

# A Study on Crime Proofing – Evaluation of Crime Risk Implications of the European Commission's Proposals Covering a Range of Policy Areas



EUROPEAN COMMISSION

*With financial support from  
the European Commission  
Directorate General JLS*

Ernesto U. Savona  
Mario Maggioni  
Francesco Calderoni  
Sara Martocchia

 **TRANSCRIME**



**UNIVERSITÀ DEGLI STUDI  
DI TRENTO**



**UNIVERSITÀ CATTOLICA  
DEL SACRO CUORE**

## A STUDY ON

# CRIME PROOFING – EVALUATION OF CRIME RISK IMPLICATIONS OF THE EUROPEAN COMMISSION'S PROPOSALS COVERING A RANGE OF POLICY AREAS

(Contract No. DG.JAI-D2/2004/05)

## FINAL REPORT

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UNIVERSITÀ DEGLI STUDI  
DI TRENTO

Administration & Research  
Via Inama, 5 - 38100 Trento (Italy)  
Tel: +39-0461-882304  
Fax: +39-0461-882303  
transcrime@transcrime.unitn.it

[www.transcrime.unitn.it](http://www.transcrime.unitn.it)



UNIVERSITÀ CATTOLICA  
DEL SACRO CUORE

Research  
Largo Gemelli, 1 - 20123 Milano (Italy)  
Tel: +39-02-72343716  
Fax: +39-02-72343721  
transcrime@unicatt.it



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This report was written by Ernesto U. Savona (Professor of criminology at Università Cattolica and Director of Transcrime with the co-operation of Mario Maggioni (Professor of Economics at Università Cattolica) and the assistance of Francesco Calderoni and Sara Martocchia, both researchers at Transcrime.

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## EXECUTIVE SUMMARY.

This report presents the results of the project *A study on Crime Proofing – Evaluation of crime risk implications of the European Commission’s proposals covering a range of policy areas* (contract No. DG.JAI-D2/2004/05). It has been financed by the European Commission and carried out by Transcrime.

The core idea underlying crime proofing is that legislation may have criminogenic effects.

The crime proofing process consists of **two phases**:

- a) Assessment of the risk that a legislative measure may produce unintended criminal implications/consequences;
- b) Action to close the loopholes in the legislation, thereby ‘proofing’ it against crime.

This study focuses on *ex ante* crime proofing, thus it addresses forthcoming EU legislation,

The overall aim of the project is to promote crime proofing, in order to develop a practical instrument to be used by policymakers for detecting and reducing possible crime risks inadvertently caused by legislation..

In order to pursue this general aim the project sets two main objectives:

1. **To carry out the crime risk assessment of selected EU Commission proposals;**
2. **To develop a crime proofing manual to be used by the Commission officials.**

In order to achieve objective 1, it has been necessary to develop **a methodology for a crime risk assessment**, here considered as **objective 1.1**.

### RESULT 1: THE 3 STEPS OF THE CRIME RISK ASSESSMENT PROCESS.

The first result of the present study is the step-based Crime Risk Assessment. It consists of three steps:

#### STEP 1: INITIAL SCREENING (IS).

The IS is the first step of CRA process. It is based on the policy options envisaged for a Commission proposal. Its aim is to check if any envisaged policy option falls within 7 general risk indicators. Officials of the relevant DGs will frame the options in one or more of the 7 abovementioned typologies. If no policy options can be framed into one risk indicator, the CRA process will end and no further activity will be required. If one or more envisaged policy options fall within the 7 categories, these options will pass to the Preliminary Crime Risk Assessment (PCRA).

#### STEP 2: PRELIMINARY CRIME RISK ASSESSMENT (PCRA).

The PCRA is the second step of the CRA process. Its aim is to assess if policy options that have been identified in the IS effectively present unintended crime risks. Evaluators will briefly assess the vulnerability of the sector/area to be regulated. They will identify what criminal behaviours

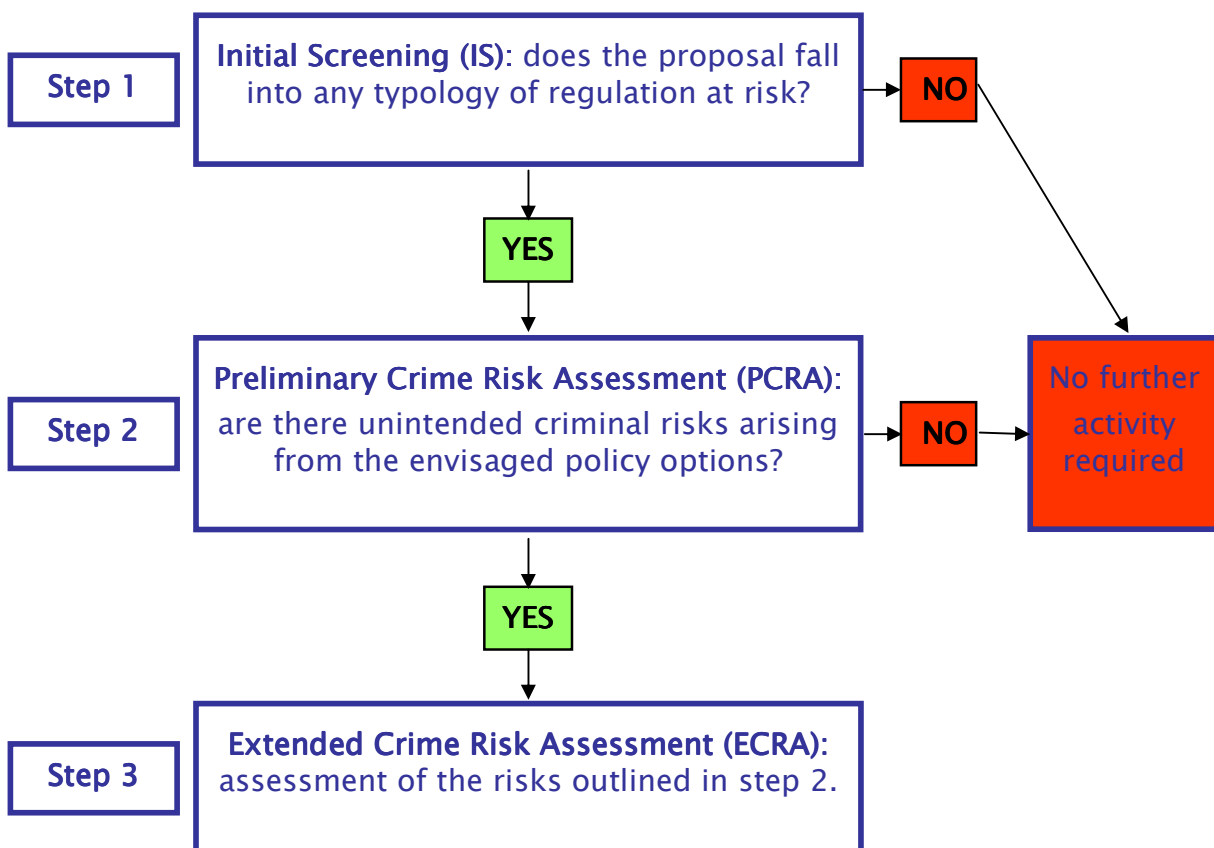


may occur and will assess such risks. If at least one policy option presents at least a medium level crime risk, such option(s) will pass to the Extended Crime Risk Assessment (ECRA).

#### STEP 3: EXTENDED CRIME RISK ASSESSMENT (ECRA).

The Extended Crime Risk Assessment (ECRA) is the third step of the CRA process. Its aim is to make an in-depth assessment of risky policy options that have been identified during the PCRA step. This step relies on the expertise of a team of experts. Such a contribution is needed in order to provide clear and specific knowledge of the sector's mechanisms and their possible impacts on crime.

The following diagram describes the three steps of the CRA process:



#### RESULT 2: CRIME PROOFING OF 19 COMMISSION PROPOSALS.

The second result of the study is the crime proofing of 19 Commission proposals. This exercise was conducted along with the elaboration of the above methodology. The assessments are presented in Chapter 4.

### RESULT 3: A MANUAL FOR THE CRIME PROOFING OF COMMISSION PROPOSALS.

The manual provides EU officials with simple instructions on how to identify unintended crime risks when drafting Commission proposals. It explains the notions of risk, risk assessment, risk management; describes through practical examples the meaning of “criminogenic legislation”; provides a step-based checklist to identify the unintended criminal implications arising from legislation; briefly summarises the whole methodology for a crime risk assessment, with the complete procedure and instructions for carrying out it. The manual includes user-friendly diagrams of both the checklist and the CRA methodology.

The table of contents of the manual is as follows:

- Introduction;
- 1. Legislative crime proofing;
- 2. Opportunities for crime due to legislation: criminogenic legislation;
- 3. How to identify unintended crime risks: a step-based checklist;
- 4. Conclusions;
- ANNEX. The Crime Risk Assessment process;

### RECOMMENDATIONS FOR THE CRA PROCESS.

The experiences attained during the crime risk assessment of the 19 Commission proposals suggested that some key recommendations should be put forward for improving the effectiveness and the reliability of a crime risk assessment. These are as follows:

#### **A. Time.**

Time is an essential variable for the Crime Risk Assessment process. The results of the different steps of the CRA (IS, PCRA, ECRA) should go back to the proposing DG as soon as possible and in any case before a draft proposal is approved. It has been our experience that the drafting of the proposal and its crime risk assessment followed two parallel, non-communicating paths. If this is the case, the crime risk assessment does not benefit the process.

*It is essential that an agenda is produced at the start of the process, where who does what and when are clearly identified and which presents the significant passages to be considered, as well as dates for communication between the producers and assessors of the proposal.*

#### **B. Information.**

In-depth knowledge of the proposal's background, as well as of all the relevant information on the targeted sector/market is crucial.

Information exchange is just as much important. All the relevant information on the proposal and on the sector/market should circulate between the relevant actors in the CRA process. Communication and feedback is very important for a successful CRA. The flow of information to the assessors should begin as soon as the policy options are established in the road map and

continue until the CRA process is completed. If external consultants are requested, they should be constantly updated on any relevant information concerning the proposal and the concerned market/sector.

*It is essential that all the relevant information continuously feeds the CRA process. The list of the documents used should be quoted in the CRA process in each of its three steps.*

### **C. Expertise.**

An effective analysis of criminal opportunities arising from the envisaged policy options may require significant expertise in order to obtain in-depth knowledge of the mechanisms of the targeted sector. Interaction among assessors and experts is crucial, especially in the case of the ECRA. All the relevant documents and information should be available to them in good time. They should have to possibility to ask for further clarifications and explanation to the assessors.

*It is essential that external experts, when necessary, are designated and involved in the process as soon as possible. Assessors and external experts should interact from the beginning and during the course of the process.*

### **D. Nature of the act.**

Difficulties may be encountered when assessing criminal implications of documents without prescriptive content. These do not lead to actual crime risks because they do not contain prescriptions that can be violated. Such documents should not be the object of the CRA process. The CRA is more effective and reliable when addressing regulatory acts (Directives, Regulations, Decisions), because of their prescriptive nature.

*The CRA process should be carried out on regulatory acts rather than on policy documents, as only regulatory acts may present actual crime risks.<sup>1</sup>*

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<sup>1</sup> This approach is in line with the principle of proportionate analysis mentioned in Doc. SEC(2005) 791, *Impact Assessment Guidelines* (hereinafter *Commission's Guidelines*), p. 8: "Broad policy-defining documents – For White Papers, Action Plans, other Communications setting out strategic orientations, or proposed framework directives (meant to be followed by daughter directives), the analysis will generally be rather broad in its problem description and objectives. [...] Assessment of impacts will necessarily be preliminary and will not provide detailed quantitative data".

## INTRODUCTION.

This Draft Final Report presents the results of the project *A study on Crime Proofing – Evaluation of crime risk implications of the European Commission’s proposals covering a range of policy areas* (contract No. DG.JAI-D2/2004/05). The project was awarded by the European Union Commission to TRANSCRIME, Joint Research Centre on Transnational Crime (Università degli Studi di Trento–Università Cattolica del Sacro Cuore, Italy).

The project aimed at: **1) assessing the criminal implications arising from some selected EU Commission proposals<sup>2</sup>; 2) developing a crime proofing manual to be used by EU Commission officials.**

This study should be considered as a first attempt to develop a crime proofing strategy on EU legislative acts. The rationale framing the project is the need to develop a powerful instrument to minimize possible crime risks arising from loopholes and flaws in legislation, and therefore to improve the security for EU citizens.

Crime proofing is a process which aims at identifying whether a legislative act contains any unintended implication/opportunity for crime. The ultimate aim is to reduce the crime risk inadvertently produced by the act through appropriate and effective measures. Therefore, a crime proofing process should consist of two main phases: a) identifying the criminal implications, if any (crime risk assessment) and b) reducing the consequent risk (crime risk management).

This project focused *only on the first phase*, trying to develop valuable know-how in order to identify and prevent possible crime risks contained in EU legislation. The core idea has been the development of a Crime Risk Assessment methodology which provides an effective instrument for EU policymakers. The second phase of the crime proofing process, aimed at reducing possible crime risks through appropriate changes in legislation, has been left to the decision-makers.

The first chapter of this Final Report briefly explains the background of crime proofing, along with the actions taken at EU level to promote it. It also explains why and how the crime risk assessment could be included within the Impact Assessment carried out by the EU Commission. The objectives of this research are outlined in Chapter 2 together with the methodology. Chapter 3 presents the methodology used for the crime risk assessment of EU Commission proposals. This methodology has been refined and improved according to the issues that emerged during the assessment of the selected Commission proposals (Chapter 4). A manual on how to identify crime risks is presented in Chapter 5, which has been prepared for use by EU Commission officials. Chapter 6 provides recommendations to improve the effectiveness of the CRA process.

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<sup>2</sup> Standing the confidential nature of the information on Commission proposals, all the people involved in the project were required to sign a confidentiality agreement. They are as follows: Ernesto Savona, Andrea Di Nicola, Gabriele Fornasari, Mario Maggioni, Francesco Calderoni, Ivana Cipriano, Federica Curtol, Sara Martocchia, Martina Montauti, Roberto Zoboli, Susanna Paleari, Stefano Carmini, Elena Antivalle, Mauro Motlacchini, Marica Amerio, Simona Beretta.



# 1. BACKGROUND.

## 1.1. CRIME PROOFING OF LEGISLATION.

The core idea underlying crime proofing is that legislation may inadvertently produce new opportunities for crime. Crime proofing belongs to the *situational crime prevention* approach, which derives from *opportunity* and *rational choice* approaches. The first assumes that criminals are influenced by opportunities they find to perform illicit activities. Crime prevention should consequently aim at identifying and reducing of such opportunities. Rational choice approaches presume that criminals are rational agents and perform a kind of cost/benefit analysis of a given illegal activity, comparing expected profits and losses. Criminals will try and maximize their benefits just as legal entrepreneurs. According to such approaches, crime prevention should deter criminals by increasing costs or reducing profits of illegal activities (e.g. by increasing sanctions, through better controls, more effective prosecution).

When applied to legislation, the crime proofing approach considers law for its criminogenic effects. Indeed, poorly drafted legislation may offer unwanted illegal opportunities to criminals. If applied to existing norms, this approach will lead to *ex post* crime proofing. When enacted during the drafting of new legislation, it will be *ex ante* crime proofing. In order to reduce such effects, *crime proofing of legislation aims at measuring existing (ex post crime proofing) or future (ex ante crime proofing) opportunities for crime due to legislation and at highlighting related interventions in order to proof it against crime.*

The crime proofing process consists of **two phases**:

- a) Assessment of the risk that a legislative measure may produce unintended criminal implications/consequences;
- b) Action to close the loopholes in the legislation, thereby 'proofing' it against crime.

The process has **four aims**:

- a) To identify, if present, the unintended criminal implications/consequences of existing or forthcoming legislation;
- b) To determine whether there is a crime risk, and if so, of what crime and of what magnitude;
- c) To analyse pros and cons in terms of crimes arising from each policy option;
- d) To suggest textual changes to the legislation likely to reduce the.

## 1.2. CRIME PREVENTION IN THE EU.

This issue was originally highlighted by the EU Institutions regarding possible actions to be taken to monitor and control the infiltration of organized crime into the legitimate economy. In 1980 the *Gabert Report* emphasized the relationships between legislation and fraud, pointing out that

complex legislation may stimulate fraudulent behaviours and that these behaviours were facilitated by asymmetries in the implementation of EU policies.<sup>3</sup> After the Tampere European Council Presidency Conclusions of 1999,<sup>4</sup> which made broad statements on the need to integrate aspects of crime prevention into legislation, several documents enacted by the EU Commission have emphasized the added value of a crime proofing strategy for legislation.<sup>5</sup> Establishing a crime proofing mechanism for the EU decision-making process will provide powerful instruments to prevent crime, by minimizing possible risks arising from the laws' weakness, and therefore achieving greater security and more opportunities for EU citizens. According to the European Commission, "crime prevention includes all activities which contribute to halting or reducing crime as a social phenomenon, both qualitatively and quantitatively, either through permanent and structured co-operation measures or through ad hoc initiatives. These activities are undertaken by all actors likely to play a preventive role: local representatives, enforcement services and judicial system, social services, education system, associations in the broad sense, industry, banks and the private sector, research workers and scientists, and the general public, supported by the media".<sup>6</sup> Several law reform projects, at international and national levels, may have an impact on crimes. The screening of legislation for provisions that create or facilitate opportunities for crime may significantly contribute towards minimising potential crime risks and their implications in terms of costs and victims.

The importance of crime prevention in the EU crime prevention strategy was confirmed in the 2004 Assessment of the Tampere Programme, where the Commission stated that "as regards crime prevention, efforts must be made to make goods and services less vulnerable to crime. The crime-proofing of legislation must be an integral part of this effort."<sup>7</sup>

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<sup>3</sup> See European Parliament: Working Document 1983–1984, *Report on behalf of the Budgetary Control on Fraud against the Community Budget*, Document 1–1346/83.

<sup>4</sup> Conclusion No. 41 of the Tampere European Council, 15–16 October 1999.

<sup>5</sup> In particular, in 2000 the European Commission asked for an instrument to test legislative proposals; see Commission of the European Communities, Communication from the Commission to the European Parliament. *The Prevention of Crime in the European Union. Reflection on Common Guidelines and Proposals for Community Financial Support*, COM (2000) 786 final, Doc. 2000/0304 (CNS), Brussels, 29 November 2000. See also: Commission of the European Communities, Joint Report from Commission Services and EUROPOL. *Towards a European Strategy to Prevent Organised Crime*, SEC (2001) 433, Brussels, 13 March 2001; European Crime Prevention Network, First Programme: *Setting Priorities and Objectives for the Period July 2001 – December 2002*, Stockholm, 25 June 2001, p. 4. See also Commission of the European Communities, Communication of the Commission to the Council and the European Parliament, COM (2001) 628, final, 30 October 2001; Commission of the European Communities, *Communication concerning the Fraud Proofing of Legislation and Contract Management*, SEC (2001) 2029 final, Brussels, 7 November 2001.

<sup>6</sup> Commission of the European Communities, Communication from the Commission to the European Parliament. *The Prevention of Crime in the European Union. Reflection on Common Guidelines and Proposals for Community Financial Support*, COM (2000) 786 final, Doc. 2000/0304 (CNS), Brussels, 29 November 2000.

<sup>7</sup> European Commission, Communication from the Commission to Council and the European Parliament, *Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, COM (2004) 401 final, Brussels, 2 June 2004.

### **1.3 CRIME PROOFING AND IMPACT ASSESSMENT (IA).**

“Impact assessment is a set of logical steps which structure the preparation of policy proposals. It involves building on and developing the practices that already accompany the process of policy development by deepening the analysis and formalising the results in an autonomous report. Responsibility for developing the impact assessment lies with the service in charge of developing the proposal.”<sup>8</sup>

The IA process aims at providing European Union policymakers with “sound analysis fed by the best data available”<sup>9</sup>. It has been mainly designed to address the social, economic and environmental impacts of envisaged proposals of the European Commission.<sup>10</sup> In this framework, crime issues are briefly considered. The Commission’s Guidelines envisage the following questions to act as drivers when addressing crime and terrorism issues related to different policy options:

Does the option improve or hinder security, crime or terrorism?  
 Does the option affect the criminal’s chances of detection or his/her potential gain from the crime?  
 Is the option likely to increase the number of criminal acts?  
 Does it affect law enforcement capacity?  
 Will it have an impact on the balance between security interests and the rights of suspects?  
 Does it affect the rights of victims of crime and witnesses?<sup>11</sup>

Although crime prevention is one of the fundamental objectives of the European Union (Art. 2 TEU), the goal of “safeguarding the security of citizens, or citizens’ rights recognized by the treaty”<sup>12</sup> is still deemed to be unsatisfactorily achieved. The Commission is aware of this loophole and recognized that discrepancies between the fundamental goal of the European Union and the present situation exist.<sup>13</sup>

The present study aims at providing the European Commission with a simple methodology to fill this gap and implement a more in-depth and effective assessment of the criminal impacts of proposed legislation. The Crime Risk Assessment process has been designed to be compatible with the existing IA process and may complement it. It may assist officials charged of the IA of a proposal in assessing and preventing the possible occurrence of crime risks. If properly implemented, such a methodology will help EU institutions to prevent crime in a very cost-effective and radical way with only a small demand on resources and time.

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<sup>8</sup> Doc. SEC(2005) 791, *Impact Assessment Guidelines* (hereinafter *Commission’s Guidelines*), p. 4

<sup>9</sup> *Ibid.*, p. 4.

<sup>10</sup> *Ibid.*, p. 5.

<sup>11</sup> *Ibid.*, p. 32.

<sup>12</sup> *Ibid.*

<sup>13</sup> Doc. SEC(2005) 791, *Impact Assessment Guidelines*, Annexes to Impact Assessment Guidelines (hereinafter *Annexes to the Commission’s Guidelines*), p. 6.



## **1.4. A TOOL TO IMPROVE THE EUROPEAN COMMISSION DECISION-MAKING PROCESS.**

The goal of the CRA process consists in providing answers to the following questions: is there any crime risk connected with the single policy options? If so, for which crime? What is the magnitude of these risks?

In order to provide the European Commission with a tool compatible with the current IA process, *the CRA process only covers risk assessment* – the first phase of crime proofing of legislation (see above, under 1.1). *Crime risk management* – the second phase of the crime proofing process – *is left to the decision-makers*. This approach is fully compatible with the IA logic of improving the decision-making process providing sound analysis of the impact of eventual decisions. As the Commission clearly states, “*Impact assessment is an aid to political decision-making, not a substitute for it*”. Consequently, the CRA process only aims at highlighting potential crime risks in envisaged policy options that may affect the effectiveness of EU policies. The final decision whether to adopt one policy option or another, implying different levels of crime risk, will lie with the decision-making bodies that will evaluate the different trade-offs between crime risks and the other impacts (social, economic and environmental impacts) of the proposed action.

Since the IA process is designed to precede the proposal by the Commission, the *ex-ante* CRA starts from the Roadmap provided by the service in charge of developing the proposal. The policy options envisaged in the Roadmap will be the starting point for the CRA process. Indeed, the goal of the whole process is to provide useful information and assessment before the drafting of the final proposal of the Commission.

## 2. THE STUDY, ITS OBJECTIVES AND ITS METHODOLOGY.

### 2.1. THE OBJECTIVES OF THE PROJECT

The objectives of this project were:

1. To carry out the crime risk assessment of selected EU Commission proposals;
2. On the basis of the results and the obstacles encountered under objective 1, to develop a crime proofing manual to be used by the Commission Directorate-Generals when drafting new regulation/amendments to existing regulation.

In order to achieve objective 1, it has been necessary to develop a **methodology for a crime risk assessment**, here considered as **objective 1.1**.

The proposals selected by the Commission and assessed by Transcrime were the following:<sup>14</sup>

1. 2004 TAXUD 007: *Commission Recommendation concerning the experimental application of Home State Taxation to small and medium-sized enterprises.*
2. 2004 SANCO 002: *Avian Influenza control measures and their Community co-financing.*
3. 2005 ENTR 020: *Integrated Competitiveness and innovation programme (CIP).*
4. 2005 TREN 039: *Communication pour un cadre commun de tarification des infrastructures (common framework for transport tariffs).*
5. 2004 TAXUD 023: *Proposal for a Council Directive on Taxation of passenger cars in the EU.*
6. 2004 ENV 001: *Thematic Strategy on the prevention and recycling of waste.*<sup>15</sup>
7. 2005 INFSO 004: *Commission Communication on e-Accessibility.*
8. 2003 MARKT 22: *Proposal for a Directive on Payment Services in the Internal Market.*
9. 2003 SANCO 38: *The protection of chickens kept for meat production*<sup>16</sup>
10. 2004 SANCO 25: *Proposal for a Council Directive on animal health conditions for placing on the market, import and transit of aquaculture animals and their products, and on minimum measures for the prevention and control of certain diseases in aquatic animals.*
11. 2005 ENTR 019: *Biotechnology-human tissue engineering.*

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<sup>14</sup> Originally the Commission had selected 21 proposals. Proposals 2005 REGIO 015 and "Amended proposal on the Statute for a European Association" have been then excluded from the project by the Commission.

<sup>15</sup> A meeting was held in Brussels on 14<sup>th</sup> October 2005 with DG JLS and representatives of DG ENV to discuss the PCRA.

<sup>16</sup> A meeting was held in Brussels on 14<sup>th</sup> October 2005 with DG JLS and representatives of DG SANCO to discuss the PCRA.

12. 2005 ENV 008: *Communication on reducing the Climate Change impact of Aviation.*
13. 2004 TAXUD 015: *Regulation (EC) Nr. of the European Parliament and the Council amending the Council Regulation (EEC) Nr. 2913/92 establishing the Community Customs Code.*
14. 2005 ENV 010: *Thematic Strategy on the protection of the Marine Environment.*
15. 2004 ENV 003: *Thematic Strategy on Pesticides.*
16. 2005 MARKT 004: *Commission Communication on the results of the consultation launched with the Green Paper on Defence Procurement.*
17. 2005 ENV 038: *Thematic Strategy on the Urban Environment.*
18. 2005 COMP 001: *Proposal for a Council Regulation repealing Regulation 4056/86 applying the EC competition rules to maritime transport.*
19. 2005 TREN 023: *Communication to the European Parliament and the Council on transparency and functioning of the European hydrocarbon market.*

## **2.2. THE METHODOLOGY**

### **2.2.1 Introduction.**

The methodology adopted in this project derives from the methodology developed under project *MARC – Developing Mechanisms for Assessing the Risk of Crime due to legislation and products in order to proof them against crime at an EU level*, started in May 2004 under the EU VI Framework Programme for Scientific and Technological Research and co-ordinated by Università Cattolica and Transcrime. Project MARC aimed at developing an *ex-post* crime risk assessment mechanism to evaluate and reduce the crime risks inadvertently produced by existing legislation (at EU, national or local level).

This study dealt with Commission proposals for new legislation and therefore aimed at developing a methodology for *ex ante* crime risk assessment. The methodology focused on policy options provided by the EU Commission through Roadmaps and other documents. It has been constantly refined during its course to completion, taking into account further issues and problems encountered during the crime risk assessments of the Commission proposals and the suggestions and comments coming from the Commission.

This project can be considered as a “pilot study”, which proposes a methodology for assessing whether forthcoming EU legislation contains any criminal implications. It has been moulded on the EU Commission’s law-making process.

### **2.2.2 Research activities.**

**In order to achieve objective 1 the following activities have been carried out:**

### *1.1 Development of a methodology for a crime risk assessment.*

#### *1.1.1 Drafting of an initial methodology, presented in the Inception Report.*

The methodology resulted from a refinement of the MARC model, in accordance with the conclusions reached at the kick-off meeting with the Commission.<sup>17</sup> Different risk assessment methodologies were studied and assessed. The three steps approach, suggested by the Commission's Impact Assessment Guidelines<sup>18</sup>, was chosen because of the different level of expertise required for the exercise. The first step is a quick tool to be used by Commission officials charged of the Impact Assessment. The second requires some knowledge of crime and of the market targeted by the proposal. It could be done by the officials charged of the IA, with the assistance of DG JLS officials. The third step usually requires specific expertise on the sector to be regulated.

#### *1.1.2 Progressive revision and improvement of the methodology.*

The methodology has been incrementally changed, adjusted and integrated over time, on the basis of issues and problems encountered during the application of the model on the selected Commission proposals.

The final methodology is presented in Chapter 3.

### *1.2. Drafting of Crime Risk Assessments of the selected proposals.*

#### *1.2.1 Preliminary Crime Risk Assessment (PCRA) of the selected Commission proposals.*

The PCRA's were carried out by the Transcrime research staff with the contribution of Prof. Mario Maggioni. In some cases the proposing Directorate Generals cooperated with Transcrime and DG JLS, through meetings or feedback exchanges.

#### *1.2.2 Extended Crime Risk Assessment (ECRA) of the selected Commission proposals.*

The ECRA's have been carried out for those proposals which presented a medium/high crime risk at the end of the PCRA. Each ECRA has been performed by a "crime proofing team", composed of Prof. Ernesto Savona, Prof. Mario Maggioni and one or more experts of the sector regulated by the proposal. Following the "crime proofing team" for each finalized ECRA:

1. 2004 ENV 001: Ernesto Savona, Mario Maggioni, Roberto Zoboli (Research Director at CERIS-CNR, Milano and Adjunct Professor of Environmental Economics at Università Cattolica del Sacro Cuore, Milano) and Susanna Paleari (Researcher at CERIS-CNR, Istituto di Ricerca per l'Impresa e lo Sviluppo, Milano);
2. 2004 TAXUD 007: Ernesto Savona, Mario Maggioni, Stefano Carmini (lawyer in Milano) and Elena Antivalle (lawyer in Milano);

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<sup>17</sup> The kick-off meeting was held in Brussels on 7 March 2005.

<sup>18</sup> *Commission's Guidelines*, p. 27.

3. 2003 SANCO 38: Ernesto Savona, Mario Maggioni, Mauro Morlacchini (Researcher at CERZOO, Centro di Ricerca per la Zootecnia e l'Ambiente, Università Cattolica del Sacro Cuore, Piacenza);
4. 2004 SANCO 25: Ernesto Savona, Mario Maggioni, Marica Amerio (Professor of Zootechnics at Università Cattolica del Sacro Cuore, Piacenza);
5. 2004 TAXUD 23: Ernesto Savona, Mario Maggioni, Simona Beretta (Professor of International Economics at Università Cattolica del Sacro Cuore, Milano).

This phase required the following methodological steps:

- Step A: Selection of the experts for each of the proposals recommended passing to the ECRA phase.
- Step B: Elaboration of a questionnaire for the “crime proofing team”.
- Step C: Submission of the questionnaire to the “crime proofing team”. For each proposal, the answers to the questionnaire were reached by consensus among the experts.
- Step D: On the basis of the results from step C drafting the ECRA.

The PCRA and ECRA of the Commission proposals are presented in Chapter 4.

**In order to achieve objective 2 the following activities have been carried out:**

### *2.1 Elaboration of a draft crime proofing manual.*

On the basis of the results achieved under activities 1.1 and 1.2, this first version of the manual provided for a detailed explanation of the methodology developed under activity 1.1, as well as the complete procedure for carrying out a CRA.

### *2.2 Revision of the manual in accordance with the requests of the Commission.*

The draft manual was sent on 30<sup>th</sup> June 2006 to DG JLS, in order to receive comments and feedback. DG JLS suggested that the manual should be a simple checklist to be used by Commission officials. It should focus on crime risk indicators rather than on procedure. Therefore, the revised version presented at its core a checklist of indicators useful for identifying possible criminal implications of a Commission proposal. These indicators have been extrapolated from the methodology under activity 1.1.

The manual is presented in Chapter 5.

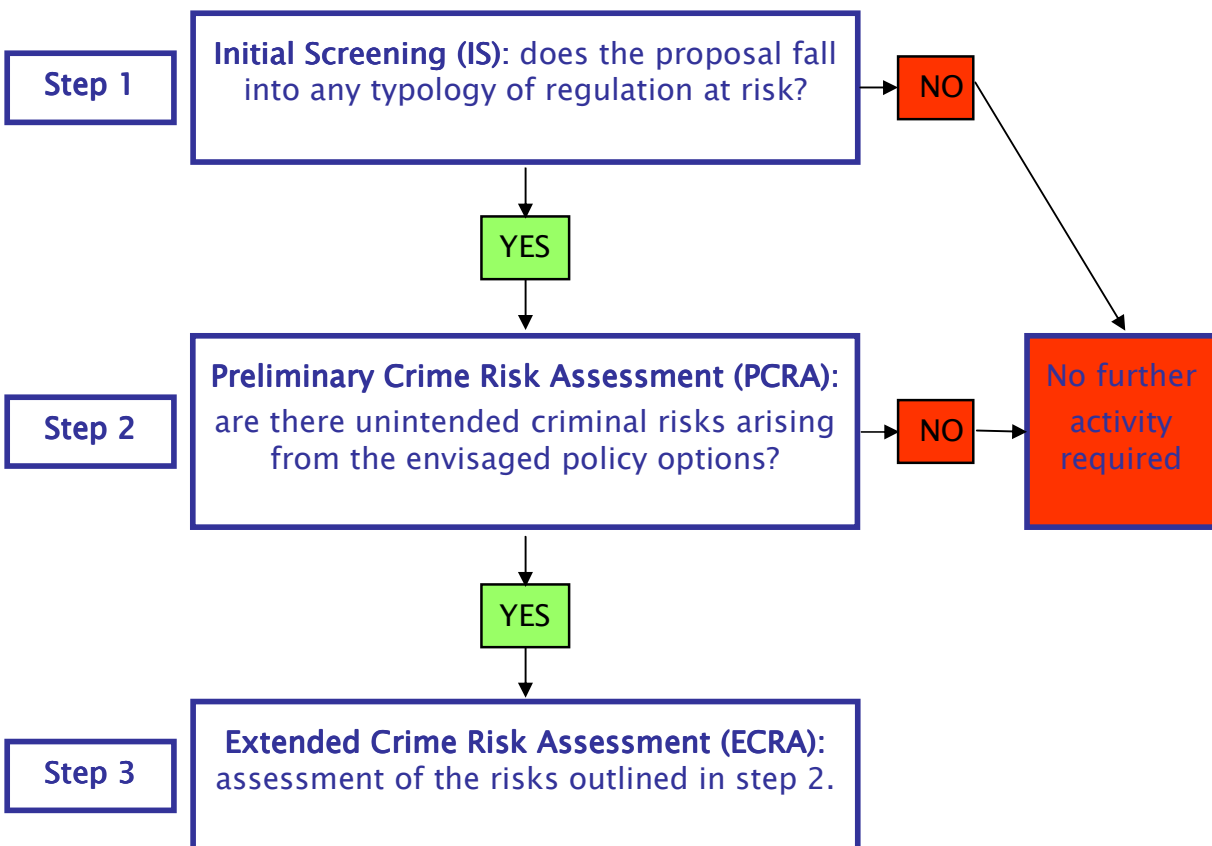
### 3. RESULT 1: THE 3 STEPS OF THE CRIME RISK ASSESSMENT PROCESS.

The following step-based Crime Risk Assessment is the first result of the present study. It is the outcome of the experience accumulated during the crime proofing of 19 European Commission proposals (result 2, see next chapter).

**The whole process is based on the principle of proportionality**, as requested by the Commission's Guidelines, in order to avoid an excessive workload for the Commission's services when not required.

The CRA process starts with the Initial Screening that frames the policy options into 7 different general risk indicators; if any regulation is found to be at risk, it continues to the Preliminary Crime Risk Assessment (PCRA), which assesses the potentially criminogenic policy options. If the PCRA highlights at least a medium level crime risk, an Extended Crime Risk Assessment (ECRA) will be recommended which will assess the risky options with the help of external experts.

The following diagram describes the main steps of the CRA process:



### **3.1. THE INITIAL SCREENING (IS).**

The IS is the first step of CRA process. Its aim is to select those proposals which should undergo a CRA process. It is based on the envisaged policy options presented in the Roadmap. Officials from the proposing DGs will frame the envisaged options in one or more of the 7 crime risk indicators. These indicators were developed by Jill Dando Institute and Transcrime<sup>19</sup> as general categories of regulation which are likely to produce opportunities for crime. If policy options cannot be framed into one risk indicator, the CRA process will end and no further activity will be required. If one or more envisaged policy options fall within the 7 categories, these options will pass to the Preliminary Crime Risk Assessment (PCRA).

#### **Who does the IS?**

Responsibility for developing the IS lies with the service in charge of developing the proposal.

#### **When should the IS be done?**

The IS should be developed as soon as the Roadmap is available. It is a very simple task that can be done in few minutes.

#### **What should be the object of the IS?**

The IS should assess all the envisaged policy options as described in the Roadmap. The Commission's Guidelines provide useful tips on how to identify and select policy options.<sup>20</sup>

#### **How will the IS be done?**

The IS is a very quick and easy step. The assessors should check whether the envisaged policy options fall within a typology of regulation at risk. Seven categories of legislation were identified which carry the risk of unintended crime consequences. These were laws that:

- 1 – Introduce product disposal regulations or any other new or more burdensome fee or obligation**
  - may produce behaviour by those regulated intended to avoid or reduce the obligation (e.g. dumping or destroying products that are required to be returned and/or a fee paid, bribery of officials). Other parties, including organised groups may assist in the avoidance or minimisation of the obligations for a fee.

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<sup>19</sup> See to this purpose Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators*. Final Report to the EU Crime Proofing Steering Group. September 2003, UCL.

<sup>20</sup> See *Commission's Guidelines*, cit., p. 23.

**2 – Introduce a concession on a tax or a concession on any other fee or obligation** – may produce deceptive or other behaviour for the purposes of meeting the criteria for the concession (e.g. providing false information, 'hiring' those who qualify for concession, bribery of officials). The concession might be exploited in an organised manner.

**3 – Introduce or modifies a grant, subsidy, or compensation scheme or any other scheme that provides a benefit** – may produce deceptive or other behaviour for the purposes of meeting the criteria for the benefit (e.g. forgery of documents, provision of false information, bribery of officials, steal goods for reward, deliberately injure self to claim compensation).

**4 – Introduce or increase the tax on legal goods or in any other way increases the costs of legal goods** – may produce smuggling of goods from lower-tax or lower-cost jurisdictions. Organised groups have historically been involved in smuggling contraband products both within and between countries.

**5 – Prohibit or restrict a demanded product or service or in any other way decrease the availability of demanded goods or services** – may produce illegitimate trade in the product or service. Organised groups have historically been involved in the supply of both black market products and services.

**6 – Introduce, modifies or remove a law enforcement capacity, increase or decrease funding for enforcement activity or in any other way impact the intensity of law enforcement activity.** When laws increase the intensity of law enforcement this may produce displacement of the behaviour subject to enforcement to other times, places or through other means; or when they reduce the intensity of law enforcement this may result in an increase in the behaviour subject to enforcement. Moreover, law enforcement tools may be inadequate or ineffective to ach the objectives set forth by the law.

**7 – Provide officials with regulatory power** – may be associated with bribery of officials (e.g. regulatory powers might concern the allocation of benefits, such as contracts or licences, or the imposition of burdens, such as taxes or rules).

These 7 indicators should be interpreted in a broad sense and not in a strict manner. Their **goal is to select potential criminogenic proposals for further assessment**. It will be noted that the way in which the regulations produce their unintended consequences has also been incorporated into the risk indicators. This has been done to possible allow for a greater application of the risk indicator by scanners to other types of new regulation.

The following diagram graphically represents the IS.



### THE CRIME RISK ASSESSMENT PROCEDURE.

#### STEP 1: INITIAL SCREENING.

AIM	Assessing if a Commission's proposal falls into any typology of regulation at risk
WHO?:	Services in charge of developing the proposal
WHEN?:	As soon as the Roadmap is available
WHAT?:	All the policy options envisaged in the Roadmap

HOW?:

##### 1. INITIAL SCREENING

Framing of the policy options into the following *general risk indicators* elaborated by the Jill Dando Institute and Transcrime:

- 1) Legislation that introduces product disposal regulations or any other new or more burdensome fee or obligation;
- 2) Legislation that introduces a concession on a tax or a concession on any other fee or obligation;
- 3) Legislation that introduces a grant, subsidy, or compensation scheme or any other scheme that provides a benefit;
- 4) Legislation that introduces or increases the tax on legal goods or in any other way increases the costs of legal goods;
- 5) Legislation that prohibits or restricts a demanded product or service or in any other way decreases the availability of demanded goods or services;
- 6) Legislation that introduces or removes a law enforcement capacity, increases or decreases funding for enforcement activity or in any other way impacts the intensity of law enforcement activity;
- 7) Legislation that provides officials with regulatory power.



## **3.2. THE PRELIMINARY CRIME RISK ASSESSMENT (PCRA).**

The PCRA is the second step of the CRA process. Its aim is to assess if policy options that have been identified in the IS effectively present unintended crime risks. Evaluators will briefly assess the vulnerability of the sector/area to be regulated. They will identify what criminal behaviours may occur and will assess such risks. If at least one policy option presents at least a medium level crime risk, such option(s) will pass to the Extended Crime Risk Assessment (ECRA).

### **Who does the PCRA?**

Responsibility for developing the PCRA lies with the service in charge of developing the proposal. This step should be done by the same officials that are developing the proposal. Since the PCRA requires some knowledge of crime, the assistance of DG JLS officials may be requested. This should allow a quick assessment of the presence of unintended crime risks in the market to be regulated as well as in the envisaged policy options.

### **When should the PCRA be done?**

The PCRA should be developed if the results of the IS are positive, i.e. at least one policy option falls within one of the 7 general risk indicators. The PCRA should start as soon as possible, in order to provide timely information before the approval of the proposal.

### **What should be the object of the PCRA?**

The PCRA should only assess the envisaged policy option(s) that have been identified in the IS.

### **How will the PCRA be done?**

The PCRA will be done through the following methodology, divided into the following sections:

- Background;
- General factors to be considered;
- Crime risks arising from specific options/provisions;
- Conclusions.

#### ***Background.***

– **DOCUMENTATION.** This subsection lists the relevant documents and bibliography collected by the service in charge of the PCRA.

– **OPTIONS TO BE ASSESSED.** This subsection describes the envisaged policy options for the proposal. The policy options are usually described in the Roadmap. If any further documentation is available which modifies the policy options, the most updated information should be used for the PCRA.

– **RESULT OF THE INITIAL SCREENING.** This subsection quotes the results of the IS (see above, under 3.1). It must state which policy option(s) has been framed into the 7 several general risk indicators, which of the 7 categories was identified as to be relevant and why.

***General factors to be considered.***

– **VULNERABILITY OF THE SECTOR/AREA TO BE REGULATED.** This subsection briefly assesses the vulnerability of the sector/area to be regulated. The concept of vulnerability can be defined as the amount of crime opportunities and the extent of crime infiltration in a given sector/area. In order to be easily assessed, vulnerability can be split into two main elements:

a) *Attractiveness of the sector/area to crime.* This element evaluates how much added value components (raw materials, labour and capital), products and structures of the sector/areas could produce when involved in criminal activities (e.g. fashion apparel is attractive to counterfeiting because of the value of trademark/branded products). The main factors of attractiveness are:

i. **PROFITABILITY:** the overall gain that illicit activities in the sector/area may produce for the perpetrator.

**Example.** 2005–ENTR–019 Proposal for a Regulation on the authorization, supervision and vigilance of human tissue engineered products addresses several sectors, namely the pharmaceutical sector, the medical device sector and the biotechnology sector. The products of these sectors/areas are usually of high added value and thus may attract illicit or criminal behaviours. These sectors/areas therefore present a high profitability.

ii. **RISK OF DETECTION:** the risk of being detected and punished while committing illicit behaviour in the sector/area.

**Example.** Proposal 2004–ENV–001 (Thematic Strategy on the prevention and recycling of waste) addressed the waste sector. In this sector the risk of detection for criminals is very low for several reasons: lack or inadequacy of controls by Public Administrations; inadequacy of criminal law and difficulties in collecting evidence on environmental crimes; obstacles to the traceability of international trafficking of waste; lack of transparency in the sector.

**Example.** Proposal 2005–ENV–008 (Communication on Reducing the Climate Change Impact of Aviation) addressed the air transport sector. This sector is strictly regulated and controlled, due to the necessity of guaranteeing high levels of security. This means that Public Administrations (both national and EU) carry out periodical checks on the market's operators, which make the possibility of detecting illegal activities very high (high risk of detection).

b) *Accessibility of the sector/area to criminals.* The concept of accessibility describes how a sector/area can be infiltrated by criminal activities. It can be split into two main elements:

i. The *MODUS OPERANDI* typical of the sector/area: the higher the level of violence and corruption, the higher the accessibility of the sector/area to criminals.

**Example** The abovementioned 2005-ENTR-019 Proposal on human tissue engineered products addresses several sectors that are mostly characterized by an oligopolistic structure. Market functioning depends on the decisions of a few subjects and this may ease anti-competitive behaviour (*modus operandi* prone to corruption).

**Example.** Proposal 2005-MARKT-004 addressed the Defence procurement market. As frequently demonstrated by scientific literature, protectionist policies, collusive/corruptive behaviours and offset mechanisms frequently affect the dynamics of the defence market, therefore making it a very vulnerable area for criminal behaviour (*modus operandi* frequently corrupted).

- ii. The DIFFICULTY IN EXPLOITING SUCH FACTORS, PRODUCTS OR STRUCTURES for criminal purposes. This element reduces the level of accessibility.

**Example.** 2004-ENV-003 Proposal (Thematic Strategy on Pesticides) addresses a sector presenting a complex market structure with high scientific, technological and financial requirements. Criminal infiltration in this sector seems improbable because of such issues. These factors make the products and structures of the pesticide market almost impervious to exploitation by criminals.

In order to assess the vulnerability of an area/sector, persons in charge of a PCRA should estimate the relevance of the above factors on the area/sector at the moment of the assessment. Further, if a policy option will significantly affect one or more of these elements, the magnitude and direction of such a change must be assessed too. If, for example, a policy option envisages increasing the professional requirements to operate in a given market, such an option will significantly reduce the accessibility of the market to criminals: therefore the vulnerability to crime will be reduced by such a measure.

**Example.** 2004-TAXUD-023 Proposal for a Council Directive on taxation of passenger cars in the EU is targeted at a very vulnerable market. Indeed, scientific literature and case studies show that the car sector is vulnerable to tax evasion and tax frauds. However, measures envisaged by the Commission would have reduced the asymmetries in car taxation regimes and therefore the opportunity to commit tax crimes related to the car sector. Consequently the proposal showed a potential effect of risk reduction on a vulnerable sector/area.

The assessment of the sector/area vulnerability may impact on the final results of a PCRA. In the presence of high vulnerability, unintended criminal consequences may have higher probability, frequency and impact. This issue is important when deciding if a proposal requires an Extended Crime Risk Assessment (ECRA). For this purpose, a comparison between the proposals 2005-ENV-008 and 2004-ENV-001 is significant:

**Example.** 2005-ENV-008 Communication on reducing the Climate Change Impact of Aviation provides for improving fuel taxation in the air transport sector. 2004-ENV-001 Thematic Strategy on the prevention and recycling of waste provides for landfill taxes. For both these proposals, possible crime risks were envisaged, concerning tax evasion. However, only 2005-ENV-001 has

been recommended for an ECRA, because the waste sector itself is more vulnerable to criminals than the air transport sector. In particular, the vulnerability of the air transport sector has been evaluated as being so low that, even if minimal crime risks have been found, they are likely not to produce significant impacts.

***Crime risks arising from specific options/provisions.***

This section only identifies those options revealing possible, specific crime risks. For each such option, the following aspects have to be considered:

- **CONTENT.** This subsection briefly outlines the content of the option/provision.
- **CRIME RISKS.** This subsection identifies crime risks related to the content of the proposal, i.e. what kind of crime opportunities the proposal inadvertently creates and how these could be exploited.
- **CRIMES ENVISAGED.** This subsection identifies specific crimes (or crime categories) potentially arising from the above crime risks related to each option/provision. Each crime risk must be scaled against a low–medium–high level risk scale. This assessment is based on the likelihood that the envisaged crimes will occur.

The concept of crime may refer to two different interpretations: 1) from a legal point of view, the strict definition contained within national criminal codes and 2) from a criminological point of view, behaviour likely to produce unlawful effects (commonly recognized, at least at EU level). In the crime risk assessment the criminological interpretation will be adopted, as the legal definitions for a given crime change depending on the law system considered. This also implies that by “crimes” we assume some activities, such as tax evasion or antitrust abuses, which may be considered as mere administrative violations in certain countries.

**Example.** The abovementioned proposal 2004–ENV–003 on pesticides envisaged measures to promote low–input farming. Such an option presented the following specific crime risk:

“Contents: in order to promote low–input farming, compensations through Common Agricultural Policy (CAP) are envisaged.

Crime risks: the creation of such a measure would introduce a form of subsidy. Subsidies may stimulate deceptive behaviours in order to meet the granting criteria. Moreover, frauds against EC budget are frequently committed in the CAP sector. It should also be noted that such frauds are often perpetrated in an organized manner. This suggests that such an economic instrument implies a significant criminal risk.

Crimes envisaged: fraud against the EC budget, corruption of regulatory/control agencies.”

**Example.** Proposal 2004–TAXUD–007 (Commission Recommendation concerning the experimental application of Home State Taxation to small and medium–sized enterprises) envisaged 5 policy options. With reference to Option 4, the PCRA reported:

“Contents: Direct subsidies by Member States/State Aid.

Crime risks: This option may produce deceptive or other behaviour for the purposes of meeting the criteria for the benefit (i.e. showing to have an economic activity in a third country when it is not true for the purposes of obtaining direct subsidies).

Crimes envisaged: forgery of documents (fraud), provision of false information, bribery of officials.”

### Conclusions.

Conclusions briefly summarize the content of the previous sections. The final decision, whether an Extended Crime Risk Assessment (ECRA) is required or not must be taken in accordance with two complementary principles:

- The *principle of proportionate analysis*, implying that the more significant the crime risks emerging from a policy option, the greater the attention such an option will receive;
- The *precautionary principle*, implying that in any case where a significant crime risk is envisaged, the related option will receive further attention.

According to these principles, an Extended Crime Risk Assessment will be required if at least one policy option shows significant crime risks. *Crime risks are significant whenever at least a medium level risk is present.*

The combination of the above principles allows the different policy options to be filtered effectively. Only options truly needing further assessment should pass such a test. Therefore, ONLY policy options presenting at least a medium level crime risk will be recommended for an Extended Crime Risk Assessment; moreover ANY policy option showing at least a medium level crime risk will be recommended for an Extended Crime Risk Assessment.

**Example.** Proposal 2005–COMP–001 (Council Regulation repealing Regulation 4056/86 applying the EC competition rules to maritime transport) was not recommended for an ECRA. Accordingly, the conclusions of the PCRA read: “The maritime transport market shows a low vulnerability to crime, though even unlawful behaviour such as violation of safety and/or environment protection rules may incur very high costs.

The overall criminal risks implied by the draft proposal appear not to be significant. The transitional period should reduce the impact of competition rules on the market and stimulate competitive behaviours.

