9. European Union

9.1 Organized Crime and Corruption — National and European Perspectives

*by Wolfgang Hetzer**

I. Introduction

In the declaration issued on the occasion of the 50th anniversary of the signing of the Treaties of Rome ("Berlin declaration" of 2007), the European Union (EU) promises to act together on countering terrorism, organized criminality, and illegal immigration. However, this promise can only be fulfilled if a wide range of demanding conditions are met, including a clear concept of organized criminality valid throughout Europe as well as moving away from a narrow understanding of the forms of criminality. Until now, certain keywords have been associated – almost instinctively – with it: drugs, red-light districts, human trafficking, smuggling of goods, foreigners, violence, and mafia.

Terms like this lead to a specific form of stigmatization. Organized crime, especially the "Mafia," means always other people, foreigners, outsiders, an odd threat that comes from elsewhere. A glance at any daily newspaper will, however, open up other views. The news on criminal events at all levels of business, government, and politics may and must lead to a fundamental change regarding notions of the phenomenon of "organized criminality."

Changes must be made to the criminological *and* criminalistic interpretation of organized criminality. The extremely attractive opportunities for crime presented by the size of the funds available within the EU and in public budgets, and the ongoing change in terms of the economy and regulatory policy have led to increasingly sophisticated methods of criminal activity. The particularly dangerous proponents of organized criminality adopt a far-sighted, businesslike approach, making commercial calculations and identifying the highest profit margins and

* Wolfgang Hetzer worked at the European Anti-Fraud Office as Head of the Intelligence from 2002 to 2012.

the lowest risks. Not least due to these reasons, organized criminality has made a number of *qualitative* steps forward over recent years. This has allowed for the increase of its systematic exploitation of the welfare system within the EU, the increase of the control of deficits typical for a liberal internal market, of the diversity and complexity of legislative acts, and of the corruptibility of factions of the economic, political, and administrative elites in all states.

II. Statistics and no facts

The government of the Federal Republic of Germany has believed for many years that the difficulties are rooted in the very nature of the matter (organized crime) itself.[1] This is defined as a complex, ramified, often diffuse field of structures, partnerships, and acts that affects many areas of criminality. There is, however, a lack of reliable information based upon empirical evidence. The "law of silence" (*omertà*) frequently impedes the gathering of reliable empirical data. Furthermore, the practice frequently adopted by those involved in organized criminality, whereby they have a "foot in both camps" – one foot in the illegal camp and one foot in the legal camp – makes it more difficult to pursue a prosecution with adequate efficiency. In this context, it must be understood that organized criminality, in its developed form, is not just about planning and committing criminal offenses. The personal relationships, connections, and networks mentioned exist and operate outside concrete fields of criminality. Organized criminality is characterized by social networks within a residential area, a town, a region, or a country. This also makes it easier to disguise illegal activities.[2]

The government of Germany believes that organized criminality is more a matter of professionally organized groups of offenders and networks than of hierarchical structures, firmly established, throughout the country or even throughout the whole Federal Republic, with an acute influence upon legal markets and social and political structures. It believes this to be a "thoroughly reassuring finding in terms of criminal policy."[3] Although it is recognized that a differentiated approach must be adopted toward assessment of the situation in Europe, the conclusion reached was that the "Mafia" or other endemic structures did not have the state, business, or society in thrall to such an extent as to justify any suggestion of a direct risk to the people or to the common democratic good.

---

1 | Zweiter Periodischer Sicherheitsbericht vom 15. November 2006 (2. PSB) Available at: www.bmi.bund.de/nn_122688/Internet/Content/Broschueren/2006/2_Periodischer_Sicherheitsbericht_de.html

The "Organised Criminality" and "White-collar criminality" chapters in the First Periodic Security Report (2001) provoked critical responses: Hetzer, Kriminalistik (2001), 762 ff.; 767 ff.

2 | 2. PSB, pp. 442, 443.

3 | Ibid., p. 445.

Germany does actually have a directive on countering organized criminality, but it does not include a sufficiently precise definition of organized criminality.[4] In fact, it describes a phenomenological field of criminal activities.[5] The principles set down in the directive are intended to help German criminal prosecutors to interpret organized criminality as a sub-category of "normal criminal" conduct, in order to condemn specific activities, not generally confined to a single offense, and their effect in terms of presenting a threat to society.

The police criminal statistics cannot be used to obtain either detailed or conclusive evidence on the amount of offenses with a clear link to organized criminality. Nor do the criminal prosecution statistics fit the bill in this respect. It is acknowledged that the statistical categories are inadequate to determine the threat posed by organized criminality, since they do not account for interconnectedness. The investigations do no more than scratch the surface.

