Organised criminal group according to Bulgarian penal law

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1. Definitions

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

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

1.1. Definition of organised criminal group

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

The definition of "organised criminal group" under Item 20 of Article 93 is of key importance in practice because it delineates the scope of application of almost all provisions of the Special Part of the *Criminal Code*, which criminalise acts related to organised crime. The content of this definition also reflects the way the Bulgarian legislator conceptualises organised crime.

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

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

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

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

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

According to Item 20 of Article 93, an organised criminal group is an association of **not fewer than three persons.**[2] In this it differs from the other types of groups described in the Special Part of the *Criminal Code*, for which no provisions are made about a minimum number of members. The lack of an expressly specified minimum number of members implies, according to case

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

law, that as few as two persons are sufficient to form such a group.[3] An association of two persons, however, cannot be classified as an organised criminal group even if all other elements of the definition under Item 20 of Article 93 are satisfied.

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

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

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

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

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

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

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

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

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

The association is permanent when it exists for a definite period of time. This period is not expressly provided for in the law, which is a correct solution because the introduction of such limitation would unjustifiably narrow the scope of application of the provisions regarding the organised criminal group.
From a practical point of view, it is important to emphasise that **permanence characterises the association itself rather than the participation of each of its members.** This means that the association may be permanent even when its participants vary. A variation in the membership of the organised criminal group (recruiting a new participant, replacing or dropping a participant) does not lead to the formation of a new group. An interpretation to the contrary may lead to bringing several charges against one and the same person of participation in different groups that in reality are not different but it is one and the same group with varying membership.
Regarding structuredness, following the pattern of the UN Convention and of the EU Framework Decision, the Bulgarian *Criminal Code* expressly specifies that **the association is structured even without formally defined functions for the participants, continuity of participation or a developed structure**. A further specification must be added, however, as formulated in the international instruments, that the association is structured where it is not randomly formed for the immediate commission of an offence.
In theory, the requirement for structuredness draws criticism above all precisely because of the **lack of clear criteria** to determine when an association of persons becomes a **structured association.** Thus, according to certain authors it is difficult to talk of a structured association without formally defined functions for the members; it is not clear how the association can be considered structured without having a developed structure, or how it can be permanent if the continuity of participation of the persons in it is legally irrelevant. On the whole, a literal interpretation of the definition invites the conclusion that "if this structure does not exist or is not developed, if each participant does whatever he wishes in an organised criminal group, is not permanently linked with it and the functions are not at all defined, it could still be assumed that this is a case of an organised criminal group".[7] Thus, the structuredness defined in this way "supersedes any concepts of organisation" and prerequisites are created for "equalisation to a conventional criminal group".[8]

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

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

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

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

The main problem in formulating the aim of an organised criminal group arises from the **scope of criminal offences for the commission of which the group has been formed**.[10] The reference is to offences punishable by imprisonment of more than three years, i.e. **a penal sanction of imprisonment with a maximum term exceeding three years** must be provided for the relevant offence in the Special Part of the *Criminal Code*.[11]

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

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

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

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

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

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

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

Moreover, if a member of the group has already committed another offence, he or she will be liable both for the act committed and for participation in the group.

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

An aim of obtaining a benefit was part of the legal definition when it was introduced in 2002 but was dropped by the amendment of 2009.[12] Thus, at present, for the existence of an organised criminal group it would suffice that the offences for which it has been formed should be punishable by more than three years of imprisonment. The aim of obtaining a benefit was turned from an element of the definition into a circumstance conditioning the imposition of a severer penalty on those who have formed, direct or participate in the group.