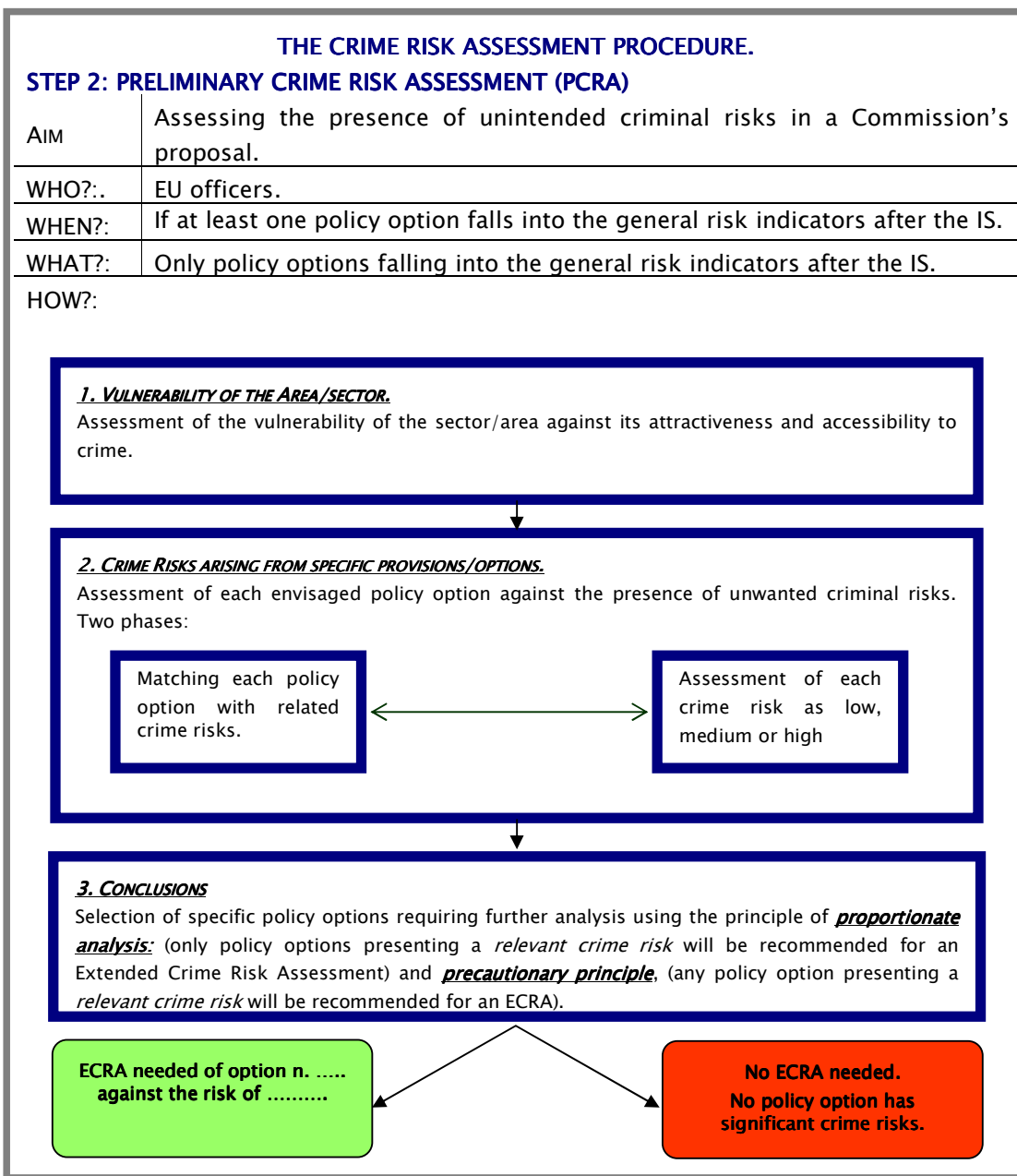
No Extended Crime Risk Assessment is required.”

**Example.** The abovementioned proposal 2005–ENV–001 on waste was recommended for an ECRA. Here is an extract from the PCRA conclusions:

“The waste disposal sector presents great crime risks, due to its accessibility and attractiveness to organised crime and a low probability that this infiltration could be easily detected and controlled. The essential lines of the draft Thematic Strategy, as it appears from the IA, do not seem to address these points. With reference to the specific options chosen in the IA, the use of economic instruments such as landfill taxes and tradable certificates could provide opportunities for a range of criminal conduct, e.g. tax evasion through fraud, forgery of documents, corruption of officials, and speculation on the tradable certificate stock-exchange. Furthermore, repealing the priority of oil regeneration may weaken the level of controls on the final destination of waste oils and facilitate their illegal disposal (see Crime risks arising from specific options).

Because of the general risks inherent in the vulnerability of the sector and the specific risks summarised above, it is advisable that a closer examination of the possible crime implications of the proposal be made in order to establish exactly which impacts they may have. For this reason an Extended CRA is highly recommended.”

The following diagram graphically represents the PCRA.



### **3.3. EXTENDED CRIME RISK ASSESSMENT (ECRA).**

The Extended Crime Risk Assessment (ECRA) is the third step of the CRA process. Its aim is to make an in-depth assessment of risky policy options that have been identified during the PCRA. This step relies on the expertise of a team of experts. Such a contribution is needed in order to provide clear and specific knowledge of the sector's mechanisms and their possible impact on crime.

#### **Who does the ECRA?**

Responsibility for developing the ECRA lies with the service in charge of developing the proposal in cooperation with a team of (external) experts. Experts should provide multidisciplinary knowledge necessary for a deep understanding of the sector/area to be regulated and of the possible unintended crime risks. Accordingly, the team should comprise an interdisciplinary expertise, with particular attention given to criminological and economic aspects. An optimal team of experts should include a criminologist, an economist and an expert of the sector/area to be regulated.

The choice of the most effective expert line-up lies with the service charged with the CRA. Experts may be EU officers from the proposing DGs, other DGs or services, members of permanent expert groups or external consultants. For this purpose, the Commission's Guidelines for collecting and using expertise are a valuable tool.<sup>21</sup>

#### **When should the ECRA be done?**

The ECRA should be developed if the results of the PCRA are positive, i.e. at least one policy option presents at least a medium level crime risk. The ECRA should start as soon as possible and should be scheduled to be finished before the final discussion on the draft proposal.

#### **What should be the object of the ECRA?**

The ECRA should only assess the policy options that have presented a significant crime risk after the PCRA.

Some envisaged policy options are broad strategies including many different actions. Following the Commission's Impact assessment Guidelines, it is convenient to break policy options into their main actions in order to effectively assess the crime impacts of each measure envisaged by the Commission. This is an optional phase that should be conducted only when possible (i.e. the main actions are easily identifiable) and useful (i.e. breaking an option into its main actions allows for a better ECRA).

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<sup>21</sup> Doc. COM(2002) 713, *Communication from the Commission on the Collection and Use of Expertise by the Commission: Principles and Guidelines*.



**Example.** If option/main action A presents a risk of fraud and tax evasion and option/main action B presents a risk of environmental crime, 3 questionnaires are needed: the first assessing the risk of fraud for option A, the second assessing risks of tax evasion for option/main action A and the third assessing risks of environmental crimes for option/main action B.

After the assessment by the expert team the different main actions are merged again into the original policy options. Indeed, the final results of the ECRA must focus on the options, in order to compare the different possible solutions for the Commission. This implies that the assessors should weigh up the various effects of the main actions contained in the same policy option.

### **How will the ECRA be done?**

#### ***The expert team and questionnaire.***

The team of experts assesses the policy option(s)/main action(s) against the risk of specific crime categories, e.g. corruption and bribery, tax evasion, fraud, environmental crimes. This assessment is made through a questionnaire. The team of experts will fill the questionnaires reaching a consensus. A separate questionnaire is completed for each policy option/main action and for each crime category respectively. If the envisaged risks of different crime categories are strictly connected, only one questionnaire may be completed for each policy option. In this case, the questionnaire should specify which crimes each question refers to.

**Example.** The ECRA Proposal 2004-ENV-001 (Thematic Strategy on the prevention and recycling of waste”) was made using only one questionnaire. This was because the envisaged crimes presented close interconnections. Indeed, in the waste sector, cases of fraud also frequently imply cases of environmental crimes. Accordingly, the experts produced one single questionnaire, duly specifying when environmental crimes may occur.

As stated above, if one or more policy options have been split into different main actions, the assessment will be made on the single main action.

**Example.** Proposal 2004-TAXUD-23 aimed at the reform of the taxation of passenger cars in the EU. Policy Option 3 was described in the Roadmap as:

“The main action [...] which would include:

- The gradual and total abolition of RT [Registration Tax], over a ten year long transitional period;
- The establishment of a RT refund system for RT and Annual Circulation Tax (ACT), to avoid double taxation;
- The restructuring of both RT and ACT tax bases to include a CO<sub>2</sub> element.”

The PCRA outlined possible crime risk of corruption connected with the establishment of a RT refund system. The ECRA thus split the above policy options into three different main actions and assessed only the RT refund system action.

The team of experts should complete the questionnaire after a discussion on the policy option(s)/main action(s) concerned and the possible criminal implications. Cooperation between experts is crucial for an effective assessment and each member of the team should provide his/her specific expertise to the other members. The answers to the questionnaire are agreed by consensus among the experts.

### Questionnaire for the Extended Crime Risk Assessment

*Please answer the following questionnaire. If appropriate, specify the time span of the expected effects (i.e. short, medium or long period). Your assessment should focus on the issues implied by the following:*

Proposal:  
Main action/policy option:  
Risk of:

#### 1. Crime.

a. Will the amount of ..... vary?

Increase / Decrease / Constant

b. How will the risk of being detected whilst committing ..... vary?

*Please assess and explain the expected effects of the considered policy option/main action on the likelihood of being detected (e.g. detection, and/or identification of the author and/or report to law enforcement agencies and/or prosecuted).*

c. How will the expected profit for the authors of ..... vary?

*Please assess and explain the expected effects of the considered policy option/main action on profits obtained through ..... (i.e. reduction of costs and/or increase of revenues). If appropriate, consider also non-monetary forms of profit.*

#### 2. Authors.

**a. Will the number of authors vary?**

*Please assess the expected effects of the considered policy option/main action on the overall number of authors (reported and unreported).*

*Increase / Decrease / Constant*

**b. How will the complexity of the organizational structure of ..... vary?**

*Please assess and explain the expected effects of the considered policy option/main action on the level of organization required to commit ..... In particular, please assess if the considered policy option/main action will affect the minimum number of authors required to commit ..... and/or the need of a coordinated organization.*

**c. How will the individual skills/knowledge required to commit ..... vary?**

*Please assess and explain the expected effects of the considered policy option/main action on the overall skills and knowledge needed to commit .....*

**d. For natural persons, how will the professional requirements needed to commit ..... or facilitating the commission of ..... vary?**

*Please assess and explain the expected effects of the considered policy option/main action on the professional (e.g. registered professionals or similar professional certificates).*

**e. For legal persons, how will the economic/legal requirements needed to commit ..... vary?**

*Please assess and explain the expected effects of the considered policy option/main action on the economic (e.g. minimum firm size to operate in a given market, certifications) and/or legal (e.g. corporate structure) requirements actually needed to commit .....*

### 3. Victims.

- a. Will the number of victims vary?

*Increase / Decrease / Constant*

- b. How will the amount of victims–natural persons vary?

*Please assess and explain the expected effects of the considered policy option/main action on the overall number of victimized people.*

- c. How will the socio–demographic characteristics of victims (natural persons) vary?

*Please assess and explain the expected effects of the considered policy option/main action on the main socio–demographic (e.g. educational level, sex, age, ethical origins) characteristics of the victims.*

- d. Will the amount of victims–legal persons vary?

*Please assess and explain the expected effects of the considered policy option/main action on the overall number of victimized legal persons (e.g. profit/no profit organizations, state and governmental agencies).*

**e. How will the economic/legal characteristics of victims (legal persons) vary?**

*Please assess and explain the expected effects of the considered policy option/main action on the economic (e.g. firm size, national or multinational companies) legal (e.g. corporate structure) characteristics of the victims (legal persons).*

**4. Costs/Harms.**

**a. Will the total cost of the crime vary?**

*Increase / Decrease / Constant*

**b. How will private costs vary?**

*Please assess and explain the expected effects of the considered policy option/main action on the direct costs suffered by victims.*

**c. How will social costs vary?**

*Please assess and explain the expected effects of the considered policy option/main action on any non-private cost, such as costs imposed on a whole sector/area or on the society.*

***The assessment.***

After the questionnaire is completed, if one or more policy options have been split into different main actions, the expert team has to assess each policy option as a whole, evaluating the combined effects of the different main actions included in the same policy option. This phase is crucial, since single main actions may impact in a very different way depending if they are adopted alone or together with other measures.

**Example.** In the abovementioned proposal 2004-TAXUD-23, 3 policy options included the establishment of a RT (registration tax) refund system. However, these options differed with regard to the RT itself. Option 2 did not propose any change to the tax, option 3 proposed its abolition while option 4 proposed its reduction to about 10% of car pre-tax prices. The different combinations between the main action concerning the RT refund system and the main action concerning the RT resulted in different outcomes in terms of crime risks. Indeed, option number 3 proved to be the least risky option, because the gradual abolition of RT would have limited possible criminal exploitation of the refund system to a limited time span. On the other hand, option number 2 was the most risky, because it would have created a permanent refund system that would have possibly been exploited by criminals.

***Conclusions.***

The conclusions of the ECRA will provide a Crime Risk Assessment of *all the envisaged policy options mentioned in the Roadmap*. Options that were not required for further evaluation after the IS or the PCRA are assessed through the outcome of these previous steps. Options that have undergone the ECRA will be assessed more deeply, providing a more exhaustive evaluation of their impact on potential criminal behaviours.

The assessment of each policy option/main action is of a qualitative nature. It places special attention on the expected effects on crime, authors, victims and costs.

The results of the assessment of the different policy options could be presented in a matrix designed as follows, in order to ease the decision-making process:

Option/main action	IS result	PCRA result	ECRA result
<b>Policy Option A</b>	Does not fall into any general risk indicator. Does not require further assessment		
<b>Policy Option B</b>	Falls under risk indicator X, PCRA required.	Presents low level crime risks. Does not require further assessment.	
<b>Policy Option C</b>	Falls under risk indicator X, PCRA required.	Medium level risk for tax evasion and fraud. ECRA required.	The envisaged risk of tax evasion will be significant in the short term (see ECRA

			report). The envisaged risk of fraud will concern specific sectors of the market (see ECRA report).
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As stated above (see above, under *1.4. A Tool to Improve the European Commission Decision-Making Process*) the CRA process only tackles the risk assessment phase of crime proofing of legislation. The risk management part is left to the decision-makers in the Commission services. Different solutions can be envisaged in order to handle/reduce/eliminate crime risks emerged from the CRA process. These may include the choice of the best policy option (from a criminological point of view), revision of the chosen policy option in order to prevent crime risks as well as co-ordination with other (existing or forthcoming) EU documents in order to secure effective implementation and better interaction between EU norms.

The following diagram graphically represents the PCRA:

**THE CRIME RISK ASSESSMENT PROCEDURE.****STEP 3: EXTENDED CRIME RISK ASSESSMENT (ECRA).**

AIM	Evaluation of the unintended crime risks emerging from the PCRA.
WHO?:	Team of experts in consultation with EU officials
WHEN?:	If at least one policy option presented relevant crime risks after the PCRA.
WHAT?:	Only policy options which presented relevant crime risks after the PCRA.

HOW?:

**1. BREAKING OF THE POLICY OPTIONS INTO THEIR MAIN ACTIONS (OPTIONAL WHEN MULTIPLE ACTIONS ARE CONTAINED IN SINGLE OPTIONS).**

Breaking the policy options into their main actions. Indeed, multiple actions are often contained in a single policy option.

**2. ASSESSMENT OF SPECIFIC CRIME RISKS.**

The options/main actions will be assessed against the risk of the specific unlawful behaviours outlined by the PCRA (e.g.: fraud, money laundering, smuggling of goods, tax crimes, environmental crimes and corruption).

Main Actions / Options	Crime categories			
	Risk of Fraud against P A	Tax crimes	Environmental Crimes	Corruption
1		X		
2		X	X	
..			X	X
n	X			X

**3. ASSESSMENT PROCEDURE.**

The team of experts will assess the relevant main actions/options against their respective crime risks through the use of a questionnaire (see annex II).

**4. OUTPUT OF THE ASSESSMENT AND FINAL RESULTS.**

The team of experts will assess the policy options on the basis of the results garnered from the questionnaires. If a policy option is made of two or more main actions, its final evaluation will be made on the overall results of the specific main action.

The team of experts will rank all the envisaged policy options against each relevant crime risk.





## 4. RESULT 2: CRIME PROOFING OF 19 COMMISSION PROPOSALS.

The second result of the study is the crime proofing of 19 Commission proposals. This exercise was conducted along with the elaboration of the methodology described in Chapter 3. As mentioned above, the methodology has changed significantly during the project, as a result of the ongoing experience and information exchange with the Commission's services.

The Initial Screening (IS) has been done by Commission officials. Through it 19 proposals were selected for further assessment.

The following proposals were assessed through the Preliminary Crime Risk Assessment (PCRA):

1. 2004 TAXUD 007: *Commission Recommendation concerning the experimental application of Home State Taxation to small and medium-sized enterprises.*
2. 2004 SANCO 002: *Avian Influenza control measures and their Community co-financing.*
3. 2005 ENTR 020: *Integrated Competitiveness and innovation programme (CIP).*
4. 2005 TREN 039: *Communication pour un cadre commun de tarification des infrastructures (common framework for transport tariffs).*
5. 2004 TAXUD 023: *Proposal for a Council Directive on Taxation of passenger cars in the EU.*
6. 2004 ENV 001: *Thematic Strategy on the prevention and recycling of waste.*<sup>22</sup>
7. 2005 INFO 004: *Commission Communication on e-Accessibility.*
8. 2003 MARKT 22: *Proposal for a Directive on Payment Services in the Internal Market.*
9. 2003 SANCO 38: *The protection of chickens kept for meat production*<sup>23</sup>
10. 2004 SANCO 25: *Proposal for a Council Directive on animal health conditions for placing on the market, import and transit of aquaculture animals and their products, and on minimum measures for the prevention and control of certain diseases in aquatic animals.*
11. 2005 ENTR 019: *Biotechnology-human tissue engineering.*
12. 2005 ENV 008: *Communication on reducing the Climate Change impact of Aviation.*
13. 2004 TAXUD 015: *Regulation (EC) Nr. of the European Parliament and the Council amending the Council Regulation (EEC) Nr. 2913/92 establishing the Community Customs Code.*
14. 2005 ENV 010: *Thematic Strategy on the protection of the Marine Environment.*
15. 2004 ENV 003: *Thematic Strategy on Pesticides.*

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<sup>22</sup> A meeting was held in Brussels on 14<sup>th</sup> October 2005 with DG JLS and representatives of DG ENV to discuss the PCRA.

<sup>23</sup> A meeting was held in Brussels on 14<sup>th</sup> October 2005 with DG JLS and representatives of DG SANCO to discuss the PCRA.

16. 2005 MARKT 004: *Commission Communication on the results of the consultation launched with the Green Paper on Defence Procurement.*
17. 2005 ENV 038: *Thematic Strategy on the Urban Environment.*
18. 2005 COMP 001: *Proposal for a Council Regulation repealing Regulation 4056/86 applying the EC competition rules to maritime transport.*
19. 2005 TREN 023: *Communication to the European Parliament and the Council on transparency and functioning of the European hydrocarbon market.*

The following proposals showed significant crime risks in one or more of the policy options and were required for an Extended Crime Risk Assessment (ECRA):

6. 2004 ENV 001<sup>24</sup>
7. 2004 TAXUD 007
8. 2003 SANCO 38
9. 2004 SANCO 25
10. 2004 TAXUD 23
11. 2005 ENTR 19
12. 2003 MARKT 22

After a meeting with DG ENTR,<sup>25</sup> it was decided to postpone the ECRA of proposal 2005-ENTR-019 until the adoption of the final text by the Council and the European Parliament (expected date: end of 2006).

Proposal 2003 MARKT 22 was recommended for an ECRA. However, consultation with the proposing DG showed that the services did not show interest in any assessment. The ECRA was thus aborted.

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<sup>24</sup> A meeting was held in Brussels on 3<sup>rd</sup> April 2006, in order to discuss about the object of the Extended Crime Risk Assessment.

<sup>25</sup> The meeting took place in Brussels on 3<sup>rd</sup> April 2006. People present: Ms Dora Balazs from EU Commission, Mr Nicolas Rossignol from DG ENTR, Mr Ernesto Savona, Mario Maggioni, Francesco Calderoni and Sara Martocchia from Transcrime. See *Proceedings of the meeting with the European Commission*, 3<sup>rd</sup> April 2006

The following table graphically resumes the activities on the 19 Commission proposals selected by Commission officials:

Proposal	IS results	PCRA results	ECRA results
2004 TAXUD 007: <i>Commission Recommendation concerning the experimental application of Home State Taxation to small and medium-sized enterprises.</i>	PCRA required	ECRA required	ECRA done on policy option n. 3, 4 and 5.
2004 SANCO 002: <i>Avian Influenza control measures and their Community co-financing.</i>	PCRA required	No ECRA required	
2005 ENTR 020: <i>Integrated Competitiveness and innovation programme (CIP).</i>	PCRA required	No ECRA required	
2005 TREN 039: <i>Communication pour un cadre commun de tarification des infrastructures (common framework for transport tariffs).</i>	PCRA required	No ECRA required	
2004 TAXUD 023: <i>Proposal for a Council Directive on Taxation of passenger cars in the EU.</i>	PCRA required	ECRA required	ECRA done on policy option n. 3
2004 ENV 001: <i>Thematic Strategy on the prevention and recycling of waste.</i>	PCRA required	ECRA required	After consultation with DG, the ECRA focused on the shipments of waste
2005 INFSO 004: <i>Commission Communication on e-Accessibility.</i>	PCRA required	No ECRA required	
2003 MARKT 22: <i>Proposal for a Directive on Payment Services in the Internal Market.</i>	PCRA required	ECRA required	ECRA aborted. No interest by proposing DG.
2003 SANCO 38: <i>The protection of chickens kept for meat production</i>	PCRA required	ECRA required	ECRA done on policy option n.3
2004 SANCO 25: <i>Proposal for a Council Directive on animal health conditions for placing on the market, import and transit of aquaculture animals and their products, and on minimum measures for the prevention and control of certain diseases in aquatic animals.</i>	PCRA required	ECRA required	ECRA done on policy option n. 4

2005 ENTR 019: <i>Biotechnology-human tissue engineering.</i>	PCRA required	ECRA required	ECRA postponed to the approval of the final text by EU institutions
2005 ENV 008: <i>Communication on reducing the Climate Change impact of Aviation.</i>	PCRA required	No ECRA required	
2004 TAXUD 015: <i>Regulation (EC) Nr. of the European Parliament and the Council amending the Council Regulation (EEC) Nr. 2913/92 establishing the Community Customs Code.</i>	PCRA required	No ECRA required	
2005 ENV 010: <i>Thematic Strategy on the protection of the Marine Environment.</i>	PCRA required	No ECRA required	
2004 ENV 003: <i>Thematic Strategy on Pesticides.</i>	PCRA required	No ECRA required	
2005 MARKT 004: <i>Commission Communication on the results of the consultation launched with the Green Paper on Defence Procurement.</i>	PCRA required	No ECRA required	
2005 ENV 038: <i>Thematic Strategy on the Urban Environment.</i>	PCRA required	No ECRA required	
2005 COMP 001: <i>Proposal for a Council Regulation repealing Regulation 4056/86 applying the EC competition rules to maritime transport.</i>	PCRA required	No ECRA required	
2005 TREN 023: <i>Communication to the European Parliament and the Council on transparency and functioning of the European hydrocarbon market.</i>	PCRA required	No ECRA required	

Following the PCRA and the ECRA of each proposal.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2004-TAXUD-007

### ***“Commission Recommendation concerning the experimental application of Home State Taxation to small and medium-sized enterprises”***

(Expected date of adoption: March 2005)

#### BACKGROUND

##### **Materials provided by the Commission**

- Roadmap/Preliminary Impact Assessment.
- Consultation Paper, *The experimental application of “Home State Taxation” to small and medium-sized enterprises in the EU*, January 2003 (hereinafter: Consultation paper of 2003).

##### **Additional Materials collected by Transcrime**

- Commission Non-paper to informal Ecofin Council, 10 and 11 September 2004, *Home State Taxation for Small and Medium-sized Enterprises*, 7 July 2004 (hereinafter: Commission non paper of 2004).
- Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *An Internal market without company obstacles achievements, ongoing initiatives and remaining challenges*, 24 November 2003 (hereinafter: Communication of 2003).
- *Conclusions of the ECOFIN Council Meeting*, 1 December 1997 (hereinafter: ECOFIN Conclusions ).
- European Commission, *Outline of a possible experimental application of Home State Taxation to small and medium-sized enterprises*, 24 June 2004 (hereinafter: Commission Outline).
- European Commission, *Summary report on the replies received in response to the questionnaire on corporate tax as barrier to EU expansion of small and medium-sized enterprises*, 18 January 2005 (hereinafter: Commission Summary Report).
- Lodin, S.O. and Gammie, M., *Home State Taxation*, IBFD Publications, Amsterdam, 2001.
- McHugh J. A., “Balancing reputation and foreign investment incentives: Ireland's second attempt at combating the abuse of Irish registered non-resident companies”, in *Brooklyn Journal of International Law*, vol. 26, 2001, pp. 1207–1249.
- Selbach S. D., “The harmonization of corporate taxation & accounting standards in the European community and their interrelationship”, in *Connecticut Journal of International Law*, vol. 18, 2003, pp. 523–583.

##### **Options to be assessed**

The options considered in the Roadmap are the following:

1. No policy change.
2. Simplification and EU-wide standardization of company tax filing and bookkeeping rules.
3. Directive on cross-border loss-offset.
4. Direct subsidies by Member States/State Aid.

## 5. Home State Taxation.

### Result of the initial screening

Option n. 4 (Direct subsidies by Member States/State Aid) can be framed in the typology of regulation at risk<sup>26</sup> n. 3 (“Introduces a grant, subsidy, or compensation scheme or any other scheme that provides a benefit”), because it introduces direct subsidies by Member States/State aid, and n. 7 (“Provides officials with regulatory power”), because it gives State officials the power to give subsidies.

Also Option n. 5 can be framed in the typology of regulation at risk n.7, because it gives State officials the power to control the profits made by an enterprise abroad.

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### Formal aspects of the draft proposal

It is not possible to identify crime risks arising from the formal aspects of the proposal, as the draft text is not yet available.

### Vulnerability of the sector/area to be regulated

The proposal concerns an area (the internationalisation of SMEs through different tax measures) which, on the basis of previous case studies and literature review,<sup>27</sup> can be considered vulnerable to crime. The crime risk, however, depends on the different options considered in the proposal. Therefore, it will be examined with reference to each specific option as illustrated below.

<b>CRIME RISKS ARISING FROM SPECIFIC OPTIONS</b>
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The main assumption, which drives the following comments related to each option is the following: “the more taxation systems are involved (or less unified they are), the more asymmetries are produced. These asymmetries are opportunities that could be exploited by criminals to commit crimes (e.g. tax crimes and money laundering) to be committed by SMEs there are”.

### With reference to Option 1:

Contents: No policy change.

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<sup>26</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

<sup>27</sup> On the specific problem of taxation of non-resident companies in EU Member States, see the case study proposed by McHugh J. A., “Balancing reputation and foreign investment incentives: Ireland's second attempt at combating the abuse of Irish registered non-resident companies”, in *Brooklyn Journal of International Law*, vol. 26, pp. 1207–1249.

Crime risks: this option produces more than one taxation system, thus creating asymmetries and consequently opportunities for crime.

Crimes envisaged: tax crimes (evasion and fraud).

#### **With reference to Option 2:**

Contents: Simplification and EU-wide standardization of company tax filing and bookkeeping rules

Crime risks: The creation of a standardised system of taxation would reduce, if not eliminate the crime risks due to the asymmetries in tax regimes.

Crimes envisaged: None.

#### **With reference to Option 3:**

Contents: Directive on cross-border loss-offset.

Crime risks: This option could be exploited by those entrepreneurs who carry out money laundering activities by producing fake receipts or invoices that are then imputed as fake losses to companies in specific countries.<sup>28</sup>

With the system of cross-border loss-offset these illicit activities are facilitated and almost encouraged by an additional gain in terms of tax savings, because the entrepreneurs might choose the countries where to make losses and use them to diminish profits in the state where they have to pay taxes.

Crimes envisaged: money laundering, tax frauds, fraudulent bankruptcy.

#### **With reference to Option 4:**

Contents: Direct subsidies by Member States/State Aid.

Crime risks: This option may produce deceptive or other behaviour for the purposes of meeting the criteria for the benefit (i.e. showing to have an economic activity in a third country when it is not true for the purposes of obtaining direct subsidies).

Crimes envisaged: forgery of documents (fraud), provision of false information, bribery of officials.

#### **With reference to Option 5:**

Contents: Home State Taxation.

Crime risks: This option presents the same risk illustrated in option 1. In addition, there are two other criminal risks emerging from the "home state taxation option":

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<sup>28</sup> This criminal mechanism is well exemplified by the recent bankruptcy cases of two international enterprises: Parmalat and Cirio. On the "Cirio case" see Tribunal of Rome, *Relazione dei commissari*, 26 September 2003; Distaso M., *La tutela dell'investitore: i casi Lloyd's TSB e Cirio*, January 2004, published by Luiss (Libera Università Internazionale degli Studi Sociali Guido Carli)– CERADI (Centro di ricerca per il diritto d'impresa). On the Parmalat case see Distaso M., *il caso Parmalat*, August 2004, published by Luiss (Libera Università Internazionale degli Studi Sociali Guido Carli)– CERADI (Centro di ricerca per il diritto d'impresa).



- a. Considering that Member States have different levels of efficiency related to tax audits, Option 5 may stimulate criminal entrepreneurs, who are based in countries with less efficient auditing systems, to open activities abroad (i.e. the very objective of option 5 with reference to legal entrepreneurs). In fact, they will be enabled to exploit the less efficient auditing system of the country of origin to make profits abroad, because, as it appears from the proposal, even if entrepreneurs have to pay taxes to the State where they have produced profits, the base for the calculation of profits and the applicable auditing system will be that of the State of residence.
- b. Option 5 may also produce an additional criminal risk consisting of the possibility that enterprises, located in the State where the criminal enterprise is making profits due to the home taxation system, emulate this deviant behaviour so multiplying the total criminal risk.

Crimes envisaged: evasion and tax frauds.

## CONCLUSIONS

Having considered the different crime risks emerging from the above options (see *Crime risks arising from specific options*), it is possible to rank all options in the following way from the more risky (a) to the less risky (e):

- a. Option n. 4 (*Direct subsidies by Member States/State Aid*) is the most risky option, because the money flux is higher and thus more attractive to criminals than all the other options.
- b. Option n. 3 (*Directive on cross-border loss-offset*) is the second most risky option, due to the theoretical possibility of realising tax frauds and money laundering.
- c. Option n. 5 (*Home State Taxation*), is the third most risky option, because it appears less attractive than Option n. 4, and it does not present a risk of serious crime such as money laundering, but it does present the risk of committing other crimes such as tax fraud and tax evasion.
- d. Option n. 1 (*No policy change*) might lead to the same types of crime illustrated with reference to Option n. 5, but without its “multiplication effect” and the problem of auditing uncertainty explained above (see *Crime risks arising from specific options*).
- e. Option n. 2 (*Simplification and EU-wide standardization of company tax filing and bookkeeping rules*) is the least risky option, because the creation of a standardised system of taxation would reduce, if not eliminate the crime risks due to the asymmetries in tax regimes.

As to the magnitude of the crime risk associated with the options above, it appears to be low because, at the moment, the SMEs operating at an international level are very few. However, as the very objective of this proposal is to increase this number, it may be possible that the crime risk will also rise accordingly.

Therefore, because of the general risks inherent in the vulnerability of the sector and the specific risks summarised above, it is advisable that a closer examination of the possible crime implications of the proposal be made in order to establish exactly which impacts they may have. For this reason an Extended CRA is highly recommended.

## EXTENDED CRIME RISK ASSESSMENT OF 2004-TAXUD-007

### ***“Commission Recommendation concerning the experimental application of Home State Taxation to small and medium-sized enterprises”***

#### BACKGROUND

##### Relevant Documents

- Roadmap.
- European Commission, *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: Tackling the corporation tax obstacles of small and medium-sized enterprises in the Internal Market – outline of a possible Home State Taxation pilot scheme*, COM (2005) 702, 23/12/2005, hereinafter the Communication.
- European Commission, *Commission Staff Working Document, Annex to the Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: Tackling the corporation tax obstacles of small and medium-sized enterprises in the Internal Market – outline of a possible Home State Taxation pilot scheme, Impact Assessment*, SEC (2005) 1785, 23/12/2005, hereinafter IA.

##### Initial policy options.

The options considered in the Roadmap are the following:

- No policy change.
- Simplification and EU-wide standardization of company tax filing and bookkeeping rules.
- Directive on cross-border loss-offset.
- Direct subsidies by Member States/State Aid.
- Home State Taxation.

##### Conclusions of the Preliminary Crime Risk Assessment.

The Preliminary Crime Risk Assessment (PCRA) of the proposal concluded the vulnerability of the sector tackled by the Communication to crime to be high.<sup>29</sup> Despite the fact that few small/medium enterprises (SME) currently have foreign subsidiaries (or permanent establishments), the adoption of a provision designed to increase the internationalisation of SME may increase illicit behaviours.

After the PCRA, only three envisaged policy options presented significant crime risk:

- Policy option 3 (“Directive on cross-border loss-offset”) may stimulate the forgery of payment receipts or supplier invoices in order to create fake costs and deduce additional losses;
- Policy option 4 (“Direct subsidies by Member States/State Aid”) may induce deceptive or other behaviours in order to obtain the benefits/subsidies, entailing possible forgery of documents, provision of false information and bribery of officials;

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<sup>29</sup> PCRA, p. 3.

- Policy option 5 (“Home State Taxation”) may stimulate enterprises based in countries with less efficient auditing systems to open activities abroad, with the only purpose of exploiting the Home State Taxation mechanism to avoid taxation.

**Further remarks.**

The present ECRA was developed between 1<sup>st</sup> July and the 7<sup>th</sup> of September 2006. The following experts participated in the ECRA: Mr. Stefano Carmini (lawyer, tax expert), Ms. Elena Antivalle (lawyer, tax expert) Prof. Mario Maggioni (Professor at Cattolica University, Milan); Prof. Ernesto Savona (Professor at Cattolica University, Milan and Director of Transcrime), Ms. Sara Martocchia (Researcher at Transcrime) and Mr. Francesco Calderoni (Researcher at Transcrime).

### ASSESSMENT OF THE POLICY OPTIONS AT RISK

After conducting the PCRA, three options were found to present a significant crime risk (see above, under *conclusions of the Preliminary Crime Risk Assessment*), which were then assessed by a team of experts through a questionnaire. The envisaged crime risks concerned a various illicit behaviours connected with the taxation of the SME's incomes. Therefore, one questionnaire was completed for each policy option at risk. Different criminal implications were pointed out in the text of the questionnaire.

Following, the answers resulting from the questionnaire are listed in italics, whilst an explanation is given in bold.

A graphical symbol has been associated with each assessment:



indicates that the expected effects will reduce crime risks;



indicates that no influence on crime risks is expected;



indicates that the expected effects will increase crime risks.

### OPTION 3: DIRECTIVE ON CROSS-BORDER LOSS-OFFSET

#### 1. Crime.

##### A) WILL THE AMOUNT OF CRIME VARY?

*The amount of crime is likely to remain constant.* 

Many countries already allow the deduction of losses of foreign subsidiaries or stable organisations. Problems may arise in those MSs that do not allow such a mechanism. In those countries companies may be stimulated to forge false documents (invoices, receipts) and frequently exploit transfer prices in order to create fake losses.

##### B) HOW WILL THE RISK OF BEING DETECTED COMMITTING A CRIME VARY?

*The risk of detection is likely to remain constant.* 

See above answer.

##### C) HOW WILL THE EXPECTED PROFIT FOR THE AUTHORS OF A CRIME VARY?

*Profits for a single crime are likely to remain constant.* 

See above answer.


#### 2. Authors.

##### A) WILL THE NUMBER OF AUTHORS VARY?

*The number of authors is likely to remain constant.* 

The option is not likely to affect such an issue.

##### B) HOW WILL THE COMPLEXITY OF THE ORGANIZATIONAL STRUCTURE OF A CRIME VARY?

*Organisational requirements are likely to remain constant.* 

The option is not likely to affect such an issue.

**C) HOW WILL THE INDIVIDUAL SKILLS/KNOWLEDGE REQUIRED TO COMMIT A CRIME VARY?**

*Individual skill/knowledge requirements are likely to remain constant.*



The option is not likely to affect such an issue.

**D) FOR NATURAL PERSONS, HOW WILL THE PROFESSIONAL REQUIREMENTS NEEDED TO COMMIT A CRIME OR FACILITATING THE COMMISSION OF A CRIME VARY?**

*Professional requirements are likely to remain constant.*



The option is not likely to affect such an issue.

**E) FOR LEGAL PERSONS, HOW WILL THE ECONOMIC/LEGAL REQUIREMENTS NEEDED TO COMMIT A CRIME VARY?**

*Requirements for legal persons to commit a crime are likely to increase.*



In order to access to the loss–offset mechanism, companies will have to create a foreign subsidiary or stable organisation.

**3. Victims.**

**A) WILL THE NUMBER OF VICTIMS VARY?**

*The number of victims is likely to increase.*



Besides the home country of the criminal enterprise, the country of the subsidiary/stable organisation will suffer from tax evasion.

**B) HOW WILL THE AMOUNT OF VICTIMS–NATURAL PERSONS VARY?**

*The amount of victims–natural persons is likely to remain constant.*



The option is not likely to affect such an issue.

**C) HOW WILL THE SOCIO–DEMOGRAPHIC CHARACTERISTICS OF VICTIMS (NATURAL PERSONS) VARY?**

*The socio–demographic characteristics victims–natural persons are likely to remain constant.*



The option is not likely to affect such an issue.

**D) WILL THE AMOUNT OF VICTIMS–LEGAL PERSONS VARY?**

See answer to point 3.A).

**E) HOW WILL THE ECONOMIC /LEGAL CHARACTERISTICS OF VICTIMS (LEGAL PERSONS) VARY?**

*The economic/legal characteristics victims (legal persons) are likely to remain constant.* 

The option is not likely to affect such an issue.

**4. Costs/Harms.**

**A) WILL THE TOTAL COST OF THE CRIME VARY?**

*The experts could not investigate this point because no data is available. Further research is needed.*

**B) HOW WILL PRIVATE COSTS VARY?**

*The experts could not investigate this point because no data is available. Further research is needed.*

**C) HOW WILL SOCIAL COSTS VARY?**


*Social costs are likely to increase.* 

The option is likely to affect the budget of both the home country and the countries where the mother company has established its subsidiaries/stable organisations.

#### OPTION 4: DIRECT SUBSIDIES BY MEMBER STATES/ STATE AID.

##### 1. Crime.

###### A) WILL THE AMOUNT OF CRIME VARY?

*The amount of crime is likely to increase.* 


Many illicit behaviours are expected in order to obtain subsidies or other forms of aid. They can range from simple forgery of documents to complex frauds.

###### B) HOW WILL THE RISK OF BEING DETECTED COMMITTING A CRIME VARY?

*The risk of detection is likely to decrease.* 

Since more fiscal administrations will be involved in possible illicit behaviours, the possibility of detecting such actions and to sanction them will be decreased because of the difficulty to ascertaining foreign accounts (fiscal legislation may differ significantly from one MS to another) and the lack of cooperation/coordination between fiscal authorities.


###### C) HOW WILL THE EXPECTED PROFIT FOR THE AUTHORS OF A CRIME VARY?

*Profits for a single crime are likely to increase.* 

Besides the additional illicit profits coming from tax evasion, companies may also illegitimately receive public money.


##### 2. Authors.

###### A) WILL THE NUMBER OF AUTHORS VARY?

*The number of authors is likely to increase.* 

Standing the expected difficulties in ascertain the above illicit behaviours, it is likely that more companies will commit crimes in order to fraudulently obtain possible benefits.

###### B) HOW WILL THE COMPLEXITY OF THE ORGANIZATIONAL STRUCTURE OF A CRIME VARY?

*Organisational requirements are likely to remain constant.* 



The option is not likely to affect such an issue.

**C) HOW WILL THE INDIVIDUAL SKILLS/KNOWLEDGE REQUIRED TO COMMIT A CRIME VARY?**

*Individual skill/knowledge requirements are likely to increase.* 


Companies will have to acquire some basic knowledge of foreign tax systems in order to exploit the subsidies/state aid scheme.

**D) FOR NATURAL PERSONS, HOW WILL THE PROFESSIONAL REQUIREMENTS NEEDED TO COMMIT A CRIME OR FACILITATING THE COMMISSION OF A CRIME VARY?**

*Professional requirements are likely to remain constant.* 

The option is not likely to affect such an issue.


**E) FOR LEGAL PERSONS, HOW WILL THE ECONOMIC/LEGAL REQUIREMENTS NEEDED TO COMMIT A CRIME VARY?**

*Requirements for legal persons to commit a crime are likely to increase.* 

In order to access to the subsidies/state aid mechanism, companies will have to create a foreign subsidiary or stable organisation.

**3. Victims.**

**A) WILL THE NUMBER OF VICTIMS VARY?**

*The number of victims is likely to increase.* 

All the MSs providing subsidies/state aid may become the targets of fraud and forgery in order to obtain such illegitimate benefits.

**B) HOW WILL THE AMOUNT OF VICTIMS–NATURAL PERSONS VARY?**

*The amount of victims–natural persons is likely to remain constant.* 

The option is not likely to affect such an issue.

**C) HOW WILL THE SOCIO-DEMOGRAPHIC CHARACTERISTICS OF VICTIMS (NATURAL PERSONS) VARY?**

*The socio-demographic characteristics victims-natural persons are likely to remain constant.*



**The option is not likely to affect such an issue.**

**D) WILL THE AMOUNT OF VICTIMS-LEGAL PERSONS VARY?**

See answer to point 3.A).

**E) HOW WILL THE ECONOMIC/LEGAL CHARACTERISTICS OF VICTIMS (LEGAL PERSONS) VARY?**

*The economic/legal characteristics victims (legal persons) are likely to remain constant.*



**The option is not likely to affect such an issue.**

**4. Costs/Harms.**

**A) WILL THE TOTAL COST OF THE CRIME VARY?**

*The experts could not investigate this point because no data is available. Further research is needed.*

**B) HOW WILL PRIVATE COSTS VARY?**

*Private costs are likely to increase.*



**The option is likely to affect the budget of those companies that would otherwise legitimately receive the benefits, taken instead by the fraudulent actions of other firms.**

**C) HOW WILL SOCIAL COSTS VARY?**

*Social costs are likely to increase.*




**The option is likely to affect the budget of MSs providing subsidies/state aid.**

## **OPTION 5: HOME STATE TAXATION.**

### **1. Crime.**

#### **A) WILL THE AMOUNT OF CRIME VARY?**

*The amount of crime is likely to increase.* 


Companies may exploit the new Home State Taxation system in order to evade taxation and commit frauds. This may happen because the home country accounting/fiscal system may differ from the one of the foreign country where they have established their subsidiary/stable organisation. This difference may entail normative overlaps or loopholes that could be exploited for illicit purposes.

#### **B) HOW WILL THE RISK OF BEING DETECTED COMMITTING A CRIME VARY?**

*The risk of detection is likely to decrease.* 

Companies will be allowed to follow their home country taxation system even for a foreign subsidiary/stable organisation. This may give companies a significant advantage over foreign fiscal authorities, since they would be much more familiar with such a system. Such illegal behaviours would also be very difficult to detect in the home country. The Commission already envisaged the introduction of an anti-avoidance clause. However, difficulties may arise because of the lack of coordination during tax assessments. In particular, the lack of a mandatory simultaneous assessment rule for fiscal authorities may significantly reduce the possibilities of detecting possible avoidances.


#### **C) HOW WILL THE EXPECTED PROFIT FOR THE AUTHORS OF A CRIME VARY?**

*Profits for a single crime are likely to increase.* 

Since the risk of being detected may be significantly reduced by such system, profits for criminal enterprises may grow. Moreover, companies may fraudulently exploit the income allotment mechanism of the Home State Taxation system in order to reduce the income share produced in MSs with higher taxation rates. This may be done through the fictional alteration of turnover figures or labour costs, especially through the extensive exploitation of transfer prices.

## **2. Authors.**

### **A) WILL THE NUMBER OF AUTHORS VARY?**

*The number of authors is likely to increase.* 

**Because the expectable difficulties in ascertain the above illicit behaviours, it is likely that more companies will commit crimes in order to obtain significant tax savings.**

### **B) HOW WILL THE COMPLEXITY OF THE ORGANIZATIONAL STRUCTURE OF A CRIME VARY?**

*Organisational requirements are likely to remain constant.* 

**The option is not likely to affect such an issue.**

### **C) HOW WILL THE INDIVIDUAL SKILLS/KNOWLEDGE REQUIRED TO COMMIT A CRIME VARY?**

*Individual skill/knowledge requirements are likely to remain constant.* 

**Companies will not need any additional knowledge in order to comply with a foreign fiscal system. Establishing foreign subsidiaries/stable organisations for illicit purposes may therefore be encouraged.**

### **D) FOR NATURAL PERSONS, HOW WILL THE PROFESSIONAL REQUIREMENTS NEEDED TO COMMIT A CRIME OR FACILITATING THE COMMISSION OF A CRIME VARY?**

*Professional requirements are likely to remain constant.* 

**The option is not likely to affect such an issue.**


### **E) FOR LEGAL PERSONS, HOW WILL THE ECONOMIC/LEGAL REQUIREMENTS NEEDED TO COMMIT A CRIME VARY?**

*Requirements for legal persons to commit a crime are likely to increase.* 

**In order to access the subsidies/state aid mechanism, companies will have to create a foreign subsidiary or stable organisation. However, these operations may be facilitated by the fact that the fiscal treatment will be the same in the home country.**

### **3. Victims.**

#### **A) WILL THE NUMBER OF VICTIMS VARY?**

*The number of victims is likely to increase.* 


Companies exploiting the Home State Taxation system for fraudulent purposes may affect the budget of all the concerned MSs. Indeed it is expected that companies may exploit the mechanism of allotment between MSs in order to evade taxation and avoid higher tax rates.

#### **B) HOW WILL THE AMOUNT OF VICTIMS–NATURAL PERSONS VARY?**

*The amount of victims–natural persons is likely to remain constant.* 

The option is not likely to affect such an issue.

#### **C) HOW WILL THE SOCIO–DEMOGRAPHIC CHARACTERISTICS OF VICTIMS (NATURAL PERSONS) VARY?**

*The socio–demographic characteristics victims–natural persons are likely to remain constant.* 

The option is not likely to affect such an issue.

#### **D) WILL THE AMOUNT OF VICTIMS–LEGAL PERSONS VARY?**

See answer to point 3.A).

#### **E) HOW WILL THE ECONOMIC/LEGAL CHARACTERISTICS OF VICTIMS (LEGAL PERSONS) VARY?**

*The economic/legal characteristics victims (legal persons) are likely to remain constant.* 

The option is not likely to affect such an issue.

### **4. Costs/Harms.**

#### **A) WILL THE TOTAL COST OF THE CRIME VARY?**

*The experts could not investigate this point because no data is available. Further research is needed.*

**B) HOW WILL PRIVATE COSTS VARY?**

*The experts could not investigate this point because no data is available. Further research is needed.*

**C) HOW WILL SOCIAL COSTS VARY?**

*Social costs are likely to increase.* 

The option is likely to affect the budget of several MSs. In some cases a “forum shopping” mechanism is expected: companies may choose their home country on the basis of the most profitable fiscal system (weaker or less effective fiscal authorities, better deduction rules, more convenient depreciation schemes). Of course, this may happen only in border areas, and when national legislation allows for simple change of head office (and therefore to change the home country accordingly).

## CONCLUSIONS

The expert team ranked all the initial policy options against their crime risk implications.

- **Option n. 4 (“Direct subsidies by Member States/State Aid”) is the most risky option**, because it is likely to stimulate fraudulent and illicit behaviours in order to obtain benefits. These crimes may result in waste of public money.
- **Option n. 3 (“Directive on cross-border loss-offset”) is the second most risky option**. Although such a regime is already applied in some MS, it may nevertheless facilitate money laundering activities and tax evasion in order to obtain significant tax savings.
- **Option n. 5 (“Home State Taxation”), is the third most risky option**. The lack of coordination between fiscal authorities (no mandatory simultaneous assessment) may encourage the exploitation of the Home State Taxation mechanisms in order to fraudulently elude taxation in MS with higher rates.
- **Option n. 1 (“No policy change”) is the fourth most risky option**. This option would maintain different fiscal systems and therefore asymmetries that could be exploited for criminal purposes. However, the additional costs associated with the need to comply with a different fiscal system are likely to discourage many potential criminal enterprises.
- **Option n. 2 (“Simplification and EU-wide standardization of company tax filing and bookkeeping rules”) is the least risky option**. A standardised system of taxation would reduce, if not eliminate, the crime risks due to the asymmetries in tax regimes.

The following table offers an overview of the Crime Risk Assessment of all the envisaged policy options:

Option	IS result	PCRA result	ECRA result
<b>Option n. 1 (“No policy change”)</b>	Does not fall into any general risk indicator.	Maintains asymmetries. Standing the little amount of international SME, low crime risk is expectable. Does not require further assessment	
<b>Option n. 2 (“Simplification and EU-wide standardization of company tax filing and bookkeeping rules”)</b>	Does not fall into any general risk indicator.	Reduces asymmetries and therefore may reduce crime risks. Does not require further assessment.	
<b>Option n. 3 (“Directive on cross-border loss-offset”).</b>	Falls under indicator 3, PCRA required.	Medium level risk for tax evasion and fraud. ECRA required.	Enterprises may forge documents and commit frauds in order to increase the foreign losses. This may lead to tax avoidance/evasion and frauds. The risk is significant for those MS who do not have yet a loss-offset scheme.
<b>Option n. 4 (“Direct subsidies by Member States/State Aid”)</b>	Falls under indicator 3, 4 and 7, PCRA required.	High risk of fraud and corruption. ECRA required.	It is very likely that some enterprises may commit frauds in order to obtain the benefits. These frauds are likely to include corruption of the public authorities that should grant the benefits.
<b>Option n. 5 (“Home State Taxation”)</b>	Falls under indicator 7, PCRA required.	Medium level risk for tax evasion and fraud. ECRA required.	There is a significant risk of tax evasion and fraud caused by the lack of coordination between fiscal authorities. Particularly



			in the short period, enterprises may easily exploit their better knowledge of their fiscal system to deceive the inexperienced foreign authorities.
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## PRELIMINARY CRIME RISK ASSESSMENT OF 2004-SANCO-002

### *“Avian Influenza control measures and their Community co-financing”*

(First quarter 2005)

#### BACKGROUND

##### Materials provided by the Commission

- Roadmap/Preliminary Impact Assessment;
- *Proposal for a Council Directive on Community measures for the control of Avian Influenza* (hereinafter *AI*). COM(2005) final, 21/02/2005;
- *Explanatory Memorandum of the Proposal for a Council Directive on Community measures for the control of Avian Influenza*;
- Commission Staff Working Document: *Impact Assessment of the new Community measures for the control of Avian Influenza, in accordance with the draft Commission proposals for a new Council Directive on the control of Avian Influenza and for a Council Decision amending Council Decision 90/424/EEC as regards Community compensation for Avian Influenza control measures*. SEC(2005); hereinafter *IA*.

