UNIVERSITY OF TIMISOARA
FACULTY OF LAW

UNIVERSITY OF PÉCS
FACULTY OF LAW

JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW
No. 1/2015

Edited biannually by courtesy of the Criminal Law Departments within the Law Faculties of the West University of Timisoara and the University of Pécs

2015

Legislative Actions of Estonia to Combat Organized Crime

Ph.D. lecturer Anneli SOO,
University of Tartu, Faculty of Law

Professor Jaan SOOTAK,
University of Tartu, Faculty of Law

Abstract:

From 2002 belonging to a criminal organization or leading one is punishable in Estonia. While making relevant changes to Estonian Penal Code, Estonian legislator took into account requirements of the United Nations Convention against Transnational Organized Crime. The Estonian courts have been applying respective law for over ten years now and have encountered several difficulties. For instance, the notion of 'criminal organization' still is debatable as in practice it should be distinguished from ordinary groups that gather occasionally to commit crimes. In addition, the problems related to the principle of ne bis in idem may arise in case the authorities have failed to investigate a crime of belonging to a criminal organization or leading one and crimes that a person has committed while belonging to the organization in the same criminal procedure. This article introduces these problems as well as gives an overview of historical development and current status of Estonian criminal law in the area of combating organized crime.

Keywords: *organized crime, membership of criminal organization, leadership of criminal organization, formation of criminal organization, Estonia, criminal law, legal regulation, development of national legislation, development of national court practice*

1. Introduction

After Estonia regained its independence on the 20th of August 1991, the Estonian legislator had a difficult task to modernize Estonian legislation. The Criminal Code, which was already in force during the Soviet era, was amended with the aim to reconcile it with the democratic principles, but it took over 10 years for the legislator to elaborate modern Penal Code. On the 1st of September 2002 it finally came into force,[1] with its Articles 255 and 256 providing punishment for forming and belonging to a criminal organization. One of the reasons these Articles were added to the Penal Code was that Estonia ratified the United Nations Convention against Transnational Organized Crime[2] (so-called Palermo Convention) on the 4th of December 2002. This article will give an overview of the content of these Articles, development of related court practice and practical problems that have raised in the course of implementing these Articles.

It should be noted that in Estonia forming and belonging to a criminal organization are crimes that do not have considerable statistical importance. They both belong to the offences against public peace which have formed 6-8% of crimes registered in Estonia

[1] Estonian Penal Code is available in English at: https://www.riigiteataja.ee/en/.
[2] Available in English at: http://www.unodc.org/unodc/treaties/CTOC/.

yearly for the last 10 years. In the last years the following number of crimes related to forming and belonging to a criminal organization were registered: 2009 – 9, 2010 – 12, 2011 – 26, 2012 – 21, 2013 – 35, and 2015 – 25. This means that they form around 1% of offences against public peace (2014 – 1.3%, 2015 – 1.1%) and around 0.07-0.08% of whole criminal activity (2013 – 0.08%, 2014 – 0.07%). Almost all crimes related to forming and belonging to a criminal organization are committed in the capital of Estonia, Tallinn, and in northeast region of Estonia. Although statistically not common, Articles 255 and 256 have significant legislative importance in Estonia's fight against organized crime and serve a purpose of fulfilling Estonia's international obligations.

2. Historical development of Estonian legislation in the area of organized crime

2.1. Legislation concerning organized crime during the Soviet era

During the Soviet era the notion of organized crime was unknown in substantive criminal law. However, in literature crimes committed by groups were mentioned, although these groups were described as small and temporary. When it came to the specific types of crimes, *e.g.*, misappropriation of the state's property, it was nevertheless admitted that the groups might be bigger and of more permanent nature. The classification of criminals mentioned so-called obdurate criminals and particularly dangerous recidivists.[3] H. J. Schneider's textbook on criminology that was published in 1987 and translated to Russian in 1994 analyzed the phenomenon of organized crime. In the book the author describes the characteristics of it and its roots. He explains that according to Marxist view, the source for organized crime is capitalistic structure of society.[4]

In the Soviet literature it was discussed that the main characteristic of criminal activity committed by groups is a relationship between the group members based on common beliefs that are against the social values of Soviet Union. Individual illegal intentions and need for cooperation are in a conflict and form a reason for inconstancy and perspectiveless of criminal groups. Mostly, there are only few members in the group, for instance in 52% of the groups that are engaged with stealing state's property have only two members, and only 25% thieves have specific 'duties' in the course of committing crimes. Also, illegal transactions and collective decisions were mentioned as a specific type of crimes committed by groups, although liability of legal persons itself was still unknown back then.[5] Despite of the fact that Soviet criminology did not recognize organized crime as a phenomenon and only mentioned criminal activity performed by groups, some material factors in criminal law indicate that in reality criminal activity was organized in quite a high level. In addition to nowadays widely used traditional institutes as joint principal offenders[6] and accomplices[7] (Criminal Code

[3] Криминология. Москва: Юридическая литература 1988, pp. 77 and 101.