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

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

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

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

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

1.2. Organised criminal group and partnership

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

Despite the substantial differences between an organised criminal group and conventional partnership, **the two notions are often confused in practice.** In

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

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

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

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

- **Continuity of the criminal activity.** The law expressly states that the organised criminal group is a permanent association. This criterion is the easiest to apply because the continuity of the relations among the accused is relatively easy to establish. Even though this is not mentioned in the definition under Item 20 of Article 93 (unlike the international instruments), the permanence of the association excludes all other cases of criminal association with a view to incidentally committing an offence. There is no room for disparate interpretations on this issue but, nevertheless, for the sake of a precise framework, it is recommended to amplify the definition of an organised criminal group by the clarification that this is an association, which is not randomly formed for the immediate commission of an offence.
- **Structuredness of the association.** An organised criminal group is a structured association, whereas partnership in principle is not structured. The application of this criterion gives rise to serious problems owing to the difficulties in determining when structuredness applies, especially considering the second sentence of Item 20 of Article 93 which specifies that the association is structured even without formally defined functions for the participants, continuity of participation or a developed structure. The precise determination of the degree of structuredness is of particular importance for the correct classification of the offence committed.

In practice, however, this criterion is often ignored or is misapplied, which is why organised criminal group charges are brought but subsequently the lack of organisation of the persons leads to complications and reclassification owing to an impossibility to rationalise and prove the initial case for the prosecution.[15]

- **Aim of the association.** The aim of an organised criminal group is to commit, in Bulgaria and abroad, criminal offences punishable by imprisonment of more than three years. According to theory, an organised criminal group implies a common will to commit multiple offences and, unlike conventional partnership, the persons need not necessarily have particularised these offences.

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

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

1.3. Organised criminal group and preliminary conspiracy

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

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

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

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

The prevalent view in theory is that, unlike an organised criminal group, in a preliminary conspiracy the persons agree on the commission of a particular offence. This means that participation in an organised criminal group in itself would be insufficient to apply the severer penalties for preliminary conspiracy. The act would be classified as having been committed in a preliminary conspiracy only if the perpetrators have **conspired specifically to commit the particular offence.**

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

The most complicated problem is presented by the provision of Item 2 of Article 199 (1) of the *Criminal Code*, which envisages a severer penalty for robbery committed by two or more persons who conspired in advance to perpetrate thefts or robberies. Unlike the rest of the cases of a preliminary conspiracy, provided for in the Special Part of the *Criminal Code*, the reference here is not to committing a particular crime but to two or more persons agreeing to commit offences of a particular category: thefts and robberies. Both theft and robbery are offences punishable by imprisonment of more than three years and, therefore, the preliminary conspiracy to commit them often satisfies the requirements for an organised criminal group.
The question raised in such cases is how to determine the criminal responsibility of the perpetrators if they are participants in an organised criminal group, i.e. which is applicable: the provision on robbery committed upon assignment by or in execution of a decision of and organised criminal group [Item 9 of Article 195 (1) and Item 5 of Article 199 (1)] and/or the provision on robbery committed by two or more persons who conspired in advance to perpetrate thefts or robberies [Item 2 of Article 199 (1)].
A specific form of a preliminary conspiracy, which borders on an organised criminal group, is outlined in the provision of Article 321 (6) of the *Criminal Code*. According to this provision, criminal responsibility is incurred by anyone "who agrees with one or more persons to perpetrate, in Bulgaria or abroad, any criminal offences punishable by deprivation of liberty exceeding three years and the aim of which is to obtain a property benefit or to exert illegal influence on the activity of a body of power or local self-government".
Even though this provision is systemically positioned as the last paragraph of Article 321, this is not a case of an organised criminal group but of a mere preliminary conspiracy, i.e. advance coordination of the will of two and more persons to perpetrate offences punishable by imprisonment of more than three years.
Undoubtedly, **preliminary conspiracy** under Article 321 (6) is **a criminal offence in its own right, distinct from forming, directing and participation in an organised criminal group**. There are several substantial differences between the two offences:

- **minimum number of persons:** a preliminary conspiracy is possible between two or more persons, whereas an organised criminal group requires not fewer than three persons;

- **permanence and structuredness:** a preliminary conspiracy does not require permanence and structuredness, which are a necessary condition for the existence of an organised criminal group;
- **aim:** unlike an organised criminal group, in a preliminary conspiracy the persons pursue a specific aim with the offences they plan to commit: obtaining a property benefit or exerting illegal influence on the activity of a body of power or local self-government.