##### Additional Materials collected by Transcrime

- Preliminary Final Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission, Paris, 1–12/12/2003;
- Proposal for a Council Decision amending Council Decision 90/424/EEC on expenditure in the veterinary field. COM(2005) 171 final, 28/04/2005;
- Regulation (EC) 882/2004 of the European Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules;
- FAO Recommendations on the Prevention, Control and Eradication of Highly Pathogenic Avian Influenza (HPAI) in Asia (proposed with the support of the OIE). September 2004.

##### Options to be assessed

Among the options considered in the IA,<sup>30</sup> the proposing DG has chosen Option 3, so Transcrime researchers will focus only on this option. Specifically, it includes two different legislative instruments:

1. *A proposal for a Council Directive on Community measures for the control of Avian Influenza*, whose objectives are:

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<sup>30</sup> The other 2 options envisaged in the IA were: option 1): “*not to change the definition of AI and the control measures laid down in Directive 92/40/EEC, with a recommendation that Member States impose restrictions to limited spread of LPAI*”; option 2): “*to change the current definition of AI to also include LPAI in it, thus establishing the same disease control measures for LPAI and HPAI*”. See *IA*, p. 16.

- a. To change the previous definition of Avian Influenza to also include Low Pathogenic AI (hereinafter LPAI) in addition to High Pathogenic AI (hereinafter HPAI);
  - b. To foresee control measures against AI, but diversifying these controls according to the different types of viruses (HPAI and LPAI) and of animal host involved.
2. *A Proposal on a Council Decision on expenditure in the veterinary field*; its objective is to ensure an adequate financial support to Member States, in relation to the new envisaged control measures.

### Result of the initial screening

1. The proposed Directive can be framed in Typology of Regulation at Risk<sup>31</sup> n. 1 (“*introduces product disposal regulation or any other new or more burdensome fee or obligation*”), because it introduces detailed safety measures to be applied by market’s operators and strict controls for guaranteeing their compliance.
2. The proposed Council Decision can be framed in Typology of Regulation at Risk n. 3 (“*introduces a grant, subsidy, or compensation scheme or any other scheme that provides a benefit*”), because it establishes new financial contribution to reimburse Member States’ costs for eradicating AI.

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### Formal aspects of the draft proposal

1. With reference to the draft Directive:

External simplicity/coherence: the draft Directive does not increase the number of regulations concerning the sector, as it will repeal the existing Directive 92/40/EEC. The proposal does not modify this previous act only in some articles, but repeal it in full. This contributes to simplify the legislation, whilst Directive 92/40 had already been amended by further legislative acts<sup>32</sup>. In particular, Annex XI of the proposed Directive contains a *correlation table* that shows how the new Directive will replace the existing articles of the Directive 92/40. This removes possible ambiguities or uncertainty in understanding the changeover between the old and the new regulation.

Internal simplicity/coherence: as regards its internal structure, the proposal looks to be well structured in all its parts and does not present contradiction among objectives and rules, which could be exploited for illicit purposes.

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<sup>31</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

<sup>32</sup> In particular, by the Council Regulation (EC) 806/2003, the Act of Accession of Austria, Sweden and Finland and the Act concerning the conditions of accession of the new EU Member States. See the consolidated text of the Directive 92/40 at [http://europa.eu.int/eur-lex/en/consleg/pdf/1992/en\\_1992L0040\\_do\\_001.pdf](http://europa.eu.int/eur-lex/en/consleg/pdf/1992/en_1992L0040_do_001.pdf)

## 2. With reference to the draft Decision:

The draft Decision amends the previous one (Council Decision 90/424) without creating contradictions or uncertainties, as it is limited to only introducing a new article 3a, which focuses on a specific financial contribution, targeted for AI cases. The other minimal amendments appear irrelevant as regards a crime risk assessment.

**Vulnerability of the sector/area to be regulated**

The markets taken into account (poultry and other birds) might be vulnerable with reference to food safety and human health, as criminal farmers could commercialize infected animals. The risk may occur because of the burdens and costs that the operators must bear to obtain quality certifications: they may be incited to defraud EU and national authorities. This assumption is supported by cases regarding similar sectors and by Communitarian legislation.<sup>33</sup> However, the “new Avian Influenza control measures and their Community co-financing” contribute to decrease such a risk (see the following sections).

## CRIME RISKS ARISING FROM SPECIFIC PROVISIONS

**With reference to the draft proposal of the Council Directive on Community measures for the control of Avian Influenza:**

Contents: the proposed Directive will replace Directive 92/40/EEC and update the existing provisions. The main changes it will introduce concern the definition of AI and the controls on LPAI. More specifically, the definition of AI is revised *“to extend the scope of the control measures also to those LPAI viruses which could potentially mutate into HPAI viruses, however it would make a distinction between the two conditions so that specific control measures can then be applied in relation to the different risks posed by these viruses”*. This means a broader field of action but also flexible provisions for the control of LPAI and HPAI.

Crime risks: no crime risks are envisaged with reference to the specific provisions of the draft Directive. Instead, the Directive looks to reduce criminal opportunities: it updates the previous definition of AI by including also LPAI (art. 2 of the draft Directive), but it foresees different control measures on the basis of different types of virus and animal host involved. This because in the Commission’s opinion *“to apply the current HPAI control measures also in case of LPAI would be disproportionate to the risks posed by LPAI to both animal and public health; this could also result in massive killings of animals – with a major negative impact on animal welfare – and very high costs for disease control, in circumstances where such massive killings and costs may not be*

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<sup>33</sup> See in particular Regulation (EC) 882/2004 of the European Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules. Official Journal L 165, 30/04/2004. The Regulation aims to ensure food quality and consumer protection by regulating the official controls. The recent experience of the “mad-cow” disease shows the strict links between food safety and frauds. For more information see <http://organicconsumers.org/madcow.htm>. In particular, details on Italian food frauds can be found at [http://www.carabinieri.it/cittadino/informazioni/tutela/agricola/frodi/05\\_carne.htm](http://www.carabinieri.it/cittadino/informazioni/tutela/agricola/frodi/05_carne.htm)

*justified nor sustainable.*" This solution reduces the incentives for farmers to hide AI cases in order to avoid the "very high costs".

Crimes envisaged: none

**With reference to the draft proposal of the Council Decision amending the Council Decision 90/424/EEC on expenditure in the veterinary field:**

Contents: The proposed Council Decision envisages changes to Council Decision 90/424, in particular concerning the amount of financial contribution to be granted to Member States for some of the expenditure necessary to eradicate HPAI. The draft Decision adds to the existing provisions a further financial contribution (30%) to MSs *"for the costs which they incurred in a case of a stamping out policy being applied following LPAI outbreaks"* and a contribution (50%) for the Member States surveillance programmes to be implemented in accordance with the proposed Council Directive.

Crime risks: also the Council Decision does not present significant crime risks. Although financial contribution may be considered an incentive for fraudulent behaviours directed to obtain it, in this case the Decision seems to decrease the impacts on crime. In fact, the contribution serves to reimburse farmers *"for the eradication of avian influenza if the minimum control measures provided for in Directive XXX [i.e. the proposal of the Directive] have been fully and efficiently implemented in compliance with relevant Community legislation"*. The close supervision carried out by the Commission makes fraud against the EU budget unattractive because of the high risk of being detected.

Crimes envisaged: none

<b>CONCLUSIONS</b>
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Crime risks arising from the option chosen by the Commission appear not to be significant. On the contrary, the "Avian Influenza control measures and their Community co-financing" reduce the level of this sector's vulnerability, improving health safety. At the same time, the draft Directive provides for control measures that take into account different levels of AI risk. This is expected to reduce costs for the operators and, consequently, to increase their compliance with the Communitarian legislation. For this reason no Extended CRA is requested.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2005-ENTR-020

### *"Integrated Competitiveness and Innovation Programme (CIP)"*

(Expected date of adoption: April 2005)

#### BACKGROUND

##### Materials provided by the Commission

Roadmap.

##### Additional Materials collected by Transcrime

- Consultation document on a framework Programme for Competitiveness and Innovation (2005), available at: [http://europa.eu.int/comm/enterprise/enterprise\\_policy/cip/docs/consultation\\_doc.pdf](http://europa.eu.int/comm/enterprise/enterprise_policy/cip/docs/consultation_doc.pdf) (hereinafter: Consultation document).
- Community Competitiveness and Innovation framework Programme. Summary of the results of the public consultation (2005), available at: [http://europa.eu.int/comm/enterprise/enterprise\\_policy/cip/docs/summary\\_results.pdf](http://europa.eu.int/comm/enterprise/enterprise_policy/cip/docs/summary_results.pdf).

##### Options to be assessed

This proposal aims at achieving the following objectives:<sup>34</sup>

- a. Encourage innovation and the sustainable use of resources
- b. Ensure the development and application of ICT
- c. Improve SMEs' access to finance
- d. Enact economic and administrative reform for more entrepreneurship and a better business environment

The only policy option envisaged in the Roadmap is a spending programme (the Integrated Competitiveness and Innovation Programme – CIP), which integrates the existing financial instruments (PACE, LIFE, MAP, IDAll, eTEN) into a single programme. This would lead to a simplification of the procedures to allocate funds to SMEs.

##### Result of the initial screening

The proposed Programme can apparently only be framed in Typology of Regulation<sup>35</sup> at Risk n. 3 ("Legislation that introduces a grant, subsidy, or compensation scheme or any other scheme that provides a benefit") and n. 7 ("Legislation that provides officials with regulatory power").

However, this inclusion is deceptive, because:

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<sup>34</sup> See Roadmap, p. 2.

<sup>35</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *"Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators"*. Final Report to the EU Crime Proofing Steering Group. September 2003, UCL.

- the proposed programme does not introduce any new grant/subsidy, but it merely integrates already existing programmes;
- for the same reason, the proposed programme does not provide officials with any new regulatory power.

As to the other typologies of regulation at risk, they are not even theoretically applicable to this proposal.

<b>CONCLUSIONS</b>
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The evaluation requested by the Commission focuses only on the specifically proposed CIP, which is independent from the evaluation of the single financial programmes which are integrated into it.<sup>36</sup>

With reference to the proposed CIP, no Extended Crime Risk Assessment is needed, since it does not introduce any new regulation behind the already existing financial programmes. Therefore, even if it might be possible that the single financial instruments listed above could create crime risk, the proposed coordinated programme *as such* does not.

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<sup>36</sup> This interpretation is further corroborated by the fact that the purpose of the public consultation was also to obtain feedback on such a framework Programme, and it did not address the details of the elements where these had already been the subject of public consultation. See Consultation document, p.1.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2005–TREN–039

### *“Communication pour un cadre commun de tarification des infrastructures”*

(Expected date of adoption: April 2005)

#### BACKGROUND

##### **Materials provided by the Commission**

Roadmap.

##### **Additional Materials collected by Transcrime**

- White Paper on Transport Policy, 2001.
- Parlement Européen, Commission de la politique régionale, des transports et du tourisme. “Rapport sur la tarification des infrastructures de transports, (2000/2030(INI)), 21 November 2000.
- Proposal for a Directive of the European Parliament and of the Council amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures. COM(2003)448final, Brussels, 27/03/2004.

##### **Options to be assessed**

According to the Roadmap, single policy options can not yet be identified: the future Communication “permettrait d’établir les options essentielles et d’engager le débat sur la nécessité et l’opportunité des actions communautaires”.<sup>37</sup> Nevertheless, the policy objectives to be addressed are:

- to harmonize the infrastructure of transport tariffs among Member States, through a Community framework, in order to reduce the current fragmentation, avoid unfair competition and improve transport in a Single Market;
- to adapt transport infrastructure costs to environmental needs (more specifically the “polluter pays” principle) and to the real external costs borne by society.

The above objectives allow envisaging a minimum content of future policy options. Therefore, the preliminary crime risk assessment is carried out on this minimum content.

##### **Result of the initial screening**

The proposed Communication can be framed in the Typology of Regulation at Risk<sup>38</sup> n. 4 (“Regulation that introduces or increases the tax on legal goods or in any other way increases the costs of legal goods”), because it may promote an increase of transport infrastructure costs, in order to internalize the external costs until now borne by society.

#### GENERAL FACTORS TO BE CONSIDERED

<sup>37</sup> See Roadmap, p. 1.

<sup>38</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators*. Final Report to the EU Crime Proofing Steering Group, September 2003, UCL.



### Formal aspects of the draft proposal

Due to the lack of a draft text, assessing crime risks related to formal aspects is not possible. Plus, the instrument envisaged in the Roadmap, a Communication, does not allow, in itself, this item to be properly addressed, as it is not a prescriptive act, but a general presentation of policy choices. Nevertheless, some considerations can be outlined, with reference to the *external simplicity* indicator: the Communication aims to reduce the legislative fragmentation characterizing the European legislative framework. A Community framework will allow a narrowing of the possible risks due to the present complex map of national legislations.

### Vulnerability of the sector/area to be regulated

It is difficult to analyze at this stage the vulnerability of the sectors/area, because it appears that several sectors will be addressed in the future Communication. Indeed, according to the Roadmap “pour les secteurs d’aéroports et ports l’application des principes au moyen de directives sera analysée”. This means that the Communication will affect road, air and maritime transport infrastructure. Road transport involves different characteristics and risks in comparison to air or maritime transport. For this reason, persons or goods transport has to be evaluated in a different way. Given these considerations, it is necessary to know the concrete extent of the Communication.

<b>CRIME RISKS ARISING FROM SPECIFIC OPTIONS</b>
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Contents: the roadmap envisages an increase of transport infrastructure costs, to internalize them.

Crime risks: a crime risk assessment only based on the information provided by the Roadmap is not effective, as the content of the proposed Communication is still too vague. Nevertheless, a general consideration can be made in relation to the possibility of burdening transport operators with higher costs. The effects (also under a crime risk profile) may be different depending on the subjects: suppliers or demanders. For this reason, knowing how the tariffs would be increased would represent significant information for a crime risk assessment, as it would allow a clarification of on which subjects the costs will fall.

Crimes: a general, though low, risk of frauds may be envisaged, but this also depends on the real increase in the tariffs. If this is a large increase, it could prompt illicit conducts to avoid major costs.

<b>CONCLUSIONS</b>
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Due to the lack of information on the proposed Communication, a complete and effective crime risk assessment cannot be carried out. Some minimal risks may be envisaged, but they are not significant enough to require a more in-depth evaluation.

Only a minimal level of crime risk is envisaged; for this reason an *Extended Crime Risk Assessment* is not recommended.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2004-TAXUD-023

### *"Proposal for a Council Directive on taxation of passenger cars in the EU"*

(Expected date of adoption: 2005-2nd quarter)

#### BACKGROUND

##### Materials provided by the Commission

- Roadmap/Preliminary Impact Assessment.
- Impact assessment (11.01.2005).
- Draft Proposal for a Council Directive (draft text of 29.3.2005), hereinafter referred to as the "draft proposal".

##### Options to be assessed<sup>39</sup>

The option considered in the draft proposal involves the following main elements:

- the gradual and total abolition of Registration Taxes (hereinafter: RT), over a ten year transitional period (art. 1 and art. 7-8 of the draft proposal);
- the establishment of an RT refund system (art. 9-10 of the draft proposal), to avoid double taxation;
- the establishment of an Annual Circulation Tax (hereinafter: ACT) refund system (art. 6 of the draft proposal), to avoid double taxation;
- the restructuring of both RT and ACT tax bases to include a CO<sup>2</sup> element.

##### Result of the initial screening

The option considered can be placed under the category of regulation at risk<sup>40</sup> n. 3 ("a grant, subsidy, or compensation scheme or any other scheme that provides a benefit"), because it introduces a temporary "RT/ACT refund system".

#### GENERAL FACTORS TO BE CONSIDERED

##### Formal aspects of the draft proposal

<sup>39</sup> There were four options initially considered in the preparatory works (Roadmap and Preliminary Impact Assessment): *Option 1*, a "do nothing" approach. *Option 2*. Rely on existing passenger car taxes, but only insert a Registration Taxes refund system, in order to avoid double taxation. *Option 3*. A solution which involves: (a) the gradual and total abolition of Registration Taxes, over a ten year long transitional period; (b) the establishment of a Registration Taxes refund system, to avoid double taxation; (c) the establishment of an Annual Circulation Tax refund system, to avoid double taxation; (d) the restructuring of both Registration Tax and Annual Circulation Tax bases to include a CO<sup>2</sup> element. *Option 4*. Reduce gradually Registration Taxes to a low level of around 10% of car pre-tax price.

The option finally chosen in the draft proposal is Option 3. For this reason Transcrime researchers have decided to make a preliminary Crime Risk Assessment on this option.

<sup>40</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

No crime risks arising from formal aspects of the draft proposal.

**Vulnerability of the sector to be regulated.**

Several cases related to the car market sector have shown that it is vulnerable to tax evasion and tax frauds (see, for instance, TIS.pt-Consultores em Transportes Inovação e Sistemas, S.A., *Study On Vehicle Taxation In The Member States Of The European Union Final Report*, January 2002). In the context of MARC Project, Transcrime researchers have interviewed Judge Luca Pistorelli (Judge of Preliminary Investigation at the Tribunal of Milan), who confirmed the existence of cases involving tax fraud schemes related to the car market (see *Intervista con il GIP Luca Pistorelli*, 20th December 2004).

However, neither the accessibility nor attractiveness of the sector to be regulated seem to be significantly affected by this draft proposal. On the contrary, its general provisions have the capability of harmonising car taxation regimes in the EU, thus reducing criminal opportunities deriving from their current differences.

<b>CRIME RISKS ARISING FROM SPECIFIC PROVISIONS</b>
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**With reference to art. 10 of the draft proposal (Calculation of the residual registration taxes):**

Contents: Art. 10 para. 2 of the draft proposal, establishes that “in order to determine the residual value of a passenger car for the purposes of paragraph 1, Member States may apply different methods, such as: assessments, expert examinations or the use of fixed scales”.

Crime risks: The risk of crime is related to two aspects:

- a. the selection of the method to determine the residual value of a passenger car (assessments, expert examinations or the use of fixed scales), and
- b. the criteria used by Member States in order to set up fixed scales.

With reference to a), the use of a fixed scale presents a lower risk, because it is less discretionary in comparison with the other two methods.

With reference to b), the use of fixed scales should be made dependent on objective criteria established at EU Commission level, because the use of different fixed scales could produce differences and asymmetries in their implementation.

Crimes envisaged:

- Corruption of the expert (or the body) in charge of the assessment, when the methods chosen by the Member State is either assessment or expert examination.
- Tax frauds/evasion consisting in the setting up of illicit export–import triangulation schemes (or other possible tax fraud/evasion schemes) in the case of fixed scales, when the criteria for the fixed scale are not established at an EU level.

**With reference to art. 6 of the draft proposal (Refund of annual circulation taxes):**

Contents: Art. 6 establishes that: “Where annual circulation taxes have been paid in the Member State of registration in respect of a passenger car which is subsequently exported outside the territory of the Community or moved to be permanently used within the meaning of Article 3(3) to the territory of another Member State, the former shall refund the residual amount of the tax, on the basis of calculations carried out in accordance with Article 3(1)”. This means that the method used to calculate the refund of ACT is “the length of time in any given twelve month period for which the passenger car has been used in the territory of that Member State”.

Crime risks: The method for refunding the ACT seems to be too difficult to ascertain in practice, thus providing opportunities for cheating by passenger car owners.

Crimes envisaged: Tax frauds consisting of cheating the ACT refund system by passenger car owners exporting their cars outside the territory of the Community or to another MS.

<b>CONCLUSIONS</b>
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The criminal risk implied by the proposal appears limited to few specific provisions. Therefore, the Commission should evaluate whether an Extended CRA is needed or not and advise Transcrime accordingly.

## EXTENDED CRIME RISK ASSESSMENT OF 2004-TAXUD-023

### *"Proposal for a Council Directive on taxation of passenger cars in the EU"*

#### BACKGROUND

##### RELEVANT DOCUMENTS.

- Roadmap.
- European Commission, *Proposal for a Council Directive on passenger car related taxes*, COM (2004) 261, 5/7/2005, hereinafter draft proposal.
- European Commission, *Commission Staff Working Document: Impact Assessment*, Annex to the Proposal for a Council Directive on passenger car related taxes, SEC (2005) 809, hereinafter IA.
- TIS.pt (Consultores em Transportes Inovação e Sistemas, S.A.), *Study on Vehicle Taxation in the Member States of the European Union*, January 2002, hereinafter TIS Study.

##### INITIAL POLICY OPTIONS.

The roadmap identified three possible policy options:

- A "do nothing" option;
- Rely on existing passenger car taxes, but only insert a registration tax (RT) refund system;
- The main option which includes:
  - The gradual and total abolition of RT, over a ten year period;
  - A RT refund system and Annual Circulation Tax (ACT);
  - Restructuring of both RT and ACT tax bases to include a CO<sub>2</sub> element.
- Second best option: similar to option 3, but which would only aim at reducing RT gradually (instead of replacing it) to a low level of around 10% of the pre-tax car price.

##### CONCLUSIONS OF THE PRELIMINARY CRIME RISK ASSESSMENT.

The Preliminary Crime Risk Assessment (PCRA) of the proposal concluded the vulnerability of the passenger car sector to crime to be medium.

The RT refund system does not provide for a uniform determination of the car's residual value. MSs may choose between assessments, expert examinations or the use of fixed scales. The first two methods may create criminal opportunities, since car owners may try and bribe the assessors/experts in order to get a higher assessment.

##### FURTHER REMARKS.

The present ECRA was developed between 1<sup>st</sup> May and the 20<sup>th</sup> of July 2006. The following experts participated in the ECRA: Prof. Simona Beretta (Professor at Cattolica University); Prof. Mario Maggioni (Professor at Cattolica University, Milan); Prof. Ernesto Savona (Professor at Cattolica University, Milan and Director of Transcrime), Ms. Sara Martocchia (Researcher at Transcrime) and Mr. Francesco Calderoni (Researcher at Transcrime).

### ASSESSMENT OF THE POLICY OPTIONS AT RISK

The IA and Draft proposal adopted option 3. Accordingly both the PCRA and the ECRA will focus on the chosen option.

For a better analysis, option number 3 can be split into different main actions:

- Gradual and total abolition of RT;
- The establishment of an RT refund system for the transitional period;
- The restructuring of both the RT and ACT tax bases in order to include a CO<sub>2</sub> element.<sup>41</sup>

According to the PCRA only the refund mechanism was deemed to present potential crime risks. Accordingly, the ECRA will focus only on this main action.<sup>42</sup>

Following, the answers to the questionnaire are listed in italics, whilst the explanation is given in bold.

A graphical symbol has been associated with each assessment:



indicates that the expected results will reduce crime risks;




indicates that no influence on crime risks is expected;



indicates that the expected results will increase crime risks.

#### **1. Crime.**

##### **A) WILL THE AMOUNT OF CRIME VARY?**

*The amount of crime is likely to increase.* 

**The possibility of using an assessment or an expert instead of fixed scales may open the way to corruptive behaviours. This may happen frequently in the short term, since RT rates will still be high and car owners may try and recuperate a significant part of the paid tax. With the progressive abolition of RT and its progressive inclusion into the ACT, the incentive to bribe assessors should decrease.**

##### **B) HOW WILL THE RISK OF BEING DETECTED COMMITTING A CRIME VARY?**


*The risk of detection is likely to decrease.* 

**No mechanism that could possibly detect the corruption of the experts/assessors seems to be in place.**

<sup>41</sup> This division for better analysis is also adopted by the Commission in the IA. See, *IA*, p. 7.

<sup>42</sup> It should be noted that an RT refund system was included both in option 2 and 4.


**C) HOW WILL THE EXPECTED PROFIT FOR THE AUTHORS OF A CRIME VARY?**

*Profits for a single crime are likely to increase.* 

**Bribers may receive higher refunds thanks to the abuse of the assessment methods.**


**2. Authors.**

**A) WILL THE NUMBER OF AUTHORS VARY?**

*The number of authors is likely to increase.* 


**In MSs where assessments and experts are used to determine a car's value, car owners may be stimulated to bribe these assessors.**

**B) HOW WILL THE COMPLEXITY OF THE ORGANIZATIONAL STRUCTURE OF A CRIME VARY?**

*Organisational requirements are likely to remain constant.* 

**The main action is not likely to affect such an issue.**

**C) HOW WILL THE INDIVIDUAL SKILLS/KNOWLEDGE REQUIRED TO COMMIT A CRIME VARY?**

*Organisational requirements are likely to remain constant.* 

**The main action is not likely to affect such an issue.**

**D) FOR NATURAL PERSONS, HOW WILL THE PROFESSIONAL REQUIREMENTS NEEDED TO COMMIT A CRIME OR FACILITATING THE COMMISSION OF A CRIME VARY?**

*Professional requirements are likely to remain constant.* 

**The option is not likely to affect such an issue.**


**E) FOR LEGAL PERSONS, HOW WILL THE ECONOMIC/LEGAL REQUIREMENTS NEEDED TO COMMIT A CRIME VARY?**

*Professional requirements are likely to remain constant.* 

**The option is not likely to affect such an issue.**


### **3. Victims.**

#### **A) WILL THE NUMBER OF VICTIMS VARY?**

*The number of victims is likely to increase.* 

**The public administrations regulating RT and ACT may be subject to fraud.**

#### **B) HOW WILL THE AMOUNT OF VICTIMS–NATURAL PERSONS VARY?**

*The amount of victims–natural persons is likely to remain constant.* 

**The option is not likely to affect such an issue.**

#### **C) HOW WILL THE SOCIO–DEMOGRAPHIC CHARACTERISTICS OF VICTIMS (NATURAL PERSONS) VARY?**

*The amount of victims–natural persons is likely to remain constant.* 

**The option is not likely to affect such an issue.**

#### **D) WILL THE AMOUNT OF VICTIMS–LEGAL PERSONS VARY?**

*See answer to point 3.A).*

#### **E) HOW WILL THE ECONOMIC/LEGAL CHARACTERISTICS OF VICTIMS (LEGAL PERSONS) VARY?**

*The economic/legal characteristics victims (legal persons) are likely to remain constant.* 

**The option is not likely to affect such an issue.**

### **4. Costs/Harms.**

*The experts could not investigate this point because no data is available. Further research is needed. Nevertheless, it is expected that fraud and corruption may be perpetrated at the beginning of the transitional period. During the first few years, some MS will still have high RT rates and this may stimulate car owners to commit crime in order to receive higher refunds. With the progressive abolition of RT, these behaviours should decrease.*



## CONCLUSIONS

The only main action presenting crime risks was the introduction of a RT refund system. This main action was included into options 2, 3 and 4. Such action may impact on the car tax sector in different ways according to the option it is incorporated into. Accordingly, an expert team ranked all the initial policy options against their crime risk implications. From the most, to the least risky:

- **Option n. 1 (“Do nothing option”) is the most risky solution.** The present regime maintains significant asymmetries that frequently stimulate the perpetration of fraud and other behaviours connected to the evasion/elusion of registration taxes;<sup>43</sup>
- **Option n. 2 (“Rely on existing passenger car taxes, but only insert a registration tax (RT) refund system”) is the second most risky solution.** The introduction of a RT refund system may create new criminal opportunities in order to fraudulently obtain undue refunds. Corruption of the assessors/experts and forgery of registration documents may become prevalent;
- **Option n. 4 (“Second best option”) is the third most risky solution.** The progressive reduction of RT to a common low level (around 10%) should reduce incentives for defrauding the RT refund system, particularly in those countries with previously high RT rates;
- **Option n. 3 (“Main option”) is the least risky option.** The progressive abolition of the RT and its absorption into the ACT may create crime risk only in the short-term. Indeed, the first few years of the transitional period may stimulate corruptive behaviours in order to achieve higher refunds, particularly in those countries with high RT rates.

The following table offers an overview of the Crime Risk Assessment of all the envisaged policy options:

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<sup>43</sup> TIS Study, p. 67–68.

Option	IS result	PCRA result	ECRA result
<b>Option n. 1 (“Do nothing option”)</b>	Does not fall into any general risk indicator.	A low crime risk is expected. Does not require further assessment.	
<b>Option n. 2 (“Rely on existing passenger car taxes, but only insert a registration tax (RT) refund system”).</b>	Falls under indicator 3, PCRA required.	The RT refund system may present a risk of experts assessing the value of a car being corrupted. An ECRA is required.	The RT refund system may stimulate corruptive behaviours towards the experts assessing the car value, particularly in those countries with high RT rates.
<b>Option n. 3 (“Main option”).</b>	Falls under indicator 3, PCRA required.	The RT refund system may present a risk of the experts assessing the value of a car being corrupted. An ECRA is required.	The RT refund system may stimulate corruptive behaviours. However, the progressive abolition of RT should reduce crime risk during the initial years of the transitional period.
<b>Option n. 4 (“Second best option”).</b>	Falls under indicator 3, PCRA required	The RT refund system may present a risk of the experts assessing the value of a car being corrupted. An ECRA is required.	The RT refund system may stimulate corruptive behaviours. The reduction of RT to a minimum level of around 10% of the car value should reduce crime risks in those countries with high RT rates.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2004-ENV-001

### *“Thematic Strategy on the prevention and recycling of waste”*

(Expected date of adoption: June 2005)

BACKGROUND
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#### Materials provided by the Commission

- Roadmap/Preliminary Impact Assessment.
- Draft Report, *IA of the Thematic Strategy on the Prevention and Recycling of Waste and its immediate implementation measures*, Commission Staff Working Document, hereinafter referred to as “IA”.
- *Annexes* to the IA of the Thematic Strategy on the Prevention and Recycling of Waste and its immediate implementation measures.

It should be noted that the IA was drafted after the Roadmap/Preliminary Impact Assessment. Therefore, the IA will be the main text of reference of this Preliminary Crime Risk Assessment.

#### Options to be assessed

The IA has identified five objectives to achieve the general aim of the Thematic Strategy<sup>44</sup> and for each of them has proposed several policy options. The European Commission has chosen only one option with reference to each operational objective,<sup>45</sup> which are as follows:

- *Objective 1: Ensure that sound knowledge on the environmental impacts of waste generation and management is the basis of waste policy development.*

Option chosen: Moving to Life Cycle Thinking (LCT).<sup>46</sup>

- *Objective 2: Exploit the potential of waste prevention to contribute in reducing the environmental impacts of resource use.*

Option chosen: adopting a Framework for Waste Prevention policies (including prevention programmes, a Recommendation to guide MS in developing waste policies and providing the diffusion of best practices).

- *Objective 3: Exploit the potential of waste recovery and recycling to contribute in reducing the environmental impacts of resource use.*

Option chosen: encouraging Member States to exploit economic instruments (in particular, landfill taxes and tradable certificates).

- *Objective 4: Improve the regulatory environment for recycling and recovery activities.*

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<sup>44</sup> The general aim is *to reduce the environmental impacts of waste generation and management and in this way contribute to reducing the overall environmental impacts associated with resources use*. See IA, p. 12.

<sup>45</sup> *Ibidem*, p. 31–32.

<sup>46</sup> The “Life Cycle Thinking” is an approach aimed at minimizing life-cycle waste generated impacts through the use of different evaluation tools. A detailed definition can be found at [http://www.polymtl.ca/ciraig/ciraig\\_eng\\_content\\_01.html](http://www.polymtl.ca/ciraig/ciraig_eng_content_01.html).

Option chosen: A) moving to an EU recycling society by developing common environmental requirements for waste recycling. B) Revising Waste Framework Legislation<sup>47</sup> and adopting Interpretative Guidelines for issues needing case by case approach.

- *Objective 5: Reduce the environmental impacts of waste oils.*

Option chosen: focusing on full collection of waste oils and repealing the priority of regeneration (by repealing the existing Waste Oil Directive).

### Result of the initial screening

The Thematic Strategy can be framed in the typology of regulation at risk<sup>48</sup> n. 2 (“a concession on a tax or a concession on any other fee or obligation”) because it promotes the introduction of landfill taxes within Member States (under objective 3).

## GENERAL FACTORS TO BE CONSIDERED

### Formal aspects of the draft proposal

The complexity of waste regulation, both at EU and national level, contributes to the creation of opportunities for criminals who take advantage of unclear interpretations and legislative overlaps. The proposed Thematic Strategy seems to reduce this complexity through a new Waste Framework Directive, which is aimed at unifying two existing acts<sup>49</sup> and clarifying definitions and rules. However, for the time being, it is not possible to deliver a final decision on the crime risks arising from the formal aspects, because the draft text of the proposal is unavailable.

### Vulnerability of the sector to be regulated

The waste disposal market has been widely infiltrated by organised criminals, who often exploit the laws regulating this sector, as reported by the large amount of extant literature (see *List of references* at the end of this document).<sup>50</sup> The vulnerability of the sector to criminals can be

<sup>47</sup> Specifically, the new Waste Framework Directive would replace the Council Directive of 15 July 1975 on waste (75/442/EEC, published in the Official Journal L 194 , 25/07/1975) and the Council Directive of 12 December 1991 on hazardous waste (91/689/EEC, published in the Official Journal L 377 , 31/12/1991).

<sup>48</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

<sup>49</sup> See note 4.

<sup>50</sup> The vulnerability of the waste sector to organised crime may be facilitated by inadequate environmental regulation. As Alan Block and Franck Scarpitti put it with reference to the US experience: “[the Resource Conservation and Recovery Act] unwittingly provided illegal dumpers, including organized crime, with the opportunity to make large profits by undercutting legitimate disposal enterprises and disposing of wastes on highways through open valves, in fuel oil, and, most critical to the Mafia's involvement, in solid waste bound for solid waste landfills [...]”. See Block A. and F. Scarpitti, *Poisoning for Profit: The Mafia and Toxic Waste in America*, New York: William Morrow & Co., 1985, p. 60–61.

explained by looking at A) its attractiveness (referred to the profitability of a given market/product *minus* the risk of being detected and punished) and B) its accessibility (referred to the ease of entry/exploiting a given market):

A. Attractiveness

*Profitability of the product.* The waste disposal market is characterised by a high demand for waste management services and a low supply of these services. Furthermore, regulations putting burdens on waste disposal, contribute to the rise of waste disposal costs. Criminals enter as unfair competitors in this market by offering waste management services at lower prices (e.g. transportation, storage, disposal, etc.). In fact, illegal disposal of waste is obviously less expensive than the legal one. Furthermore, as extant literature shows,<sup>51</sup> once criminals defeat their competitors, they can exercise a monopoly within the market and increase prices.

*Risk of detection.* The crimes can be carried out with a very low risk of detection by law enforcement authorities. This is due to the following factors:

- *Lack or inadequacy of controls by Public Administrations.* Even the best legislation does not prevent high crime risk by its implementation. Indeed, case studies demonstrate that the evasion of controls is one of the most frequent *modi operandi* used by criminals.<sup>52</sup>
- *Inadequacy of criminal regulation and difficulties in collecting evidence* (e.g. in Italian regulation illegal waste trafficking is a minor offence and this has led to significant consequences: public prosecutors are prevented from using certain evidence –such as wire tapping – or from adopting any precautionary measures; the period of limitation is too short and facilitates impunity. Furthermore, as a minor offence, it does not fall under international cooperation).<sup>53</sup>
- *Obstacles to the traceability of international trafficking of waste.*<sup>54</sup> This is due to the lack of information exchange between the States and to the differences existing in their legislations and enforcement practices. Furthermore, certain countries present improper control networks (e.g. African Countries), so that they become a profitable destination for illegal waste management companies.<sup>55</sup> For this reason crossing national (and EU) borders makes the risk of being detected lower.
- *Lack of transparency, due to the involvement of businessmen from the legal sector* (e.g. corporate entities, professional intermediaries). literature on white collar criminals shows that

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<sup>51</sup> The infiltration of organised crime in New York waste disposal market is frequently used by scholars and practitioners as an exemplificative case study. See Carter, T.S., "Ascent of the corporate model in environmental-organized crime", in *Crime, Law & Social Change*, Vol. 31, pp. 1–30, 1999; Morelle M.L., "Something Smells Fishy: The Giuliani Administration's Effort To Rid The Commercial Trade Waste Collection Industry Of Organized Crime" in *New York Law School Law Review*, Vol. 42, pp. 1213–1238, 1998. On the use of regulatory power to disrupt these types of 'criminal business', see Levi M. and M. Maguire, "Reducing and preventing organised crime: An evidence-based critique", in *Crime, Law & Social Change*, Vol.41, pp. 397–469, 2004.

<sup>52</sup> For an explanation of the role of Public Administration in the Italian illegal waste trafficking, see Commissione parlamentare d'inchiesta sul ciclo dei rifiuti e sulle attività illecite ad esso connesse, *Documento sull'introduzione nel sistema penale dei delitti contro l'ambiente e contro il fenomeno criminale dell'"Ecomafia"*, Doc. XXIII n. 11, December 2004, available at [http://www.camera.it/\\_dati/leg14/lavori/stenbic/39/2004/1221/s040.htm#9n1](http://www.camera.it/_dati/leg14/lavori/stenbic/39/2004/1221/s040.htm#9n1)

<sup>53</sup> *Ibidem*.

<sup>54</sup> See for a more in-depth analysis Y.A. Van Der Meer, "Combating Environmental Crime in an International Context", 1999, at <http://www.inece.org/2ndvol2/VDMEER2.html>

<sup>55</sup> On the use of illegal transport lines from EU Member States towards African Countries see BfU, "Organised environmental crimes in the EU Member States", final report, 2003, p. 146 at [http://europa.eu.int/comm/environment/crime/pdf/organised\\_environmental\\_crime\\_in\\_member\\_states.pdf](http://europa.eu.int/comm/environment/crime/pdf/organised_environmental_crime_in_member_states.pdf)

the combining of licit and illicit activities makes the crime unseen and its detection more difficult.<sup>56</sup> In addition, whilst “traditional” criminals get into the market as outsiders, white collar criminals act as insiders and can exploit their “unsuspicious” position.

#### B. Accessibility

- *Presence of several loopholes in the waste disposal chain.* The waste market is easily accessible to criminals because of the fragmentation of the disposal process into several stages: the origin/production of waste; the transit of waste; the destination/final site.<sup>57</sup> This allows criminals to replace legal firms at different phases or even manage the whole process.
- *Improper controls on access to the waste market.* Inadequacy of public administration’s supervision and collusive behaviour may lead to the authorization of criminal firms to enter the market.

#### Crimes envisaged:

- Development of a black waste market by criminal cartels;<sup>58</sup>
- Illegal waste management, including illegal dumping of waste;
- Frauds related to illegal waste disposal, performed through: the forgery of documentation; false declarations; the use of the “invoice switching” system;<sup>59</sup> other fraudulent conduct (e.g. using urban waste incinerators for special waste; collecting waste and, before starting the activities, declaring bankruptcy).
- The corruption of public officials, administrative bodies, politicians in order to manage illicit disposal of waste without the risk of detection.

<b>CRIME RISKS ARISING FROM SPECIFIC OPTIONS</b>
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**With reference to the option chosen associated to objective n. 3 (Exploit the potential of waste recovery and recycling to contribute in reducing the environmental impacts of resource use):**

<sup>56</sup> See in particular Ruggiero V., “*Economie Sporche. L’impresa criminale in Europa*”, pp. 24–27, Bollati Boringheri Editore, 1996. On the environmental crime as “enterprise crime”, see Hayman G. and Brack D., “*International Environmental Crime. The nature and control of environmental black market*”, Royal Institute of International Affairs, 2002, p. 6.

<sup>57</sup> A detailed description of criminal infiltration during the three stages of the waste life-cycle is given by Gruppo Abele–Nomos and Legambiente, “*The illegal trafficking in hazardous waste in Italy and Spain*”, 2003, pp. 22–23.

<sup>58</sup> Some studies have demonstrated the links between illegal waste disposal and other international crimes: the business of a criminal organization focuses at the same time on more activities, e.g. drug trafficking, weapons trafficking, environmental crimes. See BfU, cit., p. 726. For a thorough study on illicit traffics and *ecomafia* see also Commissione parlamentare d’inchiesta sul ciclo dei rifiuti e sulle attività illecite ad esso connesse, “*Documento sui traffici illeciti e le ecomafie*”, Doc. XXIII n. 47, November 2000, available at [http://www.camera.it/\\_bicamerale/ri/noschiosco.asp?pagina=/\\_bicamerale/leg14/rifiuti/home.htm](http://www.camera.it/_bicamerale/ri/noschiosco.asp?pagina=/_bicamerale/leg14/rifiuti/home.htm)

<sup>59</sup> The “invoice switch system” consists of moving false certificates that do not follow waste movements in order to elude controls. The functioning of this system is explained in Abele–Nomos and Legambiente, cit., p. 40.

*Contents:* the Commission decided to include in its proposal for a revision of the Waste Framework Directive “an encouragement of Member States to use economic instruments to progress towards the environmental objective of waste policy”.<sup>60</sup>

*Crime risks:* there are two risks emerging from this option: A) a risk arising from the choice of economic instruments (i.e. landfill taxes and, in the longer term, tradable certificates)<sup>61</sup> to promote “green waste management”; B) a risk arising from the discretion left to Member States by the Commission in implementing these instruments.

A. 1. *Risk of illicit conduct aimed at evading taxes and of the related development of a black waste market.* According to IA,<sup>62</sup> landfill taxes should lead to a diversion of waste from landfills, encouraging waste producers towards other disposal methods. For the time being, landfills are the cheapest waste disposal method, but a targeted tax would make it more expensive and less attractive. Companies may prefer an illicit and cheaper solution rather than a licit and more expensive one. The risk arises when waste producers attempt to evade taxes by delegating waste disposal to a third-party criminal subject. She/he can hide the origin of waste and make it disappear through an organised chain of persons (intermediaries, truckers, colluded officials, etc.).

2. *Risk of the development of an illicit tradable certificates market.*<sup>63</sup> Tradable certificates are an incentive-based green policy instrument developed in some jurisdictions to provide financial support for clean and safe waste disposal. This policy leads to the creation of two markets: a “material” one related to the product and/or service (e.g. energy, waste disposal services, etc.) and an “artificial” one related to the certificates, which can be traded as bonds in a specific stock exchange.

B. *Risk of fragmentation/asymmetries in the legislation of Member States.* The risk arises from the level of discretion left to Member States in promoting economic instruments. This could produce different solutions in the Member States with regards to the choice of the economic instrument and its regulation. The assumption is that these asymmetries may foster law-shopping practices, providing more opportunities for elusive behaviour.

Crimes envisaged:

With reference to risk A.1): tax evasion through frauds, forgery of documents, corruption of officials.

With reference to risk A.2): speculation of tradable certificates.

With reference to risk B): environmental crimes, performed by evading waste taxes.

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<sup>60</sup> The Commission does not directly introduce disposal taxes because of the lack of “*unanimous consensus in the Council on the necessity of such action*”. See IA, p. 32, where it is also explained that “*a common approach to waste disposal taxes would fall under the unanimity rule for its adoption by the Council*”.

<sup>61</sup> *Ibidem*, p. 14.

<sup>62</sup> *Ibid.*

<sup>63</sup> The use of tradable certificate for a strategy on the prevention and recycling of waste is clarified in European Confederation of Iron and Steel Industries, “*EUROFER Contribution to the stakeholders consultation on the Commission Communication COM (2003) 301 final*”, 2003, p. 6. See also ECN Policy Studies, Independent Energy Consultant, SPRU University of Sussex, Oeko-Institute, “*The Implication of Tradable Green Certificates for the Deployment of Renewable Electricity*”, ECN-C-99-072, 1999.

**With reference to the chosen option associated with objective n. 5 (Reduce the environmental impacts of waste oils):**

Contents: according to the option chosen, Member States will be bound to ensure “the full collection of waste oils”.<sup>64</sup> This means that the priority for oil regeneration (established with Dir. 75/439/EC) will be repealed.

Crime risks: a risk might arise from repealing the priority of *oil regeneration*, which will lead to focussing only on *full collection of waste oils* rather than on the methods for their final treatment. This is likely to have an impact on crime, because regeneration is easier to control in respect to collection. Specifically, while the amount of regenerated oils on the market may be used as a counter-check of the correct disposal of waste oils, literature<sup>65</sup> shows that criminals disperse waste oil and make their traceability impossible during the stages of the life-cycle of waste (production/transit/final destination).<sup>66</sup> The focus on collection may thus weaken the level of controls on the final destination of waste oils and facilitate their illegal disposal.

Crimes envisaged:

- Development of a black market of waste oil collection/disposal services by criminal cartels;
- Illegal waste disposal, through fraud and/or forgery of documents and/or corruption of public officials.

<b>CONCLUSIONS</b>
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The waste disposal sector presents great crime risks, due to its accessibility and attractiveness to organised crime and a low probability that this infiltration could be easily detected and controlled. The essential lines of the draft Thematic Strategy, as it appears from the IA, do not seem to address these points. With reference to the specific options chosen in the IA, the use of economic instruments such as landfill taxes and tradable certificates could provide opportunities for a range of criminal conduct, e.g. tax evasion through fraud, forgery of documents, corruption of officials, and speculation on the tradable certificate stock-exchange. Furthermore, repealing the priority of oil regeneration may weaken the level of controls on the final destination of waste oils and facilitate their illegal disposal (see *Crime risks arising from specific options*).

Because of the general risks inherent in the vulnerability of the sector and the specific risks summarised above, it is advisable that a closer examination of the possible crime implications of the proposal be made in order to establish exactly which impacts they may have. For this reason an Extended CRA is highly recommended.

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<sup>64</sup> *Ibid.*, p. 32.

<sup>65</sup> See note 13;

<sup>66</sup> See *infra* p. 3.



## EXTENDED CRIME RISK ASSESSMENT OF 2004-ENV-001

### *"Thematic Strategy on the prevention and recycling of waste"*

BACKGROUND
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#### Relevant Documents

- Council of the European Union, *Common position adopted by the Council with a view of the adoption of a Regulation of the European Parliament and of the Council on shipments of waste*, 15311/04, 24/05/2005, hereinafter common position.
- Council of the European Union, *Common position adopted by the Council with a view of the adoption of a Regulation of the European Parliament and of the Council on shipments of waste: Draft Statement of the Council's Reasons*, 15311/04 ADD1, 24/05/2005.
- European Commission, *Amended proposal for a Regulation of the European Parliament and of the Council on the Shipments of Waste*, COM (2004) 172, 8/3/2004.
- European Commission, *Commission Staff Working Document: Impact Assessment on the Thematic Strategy on the prevention and recycling of waste and the immediate implementing measures*, SEC (2005) 1681, hereinafter IA.
- European Commission, *Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council on Shipments of Waste*, COM (2005) 303, 1/7/2005.
- European Commission, *Opinion of the Commission pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the proposal for a Regulation of the European Parliament and of the Council on Shipments of Waste*, COM (2005) 641, 1/12/2005.
- European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Shipments of Waste*, COM (2003) 379, 30/06/2003, hereinafter original proposal of the Commission.
- European Parliament, *European Parliament legislative resolution on the proposal for a European Parliament and Council regulation on shipments of waste*, P5\_TA(2003)0505, 19/11/2003, hereinafter EP first reading .
- European Parliament, *European Parliament legislative resolution on the Council common position for adopting a regulation of the European Parliament and of the Council on shipments of waste*, P6\_TA(2005)0393, 25/10/2005, hereinafter EP second reading.
- *Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste*, OJL190, 12/07/2006, p.1.

### **Initial policy options.**

The IA identified five operational objectives to achieve the general aim of the Thematic Strategy<sup>67</sup> and for each of them several policy options were proposed. The European Commission chose one option for each operational objective. Following are the objectives and their chosen options:

**OBJECTIVE 1:** *Ensure that sound knowledge on the environmental impacts of waste generation and management is the basis of waste policy development.*

Chosen option: Moving to Life Cycle Thinking (LCT).<sup>68</sup>

**OBJECTIVE 2:** *Exploit the potential of waste prevention to contribute in reducing the environmental impacts of resource use.*

Chosen option: adopting a framework for Waste Prevention policies (including prevention programmes, and a Recommendation to guide MSs in developing waste policies and providing the diffusion of best practices).

**OBJECTIVE 3:** *Exploit the potential of waste recovery and recycling to contribute in reducing the environmental impacts of resource use.*

Chosen option: encouraging Member States to exploit economic instruments (in particular, landfill taxes and tradable certificates).

**OBJECTIVE 4:** *Improve the regulatory environment for recycling and recovery activities.*

Chosen options: A) moving to an EU recycling society by developing common environmental requirements for waste recycling. B) Revising Waste Framework Legislation<sup>69</sup> and adopting Interpretative Guidelines for issues needing a case by case approach.

**OBJECTIVE 5:** *Reduce the environmental impacts of waste oils.*

Chosen option: focusing on full collection of waste oils and repealing the priority of regeneration (by repealing the existing Waste Oil Directive).

### **Conclusions of the Preliminary Crime Risk Assessment.**

The Preliminary Crime Risk Assessment (PCRA) of the proposal concluded the vulnerability of the waste sector to crime to be extremely high.

The choice of using economic instruments such as landfill taxes and tradable certificates showed significant crime risks of possible frauds, corruption and environmental crimes.

The repealing of the oil regeneration priority showed a significant risk of possible illegal disposal. For these reasons, an Extended Crime Risk Assessment (ECRA) was recommended on the Thematic Strategy on the prevention and recycling of waste.

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<sup>67</sup> "The overall objective of waste policy is to reduce the environmental impacts of waste generation and management and in this way contribute to reducing the overall environmental impacts associated with resources use" (IA, p. 25).

<sup>68</sup> "Life Cycle Thinking" is an approach aimed at minimizing life-cycle waste generated impacts through the use of different evaluation tools. A detailed definition can be found at [http://www.polymtl.ca/ciraig/ciraig\\_eng\\_content\\_01.html](http://www.polymtl.ca/ciraig/ciraig_eng_content_01.html).

<sup>69</sup> Specifically, the new Waste Framework Directive would replace the Council Directive of 15 July 1975 on waste (75/442/EEC, published in the Official Journal L 194 , 25/07/1975) and the Council Directive of 12 December 1991 on hazardous waste (91/689/EEC, published in the Official Journal L 377 , 31/12/1991).

#### **Further remarks.**

On the 14<sup>th</sup> of October 2005 a meeting with DG ENV took place in order to discuss the results of the PCRA.<sup>70</sup> This meeting was followed by another meeting on the 3<sup>rd</sup> of April 2006.<sup>71</sup> After a discussion with the services responsible for the proposal, it was decided that the ECRA would shift its focus. It was jointly agreed that the ECRA would analyze the different options concerning the *Regulation on shipments of waste* as emerging from the proposal of the European Commission (COM (2003) 379) and the amendments proposed by the Council and the European Parliament. In particular, it was decided that the ECRA would focused on the unintended criminal effects implied in different levels of restriction of shipments of waste. Therefore, the ECRA was focused on the amendments to the rules concerning objections to shipments of waste (i.e. to Articles 12 and 13 of the Commission's original proposal). Moreover, the ECRA only focused on debated issues, i.e. issues which the European institutions disagreed upon during the legislative process.

On the 14<sup>th</sup> of June 2006 the European Parliament and the Council signed the final text of the Regulation on shipments of waste.<sup>72</sup> After consultation with DG JLS it was decided to continue the ECRA.