[4] Г.Й. Шнайдер. Криминология. Москва: Прогресс 1994, pp. 48-53.

[5] В. Кудрявцев. Правовое поведение: норма и патология. Москва: Наука 1982, pp.207-212.

[6] According to Article 21 (2) second sentence of Estonian Penal Code an offence is deemed to be a joint offence if an act committed by several persons jointly and in agreement comprises the necessary elements of an offence. Joint principal offenders form a group.

[7] In Estonian criminal law accomplices are abettors and aiders. According to Article 22 (2) of Estonian Penal Code an abettor is a person who intentionally induces another person to commit an intentional unlawful act. According to Article 22 (3) of Estonian Penal Code an aider is a person who

of Estonian Soviet Socialist Republic, Article 17), soviet criminal law also knew the notion of organized group (Article 38 (2)). In addition, crimes against state like conspiracy to seize power (Article 62 (1)), organized activity towards crime against the state (Article 70) and gangsterism (Article 75) were enacted in the Special Part of the Criminal Code of Estonian Soviet Socialist Republic. In addition to traditional accomplices as abettors and aiders, the criminal law also knew an organizer of the crime (Article 17 (4)).

Therefore, the Soviet criminal law had a lot in common with contemporary criminal law when it comes to the organized crime and the notion of criminal organization. For instance, the gang was considered to be permanent monolithic group formed by at least two armed members, who have permanently corporated with the aim to attack individuals or institutions. The difference between so-called casual group and the gang was the nature of relationship between the members – it was permanent and deeper than common agreement on committing a joint crime. In addition, gangs had organizational structure and labor distribution between its members. Therefore, the member of the gang was responsible for all crimes committed by the gang irrespective of his participation in a certain crime.[8] Organized group had similar features, although its members were not armed and its aim was not to attack someone. Therefore, the gang was a certain type of organized group.[9] Estonian legal literature even used notion 'criminal organization' to cover organized groups, conspiracy and gangs.[10]

2.2. Legislation concerning organized crime after re-independence of Estonia

As it was already mentioned, in 2002 the notion of criminal organization was introduced to Estonian criminal law. According to Article 255 (1) of the Penal Code membership in a permanent organization consisting of three or more persons who share a distribution of tasks, which activities are directed at the commission of criminal offences in the first degree or illegal affecting of official power was punishable by three to twelve years' imprisonment. In 2007 the wording was changed as it was added that this organization must have been created for the purpose of proprietary gain. The circle of criminal activities was widened as it was declared that the activities of the members must be directed at the commission of criminal offences in the second degree for which the maximum term of imprisonment of at least three years is prescribed, or criminal offences in the first degree. These changes were done with the aim to rise conformity with the Palermo Convention and EU legislation. It was explained that due to the amendments Articles 255 and 256 no more cover organizations formed for political aims as this activity could be punished by various articles provided for in the Penal Code (*e.g.*, Articles 235 and 237^1). In relation to widening the circle of criminal activities it was mentioned that as according to the Palermo Convention criminal organization is an organization which is formed with the aim to commit crimes that are punishable with the maximum term of imprisonment of at least four years and as in Estonian Penal Code

---

intentionally provides physical, material or moral assistance to an intentional unlawful act of another person.

[8] I. Rebane. Eesti NSV kriminaalkoodeks. Kommenteeritud väljaanne. (Criminal Code of Estonian Soviet Socialist Republic. Commented Edition.). Tallinn: Eesti Raamat 1980, Article 75 commentaries 1a, 2; Комментарий к Уголовному Кодексу РСФСР. Москва: Юридическая литература 1985, Article 77 commentary 4.

[9] Eesti NSV KrKK (Note 8) Article 38 commentary 9b.

