national law enforcement as part of the former 'third pillar' would also undergo a major change. The ECIM tips balance towards the European Union or more precisely Europol as the EU's main law enforcement agency. Already in the early years of its existence Europol was tasked to take a strategic European perspective on organised crime with the aim to develop a more orchestrated European approach taking into account the fact that the most successful organised crime groups operate at a trans-national level. However, law enforcement agencies in Member States belittled these efforts as there was never a real link between these strategic findings and operational activities at Member State level. The ECIM, establishing this link will put Europol in the driver's seat. Member States will have to align their national operational priorities with the strategic priorities established at European level.

Project Harmony, outlining the necessary steps to be taken to implement the ECIM is the most current attempt at national and European level. The Project Harmony action plan assumes that Member States will adapt their current law enforcement structures to centre their operational activities in line with the strategic finding presented in the Serious and Organised Crime Threat Assessment (S)OCTA) as the strategic product which priorities these operational activities. An ECIM will only function if Member States are prepared to mirror ECIM requirements at national level. To do so, Member States have to introduce a National Intelligence Model which might be different to established law enforcement approaches. There remains a question mark to which extent Member States are prepared to accept such a change. Two main reasons for questioning this readiness being: (a) even with

the Lisbon Treaty national law enforcement remains at the core of each individual Member State primarily defining national perspectives and priorities, and (b) the fact that the ECIM as an overarching model to effectively tackle organised crime is closely linked to a modern understanding of the world - the ability to provide a grand-narrative which is able to address the challenges of organised crime by a single concept. Such a one-dimensional approach would not fit in a post-modern society, which is characterised by promoting a more scattered reality requesting more individually tailored approaches depending on constantly changing variables which again require frequent adoption and change. Although this thesis was not able to clearly answer the question if the modern society has moved to a post-modern society or is transforming into such a society it has been demonstrated that a solely modern based perspective for law enforcement does not reflect the current situation. The monolithic concept of the police being the only legitimate entity empowered to enforce the law in line with a Weberian nation-state concept has at least shown some cracks over the last decades. In addition, today's law enforcement agencies have become much more than what is understood by traditional policing. In this context it does not matter if post-modernity will supersede modernity or if post-modernity is simply an evolutionary step within modernity. The mid and long-term consequences for the ECIM will be the same: a monolithic ECIM will not be the long-awaited law enforcement response to effectively tackle organised crime. By introducing the concept of regional hubs the OCTA has moved towards a more postmodern understanding of organised crime, highlighting the importance of regional differences as a decisive factor for defining strategic priorities. With the new SOCTA approach focusing on 'behavioural patterns' of organised crime postmodern thinking has been further incorporated into the ECIM concept. To successfully translate these developments into the national law enforcement perspective the role of National Intelligence Models aligned with the ECIM cannot be underlined enough.

Law enforcement in Europe needs to be transformed to provide an effective and in an ideal situation even efficient response to tackle organised crime and to prevent organised crime groups from subverting legal structures in Member States. The ECIM is a move in the right direction as the ECIM tries to take a holistic perspective of the problem. If the ECIM is to be successful the underlying principles have to be understood and accepted by all Member States. Project Harmony provides a blue-print for such an approach. However, so far the ECIM is promoted only by a small number of Member States and the Road Map covering the period from 2011 to 2017 is not sufficient to achieve the necessary rethinking, especially

taking into account that currently the European Union is more characterised by increased diversity rather than unity at national, regional and local level.

Before the ECIM can be successful there needs to be a different road map that outlines the necessary steps to lay the foundations for a paradigm shift in European policing.

This must show the added value for Member States and national law enforcement agencies when following a common model, the ECIM rather than relying on well-established mechanisms which are centred around primarily national interests, representing a concept focusing on established 'comfort zones' of law enforcement. Comfort zones in a post-modern setting vanish to exist and are constantly challenged by an evolving Europeanization or even globalization. Organised crime has given up the 'nation state perspective' decades ago.

New upcoming questions linked to the operational use of intelligence, like possible data protection requirements and accountability need to be carefully considered, especially if the ECIM is supposed to close the gap between strategic findings at European level and operational activities in Member States. Intelligence exchanged across national boundaries has an impact on the individuals concerned. There needs to be a judicial framework that guarantees that intelligence is used in line with existing regulations due to different national legislation in Member States, which provides law enforcement with different tools impacting on human rights.

The ECIM as a holistic model, accommodating regional differences and priorities without insisting on a 'one size fits all' approach can provide the framework to tackle organised crime more effectively and more efficiently but it needs to be embraced at national level by overcoming national egoism. This flexible approach is also the logical consequence of a societal framework that is moving beyond the traditional standards generally referred to as modernity.

(48.781 words)

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## Annex - Questionnaire

### PHD Interview Questionnaire - Implementing an ECIM Used for semi-structured interviews (Senior Officers)

1. What is your understanding of the word 'intelligence' in a law enforcement environment?
2. How do you translate the word 'intelligence' in your country in a law enforcement context?
3. How do you distinguish between 'information' and 'intelligence'?
a. Is 'information' treated different from 'intelligence'? How?
b. What does this mean for the exchange of 'information' and 'intelligence' with other countries?
4. Do you exchange 'intelligence' with other countries in the EU?
a. How is the exchange done?
b. Is the exchange of 'intelligence' institutionalised?
c. Is the exchange of 'intelligence' standardised?
d. How is the exchange of 'intelligence' safeguarded?
e. Is the purpose for using 'intelligence' when exchanged specified?
f. How is this done?
g. Is there a follow-up mechanism for 'intelligence' exchanged (e.g. in case additional intelligence is available or the intelligence provided has lost its value)
5. How do you use 'intelligence' to prioritise crime areas/criminal groups?

6. Do you have a national criminal intelligence model and what is the conceptual framework for such a model, if in existence?
7. What is your understanding of a European Criminal Intelligence Model?
8. How do you define national strategies to combat organized crime?
9. How do you establish priorities?
a. Who is involved in this process?
10. In which frequency are these strategies elaborated?
11. What are the most influencing factors for prioritizing criminal groups regarding law enforcement activities?
12. What are the most influencing factors for prioritizing crime areas regarding law enforcement activities?
13. To which extent influences the EU Organised Crime Threat assessment your prioritisation of law enforcement activities at national/regional/local level?
14. To which extent do developments in other countries influence your national priorities?
15. Do you coordinate your priorities in combating organised crime beyond the national level? How and with whom?
16. How has trans-national policing developed over the last 10 years?
a. What has been the most striking development in trans-national policing during the last 10 years?
17. If there was a mechanism at EU level to coordinate the efforts to combat organised crime how should such a mechanism look like?
a. What would you expect from such a mechanism?
18. How far should such a mechanism interfere with your national prioritisation mechanism?
19. Any other remark linked to the questions above?