The present ECRA was developed between 1<sup>st</sup> May and the 20<sup>th</sup> of July 2006. The following experts participated in the ECRA: Prof. Roberto Zoboli (Adjunct Professor at Cattolica University, Milan; Research Director at CERIS-CNR) and Ms. Susanna Paleari (Researcher at CERIS-CNR); Prof. Mario Maggioni (Professor at Cattolica University, Milan); Prof. Ernesto Savona (Professor at Cattolica University, Milan and Director of Transcrime), Ms. Sara Martocchia (Researcher at Transcrime) and Mr. Francesco Calderoni (Researcher at Transcrime).

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<sup>70</sup> The meeting was attended by Prof. Ernesto U. Savona (Transcrime), Prof. Maggioni (Cattolica University, Milan), Ms Sara Martocchia (Transcrime), Ms Martina Montauti (Transcrime), Ms Dora Balazs (European Commission, DG JLS) and Mr Christopher Allen (European Commission DG ENV).

<sup>71</sup> The meeting was attended by Prof. Ernesto U. Savona (Transcrime), Prof. Maggioni (Cattolica University, Milan), Ms Sara Martocchia (Transcrime), Mr Francesco Calderoni (Transcrime), Ms Dora Balazs (European Commission, DG JLS), Mr Christopher Allen (European Commission DG ENV), Ms Anna Karamat (European Commission, DG ENV) and Mr. Peter Wessman (European Commission, DG ENV).

<sup>72</sup> *OJ*, L 190, 12/07/2006, p. 1.

## ASSESSMENT OF THE POLICY OPTIONS AT RISK

### Result of the assessment of the proposal by the expert team.

The positions of the European Parliament, the European Commission and the Council of the European Union have been assessed by a team of experts through a questionnaire. The procedure established for an ECRA should request, when possible, one questionnaire for each crime envisaged. In this case, because of the strong interrelation of crimes involved in the waste sector (fraud, environmental crimes, forgery, bribery of public officials and tax evasion), and the scarce availability of existing data for the separate crimes, it has been decided to assess the proposal through only one questionnaire. Every reference to fraud should be interpreted as possibly including other related crimes such as environmental crimes (e.g.: illegal dumping of waste, illegal disposal), forgery of related documents, bribery of public officials and authorities and tax evasion (landfill taxes and other taxes).

Following the answers to the questionnaire are listed in italics, whilst the explanation is given in bold.

A graphical symbol has been associated with each assessment:



indicates a reduction of expected effects on crime risks;




indicates that no influence on crime risks is expected;




indicates an increase of the expected effects on crime risks.

### 1. Crime.

#### A) WILL THE AMOUNT OF CRIME VARY?


EP position: *the amount of crime is likely to decrease. Depending on national treatment capacities, it may increase local crime.* 

**More restrictions on international shipments of waste should decrease the overall number of international crime in the waste treatment sector. In countries with low waste treatment capacities, this may increase local crime.**

EC and Council position: *the amount of crime is likely to increase. Depending on national treatment capacities, it may reduce local crime.* 


**Greater freedom for international shipments of waste should increase the likelihood of international crime. In countries with low waste treatment capacities, this may reduce local crime.**

#### B) HOW WILL THE RISK OF BEING DETECTED COMMITTING A CRIME VARY?

EP and EC+CN positions: *the risk of detection is likely to increase.* 

The procedures for notification and consent (not subject to amendments) are very stringent and increase the likelihood of being detected making illegal shipment operations, e.g. illegal disposal during transport. However, with a greater freedom of circulation across different countries (EC + CN position) with different authorities, administrations, and legal systems the probability of being detected and prosecuted might decrease.

**C) HOW WILL THE EXPECTED PROFIT FOR THE AUTHORS OF A CRIME VARY?**

EP position: *profits for a single crime are likely to remain constant.* 


More restrictions on international shipments of waste may increase (depending on national waste treatment capacities) local crime. However, profits from a single crime should not change significantly.

EC + CN position: *profits from single crimes are likely to increase.* 

Greater freedom for international shipments of waste should increase the likelihood of international crime. Criminals may ship waste and commit crime in MSs where controls and enforcement capacities are low. This would give them higher profits. It must be noted that international shipments of waste will be subject to a stringent notification and consent procedure that may increase both costs (transport, documentation, possible bribery and corruption of multiple officials) and risk of detection (multiple competent authorities) for criminals.

**2. Authors.**


**A) WILL THE NUMBER OF AUTHORS VARY?**

EP and EC+CN positions: *The number of authors is likely to remain constant.* 

**B) HOW WILL THE COMPLEXITY OF THE ORGANIZATIONAL STRUCTURE OF A CRIME VARY?**

EP position: *organisational requirements are likely to remain low.* 

More restrictions on international shipments of waste may increase (depending on national waste treatment capacities) local crime. These need less organisation than international crime.


EC+CN position: *organisational requirements are likely to increase and higher number of people will be needed for a single operation.* 

Greater freedom for international shipments of waste should increase the likelihood of international crime. An increase in the organisational requirements will be needed to deal with such an international dimension. For example, more formalised organisations will be needed, possibly covered by normal legal trading activities, and possibly operating on a multinational scale, able to deal with many and complicated steps in performing the operations.

**C) HOW WILL THE INDIVIDUAL SKILLS/KNOWLEDGE REQUIRED TO COMMIT A CRIME VARY?**

EP position: *individual skill/knowledge requirements are likely to remain low.* 

More restrictions on international shipments of waste may increase (depending on national waste treatment capacities) local crime. These do not require extended skills or knowledge.

EC+CN position: *individual skills/knowledge requirements are likely to increase.* 

Greater freedom for international shipments of waste should increase the likelihood of international crime. More sophisticated individual skills will be needed (knowledge of international shipment, knowledge of norms from different countries, both general and in the waste sector, etc.).

**D) FOR NATURAL PERSONS, HOW WILL THE PROFESSIONAL REQUIREMENTS NEEDED TO COMMIT A CRIME OR FACILITATING THE COMMISSION OF A CRIME VARY?**


EP position: *professional requirements are likely to remain low.* 

More restrictions on international shipments of waste may increase (depending on national waste treatment capacities) local crime. These do not require specific professional requirements.

EC+CN position: *professional requirements are likely to increase.* 

Greater freedom for international shipments of waste should increase the likelihood of international crime. Higher professional requirements for waste operators may be needed.

**E) FOR LEGAL PERSONS, HOW WILL THE ECONOMIC/LEGAL REQUIREMENTS NEEDED TO COMMIT A FRAUD VARY?**

EP position: *requirements for legal persons are likely to remain low.* 

More restrictions on international shipments of waste may increase (depending on national waste treatment capacities) local crime. In this case, requirements for legal persons would be very limited.

EC + CN position: EC+CN position: *requirements for legal persons are likely to increase.*



**Greater freedom for international shipments of waste should increase the likelihood of international crime. In these cases, higher legal/economic requirements for legal persons may be needed.**

### **3. VICTIMS.**

*The experts could not answer to this point because no data is available. Further research is needed. Although no specific data is available, it could be assumed that the variations in the number of crimes could have a direct consequence on the number of victims (more crime equals more victims and vice versa).*

### **4. COSTS/HARMS.**

*The experts could not investigate this point because no data is available. Further research is needed.*

#### **Additional considerations.**

In general, the increase of international shipments of waste may impact on the *modi operandi* of criminals in the waste treatment cycle. Some elements will reduce crime risks:

- international illegal operations will require more complex organizational structures and skills from criminals;
- costs for transport, logistics and documents may also increase, therefore reducing profits from crime;
- the notification and consent procedures provided in the Regulation on shipments of waste are stringent and may provide sound tracking and control of the shipments of waste;
- the availability of different (international) solutions to treat waste at different prices may deter illegal behaviours in the home country.

Some elements will increase crime risks:

- possible lack of coordination in the law enforcement activity between MSs could create loopholes in the controls; a reduced risk of being detected may ensue for criminals.
- the possibility to ship waste to a MS where illegal practices are more frequent/less controlled (and therefore less expensive) may stimulate illegal operations.

Proposed amendments modifying the conditions for the objections to waste shipments will be considered from a criminological point of view. The amendments were grouped into three categories for a better analysis.

**Interim operations.<sup>73</sup>**

Interim operations are critical from a criminological point of view. Fraud and environmental crimes are frequently committed during such phases of the treatment cycle. The EP showed concern about possible fraud and amended the original proposal of the Commission introducing the possibility to restrict shipments of waste for interim operations. The Council and the Commission replied that specific provisions were already foreseen in the draft Regulation dealing with interim operations. Indeed, Article 16 of the original proposal of the Commission (Article 15 of the approved Regulation) provided for additional measures for interim operations. These will require additional information on the destination and treatment of the interim recovery or disposal operation. This mechanism appears to be stringent enough to provide rapid and effective information on possible illegal behaviours concerning such operations. From a fraud prevention perspective, the effective and full implementation of such a provision will be a crucial issue.

**National standards/legislation.<sup>74</sup>**

According to the EP, these restrictions were aimed at reducing possibilities for eco-dumping, i.e. flow of waste towards countries with lower costs and standards. It should be noted that eco-dumping *per se* does not always imply criminal or illegal behaviours. Indeed, lower costs may be caused by many different factors, such as economic efficiency and taxes, and lower standards may still comply with national and international legislative framework on waste treatment. However, it is also true that in some cases lower costs/standards may actually be a consequence of the diffusion of illegal behaviours in the waste treatment cycle.

Consequently, international shipments of waste may produce crime risks:

- if lower costs and standards in some MSs result from illegal practices in the waste treatment cycle; if more waste is shipped to those MS where illegal activities are frequent, more crimes (fraud, environmental crimes) will take place.
- in MSs with low costs/standards (whether through low taxes, high efficiency or criminal activities) *and* low treatment capacity, the increased flow of waste may glut the national capacity and stimulate illegal dumping/treatment of waste.

In some circumstances, restrictions on international shipments of waste may produce crime. Such restrictions on preventing eco-dumping will force national operators to treat waste in national facilities. If this solution is too expensive, operators may prefer illegally dump, treat or ship waste in order to avoid excessive costs.

From a crime prevention perspective, the key elements in the assessment of the best option are MSs' treatment capacities (different for disposal and recovery) and cost differentials between MSs, i.e. the difference in costs for treating waste. The higher the differentials, the higher the incentives to ship waste to the less expensive MS. If these countries have low treatment capacities as well as low tracking, monitoring and enforcement capacities, many criminal opportunities may arise.

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<sup>73</sup> This provision was in Article 12 §1 (c) and Article 13 §1 (d) of the Regulation after the EP first reading.

<sup>74</sup> This title includes Art. 12 §1 (d), (k) and Article 13 §1 (e), (n), (o) of the Regulation after the EP first reading.



**Unnecessary transport and self-sufficiency principle.<sup>75</sup>**

The EP proposed amendments in order to reduce unnecessary transport of waste. From a criminological point of view, it is important to stress that transportation is a very critical phase of the waste cycle. This happens because of the difficulty in controlling and monitoring the transport of waste. During such a phase various illegal behaviours may take place, such as illegal dumping, fraud, environmental crimes. Moreover, unnecessary transport may be used as a shield for illegal operations. Accordingly, restrictions on unnecessary transportation may significantly reduce crime opportunities.

In general, the principle of self-sufficiency (both at national and Community level) does not present crime issues in itself. However, in some cases its application could bring some long-term effects in crime trends.<sup>76</sup> The implementation of the self-sufficiency principle may allow for better tracking and control of waste flows and reduce the overall number of waste transport/interim operations.

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<sup>75</sup> This title includes Article 12 §1 (g), (h) and Article 13 §1 (h), (i), (k), (p) of the Regulation after the EP first reading.

<sup>76</sup> As noted by the Commission (see COM(2004) 172, p.7) and the Council, the self-sufficiency principle only applies to disposal and not to recovery.

## CONCLUSIONS

The expert team concluded that the best options from a crime reduction perspective are as follows:

- **interim operations:** interim operations are extremely critical phases of the waste treatment cycle; the effective and full implementation of the specific rules provided by Article 15 of the final text is crucial in preventing crime during interim operations.
- **national standards/legislation:** the optimal choice depends on the ratio between national treatment capacities and cost differentials between MSs. If high cost differentials exist, cross-border shipments of waste will be stimulated. Wherever national treatment capacities are low, the flow of imported waste may stimulate illegal behaviours;
- **unnecessary transport and self-sufficiency principle:** restrictions on unnecessary transport of waste is advisable in order to prevent possible exploitation by criminals of such operations by criminal. The self-sufficiency principle, while not showing a direct impact on crime risks, may provide a long-term indirect positive impact on crime.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2005–INFSO–004

### *“Commission Communication on eAccessibility”*

(Expected date of adoption: April 2005)

BACKGROUND
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#### **Materials provided by the Commission (in chronological order)**

Proposal Roadmap: *Commission Communication on eAccessibility*, hereinafter referred to as “Roadmap”.

Impact Assessment: *Commission Communication on eAccessibility*, hereinafter referred to as “IA”.

*Draft Communication from the Commission on eAccessibility*, 20 February 2005, hereinafter referred to as “Draft Communication”.

#### **Additional Materials collected by Transcrime**

European SeniorWatch Observatory and Inventory, *Older People and Information society Technology*, Final Report, 5 April 2002. Available at: [www.seniorwatch.de/reports/D51\\_final.pdf](http://www.seniorwatch.de/reports/D51_final.pdf) (last visited in July 2005).

European Commission, *Report: Public on-line consultation on a forthcoming Commission Communication on eAccessibility*, 31 March 2005. Available at: [http://europa.eu.int/information\\_society/policy/accessibility/com\\_ea\\_2005/a\\_documents/com\\_consult\\_res.pdf](http://europa.eu.int/information_society/policy/accessibility/com_ea_2005/a_documents/com_consult_res.pdf) (last visited in July 2005).

#### **Options to be assessed**

Among the options considered in the Roadmap and in the IA,<sup>77</sup> the proposing DG has chosen Option d), “coordinate actions”, which is specified in the Draft Communication and includes the following three approaches to promote an “Accessible Information Society”: public procurement, certification and legislation.

#### **Result of the initial screening**

The proposed Communication can be framed in Typology of Regulation at Risk<sup>78</sup> n. 7 (“*Legislation that provides officials with regulatory power*”), because it promotes the introduction a certification scheme in order to verify the compliance with accessibility requirements.

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<sup>77</sup> The other options were: a) Do nothing (leave the work to Member States and stop the on-going initiatives); b) Legislate (it can only be undertaken if sufficient evidence of failure of other options is gathered); c) Business as usual.

<sup>78</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

## GENERAL FACTORS TO BE CONSIDERED

### Formal aspects of the draft proposal

The draft Communication does not present any general risks arising from its formal aspects. In fact, the proposed type of instrument is not a prescriptive act and does not present a crime risk in itself: it works as an “early warning” to all stakeholders involved, “leaving the door open for more drastic remedial actions” (Roadmap, p. 3). In other words, as explained further in the Communication, the main objective of the policymakers is “to promote harmonisation on a voluntary basis and to foster self-regulation” (Communication, paragraph 1).

### Vulnerability of the sector/area to be regulated

No general risks arising with reference to the impact of the draft Communication on the sector to be regulated. See above motivation (*Formal aspects of the draft proposal*).

## CRIME RISKS ARISING FROM SPECIFIC PROVISIONS

With reference to paragraphs 4.1 and 4.2

Contents: paragraphs 4.1 and 4.2 of the Draft Communication describe the following two approaches to encourage the abolishment of barriers to persons with disabilities in the use of ICT products and services:

Public procurement: it means to require competitors in the furnishing of goods and services to observe accessibility requirements when dealing with public authorities.

Certification: it could be a self-certification or a certification obtained by certification bodies (public or private). This would serve as a “eAccessibility mark” for goods and services, which could be used to facilitate monitoring and compliance with regulations on accessibility.

Crime risks: If a public authority decides to follow both approaches (i.e. requiring the competitors in a public tender to certify their accessibility requirements in order to participate to the bid), there is a risk of frauds by competitors for public procurement contracts.

Crimes envisaged: frauds committed by forging documents attesting false accessibility requirements.

## CONCLUSIONS

The draft Communication does not introduce any new regulation but merely encourages the adoption of accessibility requirements on a voluntary basis. The language used is intentionally general and leaves open a choice of different instruments. An Extended Crime Risk Assessment would be needed in the future if the certification approach is chosen as a mandatory option (and not on a voluntary basis as it emerges from the Draft Communication), because in this case industries and service providers would have to conform to the standards required thus facing additional costs. Therefore, for the time being, no Extended Crime Risk Assessment is needed.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2003-MARKT-22

### *"Proposal for a Directive of Payment Services in the Internal Market"*

(Expected date of adoption: June 2005)

BACKGROUND
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#### Materials provided by the Commission

- Roadmap/Preliminary Impact Assessment.
- Working Document *A Possible legal framework for the Single Payment Area in the Internal Market. Summary of Responses* (17.10. 2002).
- Working Document *A New Legal Framework for Payments in the Internal Market* (draft text of 26.11.2004), hereinafter referred to as the "draft proposal".
- Working Document *for the Preparation of an Impact Assessment on a proposal for a Directive concerning A New Legal Framework for Payments in the Internal Market* (17.02.2005), hereinafter referred to as "IA".

#### Options to be assessed<sup>79</sup>

Among the options considered in the IA,<sup>2</sup> the proposing DG has chosen Option 1, which fixes general principles applicable to all payment services, leaving the market the task of developing the infrastructures to achieve the goal of the Directive. Specifically, the draft proposal aims at the following objectives:

- a. to produce consistent rules on information requirements and improve transparency;
- b. to develop a single set of rules that will provide more efficient, cheap and secure EU payments;
- c. to provide a new prudential regime for non-bank payment service providers.

In the words of the IA: "The proposal does not address the relationship between service providers but only that between providers and users nor does it mandate a specific payment solution or the set-up of payment services".<sup>80</sup>

#### Result of the initial screening

The proposed Directive can be framed in both *Typology of Regulation at Risk*<sup>81</sup> n. 2 ("legislation that introduces a concession on a tax or a concession on any other fee or obligation"), because it

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<sup>79</sup> There were four options initially considered in the preparatory works (see Roadmap and Preliminary Impact Assessment); the Commission has chosen *Option 1*. The others were: *Option 2* "Regulatory assessment – subsidiarity and proportionality", *Option 3* "Diverging or standardised customer information requirements", *Option 4* "Differentiated or common approach concerning the rights and obligations of providers and users of payment services", *Option 5*: "Keep fragmented market access conditions or harmonise access requirements for payment service providers".

<sup>80</sup> See IA, p. 74.

establishes the possibility of waiving the requirements for access to the payment market, and in *Typology of Regulation at Risk* n. 7 (“legislation that provides officials with regulatory power”), as it gives supervisory authorities the power of allowing or denying access to the market.

## GENERAL FACTORS TO BE CONSIDERED

### Formal aspects of the draft proposal

External coherence: the relationship between the proposed Directive (specifically, art. 13 combined with art. 5 letter d) and the Third Anti-money laundering Directive, with reference to money remitters is not well specified. In particular, it is not clear whether money remitters will be bound to this instrument.

Clarity: with reference to art. 3 para. 2 and 4, the words “*unless stated otherwise*” seems too generic, as it does not clarify how such a statement may occur, i.e. who can “state otherwise”, the extent of the term “otherwise” and whether the article refers only to pre-existing statements, in respect of the Directive, or also to possible future exclusions.

### Vulnerability of the sector to be regulated

The main risks associated with the payment service market are connected with the vulnerabilities of remote payment systems and arise from the lack of common security standards within the European Union.<sup>82</sup>

The proposed Directive does not address these aspects, as the Commission leaves the development of technological support and security systems (as part of the infrastructures) to self regulation.<sup>83</sup> For this reason the industry should develop knowledge on security and quality of payment instruments to find the best solutions for an efficient implementation of the Directive. This leads to the question of whether or not the industry sector will be able to extend and apply these best solutions to all the European payment services providers.

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<sup>81</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

<sup>82</sup> On the security issues related to payment systems in the European Union see the outcomes of the *Conference E-Payments without frontiers*, organized by the European Central Bank on 10 November 2004; they are available at: <http://www.ecb.int/events/conferences/html/epayments2004.en.html>. For an overview of the security standards developed within the US legislation, see Field R., “The Electronic Future of Cash: Survey: 1996: Survey of the Year's Developments in Electronic Cash Law and the Laws Affecting Electronic Banking in the United States”, in *American University Law Review*, vol. 46, 1997, p. 967–1026. A useful source of information on fraud and counterfeiting of non-cash payments in the EU market is available at the following website: [http://europa.eu.int/comm/internal\\_market/payments/fraud/index\\_en.htm](http://europa.eu.int/comm/internal_market/payments/fraud/index_en.htm).

<sup>83</sup> See Working Document for the Preparation of an Impact Assessment on a proposal for a Directive concerning *A New Legal Framework for Payments in the Internal Market* (17.02.2005), pp. 6–9, where the 3-pillar model to create a Single Payment Market is explained.

Furthermore, it should be taken into account that a trade off between two opposite interests occurs: customer data protection *vs* system transparency.<sup>84</sup> In particular, the use of cryptographic instruments makes the transaction secure as far as the customer's privacy is concerned, but this could be exploited by sophisticated criminals to make anonymous and invisible illicit operations. This occurrence would reduce the possibility of tracing possible criminal transactions and would therefore increase market accessibility for criminals as there would be a lower risk of being detected and punished.

*Crimes envisaged:*

- Cracking of remote banking and non-banking security systems, e.g. through the exploitation of payment verification systems, such as magnetic cards (ATM, credit cards, smart cards etc.) or cryptography tools.
- Information theft, identity theft.<sup>85</sup>
- Money laundering/organized crime, through the exploitation of the anonymity of payment systems.<sup>86</sup>

<b>CRIME RISKS ARISING FROM SPECIFIC PROVISIONS</b>
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*With reference to art. 12 of the draft proposal (Supervision):*

*Contents:* art. 12 para. 1 establishes that "*Member States shall appoint competent authorities for the purpose of this Directive, to ensure that payment institutions authorized in their territory to comply at all times with the requirements established in Title II, Chapter 2*". The article refers to requirements necessary to obtain authorization to enter the market.

*Crime risks:* several risks could occur because the Directive does not require minimum requirements regarding the independence and professionalism of the officials who must perform the controls. Literature and financial scandals have shown that criminal conduct involving private and public entities are often committed because of the complicity of authorising bodies. This risk is reduced by fixing proper requirements supervisor appointments (e.g. incompatibility rules, professionalism and/or good repute proof etc.).

*Crimes envisaged:*

- Fraud consisting in the forgery of documents certifying the compliance of payment institutions with the directive, when supervisors collude with providers to aid and abet their illicit acts.
- Corruption of the supervisory authorities by providers, with the intention of eluding the provisions of Title II, Chapter 2 of this Directive.

*With reference to art. 13 of the draft proposal (Waiver)*

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<sup>84</sup> See "Legal Issues in Electronic Commerce in the Western Hemisphere", in *Arizona Journal of International and Comparative Law*, vol. 17, 2000, p. 219-255.

<sup>85</sup> Some examples of identity theft typologies can be found in Rusch J.J., "Computer and Internet Fraud: a Risk Identification Overview", in *Computer Fraud and Security*, June 2003, p. 6-9.

<sup>86</sup> An illustration of the connections between terrorist organizations and electronic payment systems is given by Hinnen T.N., "The Cyber-Front in the War on Terrorism: Curbing Terrorist Use of the Internet", in *Columbia Science and Technology Law Review*, vol. 5, 2003/2004, p. 3. See also Everett C., "Credit Card Fraud Funds Terrorism", in *Computer Fraud and Security*, May 2003, p. 1.

Contents: art. 13 para. 1 allows competent authorities in Member States “to waive the application of some or all of the provisions of Title II, Chapter 2 of this Directive to payment institutions” when three conditions occur: “a) the total business activities of payment institutions [...] normally does not exceed EUR 5 million on average and never exceeds EUR 6 million, b) the payment institution holds a vital economic role in micro financial intermediation as providing access to payment services for underprivileged groups [...], and c) the waiver is in the public interest in particular for law and order and the effective implementation of money laundering rules.

This article mainly refers to “underground” remittance<sup>87</sup>, i.e. money remittance services provided by “unregistered entities and used by foreigners who do not appear in the national records (e.g. illegal immigrants, persons seeking asylum)”<sup>88</sup>. Through the waiver the Commission introduces a targeted approach for the regulation of small money remitters. The Commission believes that this “will be the best way to achieve a migration of these providers from the un-official to the official sector”<sup>89</sup>. The assumption is: the more the regulatory regime will be over-burdensome for such providers, the less they will migrate towards the official sector under the control of the authorities and the goal of the Directive would not be achieved.

Crime risks: art. 13 may create two different crime risks:

- Performing illicit acts in order to request and obtain the waiver.

The waiver would make the market more accessible to newcomers, as they would not have to prove to competent authorities that they possess the prudential requirements. Payment institutions could carry out illicit acts in order to get the waiver from the authorities in Member States and avoid legal barriers.

Furthermore, thanks to the waiver, they could take advantage of a more flexible and less controlled regulatory regime for criminal purposes.

- Requesting and obtaining the waiver in order to perform money laundering.

The risk of facilitating money launderers is related to the possibility of waiving the prudential requirements to get the authorization included in art. 5 letter (d) of the draft proposal, and in particular those requirements dealing with anti-money laundering obligations, according to the third Anti-Money Laundering Directive. Even if the waiver has the beneficial effect of discouraging unofficial payment networks, its wide extent may have a negative side effect on the successful implementation of anti-money laundering rules. In fact, criminals would not be bound to demonstrate their compliance with them and, consequently, the risk of being detected and punished would be reduced.

Crimes envisaged:

With reference to risk a):

- fraud against State in order to get the waiver (e.g. through the forgery of the necessary documents demonstrating the presence of the conditions *sub* points a), b), c) of para. 1) of art. 13;
- corruption of public officials who are competent to issue the waiver to payment institutions.

With reference to risk b):

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<sup>87</sup> A thorough analysis of the concept of “underground remittance” and of the related crime risks can be found in Perkel W., “Money Laundering and Terrorism: Informal Value Transfer Systems”, in *American Criminal Law Review*, vol. 41, 2004, p. 183-211.

<sup>88</sup> See Working Document for the Preparation of an Impact Assessment on a proposal for a Directive concerning *A New Legal Framework for Payments in the Internal Market* (17.02.2005), p. 137.

<sup>89</sup> *Ibidem*, p. 137.



- money laundering, if controls and anti-money laundering measures are not implemented because of the waiver.

<b>CONCLUSIONS</b>
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The payment service sector presents great risks of criminal infiltration, linked to the differences between States regarding (a) the security of payment technologies/networks and (b) the contractual relationships between providers and users. The draft Directive seems to provide a good solution in order to address the second type of differences and it is targeted to minimize the threats of fraud perpetrated against consumers by payment providers. However, in relation to a), it is not clear whether these provisions will be sufficient to reduce the related crime risks (e.g. cracking, information/identity theft).

In addition, there are other crucial crime risks that could emerge from the specific provisions of the draft Directive, i.e. exploiting money transfers to move illicit funds, corruption and frauds.

Because of the general risks inherent in the vulnerability of the sector and the specific risks summarised above, it is advisable that a closer examination of the possible crime implications of the proposal be made in order to establish exactly which impacts they may have. For this reason an Extended CRA is highly recommended.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2003–SANCO–38

### *“The protection of chickens kept for meat production”*

(Expected date of adoption: February 2005)

#### BACKGROUND

##### Materials provided by the Commission

- Roadmap.
- Working Document *Proposal for a Council Directive laying down minimum standards for the protection of chickens kept for meat production* (hereinafter referred to as “the draft proposal”), Brussels, 30 May 2005.

##### Additional Materials collected by Transcrime

- Conclusions of the Standing Committee on the Food Chain and Animal Health, *Guidance on the Implementation of articles 11, 12, 16, 17, 18, 19 and 20 of Regulation (EC) n°178/2002 on General Food Law*. The paper can be found at the following web-site: [http://europa.eu.int/comm/food/foodlaw/guidance/guidance\\_rev\\_7\\_en.pdf](http://europa.eu.int/comm/food/foodlaw/guidance/guidance_rev_7_en.pdf)
- Report of the Scientific Committee on Animal Health and Animal Welfare, *The Welfare of chicken kept for meat production (Broilers)*, 21 March 2000.
- Animal Welfare Division, *Initial Regulatory Impact Assessment (England) – Welfare of chickens kept for meat production (Broilers)*, June 2005.
- European Commission, *Proposal for a Council Directive laying down minimum rules for the protection of chickens kept for meat production*, 31 May 2005 (01/06). The paper can be found at the following web-site: [http://europa.eu.int/comm/food/animal/welfare/farm/proposal\\_EN.pdf](http://europa.eu.int/comm/food/animal/welfare/farm/proposal_EN.pdf)
- Fabrizio Feo, *Malacarne* – Italy, January 2003. The paper can be found at the following web-site: [http://www.narcomafie.it/articoli\\_2003/art\\_01\\_2003.htm](http://www.narcomafie.it/articoli_2003/art_01_2003.htm)
- Food Standards Agency, *Illegal slaughter and the production of “smokies”* – U.K. 2004. The paper can be found at the following web-site: <http://www.food.gov.uk/multimedia/pdfs/scotsmokiesguidance.pdf>
- Food Standards Agency – Meat Hygiene Division, *Investigation into allegation of illegal re-labelling and extension of “use by” dates on fresh chickens* – U.K., August 2004. The paper can be found at the following web-site: <http://www.food.gov.uk/multimedia/pdfs/usebychicken.pdf>

##### Options to be assessed

Among the options<sup>90</sup> considered by stakeholders, the Commission decided for an *integrated approach*, whose contents are expressed in the Draft proposal, this in order to “harmonise the

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<sup>90</sup> The options considered in the Roadmap were the following: 1. *do nothing* – i.e. *leave the existing variety of conditions*; 2. *to produce a non-legislative recommendation to encourage Member States to improve the welfare conditions under which chickens for meat production are kept*; 3. *to develop a legislative text to introduce welfare improvements through*

*technical requirements concerning key factors for the welfare of chickens in combination with an indicator-based monitoring of the flocks after slaughter integrated in the post-mortem inspection for the most intensive production”.*<sup>91</sup>

### **Result of the initial screening**

The Draft Proposal can be framed in Typology of Regulation at Risk<sup>92</sup> n. 4 (“legislation that introduces or increases the tax on legal goods or in any other way increases the costs of legal goods”), because this legal instrument could increase the costs of the standardized requirements.<sup>93</sup>

The Draft Proposal can also be framed in Typology of Regulation at Risk n.7 (“legislation that provides officials with regulatory power”), because it introduces standardized requirements, whose implementation needs to be monitored by specific authorities.

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### **Formal aspects of the draft proposal**

Accuracy/Clarity of the content:

A new directive, such as that contained in the Draft Proposal, would increase the volume of regulation in this sector. Indeed, a general act concerning the protection of animals kept for farming purposes (Directive 98/58/EC) already exists and the new directive does not contain any repealing provision. Furthermore, Art. 9 of the Draft Proposal<sup>94</sup> establishes a cross-reference: to Decision 1999/468/EEC. The external reference might cause some uncertainty in the interpretation of the norm, which could be exploited to bypass it or even to commit related crimes (e.g. cruelty to animals, poisoning, fraud).

### **Vulnerability of the sector/area to be regulated**

The sector presents a lack of high entrance barriers and this makes the market more accessible also to criminals. No particular skills seem to be required to enter this sector and at the same time the area provides high profits, thus increasing its attractiveness to criminals.

Furthermore, even if the Roadmap<sup>95</sup> minimises the expected impact of the legislative instrument on the production costs, it is not clear how this might be possible in view of the possible

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*the application of minimum standards on farms, increased surveillance and monitoring and transmission of information between relevant actors within the food chain.* (Compare Roadmap, p.2).

<sup>91</sup> See Draft Proposal, p. 6.

<sup>92</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

<sup>93</sup> A “standardized requirement” is, for instance, *a light with intensity of at least 20 lux during the light periods, measured at bird eye level and illuminating the whole of the floor area* (Draft Proposal, Annex I, pag.18). The complete list of standardized requirements applicable to all the establishments can be found in Annex 1.

<sup>94</sup> See Draft Proposal, p.16.

<sup>95</sup> See Roadmap, pag.2.

additional costs related to the implementation of the standardized requirements. In this case, fraud or corruption could occur in order to avoid these extra-costs<sup>96</sup>.

<b>CRIME RISKS ARISING FROM SPECIFIC PROVISIONS</b>
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**With reference to Art. 3 of the draft proposal (Requirements for the keeping of chickens):**

Contents: Art 3 para. 3 states that in cases of derogation from the requirements presented in paragraph 2<sup>97</sup> “(...) *the Member States shall ensure that* “the inspections, monitoring and follow up provided for Annexes III and IV are carried out by competent authority, and The official veterinarian responsible for official controls in the slaughterhouse complies with the requirements set out in Annex IV <sup>98</sup>.”

Crime risks: art. 3 para. 3 and the related Annexes state both the importance of the “competent authorities” and the requirements that have to been respected within Member States. According to the definition of “competent authority”<sup>99</sup>, it is not clear if this should belong to a public or a private structure: this element could be relevant in order to measure the risk of corruption of the people involved in the reporting of the compliance with the stated requirements.

Crimes envisaged: corruption of authorities responsible to ascertain and certify the compliance with the requirements.

**With reference to Art. 4 of the draft proposal (Training and guidance for persons dealing with chickens):**

Contents: Art.4 para.1 states that “Member States shall ensure that (...):

- (i) *owners or keepers and persons employed or engaged by them to attend to chickens or to catch and to load them have received:*
- (ii) *instructions and guidance on the relevant animal welfare requirements(...);*
- (iii) *sufficient training to perform their tasks (...)*”

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<sup>96</sup> Indeed, offences related to the avoidance of additional costs in the breeding of animals are a current feature, as it clearly emerges from the extant literature related to animal meat crimes. The following is a non-exhaustive list of specific cases: Fabrizio Feo, *Malacarne* – Italy, January 2003. The paper can be found at the following web-site: [http://www.narcomafie.it/articoli\\_2003/art\\_01\\_2003.htm](http://www.narcomafie.it/articoli_2003/art_01_2003.htm). Food Standards Agency, *Illegal slaughter and the production of “smokies”* – U.K. 2004. The paper can be found at the following web-site: <http://www.food.gov.uk/multimedia/pdfs/scotsmokiesguidance.pdf>

Food Standards Agency – Meat Hygiene Division , Investigation into allegation of illegal re-labelling and extension of “use by” dates on fresh chickens – U.K., August 2004. The paper can be found at the following web-site: <http://www.food.gov.uk/multimedia/pdfs/usebychicken.pdf>

<sup>97</sup> See Draft Proposal, pag. 13,14.

<sup>98</sup> See Draft Proposal, pag.15.

<sup>99</sup> See Draft Proposal, Art.2, p.13.

Art.4 para.3 states that “(...) the owner or keeper of the chickens shall hold a certificate which is recognised by the competent authority of the Member State, attesting to the completion of such a training courses or having acquired experience equivalent to such training.”

Art.4 para.4 states that “Member States may recognize experience acquired before (1 December 2006) as being equivalent to participation in such training courses and shall issue certificates attesting to such equivalences”<sup>100</sup>.

Crime risks: with regard to Art.4 it is not clear what the possible economic impact of the training courses are. The presence of relevant costs could create some crime opportunities in order to obtain the required certifications.

Crimes envisaged: corruption of the authorities involved in the reporting of these documents seems to be the main crime arising from this provision.

**With reference to Art. 5 of the draft proposal (Labelling of chicken meat ):**

Contents: Art.5 states that “(...) The Commission shall submit to the European Parliament and to the Council a report on the possible introduction of a specific mandatory labelling regime at Community level for chicken meat, meat products and preparations based on compliance with animal welfare standards.”<sup>101</sup>:

Crime risks

A future labelling regime for chicken meat, possibly representing an essential element to commercialise the product in the market, might incentivate the crime risks underlined above, especially with regard to frauds. <sup>102</sup>.

Crimes envisaged: See above.

<b>CONCLUSIONS</b>
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The overlapping with other already existent legal instruments (i.e. Directive 98/58/EC, Decision 1999/468/EEC and Decision 1999/468/EC ) and the lack of clarity of content in the legislative text (see *Formal aspects of the draft proposal* and *Crime risks arising from specific provisions*) introduce elements of vulnerability in the draft proposed directive.

In view of the high vulnerability of the sector, demonstrated by the numerous fraud cases in the breeding of animals reported above (see *Vulnerability of the sector/area to be regulated*), this lack of clarity might be exploited in order to avoid the application of the requirements introduced by the proposed directive. This could be done through falsification of certificates, corruption of the officials responsible for certifying the existence of these requirements and supervisory authorities,

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<sup>100</sup> See Draft Proposal, p.15.

<sup>101</sup> *Ibidem*.

<sup>102</sup> See the following paper: Food Standards Agency – Meat Hygiene Division , *Investigation into allegation of illegal re-labelling and extension of “use by” dates on fresh chickens* – U.K., August 2004. The paper can be found at the following web-site: <http://www.food.gov.uk/multimedia/pdfs/usebychicken.pdf>

or through other types of fraud. Furthermore, these criminal practices might be encouraged in view of the future introduction of labelling schemes.

Accordingly, a *medium* crime risk is envisaged and an extended Crime Risk Assessment is thus recommended.

## EXTENDED CRIME RISK ASSESSMENT OF 2003–SANCO–38

### *“The protection of chickens kept for meat production”*

<b>BACKGROUND</b>
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#### **Relevant Documents**

- Roadmap.
- European Commission, *Proposal for a Council Directive laying down minimum rules for the protection of chickens kept for meat production*, COM (2005) 221, 30/5/2005, hereinafter draft proposal.

#### **Initial policy options.**

The roadmap identified three possible policy options:

- “Do nothing – i.e. leave the existing variety of conditions;
- Produce a non-legislative recommendation to encourage Member States to improve the welfare conditions under which chickens for meat production are kept;
- Develop a legislative text to introduce welfare improvements through the application of minimum standards on farms, increased surveillance and monitoring and transmission of information between relevant actors within the food chain.”<sup>103</sup>

#### **Conclusions of the Preliminary Crime Risk Assessment.**

The Preliminary Crime Risk Assessment (PCRA) of the proposal concluded the vulnerability of the sector of chickens for meat production to crime to be high.<sup>104</sup>

The definition of a competent authority does not specify whether this should belong to a public or a private structure. A possible risk of bribery and corruption of the competent authority was envisaged.<sup>105</sup>

The economic impact of the training courses on the market operators is unclear. If the courses represent a relevant cost, illegal behaviours may occur in order to obtain the required certifications.<sup>106</sup>

The envisaged future labelling regime for chicken meat may increase the above crime risks, since the “EU label” will probably represent an added value for the consumers. Illegal behaviours may rise in order to fraudulently obtain such a label.

For these reasons, an Extended Crime Risk Assessment (ECRA) was recommended on the proposal.

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<sup>103</sup> Roadmap, p. 1.

<sup>104</sup> PCRA, p. 3.

<sup>105</sup> PCRA, p. 3–4.

<sup>106</sup> PCRA, p. 4.

### **Further remarks.**

As already envisaged by the Commission's Roadmap, the third policy option – i.e. a legislative instrument introducing minimum rules – was preferred ("During the extensive stakeholder consultations which took place during the elaboration of the proposal, the option of a legislative approach harmonising standards applied on farms was broadly welcomed by all interested parties. The most appropriate legislative instrument is a Council Directive setting up minimum standards on animal welfare."<sup>107</sup> A first draft of the Council Directive was made available by the Commission at the beginning of the Crime Risk Assessment exercise. Accordingly, it was decided to conduct the present Crime Risk Assessment exercise on the Draft proposal.

On October 14th 2006 a meeting with DG SANCO was held in order to discuss the PCRA.<sup>108</sup> The Commission argued that the draft proposal does not address the chicken meat market, rather just the protection of live chickens. Transcrime replied that the PCRA focused on crime risks emerging from the meat production sector because the two (chicken breeding and meat production) are strictly connected.

The present ECRA was developed between 1<sup>st</sup> July and the 5<sup>th</sup> of September 2006. The following experts participated in the ECRA: Mr. Mauro Morlacchini (Researcher at Centro Ricerche per la Zootecnia e l'Ambiente "CERZOO" and Cattolica University, Piacenza); Prof. Mario Maggioni (Professor at Cattolica University, Milan); Prof. Ernesto Savona (Professor at Cattolica University, Milan and Director of Transcrime), Ms. Sara Martocchia (Researcher at Transcrime) and Mr. Francesco Calderoni (Researcher at Transcrime).

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<sup>107</sup> Roadmap, p. 1.

<sup>108</sup> The meeting was attended by Prof. Ernesto U. Savona (Transcrime), Prof. Maggioni (Cattolica University, Milan), Ms. Sara Martocchia (Transcrime), Ms. Martina Montauti (Transcrime), Ms Dora Balazs (European Commission, DG JLS) and the representatives of DG SANCO..



## ASSESSMENT OF THE POLICY OPTIONS AT RISK

The specific provisions presenting a significant crime risk after the PCRA (see above, under *conclusions of the Preliminary Crime Risk Assessment*) have been assessed by a team of experts through a questionnaire. The only envisaged crime risk concerned possible bribery and corruption of the authority competent to carry out veterinary or zootechnical checks. However, it should be remembered that some cases of corruption may eventually include possible fraud against consumers, since it could result in products being sold that do not comply with EU standards. Following, the answers to the questionnaire are listed in italics, whilst an explanation is given in bold.

A graphical symbol has been associated with each assessment:



indicates that the expected effects would reduce crime risks;




indicates that no influence on crime risks is expected;



indicates that the expected effects would increase crime risks.

### 1. Crime.

#### A) WILL THE AMOUNT OF CORRUPTION VARY?

*The amount of corruption is likely to increase.* 


**The draft proposal will increase costs for market operators and therefore reduce their profit margin. This may stimulate corruptive behaviours attempting to avoid the increased costs arising from full compliance with EU standards.**

#### B) HOW WILL THE RISK OF BEING DETECTED COMMITTING A CRIME VARY?

*The risk of detection is likely to increase.* 

**The full implementation of the rules of Annex III (inspections and procedure in cases of non-compliance) and the requirements set out by Annexes I and II should increase the possibility to detect illegal behaviours. However, the production activities mainly take place at a local/regional level. Therefore, the competent authority (frequently with competence at a local/regional level) may therefore be one and the same. Frequent contacts may increase the authority's knowledge of producers, but may also facilitate its corruption.**

#### C) HOW WILL THE EXPECTED PROFIT FOR THE AUTHORS OF A CRIME VARY?

*Profits for a single crime are likely to increase.* 

The draft proposal may impose some additional costs on market operators (compliance with EU standards, training courses). Therefore, corruption of the competent authorities may confer higher profits due to fraudulent non-compliance with EU rules.


## **2. Authors.**

### **A) WILL THE NUMBER OF AUTHORS VARY?**

*The number of authors is likely to remain constant.* 

No specific data is available in order to assess such an impact.

### **B) HOW WILL THE COMPLEXITY OF THE ORGANIZATIONAL STRUCTURE OF A CRIME VARY?**

*Organisational requirements are likely to remain constant.* 

Corruption of the competent authority involves several people. The local scale of the production activity requires an extremely complex organisation. The draft proposal does not seem to affect this issue.

### **C) HOW WILL THE INDIVIDUAL SKILLS/KNOWLEDGE REQUIRED TO COMMIT A CRIME VARY?**

*Individual skill/knowledge requirements are likely to remain constant.* 


The draft proposal does not affect this issue. Given the local scale of the production stage, only simple knowledge of basic production/management techniques and relevant norms is required.

### **D) FOR NATURAL PERSONS, HOW WILL THE PROFESSIONAL REQUIREMENTS NEEDED TO COMMIT A CRIME OR FACILITATING THE COMMISSION OF A CRIME VARY?**

*Professional requirements are likely to remain constant.* 

The draft proposal does not affect this issue.

### **E) FOR LEGAL PERSONS, HOW WILL THE ECONOMIC/LEGAL REQUIREMENTS NEEDED TO COMMIT A FRAUD VARY?**

*Requirements for legal persons are likely to remain low.* 

The draft proposal does not affect this issue.

### **3. Victims.**

#### **A) WILL THE NUMBER OF VICTIMS VARY?**

*The experts could not answer these points because no data is available. Further research is needed. Although no specific data is available, the experts pointed out that cases of corruption may entail fraud against consumers with possible impacts on the consumers' health. These consequences may be particularly serious when the same market operator also owns a slaughterhouse. Indeed, after this stage, the meat could reach national and international markets.*

#### **B) HOW WILL THE AMOUNT OF VICTIMS–NATURAL PERSONS VARY?**

See answer to point 3.A).

#### **C) HOW WILL THE SOCIO–DEMOGRAPHIC CHARACTERISTICS OF VICTIMS (NATURAL PERSONS) VARY?**

*Potential frauds will likely affect poorer social classes.* 

**In order to increase sales, products not complying with EU standards (entering the market thanks to the corruption of the competent authority) may be sold at lower prices and/or in less controlled markets. This may affect a wide range of people and in particular, poorer populations.**

#### **D) WILL THE AMOUNT OF VICTIMS–LEGAL PERSONS VARY?**

See answer to point 3.A).

#### **E) HOW WILL THE ECONOMIC /LEGAL CHARACTERISTICS OF VICTIMS (LEGAL PERSONS) VARY?**

*Potential frauds will likely affect lower social classes.* 

**As far as legal persons are concerned, market operators may use products that do not comply with EU standards in less controllable sectors and for less profitable purposes. Accordingly, non-profit organisations that use product donations to feed homeless and poor people may be affected.**

### **4. Costs/Harms.**

#### **A) WILL THE TOTAL COST OF THE CRIME VARY?**

*The experts could not investigate this point because no data is available. Further research is needed.*

**B) HOW WILL PRIVATE COSTS VARY?**

*The experts could not investigate this point because no data is available. Further research is needed. Although no specific data is available, the experts pointed out that in cases of corruption resulting in defrauded consumers, products containing unauthorised residue of drugs or additives may be put on the market. In such cases, consumers may suffer an increase in their health expenses.*

**C) HOW WILL SOCIAL COSTS VARY?**

*The experts could not investigate this point because no data is available. Further research is needed. Although no specific data is available, the experts pointed out that in cases of corruption resulting in defrauded consumers, products containing unauthorised residues of drugs or additives may be put on the market. In such cases, the public health systems may suffer an increase in their expenses due to the need to treat possible cases of poisoning.*

## CONCLUSIONS

The expert team concluded that some issues are crucial in order to prevent the possible occurrence of crime risks due to the proposed legislation.

The full and complete implementation of the provisions on the technical requirements of farms and on the inspections by the competent authority is an extremely important issue in order to prevent illegal behaviours.

Concerning the risk of corruption and bribery of the competent authority much will depend on the characteristics of such bodies. It is not clear whether they will belong to the public or private sector. It is not clear whether any norm will protect their independence and autonomy.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2004–SANCO–025

*“Proposal for a Council Directive on Animal Health Conditions for placing on the market, import and transit of aquaculture animals and their products, and on minimum measures for the prevention and control of certain diseases in aquatic animals”*

*(Expected date of adoption: second quarter 2005)*

### BACKGROUND

#### Materials provided by the Commission

##### Roadmap

#### Additional Materials collected by Transcrime

- Council Directive 91/67/EEC concerning the animal health conditions governing the placing on the market of aquaculture animals and products, 28 January 1991, in OJ L. 46, 19.02.91, p. 1.
- Council Directive 93/53/EEC introducing minimum Community measures for the control of certain fish disease, 24 June 1993, in OJ L. 175, 19.07. 1993, p. 23.
- Council Directive 95/70/EEC on minimum Community measures for the control of certain diseases in bivalve molluscs, 22 December 1995, OJ L. 332, 30.12.1995, p. 33.
- Colin Johnston – Manager, Aquatic Animal Health – Primary Industries and Resources South Australia, “Welfare Considerations in Aquatic Animals”. Published in ANZCCART (Australian and New Zealand Council for the Care of Animals in Research and Teaching) News, vol.16 – November 2, 2003.
- State of Alaska “Recommendation on Operations that produce Aquatic Animals” submitted to National Organic Standard Board – Response to National Organic Standards Board’s Aquatic Animal Task Force”, prepared by– July 31, 2001. The paper can be found at the following web–site: <http://www.dced.state.ak.us/oed/seafood/pub/response.pdf>
- James H.Tidewell & Geoff L.Allan “Fish and Food:aquaculture’s contribution. Ecological and economic impacts and contributions of fish farming and capture fisheries”. 2001, European Molecular Biology Organization. The paper can be found at the following web–site: <http://emboreports.npgjournals.com/cgi/content/full/2/11/958>
- M.Ponta, T.Frentiu, A.Sarkany–Kiss, E.A.Cordos “Traces of Cu, Mn and Zn in aquatic animals, water and sediments from the Cris River Basin – West Romania” , 2002. The paper can be found at the following web–site: [http://jagor.srce.hr/cccaa/CCA–PDF/cca2002/V75–n1/CCA\\_75\\_2002\\_307\\_317\\_Ponta2](http://jagor.srce.hr/cccaa/CCA–PDF/cca2002/V75–n1/CCA_75_2002_307_317_Ponta2).
- V.M. Vasconcelos, “Cianobacterial toxins in Portugal: effects on aquatic animals and risks for human health”, 1999. The paper can be found at the following web–site: <http://www.scielo.br/pdf/bjmbr/v32n3/3343c.pdf>
- National list of Reportable Diseases of Aquatic Animals, Sep. 2003. The paper can be found at the following web–site: [http://www.frdc.com.au/research/programs/aah/ListRep\\_isAquAnimals.pdf](http://www.frdc.com.au/research/programs/aah/ListRep_isAquAnimals.pdf)
- CEFAS – The Centre for Environment Fisheries and Aquaculture Science, Illegal import of live fish. The paper can be found at the following web–site: <http://www.cefasc.co.uk/livefish.htm>

- Célia Chauffour and François Gremy, Caviar smuggling: the other black gold of the Caspian Sea, February 23, 2003. The paper can be found at the following web-site: [http://www.caucaz.com/home\\_eng/breve\\_contenu.php?id=131](http://www.caucaz.com/home_eng/breve_contenu.php?id=131)

### Options to be assessed

According to the Roadmap, the following options have been considered:

- Zero option: to maintain the present legislation.<sup>109</sup>
- Presentation of a proposal for Regulation. This is not considered as a practical option, due to the complicity and the diversity of the field.
- An Intra Community Trade Directive, in order to assure that Member States apply at least the same animal health conditions for trade inside a Member State as between Member States.
- A “placing on the market” Directive, which would be in line with the present policy.<sup>110</sup> It would ensure that the *minimum standards* are applied within Member States. “It would also enable flexibility on how Member States implement the provisions of the legislation into their national legislation”.<sup>111</sup>

### Result of the initial screening

All the considered options can be framed in Typology of Regulation at Risk<sup>112</sup> n. 4 (“legislation that introduces or increases the tax on legal goods or in any other way increases the costs of legal goods”), because the introduction of standards and requirements for trade and for animal health conditions could have implications such as an increased viability for smuggling of contraband products both within and among countries.

The options can also be framed in Typology of Regulation at Risk n. 7 (“legislation that provides officials with regulatory power”), because the presence of a standardized system will require public administrations’ power, e.g. for authorization of farms and establishments. This could increase the risk of corruption of officials.