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

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

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

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

In the opinion of some experts, there is a difference between joining together for a criminal purpose and criminal association, with joining together being a broader term and comprehending the formation of associations as well as other forms of concerted criminal activity.[17] Such differentiation is rather academic and can lead to serious difficulties in practice. Moreover, the length and the amount of the penalties provided for joining together for a criminal purpose is considerably smaller than the sanction for forming an organised criminal group. Thus, if three persons form an association for the purpose of money laundering, the perpetrators are liable to imprisonment of up to two years or to a fine ranging from BGN 5,000 to BGN 10,000. If, however, the same persons are charged with forming an organised criminal group for money laundering, the penalty provided for in this case is imprisonment of five to fifteen years.

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

1.5. Notion of organised crime

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

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

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

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

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

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

The diverging views regarding the content of the notion of "organised crime" are also evidenced by the results of a survey of the conceptualisation of the nature of organised crime by judges, prosecutors and officers of the special-

ised services for combating organised crime of the Ministry of Interior, conducted by the Centre for Liberal Strategies in October 2004 – February 2005. The survey found that even the institutions, which are most closely concerned with the prevention and suppression of crime, are divided in their opinions regarding the content of "organised crime".

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

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

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

- all cases of forming, directing and participation in an organised criminal group (Article 321 of the *Criminal Code*), an organisa-

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

tion or group for racketeering (Article 321a of the *Criminal Code*), an organised criminal group for the growing of opium poppy and coca bush plants and plants of the genus *Cannabis* or for the manufacture, production or processing of narcotic drugs (Article 354c (2) to (4) of the *Criminal Code*), and an organisation or group against national, racial and ethnic equality and religious and political tolerance (Article 162 (3) and (4) of the *Criminal Code*);

- the cases of offences for which a severer penalty is envisaged if the offender has acted upon assignment by or in execution of a decision of an organised criminal group or a group for racketeering, including abuse of official status by an office holder, if such offender has been involved in the criminal act;
- the cases of offences for which a severer penalty is envisaged if committed by a person engaged in security business, by an employee in an organisation carrying on security business or insurance business, by a person contracted by such an organisation or purporting to be so contracted, by a personnel member of the Ministry of Interior or by a person purporting to be such a personnel member, including abuse of official status by an office holder, if committed with the participation of such a person;
- blackmail committed by an organisation or group or contracted by a person, organisation or group [Item 3 of Article 213a (3) of the *Criminal Code*] and some other, more severely punishable cases of blackmail [Items 1 and 2 of Article 214a (2) of the *Criminal Code*];
- unlawfully taking persons across the border of Bulgaria, organised by a group or organisation or committed with the participation of an office holder who took advantage of his or her official status [Item 5 of Article 280 (2) of the *Criminal Code*];
- certain more severely punishable cases of offences involving explosives, weapons and munitions [Article 337 (2) and (3) and Article 338 (2) and (3) of the *Criminal Code*];
- certain more severely punishable cases of offences involving narcotic drugs [Article 354b (2) to (4) of the *Criminal Code*];
- preparation by a foreign national within the territory of Bulgaria for the commission abroad of cross-border smuggling of narcotic

drugs or an offence endangering the general public under Article 356a of the *Criminal Code*, as well as forming an organisation or group for the same purpose [Article 356b of the *Criminal Code*].

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

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

2. Forming, directing and participation in an organised criminal group

2.1. Types of criminal behaviour

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

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

All three offences belong to the category of the so-called **"conduct offences"** (of which the *actus reus* is limited to criminal conduct on the part of the perpetrator). Conduct offences are considered completed by the effectuation of the actual criminal act without producing any particular result.[20] The practical aspect of this division is that forming, directing and participation in an organised criminal group applies regardless of whether any of the offences planned by the group has been committed or even attempted. In practice, forming, directing and participation are often regarded not as offences in their own

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

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

right but necessarily in connection with another offence committed. This approach is incorrect and often impedes the application of the law because it unjustifiably makes the investigation and proving of the participation in the group contingent on the investigation and proving of another offence.