[10] *Ibid,* Article 17 commentary 9c.

these crimes barely exist, it is reasonable to lower the condition to the crimes with the maximum term of imprisonment of at least three years.[11] The Article 256 (1) of the Penal Code, which remains unchanged from 2002, enacts punishment by five to fifteen years' imprisonment for forming or leading of or recruiting members to a criminal organization.

In 2007 it was added to Article 255 that it is punishable for a legal person to belong to a criminal organization (the same change was made to Article 256 of the Penal Code). In Estonia a specific crime committed by a legal person is punishable only if the law determines it. Therefore, before 2007, a legal person could not be punished for membership in criminal organization. The legislator considered it to be a gap as the Palermo Convention seeks responsibility of legal persons for belonging to a criminal organization, and made abovementioned change to the law in force. A legal person may belong to the criminal organization in two ways: through its body, a member of its body, or by its senior official or competent representative or through the fact that the organization is itself in fact criminal.[12] The punishment for Articles 255 or 256 for the legal person is pecuniary, which may be according to Article 44 (8) of the Penal Code up to 6,000,000 euros.

3. Law on organized crime in action

3.1. Changes in legislation in 2015

On 1st of January 2015 two remarkable changes were made to Article 255 (1) of the Penal Code.

First, the condition that the organization must have been created for the purpose of proprietary gain was removed again. Now the wording of Article 255 (1) is: 'Membership in a permanent organization consisting of three or more persons who share a distribution of tasks, which activities are directed at the commission of criminal offences in the second degree for which the maximum term of imprisonment of at least three years is prescribed, or criminal offences in the first degree, is punishable by three to twelve years' imprisonment.' It was explained that dangerousness of an illegal organization does not depend on whether it is formed for proprietary gain or for any other illegal purpose. For instance, the organization that is formed with the aim of racial discrimination or committing violent crimes is as dangerous as the one that is formed for proprietary gain.[13] What makes the amendment interesting is the fact that the legislator does not explain the possible inconformity with Palermo Convention, a main reason why proprietary gain was brought into Article 255 in 2007.

The second change was most comprehensive and principal. So far not only was the membership in criminal organization punishable, but there were specific crimes in the Code, in case it was an aggravating circumstance to be committed by members of

---

[11] J. Sootak, P. Pikamäe. Karistusseadustik. Kommenteeritud väljaanne. 2. väljaanne, (Penal Code. Commented Edition. 2nd Edition.) Tallinn: Juura 2009, Article 255 commentaries 3.5.1. and 3.6.1.

[12] *Ibid,* Article 255 commentary 7.

[13] Seletuskiri karistusseadustiku ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu juurde, 554 SE (Explanatory Memorandum to the Act to Amend Penal Code and Other Relevant Legal Acts, 554 SE. Available, but only in Estonian at:

http://www.riigikogu.ee/?op=ems&page=eelnou&eid=78433b29-8b2f-4281-a582-0efb9631e2ad&.

criminal organization. For instance, robbery was punishable by two to ten years' imprisonment, but in case committed by the members of criminal organization by three to fifteen years' imprisonment (Article 200 (2) 7 of the Code). Another example was drug trafficking. It was punishable by one to ten years' imprisonment, but in case committed by the members of criminal organization by six to twenty years' imprisonment (Article 184 (2^1) 2 of the Code).

Although at first sight this regulation seemed to be well functioning, it had considerable shortcomings. First, the crime committed by the members of criminal organization as an aggravating circumstance was random and therefore arbitrary in the Penal Code. For instance, murder, human trafficking or illicit traffic committed by the members of criminal organization was not aggravating circumstance, but the burglary was (Article 199 (3) of the Code). At the same time the membership in criminal organization was an aggravating circumstance for some crimes that did not meet even the maximum sentence criterion of the Palermo Convention (*i.e.* four years of imprisonments): for instance incitement of hatred which is not a crime but misdemeanor, embezzlement for which maximum sentence of one year of imprisonment is provided and acquisition, storage or marketing of property received through commission of offence for which also maximum sentence of one year of imprisonment is provided. This caused a lot of questions for the courts.[14] In case a person committed a murder as a member of the criminal organization, he was convicted for a murder (Article 114 of the Code) and for belonging to the criminal organization (Article 255 of the Code). But in case a person was convicted for committing a robbery as a member to the criminal organization, the courts had no clear standpoint whether to convict him only for robbery committed by a member of criminal organization (Article 200 (2) 7 of the Code) or for a robbery committed by a member of criminal organization (Article 200 (2) 7 of the Code) and for belonging to the criminal organization (Article 255 of the Code). The main argument against the second solution was that then a person will be basically punished for the same act (his membership in a criminal organization) twice with which a principle of *ne bis in idem* is violated. From the 1st of January 2015 the situation is clear as person is convicted for a robbery without aggravating circumstances (Article 200 (1) of the Code) and for belonging to the criminal organization (Article 255 of the Code) and no conflict with *ne bis in idem* arises. It is also important to notice that the Supreme Court of Estonia has established that acquittal of a person in specific crime (e.g., in drug trafficking) does not automatically result in acquittal in belonging to the criminal organization. A person may be convicted for the latter even if he has not committed any other crime while being a member of the criminal organization.[15]