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### Formal aspects of the draft proposal

External simplicity: the sector is already regulated by Council Directive 91/67/EEC, Council Directive 93/53/EEC, and Council Directive 95/70/EC. The Commission recognized the need “to

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<sup>109</sup> The present legislation is Council Directive 91/67/EEC on animal health conditions governing the placing on the market of aquaculture animals and products, Council Directive 93/53/EEC on minimum Community measures for the control of certain fish disease, and Council Directive 95/70/EC on minimum Community measures for the control of certain diseases in bivalve molluscs.

<sup>110</sup> See Roadmap, p. 2.

<sup>111</sup> Despite the different options considered in the Roadmap, stakeholders focused on the need of a “Framework Directive” as the best typology for the proposal (compare Roadmap, pag.2).

<sup>112</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

regularly review, update and simplify the animal health community legislation for aquatic animals and products”.<sup>113</sup> Indeed, “over-regulation” may produce some criminal opportunities while causing “unnecessary restriction of free trade”<sup>114</sup>. A recast of the present legislation seems to be useful in reducing these opportunities. For this reason, stakeholders focused their attention on a strategy including both a “framework Directive” – recasting the present regulation (as regards principles, strategies and aims) and a secondary legislation for adopting the detailed rules on implementation. Such a solution aims at combining harmonization with flexibility.

External consistency: a recast of the present regulation, as envisaged by the Roadmap, seems to reduce the complexity of the sector. At the same time, the presence of a secondary legislation (for the detailed rules on implementation) could create some criminal opportunities, by establishing asymmetries among Member States’ legislations.

### **Vulnerability of the sector/area to be regulated**

The market does not present high barriers at its entrance, because no particular skills are required to enter it: this may also make it more accessible to criminals. It also offers high profits, thus increasing its attractiveness.<sup>115</sup> For these reasons, the sector should be considered as vulnerable. Furthermore, there are Member States with different legislation covering internal and external trade. If a Member State has legislation for internal trade which is milder than its external trade legislation, market operators could fake internal trade in order to practice external trade, thus avoiding its more burdensome standards. According to this, smuggling in trading aquaculture could occur.<sup>116</sup>

Finally, the administrative costs<sup>117</sup> related to the authorization requirements for farms and establishments could increase the risk of fraud and corruption of the public officials charged with issuing the authorization.

Crimes envisaged:

- smuggling in trade of animals;
- fraud, in order to avoid compliance with the authorization requirements;
- corruption of the public officials charged with issuing the authorization.

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<sup>113</sup> See Roadmap, pag.1.

<sup>114</sup> *Ibidem*.

<sup>115</sup> There are several case-studies that show the attractiveness of the fishing industry and the related criminal actions: see for instance CEFAS, *Illegal import of live fish: “(...)Large profits to be made by importers who steal fish or purchase them cheaply from non-approved sites on the continent, and sell them for large profits to fishery owners in the U.K.(...)Similar profits can be made by the fishery owners who impose high charges on anglers who are prepared to pay to catch larger, or different species of fish that may otherwise be available.”* The paper can be found at the following web-site: <http://www.cefaz.co.uk/livefish.htm>.

<sup>116</sup> Several case-studies show the relationship between smuggling and fishery industries, i.e. see C.Chauffour and F.Gremy, *Caviar smuggling: the other black gold of the Caspian Sea*. The paper can be found at the following web-site: [http://www.caucaz.com/home\\_eng/breve\\_contenu.php?id=131](http://www.caucaz.com/home_eng/breve_contenu.php?id=131)

See also CEFAS, *Illegal import of live fish: “(...) It’s believed that fish have been smuggled in from several of the Eastern Europe countries, including Hungary, Croatia and Poland”*. The paper can be found at the following web-site: <http://www.cefaz.co.uk/livefish.htm>

<sup>117</sup> While the Roadmap points out the advantages related to the administrative costs, it also recognizes that: “Administrative impacts in relation to the requirement for the authorisation of farms and establishments may cause an increased administrative burden to the competent authorities for a limited time period (until all farms are authorised)”. See Roadmap, p. 2.



<b>CRIME RISKS ARISING FROM SPECIFIC OPTIONS</b>
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**With reference to Option 1**

Contents: no policy change.

Crime risks: the current “over-regulation” characterizing this area might make it more vulnerable to criminal actions; criminals could exploit both the existing legislative asymmetries and the diversity of the field.

Crimes envisaged: Smuggling in trade of animals.

**With reference to Option 2**

Contents: introduction of a Regulation<sup>118</sup>. According to the opinion of the Commission, even if a Regulation could be considered as a “strong-impact measure”, it does not seem to fit the needs required for such a complex sector. To this purpose, stakeholders themselves did not recognize the Regulation as a practical option, considering that *“it will be impossible to write 100% targeted detailed legislation at Community level, which would meet the demand of an industry which is as diverse in nature as the European aquaculture industry.”*<sup>119</sup>

Crime risks: the *complicity and the diversity of the field* would make a Regulation a “non practical option”,<sup>120</sup> since it would introduce the same binding rules for all the 25 MSs. A high risk of non compliance could arise from the adoption of a Regulation, due to the difficulties in making it effective in certain States. Fraud could occur in order to avoid the required standards for trade and for animal welfare, as well as corruption of the operators involved in the supervision of the animal health conditions.

Crimes envisaged:

- smuggling in trade of animals;
- corruption of the operators involved in the supervision of the animal health conditions;
- fraud, in order to avoid the above mandatory requirements.

**With reference to Option 3**

Contents: introduction of an Intra Community Trade Directive, in order to ensure at least the same animal health conditions for trade inside a Member State as between Member States.

Crime risks: Council Directive 91/67/EEC has already provided the introduction of uniform animal health conditions. The mandatory nature of this kind of legislative instrument would provide uniform rules for trade while respecting the differences existing among Member States. However,

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<sup>118</sup> See Roadmap, p. 1.

<sup>119</sup> See Roadmap, p. 2.

<sup>120</sup> *Ibidem*, p.1.

the available information on the proposed strategy is inadequate for a proper understanding of the real extent of such a Directive and its possible unintended implications.

Crimes envisaged: None.

#### **With reference to Option 4**

Contents: introduction of a “placing on the market” Directive, which would be in line with the current policy.

Crime risks: a “placing on the market” Directive assures flexibility for Member States. Although flexibility has obvious, positive effects, it could inadvertently lead to different applications State by State. Therefore, asymmetries not justified by the natural differences among MSs might take place, e.g. authorization controls and procedures. This would create more opportunities to use Internal Markets for illicit purposes. Indeed, criminal actions could arise from these asymmetries, particularly by exploiting the relationship between the internal and external trade of Member States.<sup>121</sup>

#### **Crimes envisaged:**

Fraud (committed by exploiting the weakest national legislations).

## CONCLUSIONS

Some difficulties have been encountered in assessing the crime risks related to the various options, because the Roadmap alone does not provide any details. In order to carry out a more in-depth analysis, information on the contents of the options under consideration is thus essential. Nevertheless, on the basis of a preliminary assessment on the general context in which the proposal is included, the following preliminary considerations can be put forward.

As some case studies can confirm, there is a strong relationship between the sector to be regulated and some criminal risks such as fraud, corruption and smuggling, especially due to the attractiveness of this market, simply because of its high profits. Therefore, the area seems to be vulnerable (see *Vulnerability of the sector/area to be regulated*).

In addition, each of the proposed options presents different levels of crime risk. To this purpose, it is possible to rank all options in the following way from the more risky (a) to the less risky (d):

- a) Option 2: Regulation. A too rigid legislation, which does not take into account the diversity of this field, could create problems in the implementation and, consequently, compromise the compliance by the operators of the sector.
- b) Option 1: No policy change. The over-regulation creates confusion and the outdated rules, other than the effects explained in the roadmap, could also produce criminal opportunities to elude controls in complying with the legislation.
- c) Option 4: “Placing on the market” Directive. In this case, risk arises from the discretion left to MSs on how to implement the *minimum standards* provided by the Directive.

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<sup>121</sup> Compare below, p. 3 (*Vulnerability of the sector/area to be regulated*).

Inadequate application by any MS could lead to unjustified asymmetries within the EU, exploitable for illicit purposes.

- d) Option 3: Intra Community Trade Directive. The nature of this legislative instrument seems to grant both uniform rules for trade and the necessary flexibility, in order to face such a diverse market. Therefore, the related criminal risk seems to be the lowest.

According to these considerations, the vulnerability shown by the sector seems to be the substratum that pools all the proposed options. For this reason, and despite the need of a more in-depth assessment, a medium crime risk can already be envisaged and an Extended Crime Risk Assessment is recommended.

## EXTENDED CRIME RISK ASSESSMENT OF 2004–SANCO–25

*“Proposal for a Council Directive on Animal Health Conditions for placing on the market, import and transit of aquaculture animals and their products, and on minimum measures for the prevention and control of certain diseases in aquatic animals”*

### BACKGROUND

#### Relevant Documents

- Roadmap.
- European Commission, *Proposal for a Council Directive on animal health requirements and products thereof, and on the prevention and control of certain diseases in aquatic animals*, COM (2005) 362 final, 23/8/2005, hereinafter draft proposal.

#### Initial policy options.

The roadmap identified three possible policy options:

- No policy change – i.e. leave the existing legislation;
- Proposal for Regulation;
- An “Intra Community Trade” Directive, laying down “the animal health conditions for border crossing trade of aquaculture animals”;<sup>122</sup>
- A “Placing on the market” Directive, which aims at ensuring the application of the same *minimum standards* within a MS as between MSs.

#### Conclusions of the Preliminary Crime Risk Assessment.

The Preliminary Crime Risk Assessment (PCRA) of the proposal concluded the aquaculture market to be vulnerable to crime, due to its high profits and low entry barriers. The main envisaged crime risks refer to smuggling of aquaculture products, fraud and corruption of public officials.<sup>123</sup>

All the options assessed have been ranked from the most to the least risky, as follows:<sup>124</sup>

- a) Regulation, because of high risk of non compliance by operators due to it being too rigid;
- b) No policy change, because of outdated provisions and existing over-regulation, which produces legislative asymmetries;
- c) “Placing on the market” Directive, due to the discretion left to MSs to apply the *minimum standards* provided by the Directive;
- d) “Intra Community Trade” Directive, whose risks appear minimal, as it grants both uniform rules for trade and the necessary flexibility to face such a diverse market.

Given these risks and considering the vulnerability shown by the sector, when looking at all the options, an Extended Crime Risk Assessment (ECRA) was recommended on the proposal.<sup>125</sup>

<sup>122</sup> See Roadmap, p. 2.

<sup>123</sup> See PCRA, p. 3.

<sup>124</sup> See PCRA, p. 6.

**Further remarks.**

As already envisaged by the Commission in the Roadmap, the fourth policy option – i.e. a “placing on the market” Directive – was considered the most suitable one.<sup>126</sup> A first draft of the Council Directive was made available by the Commission at the beginning of the Crime Risk Assessment exercise. Accordingly, it was decided to conduct the present Crime Risk Assessment exercise on the Draft proposal.

The present ECRA was developed between 20<sup>th</sup> July and the 8<sup>th</sup> of September 2006. The following experts participated in the ECRA: Prof. Marica Amerio (Associate of zootechnics at Cattolica University, Piacenza); Prof. Mario Maggioni (Professor at Cattolica University, Milan); Prof. Ernesto Savona (Professor at Cattolica University, Milan and Director of Transcrime), Ms. Sara Martocchia (Researcher at Transcrime) and Mr. Francesco Calderoni (Researcher at Transcrime).

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<sup>125</sup> PCRA, p. 6.

<sup>126</sup> A “Placing on the market” Directive will be in line with to the present policy. This policy option has not the negative effects of a regulation or an intra community trade Directive”. Roadmap, p. 2.

## ASSESSMENT OF THE POLICY OPTIONS AT RISK

The specific provisions presenting a significant crime risk after the PCRA (see above, under *conclusions of the Preliminary Crime Risk Assessment*) have been assessed by a team of experts through a questionnaire. The crime risks identified in the draft proposal mainly refer to possible fraud and bribery of officials in charge of authorizations, declarations, permits etc. Smuggling of aquaculture animals will also be taken into account as an actual threat to the legitimate trade of aquaculture animals. However, it should be remembered that some cases of corruption may eventually include possible defrauding of consumers, since it could result in the sale of products not complying with EU standards.

Following, the answers to the questionnaire are listed in italics, whilst the explanation is given in bold.

A graphical symbol has been associated with each assessment:



indicates that the expected results will reduce crime risks;



indicates that no influence on crime risks is expected;



indicates that the expected results will increase crime risks.

### 1. Crime.

#### A) WILL THE AMOUNT OF CRIME VARY?

*The amount of corruption and fraud is likely to increase.*




The draft proposal will introduce a new regime of authorization to operate in the market of aquaculture production businesses and processing establishments. They must also be registered by Member States' competent authorities. Obtaining the authorization depends on the fulfilment of some conditions (art. 5 of the draft proposal). These new burdens may act as an incentive to corrupt officials in charge of the authorization, or to defraud the competent authorities by faking the necessary requirements.

*The amount of smuggling of aquaculture animals is likely to increase.*



The qualitative standards required at EU level for placing aquatic animals on the market will not change considerably compared to the existing acts, but more burdensome requirements have been introduced to demonstrate their fulfilment. This will imply an increase in costs for operators, who could choose to bypass the legal market and smuggle aquatic animals to gain higher profits.


**B) HOW WILL THE RISK OF BEING DETECTED COMMITTING A CRIME VARY?**

*The risk of detection is likely to increase.* 

The draft proposal will provide a more effective supervision system for aquaculture production businesses and authorised processing establishments, which “shall at least consist of regular visits and audits”.<sup>127</sup> The introduction of direct supervision on top of reporting and record-keeping will likely increase the possibility of detecting possible illicit behaviours.

Moreover, the draft proposal establishes that the Member States “shall lay down penalties applicable to infringements of the national provisions adopted pursuant to this Directive [...]”.<sup>128</sup> This provision should also increase the risk to criminals of being detected and punished.

**C) HOW WILL THE EXPECTED PROFIT FOR THE AUTHORS OF A CRIME VARY?**

*Profits for a single crime are likely to remain constant.* 

No specific data is available in order to assess such an impact.


**2. Authors.**

**A) WILL THE NUMBER OF AUTHORS VARY?**

*The number of authors is likely to remain constant.* 

No specific data is available in order to assess such an impact.

**B) HOW WILL THE COMPLEXITY OF THE ORGANIZATIONAL STRUCTURE OF A CRIME VARY?**

*Organisational requirements are likely to increase.* 

The stronger controls and surveillance schemes provided by the draft proposal will probably require a more complex organization in order to corrupt the competent authorities. However, such an effect also depends on the market scale: the more both market operators and auditing bodies act at local level, the fewer organizational requirements are needed.

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<sup>127</sup> Art. 7 of the draft proposal.

<sup>128</sup> Art. 60 of the draft proposal.

**C) HOW WILL THE INDIVIDUAL SKILLS/KNOWLEDGE REQUIRED TO COMMIT A CRIME VARY?**

*Individual skill/knowledge requirements are likely to remain constant.*



The draft proposal does not affect this issue.

**D) FOR NATURAL PERSONS, HOW WILL THE PROFESSIONAL REQUIREMENTS NEEDED TO COMMIT A CRIME OR FACILITATING THE COMMISSION OF A CRIME VARY?**

*Professional requirements are likely to remain constant.*



The draft proposal does not affect this issue.

**E) FOR LEGAL PERSONS, HOW WILL THE ECONOMIC/LEGAL REQUIREMENTS NEEDED TO COMMIT A CRIME VARY?**

*Requirements for legal persons are likely to increase.*



While the authorization regime provided by the proposal may introduce an incentive for fraud and corruption (see question 1.A), if it is properly implemented, it will also be an effective mechanism for selecting “virtuous” newcomers. This would prevent unreliable firms from entering the market.

**3. Victims.**

**A) WILL THE NUMBER OF VICTIMS VARY?**

*The experts could not answer these points because no data is available. Further research is needed. Although no specific data is available, the experts pointed out that cases of corruption may entail defrauding consumers with possible impacts on the consumers’ health.*

**B) HOW WILL THE AMOUNT OF VICTIMS–NATURAL PERSONS VARY?**

*See answer to point 3.A).*

**C) HOW WILL THE SOCIO–DEMOGRAPHIC CHARACTERISTICS OF VICTIMS (NATURAL PERSONS) VARY?**

*Potential crime risks will most strongly affect the new EU Member States.*



The introduction of burdens and standards for aquaculture production businesses and processing establishments are likely to weigh more heavily on new Member States than on old ones. Indeed, the old MSs are already subject to the existing Directive, thus costs and burdens will not considerably change compared to the present regulation.



**D) WILL THE AMOUNT OF VICTIMS—LEGAL PERSONS VARY?**

*See answer to point 3.A).*

**E) HOW WILL THE ECONOMIC /LEGAL CHARACTERISTICS OF VICTIMS (LEGAL PERSONS) VARY?**

**No specific data is available in order to assess such an impact.**

**4. Costs/Harms.**

**A) WILL THE TOTAL COST OF THE CRIME VARY?**

*The experts could not investigate this point because no data is available. Further research is needed.*

**B) HOW WILL PRIVATE COSTS VARY?**

*The experts could not investigate this point because no data is available. Further research is needed. Although no specific data is available, the experts pointed out that in cases of corruption resulting in defrauded consumers, as well as of smuggling, aquatic animals will be placed on the market without controls and disease prevention treatments. In such cases, consumers may suffer an increase in their health expenses.*

**C) HOW WILL SOCIAL COSTS VARY?**

*The experts could not investigate this point because no data is available. Further research is needed. Although no specific data is available, the experts pointed out that in cases of corruption resulting in defrauded consumers, as well as of smuggling, aquatic animals will be placed on the market without proper controls to prevent and treat possible diseases. In such cases, the public health systems may possibly suffer an increase in their expenses due to the need to treat possible cases of poisoning.*

## CONCLUSIONS

The draft proposal replaces the existing Directives and updates the general regulation on aquaculture animals. Therefore no significant changes will be introduced, apart from a new regime of authorization and registration for aquaculture production businesses and processing establishments. This is likely to have opposite effects: if not properly implemented it may stimulate corruptive and fraudulent behaviours toward national/local competent authorities. Moreover, smuggling of aquatic animals could increase, in order to bypass new administrative costs and gain higher profits. On the other hand, the new regime works as a legal barrier to the market entry, useful for selecting operators and preventing unreliable firms from entering the market. The concrete impact of such a provision will depend on its implementation. The experts believe that possible illicit behaviours are most likely to occur in the new EU Member States, which will be most affected by new costs and burdens.

Furthermore, the proposal strengthens controls on the market, providing for supervision through audits and visits, a new health surveillance scheme and recording obligations. These should improve the possibility to trace and identify illicit conducts, if any, thereby increasing the probability of a criminal being detected.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2005-ENTR-019

### *“Proposal for a Regulation on the authorization, supervision and vigilance of human tissue engineered products”*

(June–July 2005)

<b>BACKGROUND</b>
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#### **Materials provided by the Commission**

- *Roadmap*
- *Institute for Prospective Technological Studies (IPTS) and European Science and Technology Observatory (ESTO), Human tissue-engineered products. Today's market and future prospects, October 2003.*

#### **Additional Materials collected by Transcrime**

- *Human Tissue Engineering And Beyond: Proposal For A Community Regulatory Framework On Advanced Therapies* [Proposal for a Regulation of the European Parliament and of The Council on Advanced Therapies and amending Regulation (EC) No 726/2004], 4 May 2005 (hereinafter: the Draft Proposal);
- *Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.* Official Journal L 136, 30/4/2004 p. 1–33.
- Faulkner, J. Kent, I. Geesink, D.F. Patrick, *Purity and the dangers of innovative therapies: re-ordering regulation and governance in the shaping of tissue-engineered medical technology.* Draft Paper, 2004. Available at: [www.csi.ensmp.fr/csi/4S/download\\_paper/download\\_paper.php?paper=faulkner\\_kent-geesink\\_patrick.pdf](http://www.csi.ensmp.fr/csi/4S/download_paper/download_paper.php?paper=faulkner_kent-geesink_patrick.pdf) (last visited July 2005).
- R. Freudenberg, ‘Counterfeit medicines. An excuse to smear parallel trade, with no evidence’, in *Pharmaceutical Journal*, 2004, vol. 273, p. 560.
- N. Maclean, *Parallel trade in Medicines, Results of a Social market foundation discussion seminar*, May 2004. Available at <http://www.patientsorganizations.org/showarticle.pl?id=340&n=980> (last visited July 2005).
- J. Senker, *Human Tissue Engineered Products: Today's markets and future prospects. Legal Situation and Socio-Economic Impacts of Tissue-Engineering.* Final Report, Science and Technology Policy Research (University of Sussex), April 2003. Available at [http://lifesciences.jrc.es/docs/TE\\_WP4\\_FinalReport.pdf](http://lifesciences.jrc.es/docs/TE_WP4_FinalReport.pdf) (last visited July 2005).

#### **Options to be assessed**

The Roadmap considers a binding act as the only viable option, due to the lack of legislation in the sector characterizing most of Member States. For this reason, the Preliminary Crime Risk Assessment will be carried out on this option and on the related Draft Proposal for a regulation.

### Result of the initial screening

The Draft Proposal can be framed in the Typology of Regulation at Risk<sup>129</sup> n. 7 (“Regulation that provides officials with regulatory power”), because it provides rules concerning the authorization, supervision and vigilance of human tissue engineered products and creates a Committee “to assist scientifically in the elaboration of any documents related to the fulfilment of the objectives of this Regulation” (Draft Proposal, art. 6.d).

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### Formal aspects of the draft proposal

External Consistency: the Draft Proposal aims to cover the lack of regulations in this sector characterizing most of Member States. As a binding and directly applicable act, it will reduce the current fragmentation of national legislation, which could be exploited to commit illicit acts.<sup>130</sup> However, it is important to remark that at an EU level this proposal would be added to several already existing acts:<sup>131</sup> the exact relationship between the proposal and the other acts should be clarified.

Clarity of language: art. 5 of the Draft Proposal on advanced therapies states that members of the Committee “shall not have financial or other interests in the pharmaceutical sector, medical device sector or biotechnology sector that could affect their impartiality”. The formulation seems too generic and liable to diverging interpretations: the extent of the expression “other interests” it is not clear, besides the financial ones (if the official had a relative in the pharmaceutical sector, would a conflict of interest occur?). In addition, is it enough to have e.g. a financial interest in one of the above mentioned sectors, to be in conflict? Or should it be necessary to demonstrate that such an interest “could affect” the impartiality of the official? The formulation does not help to understand whether there is – or is not – a presumption of conflict of interest caused by the mere presence of the above interest. These uncertainties may lead to diverging translations and interpretations.

Enforceability: art. 5 presents some risks under the enforceability profile, as it is not linked to a concrete and clear sanctions. The article provides for the obligation (burdening the members of

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<sup>129</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

<sup>130</sup> For a detailed examination of the national legal frameworks in the field, also linked to a market analysis, see J. Senker, *Human Tissue Engineered Products: Today's markets and future prospects. Legal Situation and Socio-Economic Impacts of Tissue-Engineering*. Final Report, Science and Technology Policy Research (University of Sussex), April 2003.

<sup>131</sup> E.g. Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use and later amendments by Directive 2002/98/EC, Directive 2004/24/EC and Directive 2004/27/EC. The consolidated version of the Directive is available at <http://pharmacos.eudra.org/F2/eudralex/vol-1/home.htm#200363>. Furthermore, Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (Official Journal L 136, 30/4/2004 p. 1 – 33); Commission Regulation (EC) No 494/2003 of 18 March 2003 amending Council Regulation (EC) No 297/95 on the fees payable to the European Agency for the Evaluation of Medicinal Products.

the Committee) of declaring at each meeting any specific interest in potential conflict, but what would happen in such a case is not specified. This could make the rule ineffective to avoid conflicts of interest.

#### **Vulnerability of the sector/area to be regulated**

The draft proposal addresses more than one sector, i.e the pharmaceutical sector, the medical device sector and, more specifically, the biotechnology sector. These sectors present different characteristics, but are mostly characterized by an oligopolistic structure. Market Functioning depends on the decisions of a few subjects. Also the economic value of the product is very high and this makes it more vulnerable, e.g. to counterfeiting and illicit trade of pharmaceuticals.<sup>132</sup> The proposed Regulation refers to industrial products<sup>133</sup> meant for intra-Community trade, so it involves pharmaceutical and bioengineering companies. A risk of illicit cartels might occur.

At the same time, improving the diffusion of human-tissue engineered products, e.g. for organ transplants, could reduce the risk of trafficking in human organs, as it could cover the gap between demand and supply in the sector. Nevertheless, a crime displacement might occur, if smuggling of human-tissue engineered products turned out to be more attractive and accessible than trafficking in human organs. Of course, since the use of engineered human cells and tissues is not yet a common practice, such effects would be clearer in the long term. The Regulation addresses the need to cover a regulatory gap in this ticklish matter, by regulating authorization and monitoring.<sup>134</sup>

<b>CRIME RISKS ARISING FROM SPECIFIC PROVISIONS</b>
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#### **With reference to art. 4, paragraph 2 of the draft Regulation on Advanced Therapies(Composition of the Committee for Advanced Therapies)**

Contents: Art. 4, para. 2 of the draft proposal establishes that “the members of the Committee for Advanced Therapies shall be appointed for a renewable period of three years”.

Crime risks: crime risks might occur because the rule does not guarantee the turn-over of the members of the Committee. In fact, no limits to the renewal of their appointment are provided. This jeopardizes the officials’ independence and increases their corruptibility. The office duration is not enough to decrease such a risk, if the turn over is not required by law.

Crimes envisaged:

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<sup>132</sup> See for an examination of the fields: R. FREUDENBERG, “Counterfeit medicines. An excuse to smear parallel trade, with no evidence”, *Pharmaceutical Journal* 2004, vol. 273, No 7321, p. 560, URL: <http://www.pharmj.com/Editorial/20041016/comment/lett07.html#ref>; N. MACLEAN, Parallel trade in Medicines, Results of a Social market foundation discussion seminar, May 2004, p 18, URL: <http://www.smf.co.uk/site/smf/publications/paralleltrade/pdfFile>.

<sup>133</sup> The draft regulation on advanced therapies clarifies in art. 1, letter a) that it shall not apply to “any advanced therapy medicinal product which is made on a one-off basis, according to a specific and non-industrial manufacturing process, in order to comply with a medical prescription for an individual patient”.

<sup>134</sup> An analysis of the risks related to the human-tissue engineering and of the need for regulation is carried out by A. Faulkner, J. Kent, I. Geesink, D.F. Patrick, “Purity and the dangers of innovative therapies: re-ordering regulation and governance in the shaping of tissue-engineered medical technology”, a paper drawn on Research funded by the UK’s Economic and Social Research Council, available at: [www.csi.ensmp.fr/csi/45/download\\_paper/download\\_paper.php?paper=faulkner\\_kent\\_geesink\\_patrick.pdf](http://www.csi.ensmp.fr/csi/45/download_paper/download_paper.php?paper=faulkner_kent_geesink_patrick.pdf)

- Corruption of the members of the Committee;
- Frauds, if the members of the Committee are not independent and do not act in the public interest, but pursue private interests.

**With reference to art. 5 of the draft Regulation on advanced therapies (Conflicts of interest)**

Contents: the rule establishes that members of the Committee for Advanced Therapies “shall not have financial or other interests in the pharmaceutical sector, medical device sector or biotechnology sector that could affect their impartiality”. All these indirect interests shall be entered in a register held by the Agency. Members of the Committee shall declare at each meeting any specific interests “which could be considered to be prejudicial to their independence with respect to the points on the Agenda”.

Crime risks: the article inadvertently produces opportunities for creating conflicts of interest, as it is too mild. In fact, it specifies the principle – the independence of the Committee – but does not make it effective: the consequences of a possible conflict of interest are not mentioned; clauses fixing incompatibility cases with the office of member of the Committee are not included; a body charged with controlling compliance with the rule is missing: the responsibility of declaring a conflict of interest is left to the members of the Committee. There are no rules on a potential member’s removal from his office, so it is not clear what might happen if a serious conflict of interest occurred. These aspects also refer to the formal aspects of the Regulation, in terms of internal coherence, clarity and enforceability (see also section “formal aspects”).

Crimes envisaged:

- Frauds, performed by members of the Committee who have some personal interest in conflict with their duties;
- Corruption, as the independence of the Committee might be compromised to aid illegal affairs.

<b>CONCLUSIONS</b>
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The proposal aims at filling the legislative gaps existing in the sector of advanced therapies, both at national and EU levels. Furthermore, it will reduce asymmetries that can be exploited by criminals, as the legislative instrument chosen by the Commission is a Regulation and does not require a national act to be implemented. In addition, the free trade of human-tissue engineered products could limit trafficking in human organs, because the former might replace the latter.

Nevertheless, the proposal contains a medium/high level of crime risk. In fact, the markets affected by this Regulation are characterized by a high level of vulnerability to crime. This is particularly true for the pharmaceutical sector, which is affected by criminal infiltration due to the very high profits and the difficulty of entering it, and by the related illicit trade of pharmaceuticals. Furthermore, by looking at the specific provisions of the draft proposal, several crime risks emerge, linked in particular to frauds and corruption of officials, which entails considerable economic harm.

All these crime implications deserve a more thorough analysis. Accordingly, an Extended Crime Risk Assessment is recommended.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2005-ENV-008

### *"Communication on Reducing the Climate Change Impact of Aviation"*

(Expected date of adoption: July 2005)

#### BACKGROUND

##### **Materials provided by the Commission**

- Roadmap/Preliminary Impact Assessment.
- Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Reducing the Climate Change Impact of Aviation*, COM (2005), 16 June 2005.
- R.C.N. Wit, J.M.V. Dings, P. Mendes de Leon, L. Thwaites, P. Peeters, D. Greenwood and R. Doganis, *Economic incentives to mitigate greenhouse gas emissions from air transport in Europe*. Delft, CE, 2002.
- Commission Staff Working Document, *Impact Assessment: reducing the Climate Change Impact of Aviation*, SEC (2005), 20 June 2005.

##### **Additional materials collected by Transcrime**

- Regulation (EC) No 549/2004 of the European Parliament and of the Council laying down the framework for the creation of the Single European Sky, 10/03/2004.
- Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity. Official Journal L 283, 31/10/2003, P. 0051 – 0070.
- Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Taxation on aircraft fuel. COM (2000)110 final, 02/03/2000.
- Aviation and the Environment, from Postnote (review of the Parliamentary Office of Science and Technology), April 2003, n. 195, pp. 1–4.
- Giving wings to Emission Trading. Inclusion of aviation under the European Emission Trading System (ETS) designs and impacts. Summary of Draft Final Report. CE Solution for environment, economy and technology, May 2005.
- Evans, Principles of Kyoto and Emission Trading Systems: A Primer for Energy Lawyers, in "The Alberta Law Review", July 2004, vol. 42, p. 167.
- R.B. Stewart, "A New Generation of Environmental Regulation?", in Capital University of Law Review, 2001, vol. 29, pp. 21–131.

##### **Options to be assessed**

The draft Communication promotes two different actions: A) strengthening a number of existing policies and B) exploring new economic measures.

Sub point A) the following strategies have been chosen:

- Improving research, focusing on "greening" air transport and climate change.



- Air traffic management, through the Single European Sky and SESAME<sup>135</sup>
- Energy taxation, towards a more consistent application: the adoption of Council Directive 2003/96/EC allows Member States to introduce fuel taxation for domestic flights<sup>136</sup>.

Sub point B) the option chosen by the Commission includes the climate impact of the aviation sector into the EU Emissions Trading Scheme (hereinafter ETS).

### **Result of the initial screening**

The Communication can be framed in the typology of regulation at risk<sup>137</sup> n. 4 ("legislation that introduces or increases the tax on legal goods, or in any other way increases the costs of legal goods") with reference to point A), in regard to the improvement of fuel taxes.

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### **Formal aspects of the draft proposal**

It is not possible to identify the crime risks arising from the formal aspects of the proposal, as the Communication is still a policy document and does not specify which types of legislation will be adopted to achieve the mentioned strategies.

### **Vulnerability of the sector to be regulated**

The aviation sector is characterized by a low vulnerability, which can be explained by looking at the following elements:

- *Profitability of the product*: lately the air transport market is floundering, as several recent cases demonstrate. Some companies went bankrupt, both low costs and flag carriers, so for the time being the market is not very profitable.
- *Risk of detection*: the air transport sector is governed by strict public controls, due to the necessity of guaranteeing high levels of security. This means that Public Administrations (both national and EU) carry out periodical checks on the market's operators, which make the possibility of detecting illegal activities very high.
- *Accessibility*: The economic threshold to enter the market is very high; this prevents criminal organizations which lack the minimum funds/capital necessary from entering the legal market.

<b>CRIME RISKS ARISING FROM SPECIFIC PROVISIONS</b>
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### **With reference to point A), with specific reference to the strengthening of energy taxation:**

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<sup>135</sup> The Single European Sky is an initiative to build a de-fragmented, interoperable European Air Traffic Control system. Its technical implementation will be realized by SESAME. See Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the Single European Sky. More information on the Single European Sky and SESAME is available at [http://europa.eu.int/comm./transport/air/single\\_sky/index\\_en.htm](http://europa.eu.int/comm./transport/air/single_sky/index_en.htm)

<sup>136</sup> It can be consulted in the Official Journal, L 283, 31/10/2003 P. 0051 – 0070

<sup>137</sup> See Typologies of regulations at risk listed in the Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

Contents: the Commission provides for an improvement of aviation fuel taxes, according to Directive 2003/96/EC. It allows Member States to introduce fuel taxation for domestic flights and also allows exemptions for justified reasons.

Crime risks: such a provision could create several risks:

- Asymmetries among fiscal regimes of MSs may increase, due to a non homogeneous legal framework: EU legislation, Air Service Agreements (hereinafter ASAs) between an MS and a third Country, mutual agreements between two Member States and common practices on international flights.<sup>138</sup>
- Slight risks could arise if air companies in financial difficulties are overburdened by the costs of implementing fuel taxes. They could be tempted to transfer these major costs to aircraft maintenance. An improper reduction in maintenance costs could increase accidents, with consequent frauds committed against insurance companies.
- A risk of tax evasion through the practice of “fuel tankering” might occur. According to the Study carried out for the Commission in 2002, “a fuel tax in the EU may encourage airlines to avoid the fuel tax by taking more fuel on board at airports outside the EU than actually required for the execution of a flight”.<sup>139</sup>

Crimes envisaged: frauds, performed by companies to reduce the costs arising from fuel taxes.

**With reference to point B), with specific reference to the Emissions Trading Schemes<sup>140</sup>:**

Contents: “Emissions trading works by first setting a total limit on emissions from a group of entities, and then letting the cost for emitting each tonne of emissions be determined through a market.”<sup>141</sup> Consequently, the entity producing emissions under the total limit could sell its quota to more polluting companies.

Crime risks: this option does not cause specific crime risks, as it implies the mere inclusion of emissions from the aviation sector in the more general emissions trading system, at an international and EU level. However, as it is based on an economic and voluntary approach, the functioning of the system would depend on its profitability for the entities involved. A non compliance risk may occur due to the possibility of a parallel market of illicit emissions because of their binding limitations (a maximum quota is given).

Crimes envisaged: forgery of the documentation related to emission quotas produced by companies, to commit fraud.

## CONCLUSIONS

The criminal risk implied in the proposal appears minimal, both under the vulnerability profile and the specific options considered. In particular, from a vulnerability point of view, the draft proposal does not seem to significantly increase the accessibility and attractiveness of the market to

<sup>138</sup> See draft Communication, pp.5–6.

<sup>139</sup> Study of Wit R.C.N. Dings J.M.V., “Economic Incentives to mitigate greenhouse gas emissions from air transport in Europe”, July 2002, p. 42.

<sup>140</sup> For an analysis of the ETS, see for instance: Evans B., *Principles of Kyoto and Emission Trading Systems: A Primer for Energy Lawyers*, in “The Alberta Law Review”, July 2004, vol. 42, p. 167 and Stewart R.B., *A New Generation of Environmental Regulation?*, in “Capital University of Law Review”, 2001, vol. 29, pp.21–131.

<sup>141</sup> See draft Communication, p. 6.

criminals. With reference to the specific options chosen by the Commission some risks could occur, due to the necessity of minimizing economic costs arising from fuel taxes but also from emissions trading. Although the latter presents a lower risk (related only to its flexibility), it could be exploited for illicit profits (see previous subsection, *Crime risks arising from specific provisions*). Nevertheless, these risks are not significant, because the risks of detection are too high in comparison to the benefits of such criminal actions. In fact safety and security are a priority in the aviation sector, so that closer supervision is carried out at each level (maintenance costs, insurance obligations, professional requirements for personnel etc).

As the crime risk appears to be minimal, an Extended Crime Risk Assessment is not recommended.

**PRELIMINARY CRIME RISK ASSESSMENT OF 2004-TAXUD-015**  
***“Regulation (EC) Nr. of the European Parliament and the Council amending the Council Regulation (EEC) Nr. 2913/92 establishing the Community Customs Code”***  
(Expected date of adoption: First quarter 2005)

<b>BACKGROUND</b>
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**Materials provided by the Commission**

- Roadmap.

**Additional Materials collected by Transcrime**

- GAO, *Border Security, Investigators Transported Radioactive Sources Across Our Nation's Borders at Two Locations, Testimony before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, 2006 United States Senate*, available at <http://www.mipt.org/pdf/gao06583t.pdf>
- Implementing the Community Lisbon programme, proposal for a Regulation of the European Parliament and of the Council *laying down the Community Customs Code (Modernized Customs Code)*, COM(2005)608 final;
- Europol, *European Union Organized Crime Situation Report, 2005*, available at <http://www.europol.eu.int/index.asp?page=publications&language=>
- Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee *on a customs response to latest trends in Counterfeiting and piracy*, COM(2005)479 final;
- Ranyard P. at al., *The Legislation Protecting Intellectual Property Rights and its Enforcement in the European Union and the People's Republic of China: a Comparative Study*. Report written for the “EU-China Trade Project. Support to China's Integration into the World Trading System”, 2005 EU Commission
- Communication from the Commission to the Council and the European Parliament *on the use of administrative cooperation arrangements in the fight against VAT fraud*, COM(2004)260 final.
- Ricerche per l'economia e la finanza (Ref.), *Il contrabbando di tabacchi lavorati, un'analisi economica e istituzionale*, report financed by British American Tobacco Italia, November 2004. The report is available at the website [http://www.ref-online.it/altre\\_pubblicazioni.asp#9](http://www.ref-online.it/altre_pubblicazioni.asp#9);
- Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *a simple and paperless environment for Customs and Trade*, COM(2003)452 final;
- Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *on the role of customs in the integrated management of external borders*, COM(2003)452 final;

- Report from the Commission to the Council *on controls on cross-border cash movements*, COM(2002)328 final;
- Proposal for a Regulation of the European Parliament and the Council, *on the prevention of money laundering by means of customs cooperation*, COM(2002)328 final;
- Lane M. H., *Customs Modernization and the International Trade Superhighway*, Quorum Books 1998.

### Options to be assessed

Among the policy options envisaged in the Roadmap, the Commission considers a Regulation replacing the existing Community Customs Code as the only feasible policy option.<sup>142</sup> The preliminary CRA will therefore be carried out on this option.

### Result of the initial screening

The proposed Regulation cannot be framed in any category of regulation at risk<sup>143</sup>.

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### Formal aspects of the draft proposal

No significant crime risks related to formal aspects emerge from the proposal. On the contrary, the Regulation makes the regulatory framework less complex, replacing the existing EU Customs Code and four other related acts.<sup>144</sup> From an internal point of view, a simpler structure has been established and a client-oriented terminology has been developed. This should allow more consistent interpretations between MSs and better comprehensibility of the norms. In particular, three basic procedures (import, export and special procedures) will replace the existing thirteen different custom treatments or uses. Almost all the articles of the existing Regulation will be amended or updated and simpler implementing rules have been introduced.

### Vulnerability of the sector/area to be regulated

The sector addressed by the proposed Regulation is characterized by a high level of vulnerability to crime. The removal of internal borders within the EU territory<sup>145</sup> enhanced free circulation of

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<sup>142</sup> See Roadmap, p. 1, where the “do nothing” option and other legislative instruments are rejected as incapable of achieving the envisaged goal.

<sup>143</sup> See categories of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

<sup>144</sup> To this purpose, see Proposal for a Regulation of the European Parliament and of the Council *laying down the Community Customs Code (Modernized Customs Code)*, SEC(2005)1543, p. 4, where the acts which are to be replaced by the proposed Regulation are listed.

<sup>145</sup> The creation of a territory without internal borders has been originally envisaged by an Agreement signed in Schengen in 1985. Afterwards the Schengen Convention was signed on 19 June 1990 by five Member States, but entered into force in 1995. Little by little, it has been extended to all the MSs. A protocol to the treaty of Amsterdam has then incorporated the so called Schengen *acquis* (composed by the Agreement, the Convention and the further rules adopted together with the other related agreements) into the Treaties.

goods, but also increased the opportunities for taxpayers to bypass their duties, due to reduced border controls.<sup>146</sup>

Moreover, customs play a crucial security function in the field of cross-border and organized crime. From this point of view the EU territory is particularly attractive: once criminals have crossed EU borders, the internal market allows them to freely circulate across EU countries. The latest enlargement (1 May 2004) extends this problem to some new MSs, since they frequently are transit countries for several criminal activities (in particular, drug trafficking, trafficking in human beings, smuggling of goods).

The abolition of controls at the internal borders requires strengthening custom controls on the external borders, thereby preventing access to illicit businesses. The main threats range from smuggling of legal and illegal goods, to trafficking in human beings, money laundering, counterfeiting and activities of terrorist groups (financing, arms and explosives transfer, etc.). In particular, the growth of counterfeiting activities, as stressed by the Commission, affects safety and health of EU citizens, above all when the fake goods are medicines, car parts, foodstuffs etc.<sup>147</sup> Cash movements across MSs and toward extra EU countries may hide money laundering activities and/or the financing of terrorism.<sup>148</sup> Smuggling of goods is a widespread and growing phenomenon, which exploits the free movement of goods within the EU.<sup>149</sup> Furthermore, these high criminal interests also stimulate corruption of customs officials by criminal organizations, aimed at bypassing customs controls.

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<sup>146</sup> According to the transitional VAT arrangements, supplies of goods between taxable persons are taxed only in the Member State of destination. Such a system stimulates taxpayers defrauding national tax administrations, through the so-called "carousel frauds". For an analysis see Communication from the Commission to the Council and the European Parliament *on the use of administrative cooperation arrangements in the fight against VAT fraud*, COM(2004)260 final, pp. 4–6.

<sup>147</sup> Counterfeiting has increased during the last five years, both from a quantitative (e.g. seizures have increased by 1000%) and a qualitative point of view (e.g. production is now on an industrial scale); see Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee *on a customs response to latest trends in Counterfeiting and piracy*, COM(2005)479 final, p. 5. For a comparative analysis of the Chinese and European customs procedures to prevent counterfeiting see Ranyard P. at al., *The Legislation Protecting Intellectual Property Rights and its Enforcement in the European Union and the People's Republic of China: a Comparative Study*. Report written for the "EU-China Trade Project. Support to China's Integration into the World Trading System", 2005 EU Commission, pp. 23–29.

<sup>148</sup> See Regulation (EC) no. 1889/2005. See also Report from the Commission to the Council *on controls on cross-border cash movements*, COM(2002)328 final and the third Anti Money-Laundering and Counter Financing of Terrorism Directive, (Directive 2005/60/EC). For a test on US border security in relation to radioactive substances transfers see GAO, *Border Security, Investigators Transported Radioactive Sources Across Our Nation's Borders at Two Locations*, Testimony before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, 2006 United States Senate, available at <http://www.mipt.org/pdf/gao06583t.pdf>

<sup>149</sup> In particular, smuggling of tobacco is a growing activity which affects the EU's legitimate economy and safety. For an in-depth analysis, see (Ref.), *Il contrabbando di tabacchi lavorati, un'analisi economica e istituzionale*. The report is financed by British American Tobacco Italia, November 2004. It is available at the website [http://www.ref-online.it/altre\\_pubblicazioni.asp#9](http://www.ref-online.it/altre_pubblicazioni.asp#9)

<b>CRIME RISKS ARISING FROM SPECIFIC OPTIONS/PROVISIONS</b>
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No significant crime risks emerge from the proposal. On the contrary, its main objectives are likely to reduce the opportunities inadvertently created for transnational and economic crime. Simplification of custom procedures should prevent inadequate implementation, thus improving monitoring and the detection of possible non compliant behaviours. Electronic declarations and data exchange will create an easily interoperable system: they will reduce the risk of fraud performed through forgery, as falsifying electronic declarations requires higher skills than written documents. Concerning controls of goods, particular relevance is given to the adoption of a common risk analysis approach. This would help improve effective, standardised control measures, thereby decreasing asymmetries between MSs. Moreover, close cooperation between customs authorities and the other law enforcement authorities is requested, through the exchange of relevant information.

Several complementary acts/strategies support the modernized customs code, through targeted security policies and modern infrastructure for detecting and preventing illicit activities.

Given these remarks, eventual problems may arise only from differential implementations of the new customs code among Member States.

A few aspects should deserve particular attention:

**With reference to art. 27 of the proposed Regulation(control of goods)**

Contents: According to Art. 27 of the draft proposal “customs authorities may carry out all of the controls they deem necessary to ensure the correct application of customs legislation [...]. Those controls, hereinafter *customs controls*, may consists in examining goods, verifying declaration data and the existence and the authenticity of electronic or written documents, examining the accounts of undertakings and other records, inspecting means of transport, inspecting luggage and other goods carried by or on persons. [...] Customs controls may be carried out outside the customs territory of the Community where an international agreement provides for this [...].”

Crime risks: the use of “may” instead of “shall” allows MSs to either disregard the above provisions or adopt different kinds of controls than those mentioned by the Regulation. Such a choice, by authorizing different practices among MSs, could facilitate elusive behaviours, reducing the effectiveness of controls.

Crimes envisaged: where weak implementation of the proposed Regulation occurs, fraud, tax crimes, corruption, counterfeiting, money laundering, smuggling and the activities of terrorist groups are envisaged.

**With reference to art. 30 of the proposed Regulation (exceptions)**

Content: no customs controls or formalities shall be carried out for two categories of goods: a) the cabin and hold baggage of persons taking an intra-Community flight; b) the baggage of a person making an intra-Community sea crossing.

Crime risks: a displacement risk could occur due to the above exceptions: smugglers or drug traffickers could bypass controls and security measures by exploiting these particular regimes.

Crimes envisaged: smuggling, drug trafficking, illicit cash movements finalised to money laundering.

## CONCLUSIONS

EU external borders are crucial to prevent and control crime, especially considering the removal of internal borders and the potential effects of the latest enlargement (see section *Vulnerability of the sector/area to be regulated*). The relevant types of crime range from tax evasion and fraud to cross-border and organized crime, which may also stimulate corruption of customs officials. Given the vulnerability of the field, customs activity plays an important preventive role. The draft modernized customs code aims at simplifying the whole current regulatory framework and customs procedures (by repealing different existing acts). In particular, it promotes a paperless environment by replacing written documents with electronic ones. The overall number of customs treatments is reduced. This is likely to decrease opportunities for corruption and fraud, by making forgery and discretionary actions more difficult.

Furthermore, the EU regulatory framework already tackles all of the main issues concerning customs and security.

Therefore, no significant criminal risks emerge from the draft proposal. On the contrary, it provides for more consistent, simple and effective customs treatments. Controls and data exchange among the involved authorities are provided and supported by other complementary acts that also deal with the related security issues.

Opportunities for bypassing control measures and introducing illegal goods into the EU might eventually arise from weak implementations by MSs. Consequently, standardization and uniform application should be guaranteed in the view of effective control systems.

Given the above consideration, the criminal risk implied by the proposal appears limited to few specific provisions; for this reason no Extended CRA is recommended.



## PRELIMINARY CRIME RISK ASSESSMENT OF 2005-ENV-010

### *“Thematic Strategy on the Protection of the Marine Environment”*

(Expected date of adoption: 3rd quarter 2005)

BACKGROUND
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#### Materials provided by the Commission.

- Roadmap;
- Commission Staff Working Document, *Impact Assessment-Thematic Strategy on the protection and Conservation of the Marine Environment*, Brussels SEC(2005);
- Communication from the Commission to the Council and the European Parliament, *Thematic Strategy on the protection and Conservation of the Marine Environment*, Brussels COM(2005);
- Proposal for a Directive of the European Parliament and of the Council *Establishing a Framework for Community Action in the field of marine Environmental policy*.

#### Additional Materials collected by Transcrime.

- Council Regulation (EC) n. 1239/98 of 8 June 1998, *amending Regulation (EC) no. 894/97 laying down certain technical measures for the conservation of fisheries resources*.
- Communication from the Commission to the Council and the European Parliament, *Fisheries Management and Nature Conservation in the Marine Environment*, Brussels, 14.07.1999, COM(1999) 363 final.
- Directive 2000/60/EC of the European Parliament and of the Council *establishing a framework for the Community action in the field of water policy*, of 23 October 2000; in OJ L 327 of 22 December 2000.
- Communication from the Commission, *Community action plan for the eradication of illegal, unreported and unregulated fishing*, Brussels, 28.05.2002, COM(2002) 180 final.
- Maritime Transport Committee of OECD, *Ownership and control of ships*, March 2003, OECD.
- BfU, *Organised environmental crimes in the EU Member States*, final report, 2003, pp. 60-64, at [http://europa.eu.int/comm/environment/crime/pdf/organised\\_environmental\\_crime\\_in\\_member\\_states.pdf](http://europa.eu.int/comm/environment/crime/pdf/organised_environmental_crime_in_member_states.pdf)
- OECD, *Fish Piracy, Combating illegal, unreported and unregulated fishing*, Paris, 30 September 2004.
- European Maritime Safety Agency, *Action Plan for Oil Pollution. Preparedness and Response*, October 2004. The report is available at the web-site <http://www.emsa.eu.int/Docs/other/action%20plan.pdf>
- Ferrell J.K., *Controlling Flags of Convenience: one measure to stop overfishing of collapsing fish stocks*, in Lewis & Clark Law School Environmental Law, Spring 2005.

#### Options to be assessed.

The Thematic Strategy on the protection of the Marine Environment includes 2 acts:

- 1) The Communication from the Commission to the Council and the European Parliament, *Thematic Strategy on the protection and Conservation of the Marine Environment*, Brussels COM(2005)
- 2) The Proposal for a Directive of the European Parliament and of the Council *Establishing a Framework for Community Action in the field of Marine Environmental Policy*.

More specifically, the Proposed Directive:

- defines common objectives and principles at EU level;
- establishes European Marine Regions as management units for implementation;
- requires Member States to develop Regional Marine Strategies.

As both the texts are available, Transcrime will carry out the preliminary crime risk assessment on them.

### Result of the initial screening

The proposed Thematic Strategy can be framed in Typology of Regulation at Risk<sup>150</sup> n. 5 (*“Regulation that prohibits or restricts a demanded product or service or in any other way decreases the availability of demanded goods or services”*), as it envisages restrictions and limits to fishing (as part of the Regional Marine Strategies). Although such measures will have a positive impact on the marine environment, they could also encourage illicit behaviour, attempting to avoid the above limitations.

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### Formal aspects of the draft proposal.

The formal aspects of the proposed Communication do not present any significant crime risk. This is because policy documents, like Communications, have no direct bearing on potential crime.