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

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

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

- **Forming an organised criminal group.** Forming is defined as an activity of coordinating the will of two or more persons (in the case of an organised criminal group, the will of three or more persons) for the achievement of a specific goal.[23] Activities such as locating and recruiting participants, inducing them to participate, structuring them organisationally etc. can be classified as forming. The provision raises two main problems: whether forming necessarily presupposes participation in the group formed as well, and whether the act should result in the establishment of a group. Regarding the first problem, it can be assumed that **a person can form an organised criminal group without necessarily participating in it.** Regarding the second problem, however – **whether the act should have resulted in the forming of a new organised criminal group as evidence of a criminal offence** (i.e. whether the offence is a conduct offence or a result offence), opinions are divided.

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

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

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

- **Directing an organised criminal group.** According to case law, directing finds expression in setting general or specific tasks, whether orally or in writing, in working out a plan or other directions for achievement of the goal set.[24] Directing differs from forming, but if a person forms and subsequently directs such a group, he or she would incur responsibility for only one offence.
- **Participation in an organised criminal group.** Participation is the least severely punishable act. It finds expression in consent to enter into a definite relationship with the other persons in the group. The main problem stemming from this provision is its correlation with the provision on forming and directing an organised criminal group and more specifically whether the less severely punishable act is subsumed within the more severely punishable one and whether **a person who has formed and participated or who has directed and participated** in an organised criminal group would incur **criminal responsibility only for forming or directing.**

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

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

- either or both of the following acts: (1) agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organised criminal group; and/or (2) conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, has taken an active part in criminal activities of the organised criminal group or other ac-

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

tivities of the organised criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim; and

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

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

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

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

According to the EU Framework Decision, financing is a form of actively taking part in an organised criminal group alongside the provision of information or material means, the recruitment of new members etc. On the other hand, however, according to Article 354c (2) of the *Criminal Code*, which deals with an organised criminal group for the growing of opium poppy and coca bush plants and plants of the genus *Cannabis* or for the manufacture, production or processing of narcotic drugs, participation and financing are two different

criminal acts. Moreover, even if it is assumed that financing can be regarded as a form of participation, the person who finances the group will incur responsibility as a mere participant. Such person will not be liable to the severer penalties provided for those who form and direct the group, as provided for the group for the growing of opium poppy and coca bush plants and plants of the genus *Cannabis* or for the manufacture, production or processing of narcotic drugs under Article 354c.

The terminological discrepancies between the provisions of Article 321 and Article 354c (2) must be eliminated by a legislative amendment. At the same time, **the financing of an organised criminal group must be expressly added as a separate type of criminal behaviour** in Article 321, and similarly to Article 354c (2) the persons financing the activity of the group must be liable to the same penalties as the persons who have formed or who direct the group.

2.2. Voluntary renouncement

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

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

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

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

- Article 26 of the UN Convention states that each State Party to the Convention may provide for the possibility of mitigating punishment of and/or granting immunity from prosecution to persons who provide substantial cooperation in the investigation or prosecution. Such cooperation can take two forms: **supplying information** useful to competent authorities for investigative and evidentiary purposes (on the identity, nature, composition, structure, location or activities of organised criminal groups, on links, including international links, with other organised criminal groups, and on offences that organised criminal groups have committed or may commit), and **providing factual, concrete help** to competent authorities that may contribute to depriving organised criminal groups of their resources or of the proceeds of crime.
- Article 4 of the EU Framework Decision provides that each Member State may take the necessary measures to ensure that the penalties may be reduced or that the offender may be exempted from penalties if he **renounces criminal activity** and provides the administrative or judicial authorities with **information**, which they would not otherwise have been able to obtain. The information must help the competent authorities to prevent, end or mitigate the effects of the offence, to identify or bring to justice the other offenders, to find evidence, to deprive the criminal organisation of illicit resources or of the proceeds of its criminal activities, or to prevent further offences from being committed.

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

sibility that are common to all offences, e.g. owing to the triviality of the act under Article 9 (2) of the *Criminal Code*.