The fact that belonging to the criminal organization was an aggravating circumstance for a number of crimes brought unfair solutions in sentencing. For instance, let us observe a case in which Jan, Yevgeny, Dmitri, Daniel, Peter, Piotr, David and Boris belong to a criminal organization which focuses on committing number of crimes. Peter and Piotr steal cars which David sells to Russia. Jan and Yevgeny deal with drug trafficking – they buy drugs from abroad and sell them in Estonia. Dmitri and Daniel have a task to

---

[14] J. Sootak. Muudatused ja täiendused karistusõiguse üldosas. Läbivad muudatused eriosa sätete kohaldamiseks. (Amendments and Supplementations to the General Part of the Penal Power. Recurrent Amendments to Implementation of the Provisions of the Special Part.) Juridica 2014, No. 8, pp. 590-591.

[15] Judgment of the Criminal Chamber of the Supreme Court of Estonia, 15th of December 2014, court case no. 3-1-1-65-14, p. 21.

legitimize organization's money – they deal with money laundering. Boris is a new member and therefore have not committed any crimes, although has dealt with practical issues, e.g., arranged meetings of the members (i.e. has committed a crime of belonging to the organization). In case the Prosecutor's Office is successful in bringing the case to the court and the court convicts these persons the sentences would have been before the 1st of January 2015 as follows.

1. Boris – belonging to the criminal organization according to Article 255 of the Code 3-12 years, in average 7.5 years imprisonment.

2. Peter and Prior – stealing while belonging to the criminal organization according to Article 199 (3) of the Code 2-10 years, in average 6 years imprisonment.

3. David – selling stolen goods while belonging to the criminal organization according to Article 202 (2) 1 of the Code pecuniary punishment or imprisonment up to 3 years, in average pecuniary punishment.

4. Jan and Yevgeny – drug trafficking while belonging to the criminal organization according to Article 184 (2^1) 2 of the Code 6-20 years or life time imprisonment, in average 13 years imprisonment.

5. Dmitri and Daniel – money laundering committed by the member of criminal organization according to Article 394 (2) 4 of the Code 2-10 years, in average 6 years imprisonment.

As it can be seen, punishments vary dramatically, and not in compliance with what the members of the group have committed. For instance, David who has been active in selling stolen goods receives pecuniary punishment as Boris, who has not committed any additional crimes imprisonment. It has to be mentioned that Boris, a new member of the organization receives almost the most severe sentence from all members – only Jan and Yevgeny are punished with longer sentence than he.[16] From the 1st of January 2015 that kind of injustice cannot arise as all members are punished according to Article 255 of the Code with 3-12 years imprisonment and those who have committed additional crimes are punished respectively.

3.2. The nature of crimes provided for in Articles 255 and 256 of the Penal Code

Contemporary literature of criminology recognizes the phenomenon of organized crime, although its characteristics are still debatable. For instance, some argue that it is a permanent association of three or more people which aims at proprietary gain and has, e.g., hierarchical structure and cross-border nature.[17] If the activities of a criminal organization are targeted towards gaining economic and political power, it is called mafia.[18]

In the context of Estonian law the criminal organization has number of features already mentioned above:

1. It has to have at least three members, including its leader.[19]
2. It has to be permanent.

---

[16] K. Heide. Kuritegelikke ühendusi puudutavate kuritegude sanktsioonide omavaheline ebakõla. (Discord of Criminal Offence Sanctions Concerning Criminal Organisation). Juridica 2013, No. 10, pp 756-757.

[17] Nt G. Kaiser. Kriminologie. 10. Aufl. Heidelberg: Müller 1997, p. 188.