The proposed Directive shows minimal crime risks. Unwanted effects could arise from divergent interpretations of the same Directive, such as methods and standards for monitoring and assessing the environmental status of each Marine Region.<sup>151</sup>

Some remarks can be made in relation to the *external simplicity/consistency*. The background of this strategy is characterized by a number of different acts affecting the marine environment, but “not specifically designed to protect the marine environment”.<sup>152</sup> An overall approach does not exist, as the current policies follow a targeted approach, sector by sector. This results in a mixed legal framework, composed of acts with different natures (legislation, programmes, action plans etc.) and from different levels (regional, national, EU and international). It is not clear how the

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<sup>150</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

<sup>151</sup> See Article 10 – *Monitoring and Assessment*– of the proposed Directive.

<sup>152</sup> Explanatory Memorandum of the Proposal for a Directive of the European Parliament and of the Council *Establishing a Framework for Community Action in the field of marine Environmental policy*, p. 1.

framework Directive will co-ordinate with these existing acts. Some risks could take place where legislative overlaps occur, due to a general policy coexisting with more specific regulation addressing the same subject. Legislative hypertrophy may lead to contradictions in applying legislation by different States and may be exploited for illicit behaviours.

#### **Vulnerability of the sector/area to be regulated.**

The marine environment is a wide sector. Many elements affect its vulnerability. From an environmental point of view some pressures, such as over fishing and pollution, put the marine environment at risk in the long-term, as they endanger sustainable development of marine resources. The same issues are also relevant from a criminological point of view, as criminal behaviours already infiltrate these activities.

In particular, illegal, unreported and unregulated fishing (hereinafter IUU fishing) is considered a serious worldwide problem at EU and international level.<sup>153</sup> Studies show the relevance of IUU fishing on the marine environment, in terms of negative impacts for legitimate economy and of sustainable development.<sup>154</sup> It is a profitable activity, as it offers lower costs and higher profits compared with the legitimate economy. At the same time, it does not require high technological requirements to enter the market.

Exploitation of the law already occurs in this sector: a link between IUU fishing and legislation misuse has been observed, e.g. with reference to ship registration legislation.<sup>155</sup> Furthermore, corporate mechanisms (such as bearer shares, nominee shareholders, intermediaries etc.) are usually exploited to register corporations as owners of vessels: this allows beneficial owners (i.e. physical persons) to cloak their identity.<sup>156</sup>

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<sup>153</sup> The issue of IUU (*illegal, unreported and unregulated fishing*) is addressed both by international organizations and by European Union. At international level, some acts are significant in understanding the weight of IUU in the framework of marine environment protection: see for instance FAO, *International Plan of Action to Prevent, Deter And Eliminate Illegal, Unreported and Unregulated Fishing*, Rome 2001, available at the web-site [http://www.fao.org/documents/show\\_cdr.asp?url\\_file=/DOCREP/003/y1224e/y1224e00.HTM](http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/003/y1224e/y1224e00.HTM); furthermore, see FAO, *Code of Conduct for responsible fisheries*, 1995, available at this address: [http://www.fao.org/documents/show\\_cdr.asp?url\\_file=/DOCREP/005/v9878e/v9878e00.htm](http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/005/v9878e/v9878e00.htm). Other international initiatives on the topic can be found at this address: <http://www.fao.org/fi/agreem/agreem.asp>. At EU level a *Community Action Plan for the eradication of illegal, unreported and unregulated fishing*, COM(2002) 180 final, Brussels 28.05.2002 has been enacted to implement the international actions.

<sup>154</sup> To this purpose see OECD, *Fish Piracy, Combating illegal, unreported and unregulated fishing*, 30 September 2004, pp. 195–199, where economic and social impacts of IUU fishing are analysed. Furthermore, see BfU, *“Organised environmental crimes in the EU Member States”*, final report, 2003, pp. 60–64, at [http://europa.eu.int/comm/environment/crime/pdf/organised\\_environmental\\_crime\\_in\\_member\\_states.pdf](http://europa.eu.int/comm/environment/crime/pdf/organised_environmental_crime_in_member_states.pdf)

<sup>155</sup> More specifically, the phenomenon is related to the so called “flags of convenience”, i.e. *flags of a state whose government sees registration as a service it can sell to foreign vessel owners – not as a method to control its vessels through imposition of its sovereignty*. For a deep explanation, see Ferrell J.K., *Controlling Flags of Convenience: one measure to stop overfishing of collapsing fish stocks*, in Lewis & Clark Law School Environmental Law, Spring 2005, p. 329.

<sup>156</sup> A deep analysis of the mechanisms providing anonymity related to the control of ship is carried out by the Maritime Transport Committee of OECD, *Ownership and control of ships*, March 2003, OECD.

Pollution is also closely connected to criminal activities.<sup>157</sup> The high costs of correct and sustainable resource/waste disposal lead companies to find cheaper alternatives even if linked to criminal organizations. This practice has negative effects both on the environment and on the legitimate economy.<sup>158</sup>

Given these considerations, the marine environment sector can be considered as vulnerable to crime.

#### CRIME RISKS ARISING FROM SPECIFIC OPTIONS/PROVISIONS

The Thematic Strategy itself does not seem to create significant crime risks. It aims at reducing environmental pressures arising from a non sustainable use of marine resources. An effective reduction of these pressures would also imply a reduction of the related criminal activities. Moreover, the Strategy includes among its objectives the “effective monitoring and assessment to make sure goals are achieved and actions deliver results”.<sup>159</sup> Such programmes should also involve controls for preventing illegal activities.

However, the framework Directive provides for Regional Marine Strategies but does not clarify measures and programmes to be included in them. Indeed, their content has to comply with Marine Regions’ characteristics, thus it is left to Member States’ legislation. An effective crime risk assessment should address the specific provisions implementing the Directive, in order to analyse how the general principles will be translated into concrete rules. At this stage, actual crime risks cannot as yet be envisaged. However, some crucial issues can be pointed out:

##### ***With reference to article 7, para. 1, d) of the framework Directive (Regional Marine Strategies)***

***Content:*** the article provides for Regional Marine Strategies, which should be developed to achieve the objectives of the Directive. In particular, point d) specifies that the measures included in each Strategy have to be “designed to reduce the impact of human activity to levels compatible with the attainment of the objective specified in Article 6”. Article 6 mentions as “environmental objective” the achievement of *good environmental status* for the region by 2021 at the latest. Annex III of the framework Directive reports the characteristics of *good environmental status*. Amongst them, it includes a region where “population of all commercially valuable fish and shellfish have been restored to and are maintained within safe biological limits [...] and fishing practices have reduced impact on the seabed and greatly lowered by-catch of juvenile fish, thus minimizing the level of discarding”.

***Crime risks:*** possible crime risks are connected with the reduction of the impact of human activities on marine environment. Stricter limits to fishing practices will decrease the quantity of fish exchanged in the market, thus decreasing fishermen profits. In the long-term positive impacts

<sup>157</sup> To this purpose, see European Maritime Safety Agency, *Action Plan for Oil Pollution. Preparedness and Response*, October 2004. The report is available at the web-site <http://www.emsa.eu.int/Docs/other/action%20plan.pdf>

<sup>158</sup> To this purpose, see Gruppo Abele-Nomos and Legambiente, *The illegal trafficking in hazardous waste in Italy and Spain*, 2003;

<sup>159</sup> See Communication from the European Commission to the Council and the European Parliament, *Thematic Strategy on the Protection and Conservation of the Marine Environment*, Brussels COM(2005), p. 6. See also article 10 of the proposed framework Directive, entitled “Monitoring and Assessment”.

on the marine environment are expected, but in the short/medium term prices will increase in the most affected markets.<sup>160</sup> Such an effect could become an incentive for unlawful behaviours –such as fish piracy<sup>161</sup>– aiming at avoiding the above limitations and at keeping high profits.

Crimes envisaged:

- Illegal, unreported and unregulated fishing;
- smuggling of fish.

<b>CONCLUSIONS</b>
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The Marine Environment sector presents crime risks connected to illegal fishing and illegal discharge of harmful substances. These activities are attractive because they allow higher profits compared with the legitimate economy and do not demand particularly high technological requirements. Plus, exploitation of the law for illicit purposes is usual practice. The proposed Strategy aims at reducing the environmental impact of human activities, e.g. by introducing limitations to fishing practices. This will increase costs for fishermen, thus stimulating illicit behaviours (see above *Crime risks arising from specific provisions*). However, at this stage this is not enough to justify an Extended Crime Risk Assessment, as actual crime risks are not envisaged. These do not depend on the general principles provided by the framework Directive, but may arise from their implementation. This means that, while at this stage the Thematic Strategy seems to face possible risks (e.g. by providing for control and monitoring programmes), in the future its effective implementation should be verified. For these reasons, an Extended Crime Risk Assessment is not recommended.

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<sup>160</sup> This consequence is mentioned in the Impact Assessment of the Thematic Strategy: “[...] there may be important social and economic costs in the short-term for sectors most dependent on the marine environment and most directly affecting it (e.g. fisheries)” (p. 4).

<sup>161</sup> This unwanted effect is confirmed by the study carried out by OECD: “the higher the price of fish, the higher the benefit to both IUU and legitimate fishers will be. In the short term, market forces can be expected to increase the value of fish as volumes decrease due to declining stock sizes and quotas. This will disproportionately advantage IUU fishers at the expense of legitimate fishers, because the latter will be constrained by quotas or limitations on effort, whereas IUU fishers will not. This is a dangerous feedback, because as the resource becomes scarcer, the legitimate quota declines still further, creating greater market pressure for increases in value.” In OECD, *Fish Piracy– Combating Illegal, Unreported and Irregular Fishing*, *op. cit.*, p. 184.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2004-ENV-003

### *"Thematic Strategy on Pesticides"*

(Expected date of adoption: 3rd quarter 2005)

#### BACKGROUND

##### Materials provided by the Commission

- Roadmap/Preliminary Impact Assessment.
- Draft proposal for a Thematic Strategy on the Sustainable Use of Pesticides (hereinafter Draft Proposal).

##### Additional Materials collected by Transcrime

- Beratungsgesellschaft für integrierte Problemlösungen (BiPro), *Assessing economic impacts of the specific measures to be part of the Thematic Strategy on the Sustainable Use of Pesticides*, Final Report, European Commission, ENV.C.4/ETU/2003/0094R, October 2004, available at [europa.eu.int/comm/environment/ppps/2nd\\_step\\_study.htm](http://europa.eu.int/comm/environment/ppps/2nd_step_study.htm).
- Bernstorff A. and K. Stairs, *POPs in Africa: hazardous waste trade 1980-2000 obsolete pesticide stockpiles*, 2<sup>nd</sup> edition, Greenpeace international, 22/05/2001, available at [www.greenpeace.org/international/press/reports/pops-in-africa-hazardous-wast](http://www.greenpeace.org/international/press/reports/pops-in-africa-hazardous-wast).
- Betreuungsgesellschaft für Umweltfragen (BfU), *Organised environmental crime in the EU Member States*, final report, Kassel, 15 May 2003.
- Boullanger H., *La criminalité économique en Europe*, Paris, Presses Universitaires de France, 2002.
- Commissione parlamentare d'inchiesta sul ciclo dei rifiuti e sulle attività illecite ad esso connesse, *Documento sull'introduzione nel sistema penale dei delitti contro l'ambiente e contro il fenomeno criminale dell'"Ecomafia"*, Doc. XXIII n. 11, December 2004, available at [www.camera.it/\\_dati/leg14/lavori/stenbic/39/2004/1221/s040.htm#9n1](http://www.camera.it/_dati/leg14/lavori/stenbic/39/2004/1221/s040.htm#9n1).
- Communication COM(2002) 349, *Towards a Thematic Strategy on the Sustainable Use of Pesticides*.
- Decision n°1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme – OJ L 242, 10.9.2002, p.1 (hereinafter 6EAP).
- Greenpeace, *Pesticidi: Il comparto dei fitofarmaci in Italia*, a cura di Sergio Baffoni e Liliana Cori, Greenpeace Italia, 1992, available at [www.greenpeace.it/archivio/toxic/pest.htm](http://www.greenpeace.it/archivio/toxic/pest.htm).
- Gruppo Abele-Nomos and Legambiente, *The illegal trafficking in hazardous waste in Italy and Spain*, 2003.

##### Options to be assessed

The Thematic Strategy pursues the objectives of the 6EAC "in reducing the impacts of pesticides on human health and the environment and more generally to achieve a more sustainable use of pesticides as well as a significant overall reduction in risks and of the use of pesticides consistent

with the necessary crop protection”<sup>162</sup>. Therefore, the Thematic Strategy has five specific objectives:

- “(i) to minimise the hazards and risks to health and environment from the use of pesticides;
- (ii) to improve controls on the use and distribution of pesticides;
- (iii) to reduce the levels of harmful active substances including through substituting the most dangerous with safer (including non-chemical) alternatives;
- (iv) to encourage the use of low-input or pesticide-free crop farming, in particular by raising users’ awareness, by promoting codes of good practices and consideration of the possible application of financial instruments;
- (v) to establish a transparent system for reporting and monitoring the progress made in the achievement of the objectives of the strategy including the development of suitable indicators”<sup>163</sup>.

### **Result of the initial screening**

The proposed communication suggests some measures/actions, which can be ascribed to the categories of regulation at risk<sup>164</sup> n. 1 (“Introduction of product disposal regulations or any other new or more burdensome fee or obligation”), because they aim at introducing new provisions on the pesticide use (including the disposal of pesticide packaging and unused products); n. 3 (“Introduction of a grant, subsidy, or compensation scheme”), because of the proposal of Common Agricultural Policy measures to promote low-input farming and compensate lost production; n. 4 (“Introduction or increase taxes on legal goods”) because of the envisaged intervention on VAT rates to reduce cross border price differentials.

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### **Formal aspects of the draft proposal**

The Draft Proposal does not present any general risk arising from its formal aspects. In fact, since the proposed type of instrument is not a prescriptive act, its provisions do not present crime risks from a formal point of view, as they need to be implemented with more precise regulation.

### **Vulnerability of the area/sector to be regulated**

The pesticides market has high entry barriers based on scientific and technological expertise and large endowment of capital equipment. Furthermore the pesticides sector is a global one where large multinational enterprises (MNEs) act in an oligopolistic market, engaging in competition/collusion strategies and behaviours.<sup>165</sup>

Pesticide production shows low criminal attractiveness because it has a complex market structure with high scientific, technological and financial requirements. As far as risk of detection is

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<sup>162</sup> 6EAC, Art. 7(1).

<sup>163</sup> 6EAP, Art. 7 (2), c); Draft Proposal, p. 7.

<sup>164</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

<sup>165</sup> See Greenpeace, *Pesticidi: Il comparto dei fitofarmaci in Italia*, a cura di Sergio Baffoni e Liliana Cori, Greenpeace 1992, available at [www.greenpeace.it/archivio/toxic/pest.htm](http://www.greenpeace.it/archivio/toxic/pest.htm).

concerned, the existing maximum residue limits (MRLs) system allows for control of the production phase.<sup>166</sup> Such a mechanism aims at preventing the use of potentially harmful products exceeding EC standards. Moreover, to date there are no cases of previous infiltration of criminal organisations into the pesticide production market.

On the contrary, the *disposal* phase of obsolete pesticides represents a critical point in such a complex sector. This segment of the market is strictly connected to the toxic/hazardous waste disposal sector, an area highly infiltrated by organized crime.<sup>167</sup> This aspect of pesticide use should be addressed with great attention by policymakers as it involves “a high risk potential concerning direct environmental damage as well as long term and consequential damage for humans and the environment. At the same time economic damage is generated”<sup>168</sup>.

In conclusion, the pesticides sector shows low crime vulnerability, except for the disposal phase of obsolete pesticides, which is already heavily infiltrated by criminal organizations.

#### CRIME RISKS ARISING FROM SPECIFIC PROVISIONS/OPTIONS

**With reference to point 4.1 of the Draft Proposal (“Collection of PPP packaging and unused (obsolete) products...”):**

**Contents:** the envisaged action aims at improving the disposal of pesticide packaging and unused products, in order to reduce its environmental impact.

**Crime risks:** the toxic waste disposal sector presents high criminal risks because of the intense infiltration of criminal organizations in some Members States.<sup>169</sup> The provision of specific regulation for the handling of such goods without adequate controls and enforcement provisions might result in an unwanted criminal incentive. Organized crime may thus infiltrate such a new branch of the waste disposal market.

**Crimes envisaged:**

- Fraud in PPP packaging and unused pesticides disposal;
- Corruption of regulatory/control agencies;
- Environmental crimes.

<sup>166</sup> The MRLs system is prescribed at a EU level by Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in products of plant and animal origin, OJ L 70 of 16.3.2005.

<sup>167</sup> Betreuungsgesellschaft für Umweltfragen (BfU), *Organised environmental crime in the EU Member States*, final report, Kassel, 15 May 2003.

<sup>168</sup> *Ibid.*, p. v. Obsolete pesticide stockpiles represent a critical environmental problem for many Third World countries, due to the hazardous waste export from industrialised countries. See Andreas Bernstorff and Kevin Stairs, *POPs in Africa: hazardous waste trade 1980–2000 obsolete pesticide stockpiles*, 2<sup>nd</sup> edition, Greenpeace international, 22/05/2001, available at [www.greenpeace.org/international/press/reports/pops-in-africa-hazardous-wast](http://www.greenpeace.org/international/press/reports/pops-in-africa-hazardous-wast).

<sup>169</sup> See Commissione parlamentare d'inchiesta sul ciclo dei rifiuti e sulle attività illecite ad esso connesse, *Documento sull'introduzione nel sistema penale dei delitti contro l'ambiente e contro il fenomeno criminale dell'“Ecomafia”*, Doc. XXIII n. 11, December 2004, available at [www.camera.it/\\_dati/leg14/lavori/stenbic/39/2004/1221/s040.htm#9n1](http://www.camera.it/_dati/leg14/lavori/stenbic/39/2004/1221/s040.htm#9n1); Gruppo Abele–Nomos and Legambiente, *The illegal trafficking in hazardous waste in Italy and Spain*, 2003. In particular, on the pesticides disposal see Greenpeace, *Pesticidi: Il comparto dei fitofarmaci in Italia*, a cura di Sergio Baffoni e Liliana Cori, Greenpeace Italia, 1992, available at [www.greenpeace.it/archivio/toxic/pest.htm](http://www.greenpeace.it/archivio/toxic/pest.htm).



**With reference to point 4.2 of the Draft Proposal (“Promotion of low-input farming...”):**

Contents: in order to promote low-input farming, compensations through Common Agricultural Policy (CAP) are envisaged.

Crime risks: the creation of such a measure would introduce a form of subsidy. Subsidies may stimulate deceptive behaviours in order to meet the granting criteria. Moreover, fraud against the EC budget is frequently committed in the CAP sector.<sup>170</sup> It should also be noted that such fraud is often perpetrated in an organized manner. This suggests that such an economic instrument implies a significant criminal risk.

Crimes envisaged:

- Fraud against the EC budget;
- Corruption of regulatory/control agencies.

**With reference to point 4.2 of the Draft Proposal (“Invitation to Member States to apply VAT rates...”):**

Contents: the action is aimed at reducing/eliminating the price differentials for pesticides which encourage illegal exchange between MSs. The main instrument to reach this goal should be VAT rates.

Crime risks: levelling prices between MSs should act as a long term deterrent of illegal cross border exchange of non-authorized products. However, it should be noted that the transition period could produce criminal incentives to avoid higher taxation. Indeed, increasing VAT rates on pesticides in those MSs whose VAT rates are currently lower, could stimulate market operators to evade taxes.

Crimes envisaged:

- Fraud against EU/MSs’ budgets in the transition period.

<b>CONCLUSIONS</b>
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The Draft Proposal is a wide-ranging policy document. Its provisions are thus necessarily general. For this reason, it has been difficult to proceed with an in-depth crime proofing analysis of the specific crime risks emerging from this instrument. An additional difficulty in conducting this crime proofing exercise was that the “accompanying documents [...] intimately linked”<sup>171</sup> with the Draft Proposal were not provided. Transcrime would like to point out that a more precise assessment could be carried out only by having access to these technical documents.

That being stated, the pesticide sector does not seem to be particularly vulnerable, with the exception of the pesticide disposal phase. Criminal risks implied by the Draft Proposal appear limited to a few specific provisions (see above, under “Crime risks arising from specific provisions”), such as the disposal of packaging and obsolete products, the CAP compensation

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<sup>170</sup> See H. Boullanger, *La criminalité économique en Europe*, Paris, Presses Universitaires de France, 2002.

<sup>171</sup> Draft Proposal, p. 8. A “Technical Annex to the Communication on the Thematic Strategy on the Sustainable Use of Pesticides” and an “extended impact assessment” are mentioned. The Draft Proposal states that they “have to be read in close co-ordination”. Only the latter has been found by Transcrime.

mechanism and the VAT rates variation. These policy choices shall require a deeper analysis when they will be the object of more detailed and regulatory provisions.

For the above reasons, only a minimal level of crime risk is envisaged; consequently, an Extended Crime Risk Assessment is not recommended.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2005-MARKT-004

### *“Commission communication on the results of the consultation launched with the Green paper on Defence Procurement”*

(Expected date of adoption: October 2005)

BACKGROUND
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#### Materials provided by the Commission

- Roadmap.

#### Additional Materials collected by Transcrime

- European Commission, *Small arms and light weapons: The response of the European Union*, Luxembourg: Office for Official Publications of the European Communities, 2001.
- *European Defence – Industrial and Market Issues: Towards an EU Defence Equipment Policy*, COM(2003) 113, Brussels, 11.3.2003.
- European Defence Agency’s Steering Board Decision No. 2005/02/EDA, Brussels, 2.3.2005.
- *European Union Code of Conduct on Arms Exports*, Council document 8675/2/98 rev. 2, 8.6.1998.
- European Union Institute for Security Studies (EUISS), *Defence procurement in the European Union: The current debate*, Paris, may 2005, available at <http://www.iss-eu.org/books/bk05-01.pdf> (viewed 15 November 2005).
- *Green paper: Defence procurement*, COM(2004) 608, Brussels, 23.09.2004 (hereinafter Green paper).
- Gilby, Nicholas, *The UK Government and Arms Trade Corruption: A Short History*, London: Campaign Against Arms Trade, 2005, available at <http://www.caat.org.uk/publications/corruption/corruption-report-0605.pdf> (viewed 15 November 2005).
- International action network on small arms (IANSA), *Small Arms and Brokers*, paper for the UN Biennial Meeting of States held in July 2003, available at [http://www.iansa.org/documents/factsheets/small\\_arms\\_and\\_brokers.pdf](http://www.iansa.org/documents/factsheets/small_arms_and_brokers.pdf) (viewed 15 November 2005).
- International action network on small arms (IANSA), Western Europe, <http://www.iansa.org/regions/europe/europe.htm> (viewed 15 November 2005).
- “Odd Industry Out”, In *The Economist*, 18<sup>th</sup> July 2002, available at <http://www.globalpolicy.org/nations/launder/general/2002/defense.htm> (viewed 15 November 2005).
- Roeber, Joe, *Parallel Markets: Corruption in the international arms trade*, London: Campaign Against Arms Trade, 2005, available at <http://www.caat.org.uk/publications/corruption/parallel-markets-0205.pdf> (viewed 15 November 2005).
- Ruggiero, Vincenzo, *Economie sporche: L'impresa criminale in Europa*, Torino: Bollati Borlinghieri, 1996.
- Trybus, Martin, *European Defence Procurement Law: International and National Procurement Systems as Models for a Liberalised Defence Procurement Market in Europe*, Dordrecht: Kluwer, 1999.

- United Nations, *Report of the Panel of Governmental Experts on Small Arms*, A/52/298, annex, 27.8.1997.
- United Nations, *Small Arms and Light Weapons: Selected United Nations Documents*, United Nations, 2005, available at [http://disarmament.un.org/cab/images /bookletsalw2005.PDF](http://disarmament.un.org/cab/images/bookletsalw2005.PDF) (viewed 15 November 2005).

### Options to be assessed

In the Roadmap no policy option is proposed for the Communication.<sup>172</sup> It is only stated that in the Communication “the Commission will announce the initiative(s) that it intends to take (if any)”<sup>173</sup> and that the Communication “will identify the policy option(s) – if any – and the relevant impact extended assessment(s) needed”<sup>174</sup>.

Given the absence of actual policy options for the Commission’s Communication, this Preliminary Crime Risk Assessment exercise will focus mainly on the general crime risks afflicting the Defence equipment market.

### Result of the initial screening

The proposal cannot be placed under any of the categories of regulation at risk<sup>175</sup>, because it only aims at making public the outcome of the consultation.

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### Formal aspects of the draft proposal

It is not possible to deliver an assessment on the crime risks arising from the formal aspects of the proposal, because of its very nature. A Commission’s Communication on the results of a public debate does not present crime risks.

### Vulnerability of the area/sector to be regulated

The Defence equipment market presents a specific vulnerability because of its direct connection with the sovereignty of states and their security and defence policies. In particular, there is a dominant role of the state on the demand side; the product is frequently extremely complex and requires sophisticated technologies and high capital endowment; security of supply plays a key role and must be ensured especially in times of crisis; confidentiality of information is frequently

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<sup>172</sup> At point 3 of the Roadmap four “options” are listed (no EU initiative; an interpretative Communication; a Directive on defence procurement; both an interpretative Communication and a Directive). These options are potential initiatives that will eventually be taken when addressing the Defence procurement sector. Therefore they do not concern the Communication on the public consultation itself, instead affecting only possible future EU strategies on Defence procurement.

Moreover, point 3 of the roadmap also emphasizes that other policy options could emerge from the public consultation. Thus, during the debate, several MSs have proposed a Code of Conduct on defence procurement. The European Defence Agency has been charged to “explore the possibilities for a voluntary regime covering procurements where Article 296 applies” by the end of 2005 (Steering Board Decision No. 2005/02/EDA, Brussels, 2.3.2005).

<sup>173</sup> Roadmap, point 3.

<sup>174</sup> Roadmap, point 4.

<sup>175</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

crucial to maintain technological superiority over competitors.<sup>176</sup> These issues imply that often market forces cannot work and competition in the Defence equipment market is thus frequently distorted.<sup>177</sup> Indeed, protectionist policies, collusive/corruptive behaviours and offset mechanisms frequently affect market dynamics in a relevant way.<sup>178</sup>

From a criminological point of view, these features of the Defence equipment market suggest that it should be addressed with great attention. The Defence equipment market has been embroiled in several criminal cases ranging from corruption to fraud and illicit trade.<sup>179</sup> Ruggiero has shown that there is currently growth in the “grey” trade of arms.<sup>180</sup> Any attempt to regulate this sector must not underestimate that it represents a fertile criminal/illicit sector.

<b>CRIME RISKS ARISING FROM SPECIFIC PROVISIONS/OPTIONS</b>
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See the above statement, under *Options to be assessed*.

<b>CONCLUSIONS</b>
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The Defence equipment market is extremely complex. Its mechanisms are often opaque and unlawful behaviour is frequent. Consequently, high criminal risks are present (see above, under *Vulnerability of the area/sector to be regulated*). Any attempt to regulate it should be undertaken with great attention.

The object of this Preliminary Crime Risk Assessment is the *Commission’s Communication on the results of the public consultation launched with the Green Paper on Defence Procurement*. The goal of this Communication is limited to presenting the results of the public debate. In general, it should be noted that a Communication on the results of a public consultation should not be the object of a Crime Risk Assessment. Indeed, such acts do not promote any EU strategy nor contain provisions or policy options that can be crime-proofed.

Due to the nature and the function of the proposed act, an Extended Crime Risk Assessment (ECRA) is not recommended. At this stage no EU strategy is clearly envisaged. When the choice of the policy instrument is made (e.g. a Directive and an interpretative Communication, a code of conduct, etc.) an ECRA on these proposals will be needed in view of the general level of vulnerability presented by this sector.

For the above reasons no Extended CRA is requested.

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<sup>176</sup> See Green paper, p. 4; EUISS, *Defence procurement in the European Union: The current debate*, may 2005, p. 9–11. For a deeper analysis of defence purchasing and defence procurement see Trybus M., *European Defence Procurement Law*, Dordrecht, 1999, p. 7–27.

<sup>177</sup> See “Odd Industry Out”, in *The Economist*, 18<sup>th</sup> July 2002.

<sup>178</sup> See “Odd Industry Out”, in *The Economist*, 18<sup>th</sup> July 2002, where it is stated that “The American Department of Commerce reckons that half of all bribes paid in international business relate to arms deals, even though arms make up less than 1% of all trade”. See also Roeber J., *Parallel Markets*, London, 2005, p. 5–7 and Ruggiero V., *Economie sporche*, Torino, 1996, p. 177–189 for several examples of crimes in the Defence equipment sector.

<sup>179</sup> For relevant examples see Gilby N., *The UK Government and Arms Trade Corruption*, London, 2005, pp. 7–40; Roeber J., *Parallel Markets*, London, 2005, pp. 15–18; Ruggiero V., *Economie sporche*, Torino, 1996, pp. 177–189.

<sup>180</sup> *Ibid.*, p. 181. As the author states, “grey” transactions are neither entirely legal nor illegal (p. 183).

## PRELIMINARY CRIME RISK ASSESSMENT OF 2005 – ENV – 038

### *“Thematic Strategy on the Urban Environment”*

(Expected date of adoption: mid December 2005)

#### BACKGROUND

##### Materials provided by the Commission

- Roadmap.

##### Additional Materials collected by Transcrime

- Decision n°1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme – OJ L 242, 10.9.2002, p.1 (hereinafter 6EAP).
- Communication COM(2004) 60, *Towards a thematic strategy on the urban environment*.
- Kollamthodi, Sujith, Jennifer Alanko and Lucie Middlemiss, *Assessing the Environmental, Social, and Economic Impacts of the Thematic Strategy on the Urban Environment*, Didcot: AEA Technology Environment, 2005.
- Kollamthodi, Sujith, et al., *Review of National and Regional Obligations for Environmental Management Plans, Environmental Management Systems, and Sustainable Urban Transport Plans*, Didcot: AEA Technology Environment, 2005.
- Town, Stephen, Caroline L. Davey and Andrew B. Wootton, *Design Against Crime. Secure Urban Environment by Design*, Salford: The University of Salford, 2003.
- Cozens, P. M., “Sustainable Urban Development and Crime Prevention Through Environmental Design for the British City”, in *Cities*, 19(2), 2002, p. 129–137.
- Direzione centrale ambiente e mobilità, *Studio sulla sicurezza delle fermate dei mezzi pubblici*, Milano: Comune di Milano, 2003.
- Newman, Oscar, *Creating Defensible Space*, U.S. Department of Housing and Urban Development, 1996.

##### Options to be assessed.

The Thematic Strategy pursues the objectives of the 6EAP, i.e. “contributing to a better quality of life through an integrated approach concentrating on urban areas”<sup>181</sup>. In particular, the 6EAP sets action on the urban environment as a priority, specifically the adoption of “a thematic strategy promoting an integrated horizontal approach across Community policies and improving the quality of urban environment, taking into account progress made in implementing the existing cooperation framework reviewing it where necessary, and addressing:

- the promotion of Local Agenda 21;
- the reduction of the link between economic growth and passenger transport demand;

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<sup>181</sup> 6EAC, Art. 7(1).

- the need for an increased share in public transport, rail, inland waterways, walking and cycling modes;
- the need to tackle rising volumes of traffic and to bring about a significant decoupling of transport growth and GDP growth;
- the need to promote the use of low emission vehicles in public transports;
- the consideration of urban environment indicators”<sup>182</sup>.

The **overall aim** of the Urban Environment Thematic Strategy is “to improve the environmental performance and quality of urban areas [...] while taking into account the related economic and social issues”<sup>183</sup>.

The objectives listed in the 6EAP “have been developed into a focus on 4 **priority themes**”<sup>184</sup>:

- sustainable urban transport;
- sustainable urban management;
- sustainable construction methods;
- techniques and sustainable urban design.

**Three policy options** are envisaged in the roadmap to address the priority themes:

- “the ‘do nothing’ option to provide a baseline and benchmark for the Strategy”<sup>185</sup>;
- “a Strategy that is entirely voluntary in its approach focussing on guidance, support and assistance”<sup>186</sup>;
- “a Strategy that comprises some obligatory elements (urban environmental management plans and management systems and sustainable urban transport plans for Europe’s largest cities) as well a wide range of ‘voluntary’ measures”<sup>187</sup>.

### **Result of the initial screening**

Only the third policy option includes obligatory elements. Indeed, it would set “minimum procedural requirements for environmental management and sustainable urban transport”<sup>188</sup>.

For the time being, such measures cannot be placed under any of the categories of regulation at risk<sup>189</sup> as their scope is too general.

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<sup>182</sup> 6EAC, Art. 7(2), h).

<sup>183</sup> Communication COM(2004) 60, p. 4.

<sup>184</sup> Roadmap, point A.3.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*, point A.4.

<sup>189</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

## GENERAL FACTORS TO BE CONSIDERED

### Formal aspects of the draft proposal

It is not possible to deliver an assessment on the crime risks arising from the formal aspects of the proposal, because the draft text is unavailable.

A proposal for a Strategy, however, should not present criminal risks arising from its formal aspects due to its very nature: since the proposed type of instrument is not a prescriptive act, its future provisions will not present crime risks from a formal point of view, as they will be implemented with more precise and regulating acts.

### Vulnerability of the sector to be regulated

The Thematic Strategy on Urban environment covers an extremely wide and heterogeneous mix of sectors and activities. Urban design and management, transports and constructions are broad matters that may pose criminal issues.

In general, sustainable urban development has been “predominantly perceived as an ‘environmental’ issue [...] and fails to consider the ubiquitous issue of crime”<sup>190</sup>. Crime-related problems however are crucial for a concrete and effective sustainable urban environment. Indeed, “a prerequisite for a sustainable urban environment is that it should not pose a threat to current or future users”<sup>191</sup>. “A sustainable community must be one that is defined as safe, perceives itself to be safe and is considered by others to be safe”<sup>192</sup>.

Criminal justice and criminology have given much attention to these matters. A whole perspective of criminological theory, called ecological approach, analyses the relations of people and the surrounding environment.<sup>193</sup>

Urban management and crime present many connections.<sup>194</sup> The distribution of crimes has been analysed to draw spot maps outlining city areas that show higher crime rates.<sup>195</sup> Several theories have emerged concerning crime distribution in the urban environment proposing different solutions to reduce and prevent crimes.<sup>196</sup> A sustainable urban management plan should consider

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<sup>190</sup> P.M. Cozens, “Sustainable Urban Development and Crime Prevention Through Environmental Design for the British City”, in *Cities*, 19(2), 2002, p. 131.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*, p. 135.

<sup>193</sup> The ecological approach can be traced back to the Chicago School Criminology. As for plants and animals in natural sciences, Chicago School researchers studied people in their natural environment, analysing their behaviours in space and time. Great attention was paid on the study of cities and the urban environment in general, on the assumption that cities are responsible of a great number of social problems. See, F. Williams and M. D. McShane, *Devianza e criminalità*, Bologna, 2002, p. 54 to 69.

<sup>194</sup> The concept of CPTED (crime prevention through environmental design) defines “the proper design and effective use of the built environment [which] can lead to a reduction in the fear of crime and the incidence of crime, and to an improvement in the quality of life” (T.D. Crowe, *crime Prevention Through Environmental Design: Applications of Architectural Design and Space Management Concepts*, Oxford, 2000, p.1, as quoted in P.M. Cozens, “Sustainable Urban Development and Crime Prevention Through Environmental Design for the British City”, in *Cities*, 19(2), 2002, p. 131).

<sup>195</sup> See J. H. Ratcliffe, “Crime mapping and the trainin needs of law enforcement”, in *European Journal on Criminal Policy and Research*, 10, 2004, p. 65–83.

<sup>196</sup> See F. Williams and M. D. McShane, *Devianza e criminalità*, Bologna, 2002, p. 54 to 69.



the results of research in geographic criminology in order to avoid unwanted crime-generating effects.

The *EU Transport Council Definition of Sustainable Transport* states that a sustainable transport system “allows the basic access and development needs [...] to be met safely”<sup>197</sup>. Studies demonstrated that “personal safety aspects have a determining influence on the extent to which public transport is used”<sup>198</sup>. Crime risks greatly influence the decisions of public transport passengers.<sup>199</sup> A sustainable transport strategy should consider crime-related issues to reach the most effective results.

With regard to sustainable construction, the Commission recognizes that “buildings and the built environment give a town and city its character and landmarks that create a sense of place and identity, and can make towns and cities attractive places where people like to live and work”<sup>200</sup>. Connections between crime and forms of housing have been demonstrated. Oscar Newman studied this relation and created the concept of defensible space as a way to prevent crime by architectural design.<sup>201</sup> A real sustainable construction strategy should take account of these issues.

#### CRIME RISKS ARISING FROM SPECIFIC PROVISIONS/OPTIONS

**With reference to the third option envisaged in the roadmap (a Strategy that comprises some obligatory elements as well a wide range of ‘voluntary’ measures):**

*Contents:* this option includes the setting of minimum procedural requirements for environmental management and sustainable urban transport. European capital cities and every other city of over 100.000 inhabitants should adopt an environmental management plan and a sustainable urban transport plan. Requirements to these effects may be set at the EU level.

*Crime risks:* for the time being, the above measures are too general to assess possible specific criminal effects. The main issue related to setting requirements at the EU level is the non compliance risk, which may be caused by absence of financial resources, knowledge and information, bureaucratic paralysis, political interest, etc.

#### CONCLUSIONS

The urban environment is a very complex system that may affect crime trends like any other human activity. Criminology and criminal justice research outlines several correlations between

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<sup>197</sup> Communication COM(2004) 60, annex 4, p. 50.

<sup>198</sup> Direzione centrale ambiente e mobilità, *Studio sulla sicurezza delle fermate dei mezzi pubblici*, Milano: Comune di Milano, 2003, p. 151.

<sup>199</sup> *Ibid.*

<sup>200</sup> Communication COM(2004) 60, p. 20.

<sup>201</sup> The first work by Newman was on Defensible space is O. Newman, *Defensible space: Crime prevention through urban design*, New York, 1972. See also the more up-to-date O. Newman, *Creating Defensible Space*, U.S. Department of Housing and Urban Development, 1996.

crime trends and urban environment, including their distribution (see above, under *Vulnerability of the sector to be regulated*).

As mentioned above (under *Formal aspects of the draft proposal*), the absence of the Draft text and of more detailed information on the possible policy options do not allow a deeper analysis.

Due to the nature of the proposed act, i.e. a non regulating act, an Extended Crime Risk Assessment (ECRA) is not recommended. When other measures implement the provisions of the Thematic Strategy, an ECRA may be required, due to the complex nature of the sectors involved.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2005–COMP–001

### *“Proposal for a Council Regulation repealing Regulation 4056/86 applying the EC competition rules to maritime transport”*

(Expected date of adoption: December 2005)

#### BACKGROUND

##### Material provided by the Commission.

- Roadmap.
- *Council Regulation (EEC) 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 [now 81 and 82] of the Treaty to maritime transport (Liner shipping conferences)*, OJ L 378, 31/12/1986, p. 4 (hereinafter Regulation 4056/86).

##### Additional Material collected by Transcrime.

- Bloom, Margaret, Office of Fair Trading, *Exchange of confidential information among members of the EU network of competition authorities*, Annual Competition Workshop, European University Institute, 13 April 2002
- European Commission, *Impact Assessment*, Doc. SEC (2005) 1641 of 14/12/2005, annex to Doc. COM (2005) 651, [http://europa.eu.int/comm/competition/antitrust/legislation/maritime/com\\_2005\\_0651\\_div\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/legislation/maritime/com_2005_0651_div_en.pdf).
- European Commission, *Proposal for a Council Regulation repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 96 to maritime transport, and amending Regulation (EC) no 1/2003 as regards the extension of its scope to include cabotage and international tramp services*, Doc. COM (2005) 651 of 14/12/2005, [http://europa.eu.int/comm/competition/antitrust/legislation/maritime/com\\_2005\\_0651\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/legislation/maritime/com_2005_0651_en.pdf).
- *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ L 001, 04/01/2003, p. 1, [http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l\\_001/l\\_00120030104en00010025.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf).
- European Commission, *White paper on the review of Regulation 4056/86, applying EC competition rules to maritime transport*, [http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004\\_0675en01.pdf](http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0675en01.pdf).
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- Halarambides, Hercules E., *The Economics of Bulk Shipping Pools*, Center for Maritime Economics and Logistics, Erasmus University Rotterdam, 1996, [http://www.maritimeeconomics.com/downloads/papers/HH\\_Bulk%20Shipping%20Pools.pdf](http://www.maritimeeconomics.com/downloads/papers/HH_Bulk%20Shipping%20Pools.pdf).
- Haralambides, Hercules E. et. al., *Final Report for the assistance in processing public submissions to be received in response to the consultation paper on the review of Council regulation 4056/86*, 12 November 2003,

[http://europa.eu.int/comm/competition/antitrust/review/submissions/final\\_report\\_erasmus.pdf](http://europa.eu.int/comm/competition/antitrust/review/submissions/final_report_erasmus.pdf).

- House of Commons, European Standing Committee, *Competition: Maritime Transport*, 6 March 2006, <http://www.publications.parliament.uk/pa/cm200506/cmstand/euro/st060306/60306s01.htm>.
- House of Commons, Select Committee on European Scrutiny, *Sixteenth Report*, 2 February 2006, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xvi/3402.htm>.
- International Labor Organization (ILO), *International Labour Standards for Seafarers*, 20 October 2000, <http://www.ilo.org/public/english/standards/norm/whatare/standards/marit1.htm>.
- Union des Industries de la Communauté Européenne (UNICE), *Lisbon strategy: growth and jobs for Europe*, <http://www.unice.org/content/default.asp?PageId=373>.
- United Nations Conference on Trade and Development, *United Nations Convention on a Code of Conduct for Liner Conferences*, Geneva, 6 April 1974, <http://www.admiraltylawguide.com/conven/liner1974.html>.
- World Shipping Council, *European Commission review of International Liner Shipping Competition and Regulation*, 26 November 2003, [http://www.worldshipping.org/final\\_report\\_erasmus.pdf](http://www.worldshipping.org/final_report_erasmus.pdf).

#### Options to be assessed.

At the Lisbon Summit in 2000, the European Union adopted a strategy aimed at removing existing impediments for EU businesses to compete, innovate and grow.<sup>202</sup>

Council Regulation (EC) No 4056/86 of 22 December 1986 lays down detailed rules for the application of Articles 85 and 86 to maritime transport, granting liner shipping conferences a block exemption from EU competition rules. In addition, regulation (EC) No 1/2003 excludes international tramp vessel services and cabotage from the Community competition implementing rules.<sup>203</sup> In order to further the Lisbon strategy and promote competition, the European Union has drafted a proposal for a Council Regulation repealing Regulation (EC) 4056/86 and amending Regulation (EC) No 1/2003 (hereinafter the proposal).<sup>204</sup>

<sup>202</sup> Union des Industries de la Communauté Européenne (UNICE), *Lisbon strategy: growth and jobs for Europe*, <http://www.unice.org/content/default.asp?PageId=373>.

<sup>203</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 04/01/2003, p. 1, [http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/L\\_001/L\\_00120030104en00010025.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/L_001/L_00120030104en00010025.pdf).

<sup>204</sup> European Commission, *Proposal for a Council Regulation repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 96 to maritime transport, and amending Regulation (EC) no 1/2003 as regards the extension of its scope to include cabotage and international tramp services*, Doc. COM (2005) 651 of 14/12/2005, [http://europa.eu.int/comm/competition/antitrust/legislation/maritime/com\\_2005\\_0651\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/legislation/maritime/com_2005_0651_en.pdf) (hereinafter draft proposal).

### Result of the initial screening.

This Preliminary Crime–Risk Assessment is based on the Roadmap provided by the European Commission and on the draft proposal collected by Transcrime. The proposed discipline can be seen as coming under categories 1 and 7 of the Jill Dando Institute classification.<sup>205</sup>

The text comes under category 1 (“Introduces product disposal regulations or any other new or more burdensome fee or obligation”) in that, by submitting liner conferences to EC competition rules, it imposes on them a new set of obligations. Indeed, the EC competition rules prohibit agreements which may have as their object the prevention, restriction or distortion of competition.<sup>206</sup>

In addition, the draft proposal will place liner conferences, international tramp vessel services and cabotage under the Community competition enforcement rules. This will provide the officials enforcing the EC competition rules with more regulatory power. Hence, the proposed text also comes under category 7 of the Jill Dando Institute classification (“Provides officials with regulatory power”).

## GENERAL FACTORS TO BE CONSIDERED

### Formal aspects of the draft proposal.

The draft text is composed of three articles. Article 1 provides for the repeal of Regulation (EC) No 4056/86. Article 2 provides for the deletion of Article 32 of Regulation (EC) No 1/2003. Article 3 addresses the entry into force and applicability of the proposed Regulation.

The draft proposal is short and unambiguous and does not raise any formal issue concerning its internal consistency.

Concerning the draft proposal’s external consistency, it should be noted that the proposed regulation, if adopted, will contrast with the United Nations Convention on a Code of Conduct for Liner Conferences.<sup>207</sup> This could create a conflict of laws and a contradictory legal environment for carriers to operate. The Commission is aware of such an issue and will take action to prevent any conflict of law between EU and UN provisions.<sup>208</sup>

<sup>205</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September, 2003, UCL, [http://www.jdi.ucl.ac.uk/publications/adhoc\\_publications/crime\\_proofing\\_report.php](http://www.jdi.ucl.ac.uk/publications/adhoc_publications/crime_proofing_report.php).

<sup>206</sup> Art. 81 of the Treaty establishing the European Community, [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c\\_325/c\\_32520021224en00010184.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_325/c_32520021224en00010184.pdf).

<sup>207</sup> United Nations Conference on Trade and Development, *United Nations Convention on a Code of Conduct for Liner Conferences*, Geneva, 6 April 1974, <http://r0.unctad.org/ttl/docs-legal/unc-cml/status/Convention%20on%20a%20Code%20of%20Conduct.pdf>. The UN Convention allows liner conferences, providing regulation for them. This approach was designed to protect national lines of developing countries. The Commission states that such a goal was missed and that the current conference systems hinder developing countries maritime transport. “The UNCTAD code is not applied in practice anymore” (European Commission, *Impact Assessment*, Doc. SEC (2005) 1641 of 14/12/2005, annex to Doc. COM (2005) 651, p. 27–28, [http://europa.eu.int/comm/competition/antitrust/legislation/maritime/com\\_2005\\_0651\\_div\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/legislation/maritime/com_2005_0651_div_en.pdf)).

<sup>208</sup> “The Commission will recommend a plan of action on denunciation of the United Nations Conference on Trade and Development accord for both the Community and EU members to undertake” (House of Commons, European Standing Committee, *Competition: Maritime Transport*, 6 March 2006,

**Vulnerability of the area/sector to be regulated.**

Maritime transport is a particular sector of activity.<sup>209</sup> Illegal or criminal behaviours in the maritime sector may produce great harm, causing accidents resulting in massive sea pollution and/or numerous human casualties.

Regulation of the maritime transport sector has to deal with the protection of the environment, the working conditions of the crew, the cargo and the maintenance of the ship. Numerous international conventions address pollution and safety at sea, including transport of dangerous goods and the working conditions for seafarers.<sup>210</sup>

In terms of accessibility, the maritime transport sector requires substantive capital endowment and equipment. These features should discourage criminals from entering such a market. In terms of attractiveness, transport by sea may be a means of choice for criminals who engage in the transport of illicit goods. Nevertheless, maritime transport does not appear to be more attractive to criminals than other means of transport.

The draft proposal does not affect the vulnerability of the market to crime. Indeed, an extension of competition rules to this sector may have beneficial effects also on transparency and accountability of shipping companies.

For the above reasons, the maritime transport sector shows a low degree of vulnerability to criminal actors and organizations.

**CRIME RISKS ARISING FROM SPECIFIC PROVISIONS/OPTIONS**
Contents:

The proposed regulation would put an end to the possibility enjoyed by carriers to establish liner conferences. It would subject them to the European Communities competition rules as they already apply to the sectors which have not been granted an exemption.

Crime risks:

The draft proposal will make a set of behaviours unlawful which were previously allowed and which will remain lawful in many non EU countries. It can therefore be expected that carriers will show some resistance in adapting to the new standards, eventually maintaining the current system of agreements. The transitional period of two years, as well as the provision of clear guidelines on what will become illegal, may contribute to reducing the difficulty of adaptation. Therefore, a low level of risk can be envisaged concerning the violation of competition rules.

With the repeal of Regulation 4056/86, carriers, prevented from forming liner conferences, will have to operate in a more competitive environment. A foreseeable result will be an increased

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<http://www.publications.parliament.uk/pa/cm200506/cmstand/euro/st060306/60306s01.htm>). See also European Commission, *Proposal for a Council Regulation repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 96 to maritime transport, and amending Regulation (EC) no 1/2003 as regards the extension of its scope to include cabotage and international tramp services*, Doc. COM (2005) 651 of 14/12/2005, p. 9–10, [http://europa.eu.int/comm/competition/antitrust/legislation/maritime/com\\_2005\\_0651\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/legislation/maritime/com_2005_0651_en.pdf).

<sup>209</sup> The specificity of the activity has to do with the environment in which it takes place: the sea. The International Labour Organization speaks of the “special nature and conditions of life and work at sea” (International Labor Organization, *International Labour Standards for Seafarers*, 20 October 2000, <http://www.ilo.org/public/english/standards/norm/whatare/standards/marit1.htm>).

<sup>210</sup> See Admiralty and Maritime Law Guide, International Conventions, <http://www.admiraltylawguide.com/interconv.html>

pressure to diminish costs. A tempting possibility to do so may be by not complying with applicable regulations concerning expensive safety and maintenance. In addition, in order to successfully avoid constraining regulations, shipping lines may eventually resort to collusion and corruption. This risk does not seem to be relevant, since a great part of such constraining regulation is normal and already in force. The draft proposal will not modify the obligation to comply with these rules and thus a low risk of increased violations is envisaged.

Crimes envisaged:

- Illicit agreements/conferences;
- Non-compliance with maritime transport regulations, in particular regulations dealing with safety at sea, seafarers working conditions, safety of cargo, and pollution;
- Collusion and corruption.

<b>CONCLUSIONS</b>
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The draft proposal does not raise any formal issue concerning its internal consistency. Contrast may arise with the United Nations Convention on a Code of Conduct for Liner Conferences. The maritime transport market shows a low vulnerability to crime, though even unlawful behaviour such as violation of safety and/or environment protection rules may incur very high costs.

The overall criminal risks implied by the draft proposal appear not to be relevant. The transitional period should reduce the impact of competition rules on the market and stimulate competitive behaviours.

No Extended Crime Risk Assessment is required.

## PRELIMINARY CRIME RISK ASSESSMENT OF 2005–TREN– 023

### *“Communication to the European Parliament and the Council on transparency and functioning of the European hydrocarbon market”*

(Expected date of adoption: November 2005)

#### BACKGROUND

##### Materials provided by the Commission

- Roadmap.