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

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

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

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

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

The exclusion of the persons who have formed or who direct an organised criminal group from the lenient treatment applicable to voluntary renouncement was probably prompted by the higher degree of social danger of these acts compared to ordinary participation. Logical as it is, such an argument is hardly consistent with the overall intended purpose of the provision, which is to increase the effectiveness in countering organised crime. On the one hand, the persons who have formed and who direct the organised criminal group usually have much more information than the ordinary participants and their voluntary cooperation would contribute to a far greater extent to the detection

of previously committed offences as well as to the prevention of new criminal acts. On the other hand, quite often at the moment of surrender of the person it is still too early to determine the specific function of that person in the group. In this sense, the participant who has surrendered will hardly be persuaded to provide full cooperation if applicability of the favourable treatment is considered at a later stage and largely depends on the information, which that same person will reveal.

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

Another problem in the interpretation and application of the provisions on voluntary renouncement is related to **determining the moment of the renouncement,** which the law formulates as "prior to the commission of an offence by the participant or by the group". The pinpointing of the moment of renouncement is particularly important because it determines whether the participant who has surrendered will be released from criminal responsibility. The formulation used exhibits some very serious flaws that need to be remedied.

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

ticipant concerned in general. From this point of view, the wording of Article 321 (4) must be amended to specify the kind of offence, which the participant or the group should not have committed. The amendment can be modelled on the analogous provision on renouncement of participation in a group for the commission of offences against citizens' political rights under Article 169d (4) of the *Criminal Code*, according to which "any participant, who voluntarily surrenders to the authorities and reveals the group prior to the commission by the group or by the participant of any other offence under this Section, shall not be punished."

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

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

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

In the pre-trial phase, if the investigating authority fails to bring a charge this authority will breach his or her duty under Article 219 (1) of the *Criminal Procedure Code* to report to the prosecutor and to constitute the person as an accused when sufficient evidence is collected of the person's culpability of the commission of an indictable offence and there are no grounds for termination of the criminal proceeding. If, after the completion of the investigation, the prosecutor fails to submit an indictment, the prosecutor will breach his or her duty under Article 246 (1) of the *Criminal Procedure Code* to draw up an indictment when he or she is convinced that the evidence necessary for establishing the objective truth and for bringing a charge before the court has been collected, there are no grounds for termination or for suspension of the criminal proceeding, and a remediable material breach of the rules of procedure has not been committed.

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

The provisions on release from criminal responsibility with imposition of an administrative sanction under Article 78a of the *Criminal Code* cannot be applied, either, because participation in an organised criminal group is punishable by imprisonment of one to six years, whereas Article 78a (1) (a) of the *Criminal Code* requires that the offence be punishable by imprisonment of up to three years or by a less severe penalty. Nor is it possible to dispose of

the case by a plea bargain agreement because, according to Item 2 of Article 381 (5) of the *Criminal Procedure Code*, the type and the length and amount of the penalty imposed is a mandatory element of the plea bargain agreement.
The provision on reduction of criminal responsibility under Article 321 (5) of the *Criminal Code* creates problems, too, even though it is more clearly formulated. According to that provision, any participant in the group, who voluntarily surrenders, reveals everything which he or she knows about the group and thereby substantially facilitates the detection and proving of offences committed by the group, is punished under the terms established by Article 55 of the *Criminal Code*, i.e. the court assigns a penalty below the threshold of the range provided for or replaces the sanction by a sanction of a less severe type.
The wording does not make it clear **whether, in order to qualify for the imposition of a less severe penalty, the participant who has surrendered must not have committed another offence** prior to his or her surrender. The provision requires that by his or her surrender and by the information revealed, the participant in the group should have substantially facilitated "the detection and proving of offences committed by the group", but there is no indication of the legal relevance of his or her own participation in those offences. If the person who has surrendered has participated in the commission of another offence as well, it is not clear whether the reduction of the criminal responsibility, if at all admissible, applies only to his or her participation in the group or to the other offence as well.
The debatable issues, which the provisions on voluntary renouncement raise, necessitate a thorough revision of the formulations. A more accurate wording is all the more indispensable considering the major significance of these provisions in the fight against organised crime, because the successful detection and investigation of this type of crime often depends crucially on the voluntary cooperation by persons belonging to the organised criminal groups themselves.