[18] C. Falcone, M. Padovani. Inside Mafia. 3. Aufl. München: Herbig 1992, p. 34.

[19] Judgment of the Criminal Chamber of the Supreme Court of Estonia, 18th of January 2010, court case no. 3-1-1-57-09, p. 13.1.

3. There must be a distribution of tasks between the members.

4. Its activities have to be directed at the commission of criminal offences in the second degree for which the maximum term of imprisonment of at least three years is prescribed, or criminal offences in the first degree.

The definition differs a bit from the definition of organized criminal group described in Article 2 (a) of the Palermo Convention, according to which it is a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit. Pursuant to Article 2 (b) serious crime is a conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. As it could be seen, Estonian definition of criminal organization is slightly broader as no aim to financial or other material benefit has to be established. In addition, the activities of the organization have to be targeted towards committing offences for which the maximum term of imprisonment of at least three years, not at least four years as in Palermo Convention, is prescribed.

Articles 255 and 256 themselves aim at protecting public safety: every member of the society has a right to safely live in the society and expect the same situation to last in future.[20] These articles also protect public peace, which is threatened barely by the existence of criminal organization and by criminal potential it has. Estonian legal order defines public peace as the basis for co-existence, which exists independently from the public power and has a goal to guarantee safety of the society members. Therefore, it is also said that public peace involves public safety, public order and execution of public authority.[21] It has to be stressed that Articles 255 and 256 are individual criminal offences. As even mere existence of a criminal organization threatens public safety and peace, its members could be punished according to Article 255 or 256 even if the organization has not yet started to realize its criminal objectives.[22] But when it has, the prosecutor could prove the existence of criminal organization by indicating what kind of crimes its members have committed.[23] In addition, the member of the criminal organization could be convicted according to Article 255 or 256 even if he himself has not committed any certain crime while belonging to the criminal organization.

Above-mentioned principles determine the nature of Article 255. It is a continuous offence, which means that it is an offence that starts with a person becoming a member of the organization and ends when a person loses the status of a member.[24] Article 256 prevails Article 256, *i.e.* if a person has formed or led an organization or has recruited members to the organization and is also a member of that organization, he will be punished only according to Article 256.[25] Nevertheless, it could also happen that a person who has formed the organization does not become its member, in case he is

---

[20] A. Schönke, H. Schröder. Strafgesetzbuch. Kommentar. 28. Aufl. München: Beck 2010, Article 125 column no. 2.

[21] J. Sootak, P. Pikamäe (Note 11), Chapter 16 introductory commentary 1.2.

[22] StGB-Schönke/Schröder (Note 20) Article 129 column no. 1. Supported by the court practice of Estonian Supreme Court: court case no. 3-1-1-57-09 (Note 19), p. 13.5.

[23] Judgment of the Criminal Chamber of the Supreme Court of Estonia, 21st of January 2013, court case no. 3-1-1-132-12, p. 10.

[24] *Ibid,* p. 10.

[25] Court case no. 3-1-1-57-09 (Note 19), p. 14.

obviously punished only according to Article 256. It should be mentioned that a criminal organization could also be formed from an organization that was initially perfectly legal.[26] Leading an organization does not have to be permanent. It also does not have to be executed by only one person; there could also be co-leaders. In that case, they are all punished according to Article 256.[27] When it comes to recruiting members to the organization, there seems to be some confusion which the court practice has still not eliminated. Some claim that considering the potential punishment prescribed by Article 256 recruiting is possible only by the members of the organization, but some think that in order to recruit members one does not have to be a member himself.[28]

When it comes to Article 255 three features of the criminal organization should be explained here in detail: who are its members; what does it mean that it has permanent nature, and what kind of structure does it have to have. In addition, it should also be explained how to determine that the activities of the organization are directed at the commission of criminal offences.