##### Additional Materials collected by Transcrime

- Christian Aid, *Fuelling poverty: Oil, war and corruption*, London, 2003, available at [www.christian-aid.org.uk/indepth/0305cawreport/cawreport03.pdf](http://www.christian-aid.org.uk/indepth/0305cawreport/cawreport03.pdf).
- Commission des affaires étrangères, *Rapport d'information sur le rôle des compagnies pétrolières dans la politique internationale et son impact social et environnemental*, doc. N. 1859, 13 octobre 1999, available at [www.assemblee-nationale.fr/legislatures/11/pdf/rap-info/i1859-01.pdf](http://www.assemblee-nationale.fr/legislatures/11/pdf/rap-info/i1859-01.pdf).
- *Directive 98/93/EC of 14 December 1998 amending Directive 68/414/EEC imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products*, in *OJ L 358* 31/12/1998, p. 100, available at [europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31998L0094&model=guicheti](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31998L0094&model=guicheti).
- *EUROGULF: An EU–GCC Dialogue for Energy Stability and Sustainability*, Final Research Report, 2005, available at [europa.eu.int/comm/energy\\_transport/en/lpi\\_lv\\_en1.html](http://europa.eu.int/comm/energy_transport/en/lpi_lv_en1.html).
- *Europe could save 20% of its energy by 2020*, Press Release MEMO/05/216 of 22/06/2005, available at [europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/216&format=HTML&aged=0&language=EN&guiLanguage=en](http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/216&format=HTML&aged=0&language=EN&guiLanguage=en).
- Luciani, Giacomo, *EUROGULF: An EU–GCC Dialogue for Energy Stability and Sustainability*, Executive Summary and Policy Paper, 2005, available at <http://www.mees.com/postedarticles/oped/v48n13-5OD02.htm>.
- Oxford Institute for Energy Studies, *The Oil Supply and Demand Context for Security of Oil Supply to the EU from the GCC Countries*, Oxford, 2005, available at <http://ideas.repec.org/p/wpa/wuwpot/0507003.html>.
- *The European Union's oil supply*, 2000, available at [europa.eu.int/comm/energy/oil/index\\_en.htm](http://europa.eu.int/comm/energy/oil/index_en.htm).

##### Options to be assessed

The Communication to the European Parliament and the Council on transparency and functioning of the European hydrocarbon market (hereinafter the Communication) is part of a “series of consultative or preparatory documents that will be adopted by the Commission in 2005 and early



2006”<sup>211</sup>. Those documents will give the Commission “a full picture of how to approach the development a real coherent and integrated energy policy for Europe”<sup>212</sup>.

Concerning the transparency and functioning of the European hydrocarbon market, the objective of the Commission is to determine means to ensure more stability in oil prices.<sup>213</sup> Another objective is the evaluation of possible reforms of the European security stockpiles system.<sup>214</sup>

In the Roadmap, five policy options are listed:<sup>215</sup>

- Reform of the reference pricing system;
- Dialogue with producing countries;
- Establishment of a market observation system to improve its transparency and predictability;
- Monitoring non-commercial operators activities;
- Reform of the security stock system.

### **Result of the initial screening**

The proposal cannot be placed under any of the categories of regulation at risk<sup>216</sup>, because the mentioned options are still defined in a very general way.

<b>GENERAL FACTORS TO BE CONSIDERED</b>
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### **Formal aspects of the draft proposal**

It is not possible to deliver an assessment on the crime risks arising from the formal aspects of the proposal, because the draft text is unavailable.

A proposal for a Communication, however, should not present criminal risks arising from its formal aspects due to its very nature: since the proposed type of instrument is not a prescriptive act, its future provisions will not present crime risks from a formal point of view.

### **Vulnerability of the sector to be regulated**

The hydrocarbon market is global and has strategic importance for all countries.<sup>217</sup> Security of supply plays a key role and must be ensured especially in times of crisis, because all modern economies still depend on oil supply for a relevant part of their energy production.<sup>218</sup> A great share of the world oil reserves is placed in areas that present high political and economic

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<sup>211</sup> *Europe could save 20% of its energy by 2020*, Press Release MEMO/05/216 of 22/06/2005.

<sup>212</sup> *Ibid.*

<sup>213</sup> See Roadmap, p. 1.

<sup>214</sup> *Ibid.*

<sup>215</sup> See Roadmap, p. 1.

<sup>216</sup> See Typologies of regulations at risk listed in Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators. Final Report to the EU Crime Proofing Steering Group*. September 2003, UCL.

<sup>217</sup> See G. Luciani, *EUROGULF: An EU-GCC Dialogue for Energy Stability and Sustainability*, 2005, p. 5-6; Commission des affaires étrangères, *Rapport d'information sur le rôle des compagnies pétrolières dans la politique internationale et son impact social et environnemental*, doc. N. 1859, 13 October 1999, available at [www.assemblee-nationale.fr/legislatures/11/pdf/rap-info/i1859-01.pdf](http://www.assemblee-nationale.fr/legislatures/11/pdf/rap-info/i1859-01.pdf).

<sup>218</sup> See G. Luciani, *EUROGULF: An EU-GCC Dialogue for Energy Stability and Sustainability*, 2005, p. 6.

instability such as the Persian Gulf region, Central Asia and South America.<sup>219</sup> Consequently, oil companies need to maintain good relations with the governments of oil producing countries.<sup>220</sup> The Middle East (and therefore the Gulf Cooperation Council<sup>221</sup>) is a key region from that point of view, because it has the largest oil reserves in the world.<sup>222</sup> Although the share of the GCC countries in EU MSs' oil supplies are limited compared to other oil producing countries (e.g. Russia, Algeria), "the EU is dependent on GCC oil production and exports because the latter are essential to the orderly functioning of the global oil market, and the GCC members countries are the marginal suppliers of world oil"<sup>223</sup>. For these reasons, the oil market is tightly connected with the global political and diplomatic situation.<sup>224</sup>

The hydrocarbon sector is very complex. It requires high capital endowment, substantial investment and sophisticated technologies.<sup>225</sup> The political and economic features of the hydrocarbon market imply that market forces often cannot work and competition is frequently distorted in the sector. The need to obtain concessions from national governments often brings corruptive behaviours. This effect is fostered by the fact that governments of developing oil-based countries tend to have lower levels of accountability.<sup>226</sup> Many cases of corruption and other illegal behaviours in the hydrocarbon market have been reported. A great number of them concern multinational oil companies and governments of developing countries, but EU MSs cannot be deemed completely distant from that, since oil supply is a crucial issue for their economies.<sup>227</sup>

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<sup>219</sup> See Commission des affaires étrangères, *Rapport d'information sur le rôle des compagnies pétrolières dans la politique internationale et son impact social et environnemental*, p. 8.

<sup>220</sup> See *ibid.*

<sup>221</sup> The Gulf Cooperation Council (GCC) is a regional organization founded on 21<sup>st</sup> may 1981 and is composed of the United Arab Emirates, Bahrain, Saudi Arabia, Oman, Qatar and Kuwait. The GCC Charter states that its' basic objectives are to effect coordination, integration and inter-connection between Member States in all fields, strengthening ties between their peoples, formulating similar regulations in various fields such as economy, finance, trade, customs, tourism, legislation, administration, as well as fostering scientific and technical progress in industry, mining, agriculture, water and animal resources, establishing scientific research centres, setting up joint ventures, and encouraging cooperation of the private sector. For more information see <http://www.gcc-sg.org/>.

<sup>222</sup> The GCC oil and natural gas reserves represent 41.6% and 23.8% of the world's total respectively (see N. Abi-Aad, *Prospects for Oil & Gas Exports from the GCC Member Countries*, subtask 1.1 in *EUROGULF: An EU-GCC Dialogue for Energy Stability and Sustainability*, 2005, p. 3, available at [europa.eu.int/comm/energy\\_transport/en/lpi\\_lv\\_en1.html](http://europa.eu.int/comm/energy_transport/en/lpi_lv_en1.html) and R. Skinner and R. Arnott, *Prospects for Oil and Gas Exports from the GCC member countries*, subtask 1.1b in *ibid.*, p. 1-3).

<sup>223</sup> G. Luciani, *EUROGULF: An EU-GCC Dialogue for Energy Stability and Sustainability*, 2005, p. 5, available at <http://www.mees.com/postedarticles/oped/v48n13-5OD02.htm>. However, the author states that "oil production from the GCC is set to increase in importance over the next 20 years".

<sup>224</sup> See Commission des affaires étrangères, *Rapport d'information sur le rôle des compagnies pétrolières dans la politique internationale et son impact social et environnemental*, p. 9: some important oil companies would have exercised "certains des attributs de la puissance étatique".

<sup>225</sup> See Commission des affaires étrangères, *Rapport d'information sur le rôle des compagnies pétrolières dans la politique internationale et son impact social et environnemental*, p. 201.

<sup>226</sup> See Christian Aid, *Fuelling poverty: Oil, war and corruption*, London, 2003, p. 9, available at [www.christian-aid.org.uk/indepth/0305cawreport/cawreport03.pdf](http://www.christian-aid.org.uk/indepth/0305cawreport/cawreport03.pdf).

<sup>227</sup> See Commission des affaires étrangères, *Rapport d'information sur le rôle des compagnies pétrolières dans la politique internationale et son impact social et environnemental*, p. 201, where the Commission denounces "un certain laxisme des pays du Nord qui n'ont pas hésité à laisser les compagnies pétrolières appliquer un système de double standard s'agissant du respect des droits de l'Homme et de celui des normes sociales et environnementales [...] L'indépendance énergétique

### CRIME RISKS ARISING FROM SPECIFIC PROVISIONS/OPTIONS

A Communication of the Commission to the European Parliament and the Council is a non regulating and non binding act. Its main goal is to communicate the position of the Commission to the other EU Institutions. An in-depth analysis of the envisaged policy options is not possible at the moment because of the lack of relevant information about them.

Some considerations should still be made.

Any reform of the **reference pricing system** is likely to be heavily influenced by the balance of power between oil producers and consumers (and within oil producers) at a given moment.<sup>228</sup> The choice of a particularly thin market may increase the emergence of strategic (when not illegal) activities by some players in what are intrinsically oligopolistic markets.<sup>229</sup>

As far as **strategic stocks** are concerned, it has been stated that “rather than stabilising production, storage actually accentuates its variability”<sup>230</sup>. Moreover, “rather than causing [...] a mean-output-preserving decrease in the dispersion of price, storage generally causes a more complex modification in the distribution of price”<sup>231</sup>. It can be further assumed that extreme price variability is correlated not only with the increase in speculative behaviour but also with higher incentives to engage in illegal behaviour.

### CONCLUSIONS

As mentioned above (under *Crime risks arising from specific options/provisions*), Communications do not contain provisions or policy options that can concretely be crime proofed. The absence of the draft text and of any relevant information on the strategy of the Commission prevents any in-depth Preliminary Crime Risk Assessment of the proposal.

The hydrocarbon market is extremely complex. Its mechanisms are often opaque and unlawful behaviours are frequent. Consequently, high criminal risks are present (see above, under *Vulnerability of the area/sector to be regulated*). Any attempt to regulate it should be undertaken with great care.

Due to the nature and the function of the proposed act, an Extended Crime Risk Assessment (ECRA) is not recommended. At this stage the EU strategy is not clearly defined. When the choice of the policy instruments is made and more precise information is available an ECRA on these proposals will be needed in view of the general level of vulnerability presented by this sector.

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considérée comme vitale justifiait ce laxisme”. For several examples of illicit behaviours and crimes related to the oil market see *ibid.* and Christian Aid, *Fuelling poverty: Oil, war and corruption*, London, 2003, p. 18-42.

<sup>228</sup> See Mapro R., *The Reference Pricing System: Origins, Rationale, Assessment*, Subtask 2.1 in *EUROGULF: An EU-GCC Dialogue for Energy Stability and Sustainability*, 2005, p. 14, available at [europa.eu.int/comm/energy\\_transport/en/lpi\\_lv\\_en1.html](http://europa.eu.int/comm/energy_transport/en/lpi_lv_en1.html).

<sup>229</sup> *Ibid.*, p. 9-10; Luciani G. and Merrouche O., *Reforming Reference Pricing and seeking for Alternative Pricing Systems*, subtask 2.2 in *EUROGULF: An EU-GCC Dialogue for Energy Stability and Sustainability*, 2005, p. 3-6, available at [europa.eu.int/comm/energy\\_transport/en/lpi\\_lv\\_en1.html](http://europa.eu.int/comm/energy_transport/en/lpi_lv_en1.html).

<sup>230</sup> Luciani G., *Strategic Stockpiles vs. Market Intervention for Price Stabilisation*, subtask 2.3 in *EUROGULF: An EU-GCC Dialogue for Energy Stability and Sustainability*, 2005, p. 4, available at [europa.eu.int/comm/energy\\_transport/en/lpi\\_lv\\_en1.html](http://europa.eu.int/comm/energy_transport/en/lpi_lv_en1.html).

<sup>231</sup> *Ibid.*

For the above reasons no Extended CRA is requested.

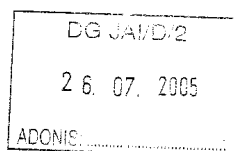
## Comments by the Commission and Replies by Transcrime

### COMMENTS AND REPLY TO THE PCRA OF 2004-ENV -01

#### Comments by the Commission



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL  
ENVIRONMENT  
Directorate G - Sustainable Development and Integration  
ENV.G.4 - Sustainable Production & Consumption



Brussels, 25 JUL 2005  
CA cb D(2005) 15098

NOTE TO THE ATTENTION OF MRS GISELE VERNIMMEN,  
HEAD OF UNIT, DG JLS D2

**Subject: Comments on the Preliminary Crime Risk Assessment of 2004-ENV-001,  
“Thematic Strategy on the prevention and recycling of waste”**

Thank you for your invitation to participate in the meeting of 18 July in which my colleague Christopher Allen participated. As agreed during the meeting please find hereunder my unit's comments on the draft Preliminary Crime Risk Assessment:

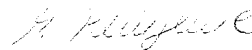
- (1) The consultants consider that introducing an EU requirement for landfill taxes could increase crime. This consideration must be reconsidered on the basis of the following information:
  - (a) Currently most MS apply landfill taxes that are at very different levels. This fact combined with different environmental standards applied by MS to landfill operations results in cost differences for landfill operations across the EU;
  - (b) Communication COM(2003)301 towards a thematic strategy on the prevention and recycling of waste included a paragraph mentioning problems that very different levels of costs can cause;
  - (c) The option under consideration would not be limited to encouraging MS to use economic instruments such as landfill taxes but would also ask MS to coordinate the use of such instruments to reduce unwanted effects. This should result in reduced risk of criminal activities and not the opposite;

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.  
Office: BU-5 5/188. Telephone: direct line (32-2) 299 02 61. Fax: (32-2) 296 39 80.  
P:\53.01 GENERAL\53.01-32 TS waste OF\Notes\MK to Vernimmen JAI crime screening.doc

E-mail: Christopher.Allen@cec.eu.int

- (2) The consultants consider that regeneration of waste oils is easier to control and less vulnerable to crime than collection. This consideration must be reconsidered on the basis of the following information:
  - (a) Regeneration is an activity that is more costly than other treatment operations such as use as a fuel. The obligation to treat such waste through a more costly technique could be the subject of criminal activities if operators seek to escape the obligation. Thus, repealing the priority for regeneration will eliminate any such effect if existing;
  - (b) Available information (see draft IA) demonstrates that not all waste oils are collected and treated in a controlled manner indicating the existence of fraudulent practices. Thus, a focus on collection will increase the controls at the point where fraud seems to take place. It should be noted that uncontrolled treatment of waste oils can result in serious health and environment impacts;
  - (c) The repeal of the priority of regeneration and a focus on collection would therefore reduce any risk of criminal activities rather than the opposite;
- (3) The above suggests that an extended crime risk assessment is not necessary for these specific options. However, another aspect of the Strategy could be more relevant as it should lead to a new approach to the waste recycling market, i.e. moving from paper controls and national restrictions to common standards and the establishment of an internal market. This could lead to new proposals in the medium term. A detailed impact assessment would be required for such proposals,
- (4) It is suggested that further work on this pilot project rather concentrates on highlighting the crime issues the Strategy could tackle through the new approach to the recycling market. Input from your experts on the following questions could reinforce the impact assessment of the Strategy that has been sent to your services in draft form:
  - (a) What will be the potential impact on crime risks in the waste sector of developing common standards for the recycling of waste?
  - (b) To what extent is the current paper based shipment control system an efficient tool to mitigate potential criminal activities?
  - (c) Should the balance of controls include more paper controls or more controls on site of waste shipments (e.g. ports) and waste treatment facilities?
  - (d) Which of intra-EU trade of waste and trade with third countries displays the highest crime risk potential?

- (5) The IMPEL network established by the environmental inspectorates of MS have produced information that may be relevant for this pilot project. This will be sent separately to your services by email;
- (6) As regards the process for such assessments, the experience in this pilot project demonstrates the need for an early exchange of information to ensure that experts contributing to the work have a sufficient understanding of the issues and considered policy options.



Marianne KLINGBELL  
Head of Unit

CC: Timo Makela, Klaus Kogler, Françoise Comte, Peter Wessman, Paul Speight,  
Martin Pohlmann

### Reply by Transcrime

Thank you for your note. We greatly appreciated it and gave it much attention.

We definitely agree on the need for an early exchange of information (as expressed in point 6 of your note) for the effective outcome of the Crime Risk Assessment (CRA).

We will highly appreciate the supply of any further information, in particular from the IMPEL network, as identified in point 5 of your note.

We agree on the need for further work on the project, as you suggested in points 3 and 4 of your note. An Extended Crime Risk Assessment (ECRA) would surely be the appropriate context for this. There, among other things, we will examine the issues posed by your suggestions in point 4 of your note (i.e., paper control efficiency, crime risk impact of EU standards for recycling).

With reference to your comments in point 1 of your note, we would like to point out some aspects worth considering:

1 – An EU requirement for landfill taxes could have a long term positive effect resulting in coordination of taxes among MSs. Such a process is nevertheless very complex and implies some short term criminal risks.

2 – The key variables to foresee such criminal risks are both the speed of the process of EU coordination and the final level of landfill taxes.

Consequently:

- Introducing landfill taxes in those MSs that do not yet provide them could create new criminal opportunities in avoiding the new imposition (e.g. frauds, tax evasions etc.).<sup>232</sup> Such risks could be reduced by setting a gradual timeline to reach the EU standard compliance, allowing time for waste producers to adapt to leaner alternative production processes.
- Uniforming landfill taxes in those MSs that already provide them could create short term criminal risks. The criminal incentives will depend on the level the EU standards set for landfill taxation compared to the present national level: a higher taxation level will boost incentives for operators in MSs which have a low taxation level.

With reference to your considerations in point 2 of your note on the waste oils:

1 – The strategy does not explain clearly what the destination of the waste oils would be after collection. While collection is not the final step of the cycle, treatments like regeneration allow for

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<sup>232</sup> For instance, Germany has developed a different system, called product responsibility. "Through this the conditions for an effective and environmentally sound waste avoidance and recovery will already be created in the production stage. Producers and distributors must design their products in such a way as to reduce waste occurrence and allow environmentally sound recovery and disposal of the residual substances, both in the production of the goods and in their subsequent use" ([http://www.bmu.de/english/waste\\_management/general\\_information/doc/4304.php](http://www.bmu.de/english/waste_management/general_information/doc/4304.php), at September 15).



the whole cycle of waste oils disposal to be controlled. As studies demonstrate, crimes take place at every point of the treatment cycle, from the production to the final disposal, including transport from the producer to the collecting firm (See Gruppo Abele–Nomos and Legambiente, *The illegal trafficking in hazardous waste in Italy and Spain*, 2003). Controls should therefore focus on every step of the treatment cycle and not merely on collection. An ECRA would provide the opportunity for a deeper analysis of crime risks related to the different waste oils disposal solutions after collection.

2 – Moreover, regeneration involves two contrasting effects:

- Surely, regeneration is more costly than other treatment operations and thus incents illicit behaviours to evade it.
- It nevertheless allows a deep and effective control on the treatment process, increasing the chances of detection for criminals and therefore deterring unlawful activities.

The above effects have opposite signs. At this current stage of the study it is impossible to state which one would prevail. An ECRA would therefore be needed to deepen the analysis.

## COMMENTS AND REPLY TO THE PCRA OF 2004-MARKT -22

### Comments by the Commission



EUROPEAN COMMISSION  
Internal Market and Services DG  
FINANCIAL INSTITUTIONS  
Retail issues, consumer policy and payment systems

Brussels, 02.08.05 3759  
MARKT/H-3/ST/rv D(2005) 10881

NOTE TO THE ATTENTION OF MS VERNIMMEN, HEAD OF UNIT JLS.D2

#### **Subject: Preliminary Crime Risk Assessment on the draft Proposal for a Directive on Payment Services in the Internal Market**

Thank you very much for your e-mail on 14 July, with which you sent the Preliminary Crime Risk Assessment prepared by the criminologists on the draft Proposal for a Directive on Payment Services in the Internal Market ("Payments Directive").

My colleagues and I have serious reservations on several preliminary conclusions reached by Transcrime. We note that in general the issues raised in the preliminary Crime Risk Assessment are not related to the core issues that the Directive intends to address. Please find hereafter our initial detailed remarks:

- **Page 2, Results of the initial screening:** We cannot agree with the inclusion of the Payments Directive under the typology "regulation that introduces a concession ...on any obligation". The Payments Directive aims at introducing obligations for all payment providers in a market which is presently not fully regulated. A waiver clause exists, but is only an option for Member States to implement and an exception to the general framework introduced by the Payments Directive.
- **Page 2, General Factors, Vulnerabilities of the sector to be regulated:** The statements in the first paragraph are not supported by the statistical facts. At present only 25-30% of the total estimated volume of payment fraud in the EU may be connected with vulnerabilities of remote payment systems. Most of the fraudulent transactions today take place in a face-to-face situation through the use of counterfeit payment cards or the misuse of genuine lost/stolen cards. The existence of common security standards would help reducing fraud, but their absence is certainly not the main source of the problem.

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11. Office: C 107 01/18. Telephone: direct line (32-2) 295.62.56. Fax: (32-2) 295.07.50.

[http://europa.eu.int/comm/internal\\_market/](http://europa.eu.int/comm/internal_market/)

Second paragraph: On the basis of the results of the stakeholders' consultation<sup>1</sup> and of our extensive discussions with Member States and market participants<sup>2</sup>, we decided not to include operational provisions on the security of payments in the Directive. The fact that the Directive does not address these aspects can however hardly be considered as a weakness. Moreover, the Commission issued in October 2004 a second EU Fraud Prevention Action Plan for the period 2004-2007<sup>3</sup>. The Action Plan complements the Payments Directive in underpinning the creation of a Single Payment Area in the EU. It aims at tackling precisely these risks with non-legislative measures. As you know, our services cooperate closely in the implementation of the measures in the Action Plan.

Third paragraph: the envisaged trade-off situation may exist in theory, but does not have a measurable impact on actual risks and fraud. Moreover, it does not relate in any way with the provisions in the Payments Directive.

- ***Page 3, General Factors, Crimes envisaged***

The crimes envisaged are real threats, but they are in no way facilitated by the provisions in the Payments Directive. In our opinion a legislation crime proofing exercise should only identify crime risks directly resulting from the introduction of the specific new provisions (ie ensure that the new provisions do not introduce further opportunities for criminals). It should not go as far as checking whether a new legislative proposal satisfactorily addresses all possible crime risks in a specific sector. Moreover, it should be taken into account that other existing EU instruments already cover the envisaged situations<sup>4</sup>.

- ***Page 3, Specific Provisions, Supervision, Crime Risks***

The most recent version of the Payments Directive (see Article 11 of the text currently in Inter-service Consultation, Annex 1) provides for the independence of the authorities designated to perform the controls.

- ***Page 3, Specific Provisions, Supervision, Crimes envisaged***

The introduction of stronger requirements such as professionalism would probably not help preventing the crimes envisaged (collusion with, or corruption by, payment providers of the supervisory authorities).

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<sup>1</sup> Launched with the Commission Communication on a New Legal Framework for Payments in the Internal Market (COM (2003) 718 final).

<sup>2</sup> The numerous meetings of the Payment Systems Government Expert Group and of the Payment Systems Market Group held in 2004 and 2005, to which DG JLS has been regularly invited.

<sup>3</sup> Communication from the Commission "A new Action Plan 2004-2007 to prevent fraud and counterfeiting of non-cash means of payment", COM(2004) 679 final, of 20.10.2004.

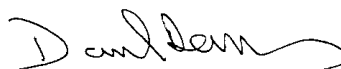
<sup>4</sup> For example the Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ no. L 069 of 16.3.2005); the Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency (OJ no. L 77 of 13.3.2004); and the Council Framework Decision 2001/413/JHA on combating fraud and counterfeiting on non-cash means of payment (OJ no. L 149 of 2.6.2001).

- **Page 4, Specific Provisions, Waiver clause**

The waiver clause is only an option given to Member States. We feel that its objective and added value (notably with regard to “grey” payment providers) have been misunderstood or discounted. The Crime Risk Assessment emphasizes the potential risks of a waiver, but the potential advantage of having small providers of money transfer services operate as registered entities has been overlooked.

Moreover, the waiver clause does not affect in any way the compliance with money laundering requirements. Therefore Member States may introduce exceptions to the normal “customer due diligence” regime only in cases where the customers, products or transactions represent a low risk of money laundering according to Article 10, paragraphs 1 and 3, of the Third Money Laundering Directive (final text attached, Annex 2).

We will be happy to discuss these comments with you and your colleagues. However, we are in the final stages of preparing the Commission proposal, which will be hopefully adopted in October 2005. Taking into account both the timing aspects, we do not advise to carry out an extended Crime Risk Assessment on the Payments Directive.



David DEACON

Copies: Messrs Delsaux, Pellé, Tiné, Palmero-Zurdo, Allix,  
Mlle Hoffmann (DG MARKT)  
Mr Marini, Ms Balazs (DG JLS)

Contact: Sebastiano Tiné, Telephone:(32-2) 295.62.56, [sebastiano.tine@cec.eu.int](mailto:sebastiano.tine@cec.eu.int)

### **Reply by Transcrime**

We have read with great attention the comments on our Preliminary Crime Risk Assessment and inevitably focused on the conclusions. According to these, DG Internal Market is *“in the final stages of preparing the Commission proposal, which will be hopefully adopted in October 2005. Taking into account both the timing aspects, we do not advise to carry out an extended Crime Risk Assessment on the Payments Directive”*.

The discussion on our Preliminary Crime Risk Assessment should have been done before the main decisions were taken. At this point, we believe the crime proofing process is without use.

We produced a document on the basis of obsolete information. The Directive has been updated and Commission’s comments provided to our PCRA refer to this new document, which we did not even receive. A close coordination between DG JLS, TRANSCIME and the proposing DGs is crucial for the whole process.

## COMMENTS AND REPLY TO THE PCRA OF 2005–TREN–023

### Comments by the Commission

As for the other arguments put forth in the study, I must say I have problems understanding the argumentation of the second paragraph of the Conclusions on the last page. What do the authors mean by the assertion that "unlawful behaviours are frequent" in the hydrocarbon market. Which market specifically? For which type of hydrocarbon? What unlawful behaviours? How frequent is FREQUENT? I wish to stress that the allegation of corruption which the study makes on pages 3/4 is presented as a problem faced by companies accessing investment opportunities in certain geographical areas. Is this part of the hydrocarbon market? Is it not rather part of the oil business sector. The hydrocarbon market is the market where hydrocarbons are traded, not the industry where they are pumped from the ground. I am not sure that with such systemic lack of comprehension of the subject the study is worth too much.

### Reply by Transcrime

In reply to the comment of the responsible service on our Preliminary Crime Risk Assessment 2005–TREN–023, we would like to make the following remarks:

1) With reference to the comment "What do the authors mean by the assertion that 'unlawful behaviours are frequent' in the hydrocarbon market" we have used the term "unlawful behaviours" as a broad concept that includes crimes and other illegal behaviours. Since legal definitions vary between Member States and the authors are not aware if some specific behaviours are defined as crime in all MS, we have decided to use the term of "unlawful behaviours" covering a wide concept including crimes in the strict sense of the word and all administrative and antitrust law violations.

2) With reference to the comment "Which market specifically? For which type of hydrocarbon?": considering that this a *preliminary* Crime Risk Assessment and that the Roadmap did not provide much information on the policy options, our remarks referred to a wide definition of hydrocarbon market and to any type of hydrocarbon.

3) Concerning the typologies of unlawful behaviours, the following can be mentioned: insider trading, rigging the market and other behaviours that, even without being criminal from a formal point of view, may unduly distort the market.

4) With reference to the comment "How frequent is FREQUENT?", we should remember that we are in a PCRA and "frequent" means that crimes could occur under certain conditions.

5) Regarding the observation that the hydrocarbon market should not include the production phase ("the industry where they are pumped from the ground"), please note that point 3 of the Road Map mentions the dialogue with producing countries regarding short-term production

policies and long-term investment policies.<sup>233</sup> Furthermore, economic actors involved in the trade of hydrocarbon are often also involved in the extraction of crude oil.

Finally, we would like to point out that the PCRA has been conducted only on the basis of the Road Map provided by the leading DG. The Road Map has thus guided the selection of further documents by Transcrime. Our analysis excluded the need of an Extended Crime Risk Assessment. According to the precautionary principle adopted by Transcrime in this exercise, an Extended Crime Risk Assessment (ECRA) will be requested only in case that at least one policy option presents a medium level of crime risk.<sup>234</sup> According to the principle of proportionate analysis adopted by the Commission in the Impact Assessment Guidelines, the ECRA will only focus on the policy options which presented relevant risk after the PCRA.<sup>235</sup> Since the proposal 2005 – TREN – 023 is a broad policy-defining document, our PCRA was “rather broad in its problem description and objectives”, as suggested by the Commission in its Guidelines<sup>236</sup>. As clearly stated by the Commission such an “assessment of impacts will necessarily be preliminary and will not provide detailed quantitative data”<sup>237</sup>.

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<sup>233</sup> See Road Map, p. 1: “*des politiques inadéquates des pays producteurs (politiques de production dans le court terme (quotas) et politiques d’investissement dans le long terme) sont des facteurs d’instabilité des prix*”.

<sup>234</sup> Interim report, p. 5.

<sup>235</sup> See Doc SEC(2005)791, *Impact Assessment Guidelines*, 15 June 2005, p. 8.

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*

## **5. RESULT 3: A MANUAL FOR THE CRIME PROOFING OF COMMISSION PROPOSALS.**

The third result of this study is a manual for Commission officials. Its goal is to explain what crime risks are and how to identify them. The manual includes a simple and progressive checklist that helps EU officials to understand how to identify crime risks and briefly explains the Crime Risk Assessment procedure developed by this study.

The manual was designed in order to be very simple and user-friendly. Particular attention was given to avoid complex terminology and scientific approaches and to instead use clear language with examples.

Following, a copy of the manual is presented.





**A STUDY ON**

**CRIME PROOFING – EVALUATION OF CRIME RISK  
IMPLICATIONS OF THE EUROPEAN COMMISSION'S  
PROPOSALS COVERING A RANGE OF POLICY AREAS**

**(Contract No. DG.JAI-D2/2004/05)**

**MANUAL**

9 October 2006



## INTRODUCTION.



The core idea underlying this manual is that legislation may have criminogenic effects. This means that legislation may inadvertently produce opportunities for crime. Reducing such opportunities will help to reduce crime and its consequences in terms of costs and victims. This manual provides EU officials with simple instructions on how to identify such unintended crime risks in European Commission proposals.

The present document has been conceived as a user-friendly tool for EU officials charged with the production of new proposals of EU regulation and the related Impact assessments (IA). It aims at providing a brief description of some key concepts such as crime, crime risk and crime proofing of legislation. It explains the role of crime proofing of legislation in the EU crime prevention strategy. It presents a three-step checklist that will guide officials through a very simple assessment of any Commission proposal. It provides a step-by-step explanation of the checklist along with simple examples. It briefly describes a possible Crime Risk Assessment process to assess such risks.

This manual closely follows the experience gained from the project "A study on Crime Proofing – Evaluation of crime risk implications of the European Commission's proposals covering a range of policy areas" (contract No. DG.JAI-D2/2004/05).







## 1. LEGISLATIVE CRIME PROOFING.

### 1.1. WHAT IS CRIME PROOFING OF LEGISLATION?

Crime proofing of legislation is a form of risk management applied to crime.<sup>238</sup> Its core idea is that legislation may inadvertently produce new opportunities for crime. Crime proofing belongs to the *situational crime prevention* approach, aiming at reducing opportunities for crime produced by vulnerabilities in legislation. From this perspective laws are considered for their potential criminogenic effects, i.e. the possibility of their facilitating the commission of crimes. In order to reduce such effects, *crime proofing of legislation aims at measuring existing ("ex post crime proofing") or future ("ex ante crime proofing") opportunities for crime due to legislation and at highlighting related interventions in order to proof it against crime.*

The crime proofing process consists of *two phases*:

- a) Assessment of the risk that a legislative measure may produce unintended criminal implications/consequences;
- b) Action to close the loopholes in the legislation, thereby 'proofing' it against crime.

The process has *four aims*:

- a) Identify unintended criminal implications/consequences of existing or forthcoming legislation, if present;
- b) Determine whether there is crime risk, and if so, of what crime and of what magnitude;
- c) Analyse pros and cons in terms of crime arising from each policy option;
- d) Suggest textual changes to the legislation likely to reduce the risk.

The present manual provides a brief and simple introduction on how to pursue the first aim of the crime proofing process.

### 1.2. WHAT IS A CRIME RISK?

In order to effectively understand the importance of crime proofing of legislation, the concepts of crime risk and crime will be shortly explained.

Considering the criminogenic effects of legislation implies that laws might present crime opportunities that may be exploited by criminals. Such opportunities will be called crime risks.

In general, risk means *the probability, defined as the likelihood that a crime, as a negative event, will occur, and the impact, defined as the harm caused to society and individuals by such a crime.* Such an impact may come from any present or future event. In a more specific approach, every risk (R) is a function of the probability (P) of a risky event and the expected harm (H) which can be caused by this event:

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<sup>238</sup> Risk management is the process of measuring, or assessing risk and then developing strategies to manage the risk.

$$R = f(P, H)$$

This approach to risk and risk assessment has been supported by several academic and institutional experiences. The following brief review of risk and risk assessment definitions further clarifies these concepts.

One of the first and most famous exercises in the definition (and also measurement) of organised crime risk was carried out by the Australian Queensland Crime Commission (QCC). In 1999 it performed a comprehensive study on risk assessment, called Project Krystal, where risk is defined as "an assessment of the likelihood that harm might occur and its impact"<sup>239</sup>.

According to the Canada Threat and Risk Assessment Working Guide risk is "the adverse effects that can result if a vulnerability is exploited or if a threat is actualised. In some contexts, a risk is the measure of the likelihood of adverse effects or the product of the likelihood and the quantified consequences". Threat and risk assessment is defined as "a process in which the objective is to identify system assets, to identify how these assets can be compromised by threat agents, to assess the level of risk that the threat agents pose to the assets and recommend the necessary safeguards in order to mitigate effects of the threat agents"<sup>240</sup>.

Pradham and Meher define risk as "the probability of an event that has negative consequences"<sup>241</sup>. They argue that risk assessment is the process of identifying vulnerabilities and threats (defined as "any circumstances or events with the potential to cause harm on an information resource"<sup>242</sup>.

Similarly, the Risk Assessment Information System defines risk as "the product of impact of severity (consequence) and impact of likelihood probability"<sup>243</sup>. Risk assessment is defined as "the process of establishing information regarding acceptable levels of a risk and/or levels of risk for an individual, group, society, or the environment"<sup>244</sup>.

According to the Comprehensive Risk Analysis and Management Network (2004), in a broad definition risk is "the combination of the probability of a possible unwanted event and the quantity of possible damage"<sup>245</sup>. In a more technical sense, risk is defined as "the potential occurrence of unwanted adverse consequences to human life, health, property and/or the environment"<sup>246</sup>. Also according to this source, the estimation of risk is usually based on "the expectation value of the conditional probability of the event



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<sup>239</sup> Queensland Crime Commission (1999), *Project Krystal – A Strategic Assessment of Organised Crime in Queensland*.

<sup>240</sup> Government of Canada (1999), *Communications Security Establishment, Threat and Risk Assessment Working Guide*, [http://www.cse-cst.gc.ca/en/knowledge\\_centre/gov\\_publications/itsg/itsg04.html](http://www.cse-cst.gc.ca/en/knowledge_centre/gov_publications/itsg/itsg04.html).

<sup>241</sup> Pradhan P.L., Meher P.K. (2004), *Risk Assessment on IT Infrastructure* [http://infosecwriters.com/text\\_resources/pdf/Risk\\_asst-Infra.pdf](http://infosecwriters.com/text_resources/pdf/Risk_asst-Infra.pdf).

<sup>242</sup> *Ibid.*

<sup>243</sup> Risk Assessment Information System 2004, <http://risk.lsd.ornl.gov/homepage/glossary.shtml>.

<sup>244</sup> *Ibid.*

<sup>245</sup> Comprehensive Risk Analysis and Management Network, (2004), [http://www.isn.ethz.ch/crn/risk\\_issues/risk\\_definitions.cfm](http://www.isn.ethz.ch/crn/risk_issues/risk_definitions.cfm).

<sup>246</sup> *Ibid.*

occurring, multiplied by the consequences of the event, given that it has occurred"<sup>247</sup>.

In order to effectively identify possible crime risks implied in legislative proposals, such as the proposals of the European Commission, which impact on many different legal systems, the concept of crime has to be refined. In a very strict definition, crime is any behaviour prohibited by criminal law. When dealing with all 25 different criminal justice systems of the EU Member States, such a strict approach could lead to many difficulties related to the issue of national sovereignty. In order to deal with these issues, it is more appropriate to define "crime" as a criminological concept, i.e. any behaviour which is commonly recognized at the EU level as likely to violate criminal and/or administrative norms. This allows activities, such as tax evasion or antitrust abuses to be included, whose legal nature (criminal offences or administrative violations) may vary among EU MSs.

Crime risk in legislation presents two possible dimensions:

- *Non compliance risk*: this is the risk that the legislation fails to achieve the goal of regulating a sector. Instead of inducing operators in the regulated sector/market to comply with the norms, the regulation offers opportunities for criminals to disregard it.
- *Side effect risk*: this is a risk that goes beyond the specific scope of the regulation. Indeed norms can inadvertently create opportunities that can be exploited by criminals. An example of side effect risk is the displacement risk. This means that criminal activities migrate from one sector to another as a consequence of new regulation introduced in the former sector. E.g. anti money-laundering legislation increased controls over the financial systems in order to detect possible money-laundering activities. This has caused a displacement of money-laundering operations towards more informal and unofficial money-remittance systems, called *hawala* in India, *hundi* in Pakistan and Afghanistan and *chop* in China.

### 1.3. CRIME PROOFING AND CRIME PREVENTION IN THE EU.



This issue was originally highlighted by the EU Institutions regarding possible actions to be taken to monitor and control the infiltration of organized crime into the legitimate economy. In 1980 the *Gabert Report* emphasized the relationships between legislation and fraud, pointing out that complex legislation may stimulate fraudulent behaviours and

that these behaviours were facilitated by asymmetries in the implementation of

<sup>247</sup> *Ibid.*





EU policies.<sup>248</sup> After the Tampere European Council Presidency Conclusions<sup>249</sup> of 1999, which made important and broad statements on the need to integrate aspects of crime prevention into legislation, several documents enacted by the EU Commission have emphasized the added value of a crime proofing strategy for legislation. The Dublin Declaration<sup>250</sup> mentioned crime proofing and recommended “that an EU Good Practice Guide on designing crime out of legislation, products and services be developed in conjunction with relevant manufacturers, consumer bodies and other stakeholders”<sup>251</sup>.

Establishing a crime proofing mechanism for the EU decision-making process will provide powerful instruments to prevent crime, by minimizing possible risks arising from the laws' weakness, and therefore achieving greater security and more opportunities for EU citizens. In the 2000 Communication on the prevention of crime in the European Union, the European Commission stressed the importance of crime proofing of legislation both at the EU and Member State level.<sup>252</sup> The strict connection between crime prevention in the EU and crime proofing was confirmed in the 2004 Assessment of the Tampere Programme, where the Commission stated that “as regards crime prevention, efforts must be made to make goods and services less vulnerable to crime. The crime-proofing of legislation must be an integral part of this effort.”<sup>253</sup>

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<sup>248</sup> See European Parliament: Working Document 1983–1984, *Report on behalf of the Budgetary Control on Fraud against the Community Budget*, Document 1–1346/83.

<sup>249</sup> Conclusion No. 41 of the Tampere European Council, 15–16 October 1999.

<sup>250</sup> Issued after “Tackling Organised Crime in Partnership”, the first European Congress on developing partnerships between the public and private sectors to identify, measure and prevent harm from organised crime, held in Dublin on 20th and 21st November 2003.

<sup>251</sup> Dublin Declaration, available at <http://www.tocpartnership.org/orgcrime2003/website.asp?page=dublin>.

<sup>252</sup> Commission of the European Communities, Communication from the Commission to the European Parliament. *The Prevention of Crime in the European Union. Reflection on Common Guidelines and Proposals for Community Financial Support*, COM (2000) 786 final, Doc. 2000/0304 (CNS), Brussels, 29 November 2000.

<sup>253</sup> European Commission, Communication from the Commission to Council and the European Parliament, *Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, COM (2004) 401 final, Brussels, 2 June 2004.

## 2. OPPORTUNITIES FOR CRIME DUE TO LEGISLATION: CRIMINOGENIC LEGISLATION.



Every type of legislation may produce unintended criminal opportunities. In general, when drafting norms, legislators focus on the main objectives of their piece of legislation and do not consider the potential criminogenic effects of law. However, such effects may be extremely relevant and may ultimately undermine the main objectives of the law.

The following examples will describe how legislation may inadvertently create crime risk.

### Example 1: bearer shares regulation.

A bearer share is an instrument which contributes towards anonymity being maintained inside the market, influencing the financial sector's transparency. In many countries their use has been restricted or prohibited, but in some cases they are still allowed (for example, in Belgium bearer shares still exist, although there are plans to ban them by 2007/2008). **Bearer shares facilitate money laundering activities, because they make it possible to convert illicit money into negotiable and anonymous financial instruments.** Moreover, as shares are controlling stakes of corporations, bearer shares could be exploited to govern a company, whilst remaining anonymous.

### Example 2: shell companies.

Shell companies are companies which conduct either no business or minimal business; their legitimate use is often to obtain financing prior to starting business operations, or to minimise business and tax costs. Although legitimate, they are often exploited to hide criminal activities, as they do not carry out any productive activity but work as junctions for money transfers. Their use is enhanced in those jurisdictions providing for anonymous banking and financial services, which allow the identity of the beneficial owners behind the entities to be concealed. **Such regulations increase the opportunities for several criminal activities to be committed, ranging from fraud against creditors and tax crime to money laundering and the financing of terrorism.** All major financial scandal (such as Enron and Parmalat) showed the involvement of shell companies in such massive frauds.



### Example 3: suspicious transaction regulation.

According to anti-money laundering legislation, bank clerks have to report suspicious transactions. However, in those areas where criminal organizations are powerful and where intimidation or collusive behaviours are frequent, such a duty may expose clerks to threats or violence. This was facilitated by weak regulation, not

providing effective measures to guarantee the anonymity of bank officials reporting suspicious operations. **Such a loophole discouraged officials from**

reporting and therefore facilitated the commission of money-laundering and other illicit operations.

**Example 4: dividends-received deduction and criminal exploitation.**

The dividends-received deduction system is meant to avoid double taxation of dividends. Dividends that are already subject to taxation in the home country of the company should not be taxed again in the country of the shareholder.

According to the Belgian Tax Code (articles 202 § 2 and 203), dividends paid to a domestic company could, under certain conditions and within certain boundaries, be deducted and excluded from taxation. There was an exception on this benefit for dividends paid by a company that was established in a country in which the regulation on the payment of taxes was 'seriously more advantageous' than in Belgium. However, the wording 'seriously more advantageous' was not further elaborated by the legislator, which of course made it very difficult to know the exact scope of application of the provision in the law.

Consequently, this system favoured a practice in which a company benefited from the dividends-received deduction even for dividends that were barely taxed or not taxed at all in foreign countries. **Such ambiguity in the norm wording stimulated a mechanism that finally led companies to evade taxation on dividends.** As of 24 December 2002, this system was changed by law to prevent such abuses.

**Example 5: turn over of officials.**

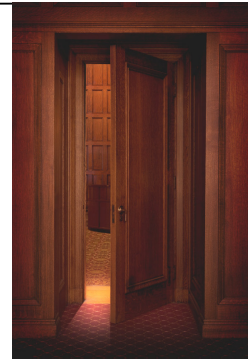
Article 46 of Council Regulation (EC) no. 2157/2001, which creates a European Company (*Societas Europaea*) fixes the term of office for members of the governing bodies. The rule explicitly provides for a term of six years, after which auditors should quit their office, but it also says that "members may be reappointed once or more than once for the period determined in accordance with paragraph 1". The consequence is that there is no effective duty of turn over: for example, an auditor could be re-elected without limit. **This loophole decreases the independence of guardians, possibly leading to collusion and conflict of interests.**

**Example 6: controls in the financial system.**

Art. 129 of the Italian *Testo Unico Bancario* (TUB) proved to be the weak point in the Cirio case. Indeed, its unclear wording seemed to limit the powers of Bankitalia, the Italian National Bank, to control only in the "primary market" of foreign bonds (i.e. the market between the company issuing the bonds and the financial intermediaries/banks acquiring them). The secondary market (i.e. the market between financial intermediaries/banks selling foreign bonds and private small savers) seems to be outside the powers of control of Bankitalia. **This uncertainty has been exploited by banks in defrauding small savers by selling worthless bonds, since personal operations with bank clients ("trattative personalizzate in relazione a strumenti finanziari richiesti dalla clientela") were excluded from the competence of Bankitalia.**

**Example 7: prohibitionism.**

Prohibition strategies often produced criminal opportunities. Perhaps the most relevant consequence of prohibitionism is the development of black markets. Many documented cases demonstrate their generation following prohibition. The most notable include prohibition of alcohol in the U.S., whose consequence was an enormous black market, fuelled by the smuggling of alcohol from neighbouring countries, particularly Canada, and illegal production within the United States. Indeed, **illegitimate trade in prohibited and demanded products appears to be a foreseeable consequence of prohibition**, and it may be

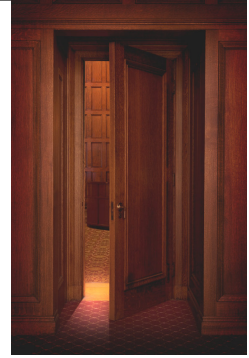


particularly extensive where significant quantities of the product are available for diversion to illegitimate markets because of local exemptions or because the product is legally available in neighbouring jurisdictions. The unparalleled development of organised crime groups in this era of prohibition has also been recognised.

**Example 8: foot and mouth disease.**

With the Animal Health Act of 1981 the UK established a compensation scheme under which the owners of infected livestock are given compensation for the destruction of their infected livestock. During the outbreak of Foot and Mouth Disease (FMD), this mechanism has been allegedly exploited by some farmers. A range of allegations was received by government agencies, including the deliberate infection of stock for the purposes of making claims, the making of false and inflated claims and the commission of expenses fraud by administering officials. The review highlighted weak controls as a contributory factor. Indeed, farmers were allowed to select a valuer for their infected stock, a practice which was considered to put 'pressure' on valuers to increase their valuations.

**The absence of independent and autonomous valuers was exploited to perform frauds against the scheme.**





### 3. HOW TO IDENTIFY UNINTENDED CRIME RISKS: A STEP-BASED CHECKLIST.



The following checklist should be considered as an instrument through which EU Commission officials will be able to explore possible unintended criminal implications associated with regulation. Its purpose is to explore whether a regulatory strategy contains any crime risk and, if so, to separate such risk into its components.

The checklist is structured on three steps, which allows for a gradual assessment. It has been developed to answer two questions: a) Does regulation produce any unintended crime risk? And b) If so, how is this crime risk structured? The first two steps of the checklist will provide information in order to answer question a), while the third step will answer question b).

The checklist follows the proportionate analysis principle: after each step, only those regulations which show a significant crime risk will continue to the following steps. This decision is taken by the officials that are answering the checklist. Crime risks are relevant when the answers to the questions of the same step highlight actual criminal implication requiring further assessment.





### 3.1. STRUCTURE OF THE CHECKLIST.

The checklist is structured as follows:

#### STEP 1 - GENERAL CRIME RISK INDICATORS.

This step includes some specific regulatory measures likely to stimulate an interest in carrying out illicit activities. They address either criminals' motivation or opportunities to exploit legislation. **If a policy option falls into one of these risk indicators, it will be assumed to be a significant crime risk. Step 2 is required.**

#### STEP 2 - COHERENCE OF REGULATION AND MARKET VULNERABILITY TO CRIME.

This part takes two aspects into account:

- **The overall coherence of regulation**, on the assumption that ambiguous and inconsistent policy strategies may contribute to the fragmentation and complexity of the overall regulatory framework, thus causing overlaps and differing implementation at national level. Such shortcomings may be exploited to circumvent, misuse and bend regulation to the criminals' economic interests.
- **The vulnerability of the regulated market sector to crime.** Market vulnerability plays a crucial role in exploring possible unwanted effects, as the same policy may have different impacts according to the specific market addressed. What is deemed as a relevant risk in one market may be insignificant in another.

Example: the introduction of new taxes may be an incentive for non compliant and fraudulent behaviours in a sector already infiltrated by criminal activities or characterised by weak controls. On the contrary, in a strongly regulated sector, with effective controls and heavy sanctions for abuses, operators would be less willing to run the risk of being detected, in return for the profit arising from avoiding taxes.

The vulnerability of a market sector derives from its **attractiveness** and its **accessibility** to potential criminals.

a) *Attractiveness*: it can be defined as the profitability of a market for criminals *minus* the risk they run of being detected and punished:

$$\text{ATTRACTIVENESS} = \text{PROFITABILITY} - \text{RISK OF DETECTION}$$

a.1) *Profitability*: it concerns the profit/gain/benefit a criminal could obtain by committing an illicit activity.

a.2) *Risk of detection*: it concerns the risk to criminals of being detected and punished. The higher the risk of detection the lower the attractiveness, hence the market is less vulnerable to crime.

b) *Accessibility*: it concerns the possibility of a market being entered by criminals, i.e. the presence of obstacles or barriers raised by the legislator to prevent criminals from accessing the market. The more a market is provided with barriers against access by illegitimate operators, the less vulnerable it is to crime. Of course, barriers may produce negative effects on the market, but this issue concerns the evaluation of other impacts produced by the policies which should be considered in balance, as a trade-off with the crime risk assessment.

**At the end of this assessment if any significant crime risk has been discovered the policy option will pass to the third step.**



### **STEP 3 - CRIME COMPONENTS.**

The previous step discovers if any crime risk is associated with the policy option. In case of a positive answer this step analyses the envisaged risk, entering into the details of its components and exploring its magnitude. Criminological expertise is required to answer the related questionnaire.





## 3.2. THE THREE-STEP CHECKLIST.

The following paragraph contains the question in bold and the explanation in italics. Examples will be presented in boxes.