2.3. Aggravated circumstances

Article 321 (3) of the *Criminal Code* provides for four groups of more severely punishable cases of forming, directing or participation in an organised criminal group.
In the first place, forming, directing and participation in an organised criminal group are more severely punishable where **the group is armed**. According to certain authors, the group is armed where some of its members have access to weapons, which they can use, "weapon" referring to any object, which, ac-

cording to its customary or specifically assigned intended purpose, is capable of taking human life or of harming human health.[26]

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

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

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

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

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

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

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

unlawful activity, which is carried out, which is why it is illogical to limit the aim of obtaining a benefit to an aggravating circumstance.

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

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

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

the provision of Article 321 (3) should be reviewed and revised so as to cover, to the fullest extent possible, the offences typical of organised crime.

Finally, forming, directing and participation in an organised criminal group is more severely punishable where **the group includes a public official**. According to Item 1 of Article 93 of the *Criminal Code*, a public official is a person who is assigned to perform, whether salaried or unsalaried, temporarily or permanently: service at an institution of State (with the exception of those performing an activity materially limited to order-taking) or administrating work or work related to safeguarding and managing another's property in a state-owned enterprise, a cooperative, a public organisation, another legal person or at a sole trader, as well as of a notary and assistant notary, a private enforcement agent and assistant private enforcement agent.

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

3. Aggravated cases of other offences committed upon assignment by or in execution of a decision of an organised criminal group

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

The commission of the act upon assignment by or in execution of a decision of an organised criminal group is an aggravated circumstance for the following offences listed in the *Criminal Code*: murder (Item 10 of Article 116), causing bodily injury [Item 8 of Article 131 (1)], kidnapping [Item 8 of Article 142 (2)], illegal restraint [Article 142a (2)], coercion [Article 143 (2)], holding a person hostage [Article 143a (3)], threatening with a criminal offence [Article 144 (3)], inducement to prostitution, procuring for molestation or copulation and providing premises for lewd and lascivious acts [Item 1 of Article 155 (5)], kidnapping for the purpose of procuring for lewd and lascivious acts [Item 1 of Article 156 (3)], creating, supplying and distributing works having a pornographic content [Article 159 (5)], trafficking in human beings [Article 159d], theft [Item 9 of Article 195 (1)], robbery [Item 5 of Article 199 (1)], treasure hunting [Article 208 (5)], blackmail [Item 5 of Article 213a (2) and

Article 214 (2)], destroying and damaging another's property [Article 216 (5)], unlawful logging and unlawful concealment, loading, transporting, unloading, storing or processing of timber [Article 235 (4)], cross-border smuggling of goods [Article 242 (1) (g)], money laundering [Item 1 of Article 253 (3)], illicit trade in cultural property [Article 278a (3)], taking a motor vehicle without lawful authority [Article 346 (6)], unlawfully obtaining a large amount of resources from the State budget [Article 256 (2)], wrongfully influencing the development or the result of a sporting competition [Item 1 of Article 307d (2)], arson [Item 4 of Article 330 (2)], and offences related to distribution of narcotic drugs [Item 1 of Article 354a (2)].

From a practical point of view, the main question which these aggravated cases raise is **how to differentiate between participation in an organised criminal group and commission of an offence upon assignment by or in execution of a decision of the same group**. Neither the law nor the theory and practice, however, give a clear answer to this question, which confronts the application of the law with a number of problems.

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

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

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

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

Where a participant in an organised criminal group commits any of the listed offences, he or she will incur responsibility for his or her participation in the group according to Article 321 (2) of the *Criminal Code* and for the offence committed according to the relevant aggravated provision under the terms of real aggregation.
The other hypothetical presents a more complicated issue: when the participant is not a member of the group but commits an offence upon assignment by or in execution of a decision of that group. In any case, intent would apply if the offender was aware that he or she was acting upon assignment by or in execution of a decision of the group, i.e. he or she must be clear that a group of persons pursuing the commission of offences is behind the assignment. Participation in the group and acting upon its assignment or in execution of its decision remains to be distinguished by case law.