A person is a member of a criminal organization if he is subject to the will of the organization and he contributes to achieving the goals of the organization.[29] In order to become a member, there does not have to be any formal ceremony. Neither does there have to be a formal list of active members. Therefore, the membership is a planned permanent or at least long-term active participation in the activities of the organization even if in reality it may be confined with a sole act (e.g., due to arrest of a person). Usually the mere fact that person's name is in a list of members (if that kind of list exists) but he remains otherwise passive does not mean that he is a member of criminal organization in the meaning of Article 255. But if a person is an active member, his actions themselves do not have to be criminal, e.g., he could also give legal advice to the organization, keep accounts etc.[30]

The permanent nature of the organization means that due to its structure it has a potential to operate for a longer period of time. The members of the organization (including its leader) themselves are replicable without considerable difficulties.[31] For instance, a group, which has gathered spontaneously with an aim to resist the police, cannot be considered a criminal organization. The characteristics of a criminal organization are distribution of tasks, strict chain of command and discipline, and a certain amount of care for its members. [32] Nevertheless, Estonian courts have also accepted that there might be some criminal organizations with more democratic and loose style of leading. At the same time gangs are not criminal organizations. Gangs are groups that commit homogenous crimes (e.g., burglaries) and exist mainly because of its leader. In gangs personal relations are much more important than in criminal organizations.[33]

The activities of the organization are directed at the commission of criminal offences if persons who determine the will of an organization have decided so and the

---

[26] J. Sootak, P. Pikamäe (Note 11), Article 256 commentary 3.1.

[27] *Ibid*, Article 256 commentary 3.2.

[28] *Ibid*, Article 256 commentary 3.3.

[29] StGB-Schönke/Schröder (Note 20) Article 129 column no. 13.

[30] J. Sootak, P. Pikamäe (Note 11), Article 255 commentary 3.7. Supported by the court practice of Estonian Supreme Court: court case no. 3-1-1-57-09 (Note 19), p. 13.1.

[31] Court case no. 3-1-1-57-09 (Note 19), pp. 13.2 and 13.3.

[32] J. Sootak, P. Pikamäe (Note 11), Article 255 commentary 3.

[33] H.-D. Schwind. Kriminologie: Eine praxisorientierte Einführung mit Beispielen. 10 Aufl, Heidelberg: Kriminalistik 2000, Article 29 commentary 7.

structure of an organization supports achieving this goal.[34] Nevertheless, as it was explained above, in order to convict the members according to Article 255 or 256 it is not necessary that the organization (or its members to be more exact) have already committed some criminal offences or have been actively preparing to commit these offences. Committing criminal offences does not have to be main goal of the organization: it might also be, e.g., material benefit, overthrowing a government etc. Yet, its goals have to influence its structure. For instance, a company that organizes arson of its competitor's property in order to achieve leading position in the market is not a criminal organization. But it may become criminal if the leaders of the company establish a special unit in the company with the aim to solve similar situations similarly in future.[35] Due to the nature of criminal organization it is also possible that it aims at committing one, but continuous crime (e.g., human trafficking), but it has to be kept in mind that by its nature it still have to be permanent.[36]

4. Practical questions concerning application of the law in the area of organized crime

Although at first sight Articles 255 and 256 seem to be clearly defined, Estonian courts have encountered several difficulties with applying them in practice. First, there is confusion about how to distinguish criminal organizations from so-called common groups (i.e. two or more people committing some crimes together occasionally). Second, some issues related to the principle of *ne bis in idem* have also arisen.

In Estonia committing a crime in a group is an aggravating circumstance, but belonging to a group is not criminalized itself unlike belonging to a criminal organization. A criminal organization is also a group, but a group might not be a criminal organization. First, two or more people belong to a group. In order to call a group a criminal organization, it has to have at least three members. Second, as it could be seen above, the group has to meet some qualitative criteria in order to be considered a criminal organization.

As it was mentioned above Criminal Code of Estonian Soviet Socialist Republic knew the notion of organizer of the crime – according to Article 17 (4) of the Code it was a person who organized a crime or was leading execution of it. He had much active role than an abettor or an aider as he was a connecting link between the participants and he guided them towards a common criminal goal.[37] Due to that he was not considered to be a member of a group but an independent figure. From Estonian Penal Code, which came into force in 2002, organizer of the crime was excluded because Estonian legislator wanted to abandon Soviet past. Nevertheless, it seems that there is still a need to distinguish organizer from aiders, abettors and group members due to the remarkable role he has in planning and execution of a crime. Because of the limitations of the law Estonian court practice has so far considered the organizers to be just members of a group and punished them accordingly no matter how active they have been.[38] In any

[34] StGB-Schönke/Schröder (Note 20), Article 129 komm 7.

[35] J. Sootak, P. Pikamäe (Note 11), Article 255 commentary 3.6.

[36] Rulings of the Criminal Chamber of the Supreme Court of Estonia, 19th of December 2013, court cases no. 3-1-1-127-13, p. 7; 3-1-1-125-13, p. 7.