### STEP 1. GENERAL CRIME RISK INDICATORS.

#### **QUESTION 1.1. DOES THE REGULATION INTRODUCE A NEW OR MORE BURDENSOME OBLIGATION?**

*The introduction of new or heavier burdens increases the risk of non compliant behaviours, usually carried out through illicit activities. Waste disposal services, for example, are characterised by burdens and costs finalised to reduce negative environmental impacts linked to waste production. However, these burdensome obligations are also an incentive to choose illegal channels for waste disposal. Waste producers aim at minimizing their costs, thus opting for waste firms which offer low costs, without checking whether they are legitimate operators or criminal organizations, as well as sometimes colluding with them. As waste disposal services are mainly provided by local firms, this favours criminal organizations, which act as unfair competitors and create illegal oligopolies. Burdensome obligations may include: new standards, new administrative requirements, additional procedures/bureaucracy.*

Example: Council Directive 2000/53/CE on End-Of-Life Vehicles promotes the recovery and reuse of vehicles at the end of their life, by establishing a treatment process which should improve the environmental performance of the companies. This entails weighting the last owner of a vehicle with the costs of its treatment and of a Certification of Destruction (COD). However, such increased administrative burdens are likely to raise the rate of abandoned vehicles and of illegal dumping activities.<sup>254</sup>

#### **QUESTION 1.2. DOES THE REGULATION PROVIDE FOR TAX ALLOWANCES AND/OR EXEMPTIONS?**

*Tax allowances stimulate avoidance behaviours, usually through deceptive means for meeting the requirements to obtain the concession. Such measures may include: tax relief, tax exemptions or tax deductions.*

Example: Council Regulation 2007/2000/EC removed a tariff on sugar imported from Serbia and Montenegro into the EU. This allowance was used to perform a sort of "carousel fraud": goods were being exported from the EU, using export subsidies, and then freely re-imported from Serbia and Montenegro, finally evading taxes.

Example: The EU duty suspension system was introduced as a part of the Internal Market to improve trade between EU MSs. The unwanted effect of this policy was the so-called 'excise diversion funds' phenomenon. According to this system, those trading excise goods and providing evidence of their movement to other registered

<sup>254</sup> The case studies reported hereinafter are taken from Russel M., Clarke R., *Government Regulations and their Unintended Consequences for Crime: a Project to Develop Risk Indicators*, London 2003, report prepared by the Jill Dnado Institute and Transcrime for the EU Crime Proofing Steering Group.

traders in the EU, or of their export outside the EU, can have the payment of the excise duty suspended. This would be payable whether the goods were moved to an unregistered trader or for consumption. Such movements, together with the status of goods, were recorded through the Accompanying Administrative Document (AAD). However this mechanism has been abused to obtain the suspension. Companies simulated the trade of excise goods, which were distributed on the market and not in a registered country, or exported and then returned them as duty-free goods to the home market.

This example shows how tax relief can increase motivation to commit crime. Inadequate vetting of warehouses and standards as proof of movement, as well as improper controls and inspections (reduced after the introduction of the duty suspension system) were identified as added factors which favoured such fraud.



**QUESTION 1.3. DOES THE REGULATION INTRODUCE BENEFITS SUCH AS GRANTS, SUBSIDIES AND COMPENSATION SCHEMES?**

*Grants, subsidies, compensation schemes and benefits can often be an incentive to adopt deceptive means to obtain such profits. For example differences in the level of compensation for different benefits may lead to deceptive behaviour in order to receive the most profitable benefit.*

*Fraudulent behaviours are the most likely offences stimulated by such measures, potentially facilitated by corrupting the public officials in charge with the proceedings. Such measures may include: subsidies, grants and compensation schemes.*

Example: The UK foot and mouth compensation scheme increased the motivation for committing fraud, exploiting the weak controls in the sector. The system provides compensation to the owners of infected livestock when they declare that these have been destroyed. Some farmers exploited this compensation scheme by various means: false or inflated claims, deliberate infection of their livestock to make claims and colluding with administering officials in defrauding the government.

Example: The agriculture sector offers many examples of fraudulent behaviour aiming to exploit government benefits, e.g. for organic food and farming. The European Union promotes the development of organic farming, through targeted funds. However, it has been found that often false organic products are traded as organic, as well as these funds being diverted toward non organic farming.

**QUESTION 1.4. DOES THE REGULATION INTRODUCE TAX ON LEGAL GOODS/SERVICES, OR INCREASE THE COST OF LEGAL GOODS/SERVICES?**

*Taxation is traditionally associated with avoidance behaviours, which may also include fraud. When taxation involves legal goods or services, increasing its cost, parallel markets and smuggling are likely to be established, often taking advantage of the existing differences between national tax systems. Fraud and corruption may also occur, facilitating illicit trafficking. Such measures may include: taxes, customs duties and excise.*

Example: Since the 1990's, the UK has introduced high excise on tobacco, aiming to discourage tobacco consumption. However, the negative impact has been an increase in tobacco smuggling, involving other European countries, in particular from the Netherlands, which are gates into UK from the continent for illegal trade.<sup>255</sup>

**QUESTION 1.5. DOES THE REGULATION PROHIBIT OR LIMIT THE PRODUCTION AND/OR THE DISTRIBUTION OF A DEMANDED GOOD/SERVICE?**

<sup>255</sup> To this purpose see the related study: Van Duyne P.C., *Organizing cigarette smuggling and policy making, ending up in smoke*, in "Crime, Law and Social Change", no. 39, 2003, pp. 285-317.

When limits to the distribution/production of a good are established, the demand is higher than the supply. This stimulates the creation of black markets, where illegitimate operators act as unfair competitors. Smuggling of goods, together with counterfeiting and trademarks violations, are the main offences linked to such policies. Examples of limits to the production/distribution are: limits to export/import, introduction of legal monopolies, more stringent Trademark regulation, new standards of quality/labels and increases to the cost of production factors.



**QUESTION 1.6. DOES THE REGULATION REMOVE A LAW ENFORCEMENT CAPACITY OR DECREASE FUNDING FOR LAW ENFORCEMENT ACTIVITY OR IN ANY OTHER WAY WEAKEN A LAW ENFORCEMENT ACTIVITY?**

The assumption is that a decrease in law enforcement activity is likely to produce a consequent increase in the behaviour subject to enforcement. This happens either when funding of the law enforcement agencies is reduced or when their effective competencies and powers are weakened in some way. It should be pointed out that, even when a law enforcement capacity has been improved, possible unwanted effects can be envisaged: for instance displacement of illicit activity may occur towards less controlled sectors. Removal of a law enforcement capacity may include: decreased funds, moving funds from one sector to another, reduction in powers and competencies.

Example: The introduction of federal jurisdiction over tobacco smuggling in the United States facilitated an increase in tobacco smuggling, due to a decreased involvement of State law enforcement agencies. Indeed, the centralization of law enforcement activity reduced the effectiveness of controls.

Example: Unintended negative impacts have been associated to the strengthening of U.S./Mexico border enforcement in the 1990s. As organized smuggling groups perceived a higher difficulty in moving between the countries, an increase of illegal immigrants in the U.S was registered, together with border-crossing attempts in less protected areas. Another consequence was the increased number of crossing-deaths, due to the adoption of more clandestine methods of transit from one country to the other.

**QUESTION 1.7. DOES THE REGULATION INCREASE THE DISCRETIONARY POWER OF OFFICIALS OR PROVIDE THEM WITH NEW DISCRETIONARY POWERS?**

Discretionary power entails taking decisions or actions without a substantial control upon their advisability. Such powers usually concern the allocation of benefits or the imposition of burdens, which increase the interest in corrupting officials. The main risks associated with the empowerment of administering officials are a lower visibility due to increased discretion, a higher risk of conflict of interests, the involvement of a lower number of officials or a too chaotic ramification of competencies. Corruption is the most likely offence arising from such regulation, linked with fraudulent activities aimed at manipulating the final decisions. Examples of discretionary power are: possibility to take decisions without need of motivating them, decisions/actions not subject to supervision of independent control body, decisions without predetermined guidelines.

Example: The number of goods classifications used by customs has been deemed to be a risk factor for corruptive practices. The large number of possible classifications,

which allows for different interpretations, favours the discretion of customs officials, e.g. giving them the power to classify a good into a lower-tax category.



**If at least one of the above questions is answered "YES", step 2 is required.**

## **STEP 2. COHERENCE OF REGULATION AND MARKET VULNERABILITY.**

### **STEP 2.1. COHERENCE OF REGULATION.**

#### **QUESTION 2.1.1. IS THE REGULATION LIKELY TO PRODUCE REGULATIVE OVERLAPS?**

*Every new legislative measure produces a series of impacts which go beyond the specific regulated sector. Such interplays should be considered when drafting a proposal, as unintended contradictions or mere overlaps with similar legislation may occur. It might lead to the exploitation of these shortcomings in the whole regulatory framework to the purpose of bending the law for private gains. Indicators of regulative overlaps are: excess of acts regulating the same field, contradictions among the provisions of the same act or conflict between goals and norms.*

Example: The recent Italian scandals, in particular the Parmalat and the Banca Popolare Italiana (BPI) cases, highlight an example of regulatory uncertainty. In the latter scandal the BPI was investigated to find whether it acted illegally in attempting to buy its competitor Antonveneta and whether any illegitimate help of the ex-governor of Bankitalia could be found. Regulatory overlaps have been discovered in the identification of Bankitalia and Consob's competencies. The former should control banking activities; the latter is in charge of monitoring the stock exchange market. Both of them played a role in the Antonveneta business, but the borders of their duties and responsibilities were not clear. Such a gap, making the respective competencies uncertain, poses a great risk of the market being compromised along with the involved operators.

#### **QUESTION 2.1.2. IS THE REGULATION EASILY APPLICABLE WITH THE EU?**

*EU regulations should be implemented by national governments without causing inefficiencies or undesired effects. Possible consequences are, apart from delays in the implementation, a fragmentary compliance by MSs and a messy regulatory framework. The risk of law exploitation may occur accordingly. Indicators of difficult applicability of regulation are: tight deadlines, high costs and long and complex requirements.*

Example: The lack of a proper implementing structure and mechanism, as well as the provision of unrealistic deadlines, may hamper Member States in the correct application of new measures. The same effect may be produced when national budgets are insufficient or inadequate for meeting the requests of the EU legislator.

#### **QUESTION 2.1.3. IS THE REGULATION LIKELY TO PRODUCE REGULATORY ASYMMETRIES AMONG MSs?**

*Regulative asymmetries are one of the main factors associated with circumvention of legislation. They may depend both on how the regulation is conceived and on how it is drafted (e.g. a too generic content prone to many interpretations, a vague language, problems in translation) and on unwanted effects due to the different national legal systems (e.g. delocalization or centralization of specific competencies, the difference between private and public levels, the welfare system). Law and jurisdiction shopping, not illegal in itself, may actually hide deceptive behaviours and illegitimate purposes. They are generally associated with tax and duties evasion, but often work as an*

incentive for fraudulent conducts or as facilitators for illegal practices linked to the business environment. Factors likely to create asymmetries are: generic and ambiguous terms, norms prone to different implementations, difficulties in translation



Example: Off-shore jurisdictions are used not only to bypass tax burdens, but also as instruments for the activities of organized crime groups. Money laundering, financing of terrorism and trafficking of legal and illegal goods exploit the lack of transparency offered by these legal systems. Asymmetries between on-shore and off-shore jurisdictions are an incentive to choose less transparent channels, which offer anonymous banking services and attractive business solutions.<sup>256</sup>

## STEP 2.2. MARKET VULNERABILITY TO CRIME (SEE ABOVE P. 7).

### QUESTION 2.2.1. IS THE MARKET ALREADY INFILTRATED BY ECONOMIC AND ORGANIZED CRIME? IF SO, WHICH CRIMES?

*This is an indicator of market vulnerability: a market where criminal activities are frequent (such as the tobacco market and the public procurement sector or waste disposal market) is more exposed than others to further abuses.*

### QUESTION 2.2.2. IS THE MARKET/SECTOR PROFITABLE FOR CRIMINALS?

*Profitability of a given market in relation to crime refers to the gains/profits a criminal could obtain by carrying out illicit activities. It can be assessed by estimating how much added value the component of a market, i.e. production factors (capital, raw material, labour), product and structure (competitive, monopolistic, or oligopolistic) would produce when subject to a criminal transaction. Such measures may include: high economic value of the product, monopolistic structure, high value of production factors, high demand and low supply.*

Example: The fashion and pharmaceutical markets are profitable for counterfeiting because of the high value of trademarks;  
The waste market is profitable for criminal organizations, whose profits are gained by avoiding the costs of the legitimate market  
The tobacco market is profitable for smuggling because of the high taxes levied on cigarettes.

### QUESTION 2.2.3. IS THE MARKET PROVIDED WITH SYSTEMS/STRUCTURES TO DETECT CRIMINALS?

*This concerns the risk to criminals of being detected and consequently punished. The main assumption is that the greater the likelihood that a criminal will be detected, the less s/he will be willing to commit a crime. Therefore a high risk of detection reduces the attractiveness of a market to crime. Controls and security strategies are the necessary instruments to increase the risk of detection; these may include: mechanisms for the identification of legal/natural persons operating in the market, disclosure procedures, internal auditing to monitor managing powers, independent supervision authorities provided with clear and effective powers, requirements of professionalism and probity for guardians and inspections and cross-checks.*

Example: The waste disposal market is characterized by low visibility and weak controls, due to the difficulty in monitoring waste movement from the producers to the final site. In Italy this happens because waste disposal services are local and

<sup>256</sup> To deepen the question see Transcrime, *Euroshore—Protecting the EU Financial System from the Exploitation of Financial Centres and Offshore Facilities by Organised Crime*, Transcrime, Trento, January 2000.



frequently connected to criminal oligopolies, which are able to prevent effective controls. Paper controls, i.e. documents certifying the nature and destination of waste during transit, contribute towards weakening the whole system, by being exposed to falsification and abuse.



#### **QUESTION 2.2.4. IS THE MARKET ACCESSIBLE TO CRIMINALS?**

Accessibility of a market to crime means the objective capability of illegitimate newcomers to infiltrate an established market. It depends on the obstacles and barriers raised by legislation against illicit behaviours. The main assumption is that the

more obstacles/barriers raised against illegitimate entry into the market, the less it will be accessible to criminals. Such measures may prevent companies with bad or less reliable finances (thus more inclined to bypass legitimate channels) from accessing to the market. Barriers may be of different natures, ranging from: background checks, standards of professionalism/competence/honesty, economic thresholds, administrative authorizations etc.

Example: Public Procurement regulations usually fix an economic threshold for companies which intend to compete for tenders. The minimum capital required aims at selecting participants, on the assumption that possession of a high capital should ensure high reliability. However, if the regulation does not apply also to subcontractors the goal of the provision is defeated. Such a loophole may be exploited by criminal organizations, which would be able to bypass the economic barrier.

**If any significant crime risk is envisaged, step 3 is required.**

### **STEP 3. CRIME COMPONENTS.**

#### **STEP 3.1. CRIME.**

##### **QUESTION 3.1.1. WILL THE AMOUNT OF CRIME VARY?**

##### **QUESTION 3.1.2. HOW WILL THE RISK OF BEING DETECTED COMMITTING A CRIME VARY?**

This refers to the expected effects of the considered regulation on the likelihood of being detected (e.g. detection, and/or identification of the author and/or report to law enforcement agencies and/or prosecuted). The risk of being detected is one of the major deterring factors for criminals.

Example: thanks to technological improvements, many new legislation introduced electronic controls in sensible sectors/markets (e.g., transports, food production). The replacement of paper documents with electronic documents with appropriate anti-forgery devices increase the risk of being detected for criminals and should therefore deter them from forge certificates and documents.

##### **QUESTION 3.1.3. HOW WILL THE EXPECTED PROFIT FOR THE AUTHORS OF CRIME VARY?**

This refers to the expected effects of the considered regulation on profits obtained through fraud (i.e. reduction of costs and/or increase of revenues). If appropriate, consider also non-monetary forms of profit.

Example: legislation introducing expensive burdens or requirements on market operator may render very profitable a non-complying or falsely complying behaviour by enterprises.

**STEP 3.2. AUTHORS.****QUESTION 3.2.1. WILL THE NUMBER OF AUTHORS VARY?**

*This refers to the expected effects of the considered regulation on the overall number of authors (reported and unreported). Regulations that reduce controls or increase the potential profits deriving from criminal activities will likely increase the number of the authors. However, an increase of the amount of crimes may be caused by an increase of the number of crimes per author.*

**QUESTION 3.2.2. HOW WILL THE COMPLEXITY OF THE ORGANIZATIONAL STRUCTURE OF A CRIME VARY?**

*This refers to the expected effects of the considered regulation on the level of organization required to commit a crime. In particular, please assess if the considered policy option/main action will affect the minimum number of authors required to commit a fraud and/or the need of a coordinated organization.*

*The complexity of the organization required is a relevant element in the criminals' choice to commit a crime. Indeed co-ordination of different agents as well as recruitment and management of many people is particularly complex for illegal organisation, since they cannot rely on legal instruments of argument settlement (no access to contracts, tribunals, law enforcement system) in the illegal arena. The more complex the organisation of frauds and other crimes become, the more difficult will be for criminal to commit such crimes.*

Example: a piece of legislation introduces controls on the quality of food. Consequently, it regulates the production processes and requires such processes to be certified by competent authorities. These provisions will indirectly increase the organizational requirements to commit crimes in the food sector. Indeed, criminal may have to bribe national authorities and/or forge the required certifications. Since such activities do not fall under the standard food production activities, they will probably need the involvement of third persons in the criminal activity, so increasing the complexity of the organisation.

**QUESTION 3.2.3. HOW WILL THE INDIVIDUAL SKILLS/KNOWLEDGE REQUIRED TO COMMIT A CRIME VARY?**

*This refers to the expected effects of the considered regulation on the overall skills and knowledge needed to commit a crime. If a sector requires considerable skills and knowledge to operate, it will be less accessible to criminals.*

Example: electronic documents require higher skills to be forged than mere paper documents. Consequently, their introduction may increase the skills required to commit forgery and other crimes.

**QUESTION 3.2.4. FOR NATURAL PERSONS, HOW WILL THE PROFESSIONAL REQUIREMENTS NEEDED TO COMMIT A CRIME OR FACILITATING THE COMMISSION OF A CRIME VARY?**

*This refers to the expected effects of the proposed regulation on professionals). Many norms require specific professional requirements or other certifications in order to operate in a market/sector (e.g. registered professionals).*

Example: many norms require that individuals having particular top management roles in enterprises should have particular professional requirements, such as registration on management, bar or other registers or similar.





**QUESTION 3.2.5. FOR LEGAL PERSONS, HOW WILL THE ECONOMIC/LEGAL REQUIREMENTS NEEDED TO COMMIT A CRIME VARY?**

*This refers to the expected effects of the considered regulation on the economic and/or legal requirements actually needed to commit a crime. Such requirements may be expressly imposed by the law or ensue from the structure of the targeted market/sector. These issues may affect illegal enterprises/activities just as well as the affect legal activities. Therefore it is important to investigate the impact of a proposed legislation on the structure of the enterprises operating in the sector.*

Example: in order to ensure appropriate guarantees for the costumers and the solidity of the banking system, banks have to fulfil with a series of requirements in order to operate with the public, such as capital reserves. Any change in such requirements will consequently modify the structure of the banking sector. These modifications may impact on the sector in a positive (e.g. increasing concurrence and transparency of the banking system) or negative way (e.g. facilitating frauds or increasing the opacity of the market), thus affecting the economic/legal requirements to commit credit frauds and other similar crimes.



**STEP 3.3. VICTIMS.**

**QUESTION 3.3.1. HOW WILL THE AMOUNT OF VICTIMS (NATURAL PERSONS) VARY?**

*This refers to the expected effects of the considered regulation on the overall number of victimized people. The amount of victimized people is a very relevant issue concerning the impact of a potential crime risk.*

Example: after the occurrence of a disaster, emergency legislation allocating funds for reconstruction is usually enacted, whose vulnerabilities are exploited by organised crime in order to divert the aids to their convenience. On 23-24 November 1980 an earthquake struck Irpinia (Southern Italy) causing 2735 deaths. The emergency relief law was exploited by organised crime (camorra). The level of criminal infiltration in the building industry rose, the buildings were not reconstructed or were reconstructed late and/or badly, and other crimes (killings, corruption, arson) were committed.

**QUESTION 3.3.2. HOW WILL THE SOCIO-DEMOGRAPHIC CHARACTERISTICS OF VICTIMS (NATURAL PERSONS) VARY?**

*This refers to the expected effects of the considered regulation on the main socio-demographic (e.g. educational level, sex, age, ethical origins) characteristics of the victims. This question aims at assessing any variation in the characteristics of the victims of a crime. This issue may be relevant even if the overall amount of expected victims is not likely to increase.*

Example: the introduction of anti pollution norms in Italy has forced many enterprises to move their activities in countries with more permissive environmental legislation. E.g. an enterprises producing aluminium coffee machines in Northern Italy moved its production plants in Eastern Europe, where anti-pollution laws are less strict and could easily be fooled. As a consequence, the people living in such countries became victims of possibly illegal pollution and had to sustain higher health care costs in countries with underdeveloped the public health systems.

**QUESTION 3.3.3. WILL THE AMOUNT OF VICTIMS (LEGAL PERSONS) VARY?**

*This refers to the expected effects of the considered regulation on the overall number of victimized legal persons (e.g. profit/no profit organizations, state and governmental agencies).*

Example: a change in industrial property legislation may not specify in a clear way when a company's trademark is imitating another registered trademark. Such a piece of legislation would likely increase the number of companies suffering from illicit trademark imitation.



**QUESTION 3.3.4. HOW WILL THE ECONOMIC/LEGAL CHARACTERISTICS OF VICTIMS (LEGAL PERSONS) VARY?**

*This refers to the expected effects of the considered regulation on the economic (e.g. corporate size, national or multinational companies) legal (e.g. corporate structure) characteristics of the victims (legal persons).*

Example: regulation of the credit sector may require specific pre-existing assets in order to obtain fund from banks or other sponsor. This mechanism may push newborn enterprises to avoid the legal credit sector and resort to the usury market.

**STEP 3.4. COSTS/HARM.**

**QUESTION 3.4.1. WILL THE TOTAL COSTS OF THE CRIME VARY?**

*An assessment of the economic impact of the proposed legislation on the whole society will provide a very useful tool of comparison between envisaged policy options.*

**QUESTION 3.4.2. HOW WILL PRIVATE COSTS VARY?**

*This refers to the expected effects of the considered regulation on the direct costs suffered by victims. The assessment of such impact may be very relevant when choosing the optimal policy option.*

Example: legislation decreasing controls on the pharmaceutical sector may affect the product reliability and safety. This may impact on the cost suffered by victims of frauds and counterfeiting of pharmaceutical products, since they may face higher health care costs due to unexpected effect of medicines.

**QUESTION 3.4.3. HOW WILL SOCIAL COSTS VARY?**

*This refers to the expected effects of the considered regulation on any non-private cost, such as costs imposed on a whole sector/area or on society.*

Example: frauds against the EU common agricultural policy directly affect the EU and MSs budget. However, these crimes also hinder the ultimate purposes of the common agricultural policy, subtracting fund from deserving commercial farms. The social costs include the losses and inefficiencies caused by this diversion of funds from their original and legitimate goal.





## 4. CONCLUSIONS.

### ***Main concepts.***

The core idea underlying this manual is that legislation may have criminogenic effects. This means that legislation may inadvertently produce opportunities for crime. Reducing such opportunities will help to reduce crime and its consequences in terms of costs and victims.

Therefore, *crime proofing of legislation aims at measuring existing ("ex post crime proofing") or future ("ex ante crime proofing") opportunities for crime due to legislation and at highlighting related interventions in order to proof it against crime.*

The concept of risk means *the probability defined as the likelihood that a crime, as a negative event, will occur (e.g. 1 in 100 chance per year), and the impact, defined as the harm caused to society and individuals by such a crime.* Crime risk is a function of the expected losses/harm which can be caused by a criminal behaviour and the probability of such behaviour.

In order to deal with the criminal justice systems of 25 EU MS, a criminological definition of crime should be adopted. Instead of relying on a strictly legal definition, "crime" should be considered as any behaviour recognized at the EU level as likely to violate criminal and/or administrative norms. This approach allows behaviours such as tax evasion and antitrust violations to be included, even though they are not always criminalized.

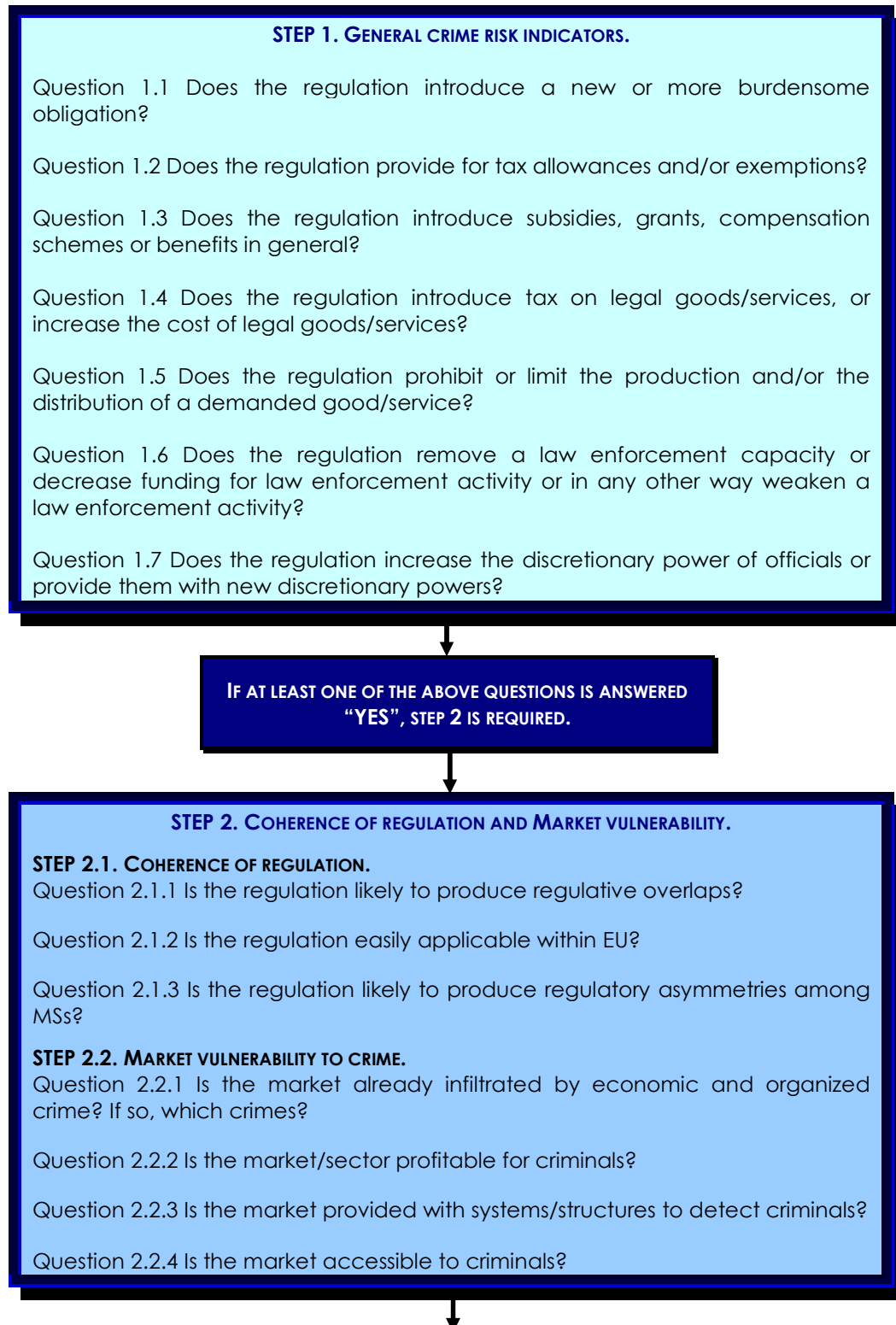
The concept of criminogenic effects of legislation assumes that law may inadvertently produce unintended criminal opportunities. Such opportunities may consist of new techniques to commit crimes, higher incentives (e.g. profits) related to crime, weaker controls, as well as particular side effects such as the displacement of criminal activities from one sector to another. Every criminal opportunity increases the harm and/or the threat of a crime risk.

Any kind of legislation may produce unintended criminal opportunities. While frequently overlooked, such effects may be extremely relevant and may ultimately undermine the main objectives of the law.



### ***The three-step checklist.***

The following checklist provides a simple and easy tool to check whether a piece of legislation may contain unintended crime risks. It has been designed in order to allow Commission officials to easily verify if a given proposal presents crimes risks and thus needs further assessment and consideration.





### STEP 3. CRIME COMPONENTS.

#### STEP 3.1. CRIME.

Question 3.1.1. Will the amount of crime vary?

Question 3.1.2. How will the risk of being detected committing a crime vary?

Question 3.1.3. How will the expected profit for the authors of crime vary?

#### STEP 3.2. AUTHORS

Question 3.2.1. Will the number of authors vary?

Question 3.2.2. How will the complexity of the organizational structure of a crime vary?

Question 3.2.3. How will the individual skills/knowledge required to commit a crime vary?

Question 3.2.4. For natural persons, how will the professional requirements needed to commit a crime or facilitating the commission of a crime vary?

Question 3.2.5. For legal persons, how will the economic/legal requirements needed to commit a crime vary?

#### STEP 3.3. VICTIMS.

Question 3.3.1. How will the amount of victims (natural persons) vary?

Question 3.3.2. How will the socio-demographic characteristics of victims (natural persons) vary?

Question 3.3.3. Will the amount of victims (legal persons) vary?

Question 3.3.4. How will the economic/legal characteristics of victims (legal persons) vary?

#### STEP 3.4. COSTS/HARM.

Question 3.4.1. Will the total costs of the crime vary?

Question 3.4.2. How will private costs vary?

Question 3.4.3. How will social costs vary?

### ***A possible procedure to identify crime risks.***

Risk assessment models have already been applied with success in the socio-political, environmental, technological and health fields.

The most frequently used models are: Event-tree risk assessment, Indicator-based risk assessment, Step-based risk assessment and Indicator/step-based risk assessment.

The experience gained from the project "A study on Crime Proofing – Evaluation of crime risk implications of the European Commission's proposals covering a range of policy areas" (contract No. DG.JAI-D2/2004/05) led to the creation of a methodology to assess crime risk in the proposals of the European Commission (see Annex). This Crime Risk Assessment process may be a very important step towards a very effective crime prevention strategy in the EU. The CRA process is divided in 3 steps:

- **Step 1: Initial Screening (IS).** Its aim is to check if a piece of legislation falls within 7 general risk indicators. If one or more envisaged policy options fall within the 7 categories, these options will pass to the Preliminary Crime Risk Assessment (PCRA).
- **Step 2: Preliminary Crime Risk Assessment (PCRA).** Its aim is to assess if the policy options that have been identified in the IS effectively present unintended crime risks. If at least one policy option presents at least a medium level crime risk, such option(s) will pass to the Extended Crime Risk Assessment (ECRA).
- **Step 3: Extended Crime Risk Assessment (ECRA).** Its aim is to make an in-depth assessment of risky policy options that have been identified after the PCRA.





## ANNEX. THE CRIME RISK ASSESSMENT PROCESS.

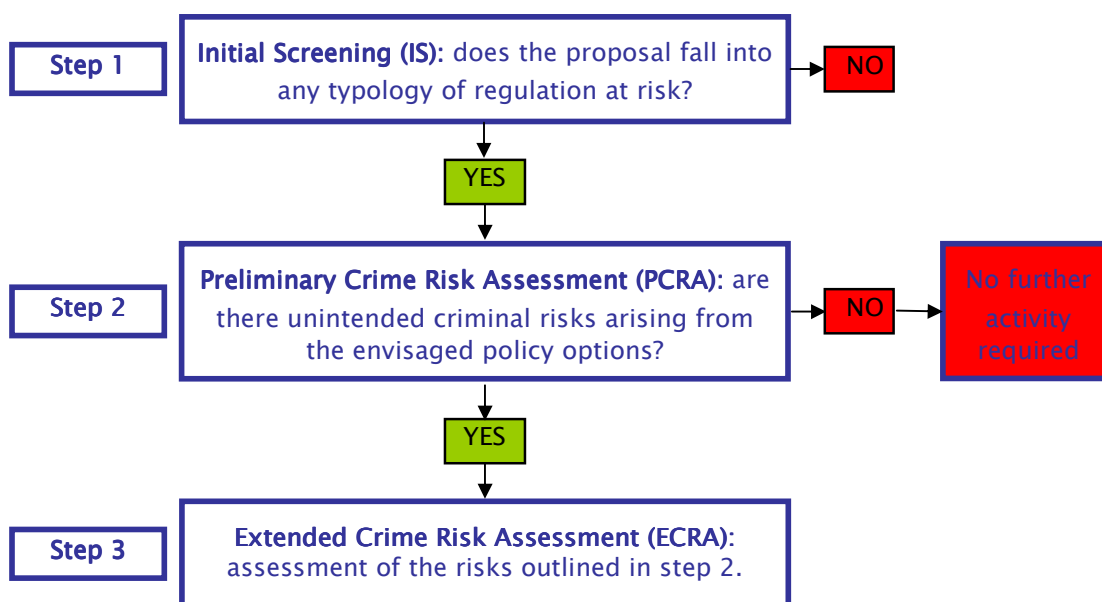
Crime proofing is a type of risk assessment. Risk assessment models have already been applied with success in the socio-political, environmental, technological and health fields.

There is no ideal risk assessment model: each risk has different characteristics that require a specific approach. The most frequently used models are: Event-tree risk assessment, Indicator-based risk assessment, Step-based risk assessment and Indicator/step-based risk assessment.

The most appropriate model for a crime risk assessment of legislation is a step-based risk assessment. This consists of structured phases or steps of risk analysis; it is by far the most pervasive technique. The steps generally focus on the different components of risk, from the *probability or likelihood* of the event occurring, to its impact (expressed as costs on society and individuals), until achieving a synthetic result. This method of risk analysis spans all areas of risk assessment and serves as a practical framework for standardizing assessment techniques.

Under the project "A study on Crime Proofing – Evaluation of crime risk implications of the European Commission's proposals covering a range of policy areas" (contract No. DG.JAI-D2/2004/05) Transcrime – Joint Research Centre on Transnational Crime – developed a methodology to assess unintended crime risks in the proposals of the European Commission. The Crime Risk Assessment (CRA) process consists of 3 logically interlinked steps. The whole process is based on the principle of proportionality, as requested by the Commission's Guidelines, in order to avoid an excessive workload when not required. The CRA process starts with the Initial Screening which frames the policy options into 7 different general risk indicators; if any regulation is found to be at risk, it continues to the Preliminary Crime Risk Assessment (PCRA), which assesses the potentially criminogenic policy options. If the PCRA highlights at least a medium level crime risk, an Extended Crime Risk Assessment (ECRA) will be recommended which will assess the risky options with the help of external experts.

The following diagram illustrates the main steps of the CRA process:

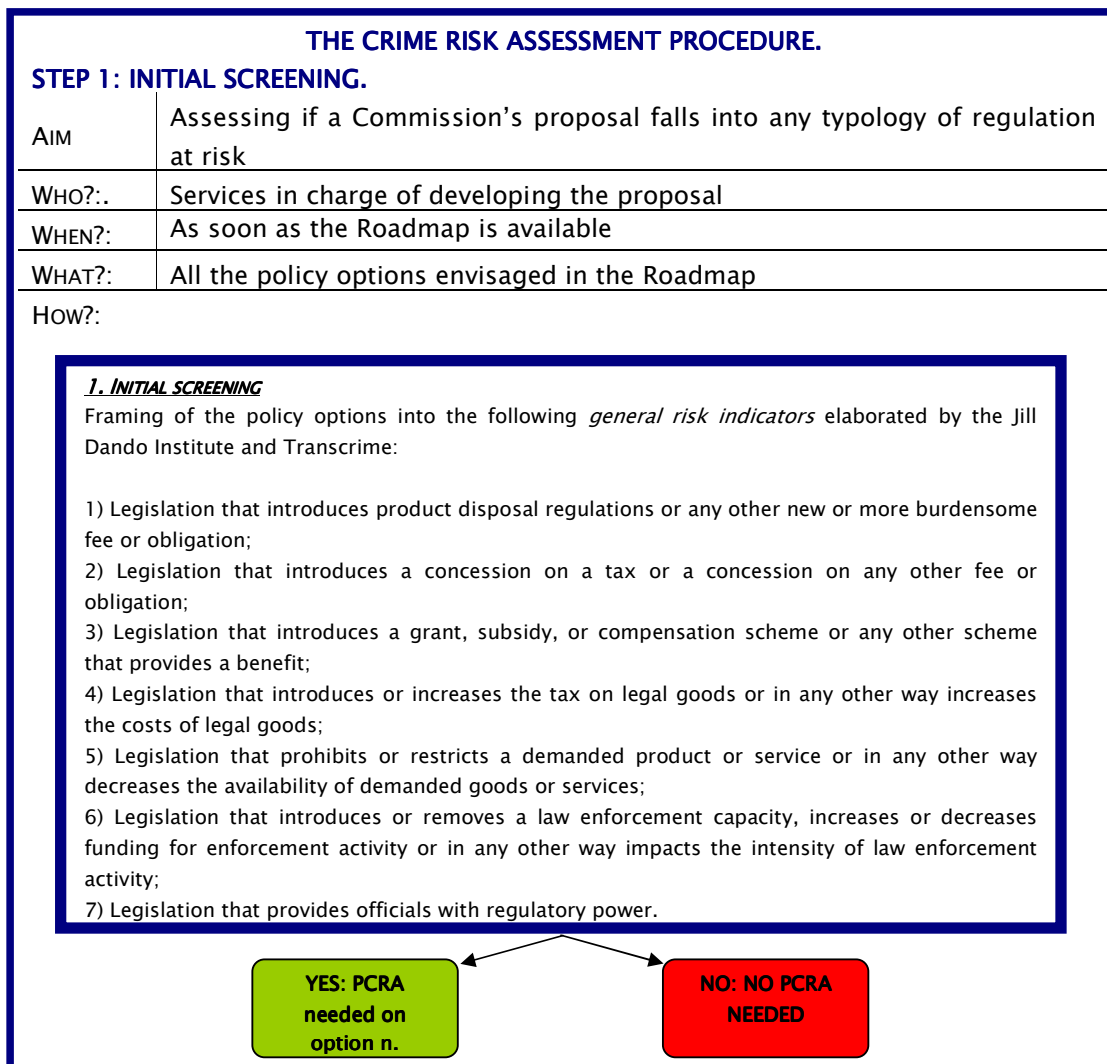






## THE INITIAL SCREENING (IS).

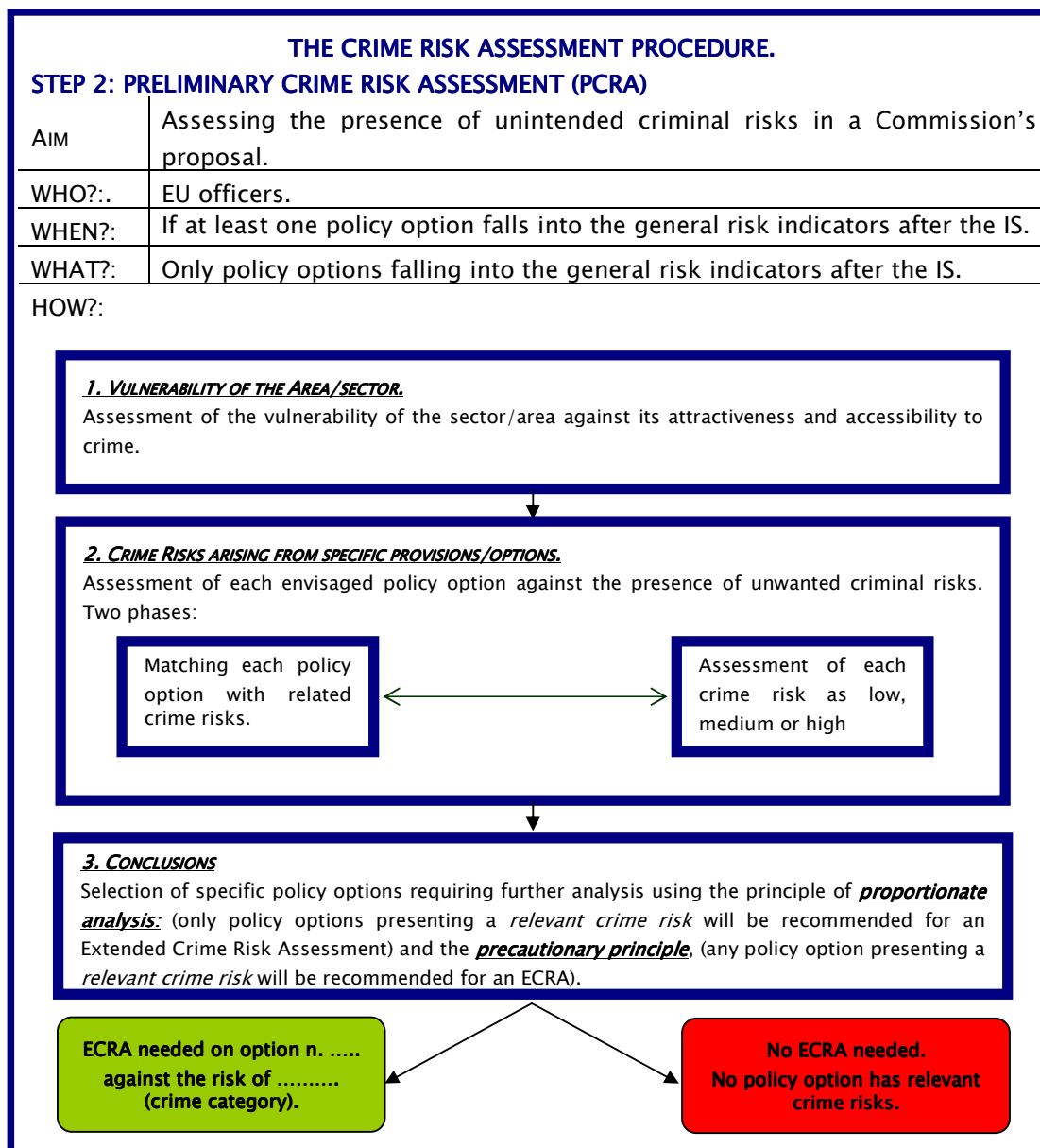
The IS is the first step of the CRA process. It is based on the envisaged policy options presented in the Roadmap. Its aim is to check if the policy options fall within 7 general risk indicators. Officials of the relevant DGs should frame the envisaged options in one or more of the 7 abovementioned typologies. If no policy option can be framed into one risk indicator, the CRA process will end and no further activity will be required. If one or more envisaged policy options fall within the 7 categories, these options will pass to the Preliminary Crime Risk Assessment (PCRA). The following diagram graphically represents the IS:





## THE PRELIMINARY CRIME RISK ASSESSMENT (PCRA).

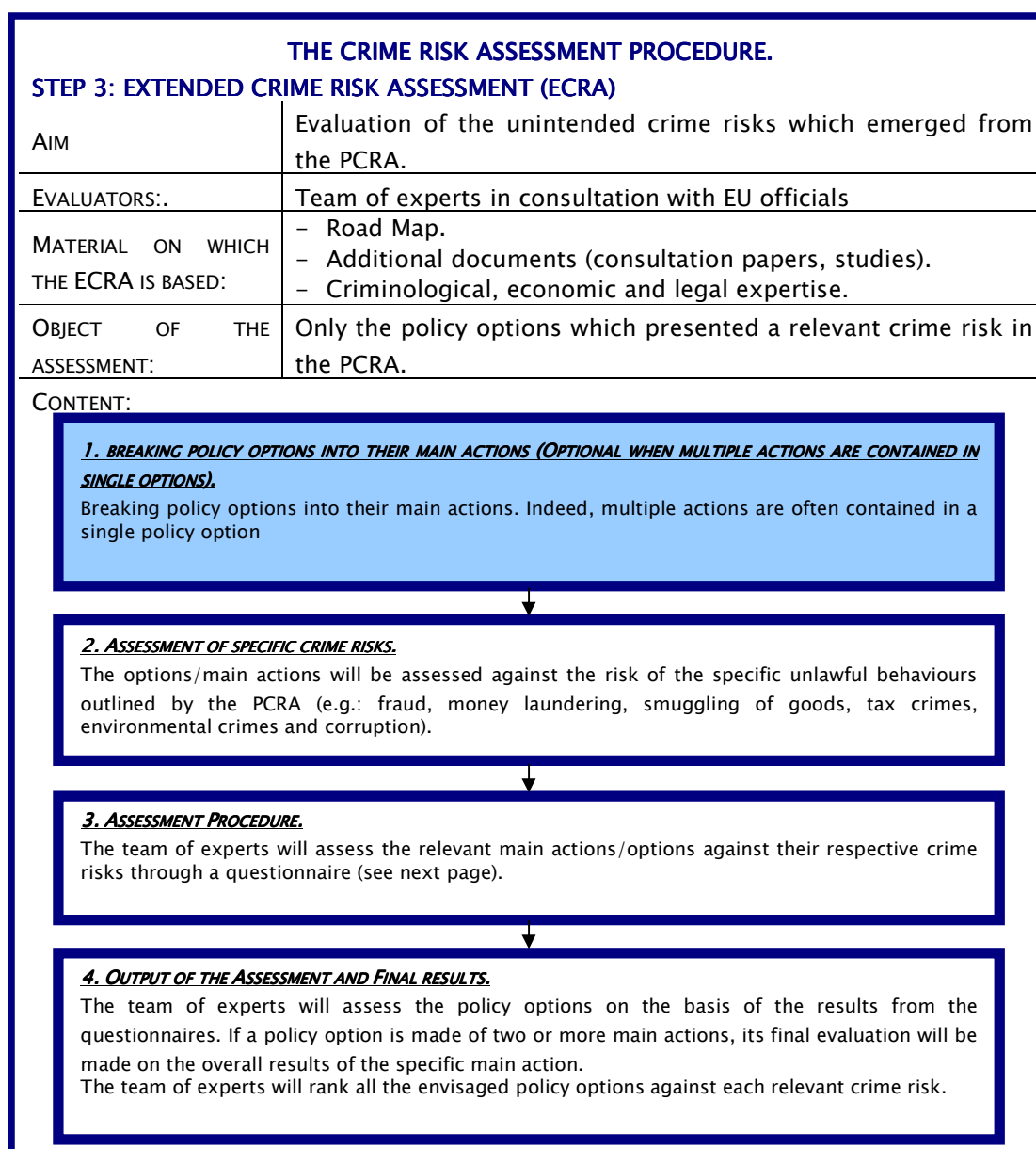
The PCRA is the second step of the CRA process. Its aim is to assess if the policy options that have been identified in the IS effectively present unintended crime risks. Evaluators will briefly assess the vulnerability of the sector/area to be regulated. They will identify the criminal behaviours that may occur and will assess such risks. If at least one policy option presents at least a medium level crime risk, such option(s) will pass to the Extended Crime Risk Assessment (ECRA). The following diagram graphically represents the PCRA:





## THE EXTENDED CRIME RISK ASSESSMENT (ECRA).

The Extended Crime Risk Assessment (ECRA) is the third step of the overall Crime Risk Assessment process. Its aim is to make an in-depth assessment of risky policy options that have been identified after the PCRA step. This step relies on the assistance of a team of experts. Such a contribution is needed in order to provide clear and specific knowledge of the sector's mechanisms and their possible impacts on crime. The following diagram graphically represents the ECRA:



## 6. CONCLUSIVE RECOMMENDATIONS.

Previous to this study there was no practical experience in crime risk assessment resulting in the crime proofing of EU Commission proposals. It has been necessary to build a methodology and then test it inside the legislative process of the European Commission.

The experience of this Study proved that crime proofing of Commission proposals may be very useful for effective crime prevention. The application of the CRA methodology helped in highlighting possible crime risks in the 19 Commission proposals. Some critical points should be considered as crucial in order to improve the quality of the entire exercise.

### **A. Time.**

Time is an essential variable for the Crime Risk Assessment process. The whole process has been designed to serve to the Commission's decision-making process. Accordingly, the results of the different steps of the CRA (IS, PCRA, ECRA) should go back to the proposing DG as soon as possible and in any case before a draft proposal is approved. This is required to allow the concerned services to be aware of the possible crime risks implied in the envisaged policy option(s) and thus manage such risks with appropriate measures. It has been our experience that the drafting of the proposal and its crime risk assessment followed two parallel, non-communicating paths. If this is the case, the crime risk assessment does not benefit the process.

*It is essential that an agenda is produced at the start of the process, where who does what and when are clearly identified and which presents the relevant passages to be considered, as well as dates for communication between the producers and assessors of the proposal.*

### **B. Information.**

In-depth knowledge of the proposal's background, as well as of all the relevant information on the targeted sector/market is crucial. The collection of reliable and extensive information improves both the reliability and the effectiveness of the CRA process. It thus has a vital importance for the process. In this perspective, the Roadmap has proved to be a crucial document. Problems may be related to its level of detail. In some cases it is very general, in others more exhaustive. Sometimes the envisaged policy options are not specified at all. This makes it more difficult to analyse all the possible implications of a Commission's proposal and, consequently, to understand if it contains crime risks.

Information exchange is just as much important. All the relevant information on the proposal and on the sector/market should circulate between the relevant actors in the CRA process. This includes the proposing Commission services, other services and external consultants. Communication and feedback is very important for a successful CRA. The flow of information to the assessors should begin as soon as the policy options are established in the road map and continue until the CRA process is completed. If external consultants are requested, they should be constantly updated on any relevant information concerning the proposal and the concerned market/sector.

If assessors do not receive updated information, or that their information does not mirror the information held by those who are preparing the proposal the CRA process will not provide a useful assessment of possible crime risks.

*It is essential that all the relevant information continuously feeds the CRA process. The list of the documents used should be quoted in the CRA process in each of its three steps.*

### **C. Expertise.**

Commission proposals may address very different and complex markets/sectors. An effective analysis of criminal opportunities arising from the envisaged policy options may require relevant expertise in order to obtain in-depth knowledge of the mechanisms of the targeted sector. Interaction among assessors and experts is crucial, especially in the case of the ECRA. External experts should be selected according to the Commission's Guidelines.<sup>257</sup> Once involved in the CRA exercise, they should be instructed on the goal of the process. They should have adequate time to study the issues and answer to assessors. All the relevant documents and information should be available to them in good time. They should have to possibility to ask for further clarifications and explanation to the assessors.

*It is essential that external experts, when necessary, are designated and involved in the process as soon as possible. Assessors and external experts should interact from the beginning and during the course of the process.*

### **D. Nature of the act.**

Crime proofing of legislation aims at prevent crime risks emerging from legislative documents. While some Commission proposals have normative content (e.g. proposals for Regulations and Directives), others have not (e.g. Communications, Thematic Strategies, White and Green papers). Such documents usually set very general policy guidelines. Difficulties may be encountered when assessing criminal implications of documents without prescriptive content. These do not lead to actual crime risks because they do not contain prescriptions that can be violated. Such documents should not be the object of the CRA process. The CRA is more effective and reliable when addressing regulatory acts (Directives, Regulations, Decisions), because of their prescriptive nature.

*The CRA process should be carried out on regulatory acts rather than on policy documents, as only regulatory acts may present actual crime risks.*<sup>258</sup>

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<sup>257</sup> Doc. COM(2002) 713, *Communication from the Commission on the Collection and Use of Expertise by the Commission: Principles and Guidelines*.

<sup>258</sup> This approach is in line with the principle of proportionate analysis mentioned in the *Commission's Guidelines*, (p. 8): "Broad policy-defining documents – For White Papers, Action Plans, other Communications setting out strategic orientations, or proposed framework directives (meant to be followed by daughter directives), the analysis will generally be rather broad in its problem description and objectives. [...] Assessment of impacts will necessarily be preliminary and will not provide detailed quantitative data".