[37] Eesti NSV KrKK (Note 8) Article 17 commentary 12.

[38] Judgment of the Criminal Chamber of the Supreme Court of Estonia, 14th of March 2003, court case no. 3-1-1-20-03, p. 14; 18th January 2005, court case no. 3-1-1-97-04; 3-1-1-57-09 (Note 19),

case, the court practice still has to draw the line between an organizer being just a member of a group, him being a founder or leader of a criminal organization (which is punishable according to Article 256 of the Estonian Penal Code) and him being a member of a criminal organization without leader qualities (which is punishable according to Article 255 of the Estonian Penal Code). If he is not only a leader or a member of a criminal organization but also commits crimes, he is punished according to Article 255 or 256 of the Code and for whatever crime he has committed as it was discussed above. The problems with *ne bis in idem* arise if investigation of his crimes is not united in one criminal procedure (see below).

One has to be very careful with distinguishing groups from criminal organization and members of the groups from formers, leaders and members of criminal organization as the sanctions for Articles 255 are 256 are very severe. In Estonia some judges and defense counsels think that the prosecutors and some courts are too eager to consider almost every group of three or more criminals to be a criminal organization: this is not in accordance with the nature of Articles 255 and 256, and with the Palermo Convention. While deciding whether a certain group was a criminal organization, the courts should explicitly focus on the four features a criminal organization has according to Estonian law (and in the Palermo Convention). The permanent nature, hierarchical structure, distribution of tasks, the fact that the members are replaceable without difficulties, and independent will of an organization are the main keywords for a criminal organization. The courts should analyze these characteristics as a whole and keep in mind that not every group with an indication to some kind of structure is automatically a criminal organization. If that would be so, Articles 255 and 256 would lose their purpose. It could be concluded that Estonian courts are still struggling with developing adequate court practice in this area and many more leading cases from the Supreme Court of Estonia are expected before the features of a criminal organization in the meaning of Articles 255 and 256 become clear.

When it comes to the principle of *ne bis in idem*, the Estonian Supreme Court has already launched its leading case in 2010, although one can assume that it will not be the last in this area. In the case N.K. was convicted by lower courts according to Article 256 for forming a criminal organization that dealt with drug trafficking and for leading it from January 2005 to the 2nd of March 2006. According to the indictment he not only gave tasks to the members of the organization and funded the organization, but also recruited its members. The case itself would have been easy as the organization itself clearly was a criminal organization if N.K. would not have been previously convicted for drug trafficking during the same time period. In that case he was accused of being a member of a group that dealt with drug trafficking, and according to the indictment his role was to organize trafficking itself by giving tasks to the group members. The defense counsel immediately claimed that convicting N.K. according to Article 256 in a latter procedure would be a violation of the principle of *ne bis in idem*. Lower courts did not agree with this standpoint and therefore the same argument was raised before the Estonian Supreme Court.

According to Article 23 (3) of the Constitution of Republic of Estonia[39] no one may be prosecuted or sentenced for a second time for an act in respect of which he has been

pp. 19.2–20. The same standpoint could be found in Estonian legal theory: J. Sootak, P. Pikamäe (Note 11), Article 21 commentary 6; also J. Sootak. Karistusõigus. Üldosa. (Penal Law. General Part.) Tallinn: Juura 2010, Chapter 12 columns no. 159-161.

[39] Constitution of Republic of Estonia is available in English at: https://www.riigiteataja.ee/en/.

the subject of a final conviction or acquittal pursuant to the law. The same principle comes from Article 4 of the Seventh Protocol of the European Convention on Human Rights and Fundamental Freedoms.[40] There seemed to be several approaches to what constitutes the same offence in practice of the European Court of Human Rights until 2009.[41] However, in *Sergey Zolotukhin v. Russia* the Court held that it should be 'understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same.'[42] The Estonian Supreme Court followed the same approach and compared the facts described in two charges against N.K.

The Supreme Court of Estonia concluded violation of the principle of *ne bis in idem*, but only in certain crime episodes. Namely, in both indictments the activities of N.K. were described by the commands he gave to the group members. Some of these activities did not match but some of them did. For example, in both indictments it was written that N.K. instructed H.L. and D.M. to acquire, possess, traffic and mediate drugs. Therefore, convicting him for these acts twice would violate the principle of *ne bis in idem.* Nevertheless, the conclusion of the Supreme Court of Estonia did not change anything for N.K. because most of the episodes described in new indictment did not match the previous one. Therefore, he was still convicted according to Article 256 of the Code.

It is considered that the Supreme Court of Estonia did not try to grasp the bigger picture of the case and looked for the easiest (but not the most correct) solution. Therefore, there are several arguments against the judgment of the Court. Futeure will show if these arguments will be used in court practice, and if they will be, what will be the results.

First, there is an approach expressed by one of the Justices of the Supreme Court of Estonia[43] according to which it convicting a person for certain crime and afterwards according to Article 255 or 256 of the Code is never a violation of the principle of *ne bis in idem* as belonging to a criminal organization or leading one is not equal to committing certain crimes. Therefore, while a person is accused according to Article 255 or 256, he is not automatically accused for sole crimes he has committed while belonging to the organization or leading it. The latter is a whole new dimension compered to individual crimes and exist separately from these crimes. The similar approach has been used by German Federal High Court of Justice on the 8th of January 1981 when the Court held that it is not a violation of the principle of *ne bis in idem* when a person is convicted for murders committed while belonging to a criminal organization after he has been convicted for belonging to the same organization.[44]

The second and completely opposite opinion stresses the fact that crimes described in Articles 255 and 256 of the Code are continuous, starting with a person becoming a member or a leader of the organization and ending with a person losing his status. The status of a person is defined by the activities he performs as a member or as a leader. If these activities are criminal, his status will be defined by these crimes, Therefore, if he is

---

[40] Convention for the Protection of Human Rights and Fundamental Freedoms. Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[41] C. Buckley et al. Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights. 3rd ed. Oxford: Oxford University Press 2014, p. 972.

[42] *Sergey Zolotukhin v. Russia.* Application No. 14939/03. 10 February 2009, p. 82.

[43] His concurring opinion to the judgment no. 3-1-1-57-09 only available in Estonian.

[44] BverfGE 56, 22. Available at: http://www.servat.unibe.ch/dfr/bv056022.html

convicted for being a member or a leader of an organization, he is also convicted for the certain crimes he has performed no matter if these crimes have been described in the indictment or not.[45] This argument may not be strong when a person is first convicted according to Article 255 or 256 and afterwards it is found out that he has committed some specific crimes during the same time period, but it acquires much more credibility when the situation is *vice versa* like it was in N.K.'s case. It could be argued that if individual crimes are discovered, described in indictment as group crimes and the accused persons are convicted for these crimes, the Prosecutor's Office should not get a second chance to redefine the group as a criminal organization and to ask for another conviction. One of the main purposes of *ne bis in idem* is to guarantee that once the case is decided, law enforcement authorities have no opportunity to change their mind arbitrarily. Therefore, whenever the Prosecutor's Office faces the case in which crimes were committed by the group, it should immediately verify if this group could also be considered to be a criminal organization. If it fails to do so the principle of finality should prevail.

5. Conclusions

As it could be seen above, although Estonian legislator has given legislative tools for Estonian authorities to fight against organized crime, applying relevant law is not as easy as it seems at first sight. Of course, Estonian court practice is quite young in this area – only a bit more than 10 years old, and there are several important standpoints the Supreme Court has already taken which is very good indicator. Nevertheless, the developments have shown that many questions has to be still answered and maybe even some corrections made before the clear guidance on how to understand notion 'criminal organization' is given to the lower courts and other relevant institutions. In addition, although the Prosecutor's Office usually accuses the leaders and members of the criminal organization for both being a leader or a member and committing specific crimes in one criminal procedure, it can happen that the charges are presented in different proceedings in different time periods. Then a possible violation of *ne bis in idem* arises. The Estonian Supreme Court has once tried to look solutions for this problem, but its findings are highly debatable and therefore further guidance is expected. Nevertheless, it could be concluded that Estonian legislation is moving towards the goals the United Nations Convention against Transnational Organized Crime has set as since 2002 belonging to a criminal organization and leading such organization is punishable by criminal law.

[45] A. Soo. Kuritegeliku ühenduse mõiste. *Ne bis in idem* põhimõte. Riigikohtu kriminaalkolleegiumi otsus asjas 3-1-1-57-09. (The Concept 'Criminal Organisation'. The Principle of *Ne Bis In Idem*. Judgment of the Criminal Chamber of the Supreme Court in Case 3-1-1-57-09.) Juridica 2010, No. 2, p 152.