There are structural reasons for this situation:

- lack of or late disclosure of offenses, because legal persons are involved as injured parties
- identity between those with information and accomplices
- lack of social controls
- high proportion (50%) of collective victims (e.g., state, social institutions)
- lack of a sense of victimhood among collective victims
- reduced awareness of loss
- reduced willingness to report an offense
- high proportion of companies among individual victims
- risk of damage to one's own interests if an offense is reported (holder of untaxed earnings as victim of a capital investment fraud)
- preference to resort to civil law methods
- interest in exercising discretion, with a view to possible damage to reputation

However, there is hardly any well-founded knowledge even outside the undetected areas, that is, on the extent and structure of – and trends in – registered white-collar criminality. The current format of the official statistics either does not permit white-collar criminality to be recorded at all, or, at best, gives an incomplete picture.[6]

White-collar criminality is always characterized by a high degree of damage to society, in particular because of the material losses it causes. The government of Germany would like to emphasize, however, that there is no reliable information available on this. It states that in the past, global estimates were made that were not backed up with sufficient data, either in terms of amount or in terms of the

4 | This is more or less a "mantra of criminal policy": Hetzer, Kriminalistik (2007), p. 251.

5 | For details see 2. PSB, pp. 447, 448.

6 | See, overall, ibid., p. 221.

increase in the losses claimed. There is a correspondingly large variation between the losses estimated for individual areas of the economy. And it believes that the intangible losses arising from white-collar criminality are even more serious than the material losses. These include:

- distortion of competition
- turning competitors into accomplices
- associated criminality by way of assistance by third parties
- risk posed to law-abiding business partners as a chain reaction after economic collapse
- hazards and damage to health
- reduced confidence among competitors and consumers in the honesty of certain professions and trades and/or even in the functioning of the prevailing social and economic systems

It goes without saying that it is extremely difficult, if not impossible, to put a figure on the losses arising from a loss of confidence.[7] All in all, the government of Germany's analysis of white-collar criminality in Germany reaches a number of conclusions and makes a number of recommendations[8]:

- variety of forms of white-collar criminality
- offender profile significantly different from the average
- essential significance, for the sake of an effective market economy, of prevention and combating of white-collar criminality
- high degree of public interest in effective prosecution of white-collar crime
- requirements for sufficient police and legal resources
- institutional development and combination of specialized knowledge
- involvement of auditors in the siphoning off of profits
- rigorous development of cooperation with the branches of affected industries
- prevention by transparency specifications within business circles
- improved "corporate governance" (information provided to control bodies, guaranteed independence of these bodies, early warning system, internal controlling, assessment by auditors)
- special allowance for international links and for the globalization of markets

The term "organized criminality" is almost unique in the extent to which it is surrounded by myths, conjecture, and speculation. Nevertheless, organized criminality is even referred to as a "form of business."[9] Our context is not just "the Mafia," as a concrete historical – but unfortunately still current – version of organized

7 | Ibid., p. 232.

8 | Ibid., pp. 218, 245.

9 | Hetzer, wistra (1999), 126 ff.

criminality in Italy; it is in fact a globalized system of uncontrollable power. The term must be interpreted as a metaphor for various forms of abuse of power. Organized criminality is not just found in societies with weak structures. Today, it has become established in all economic orders and political systems. No level of hierarchy in trade, government, or politics has escaped unaffected.

Tax evasion, corrupt practices, and systemic illegality in commercial enterprises operating worldwide have resulted in functional and structural overlaps with organized criminality. It is not actually possible to say that certain companies, governments, and authorities are all covering the same ground. However, there is already evidence to suggest that there may be dangerous clashes between parties' funding requirements, politicians' power interests, corporate groups' profit orientation, and the vulnerability of leading members of trade unions.

Corruption has actually become one of the most important functional principles of the globalized economy.[10] It helps organized criminality along the way. The use of force is becoming obsolete. This may be due to the quiet efficiency, the fact that white-collar criminality is a "capital" risk, which is increasing all the time, in terms of its national importance and in its international links and organization, which tends to be overlooked.

The instruments of criminal law alone are not sufficient to combat either conventional organized criminality or white-collar criminality with the degree of necessary effectiveness. The requirements include stable guidelines and institutions, for example, clear guidelines on "compliance" and "corporate governance," which lend themselves to practical implementation. Ultimately, this is one way in which an effective governance of companies can be defined and compliance with statutory provisions and internal standards can be made more straightforward.[11]

The findings and assessments to date have resulted in the following conclusions:

- It is not possible to use those methods applied in the official reports to make a sufficiently realistic quantitative or qualitative assessment of the threat that organized criminality poses to society, business, and the state.
- The established official term of "organized criminality" is insufficiently precise, not least because it has at least two functions, as a means of discrimination and as legitimation.
- Social inertia and economic profit-seeking may condense into structures that are, in part, identical with organized criminality.
- Political parties' funding requirements and the corrupt complicity of state bureaucracies provide organized criminality with opportunities to exercise an influence with the maximum leverage.

10 | Hetzer, Kriminalistik (2007), pp. 251, 255. On the international aspects of combating corruption: Korte, wistra (1999), 81 ff.; Wolf, *NJW* (2006), 2735 ff.

11 | Leyendecker, loc. cit. p. 13.

- Organized criminality is also a consequence of the egomaniacal-asocial energies developed by those with status in business, government, and politics in order to obtain and to defend their positions of power.
- Efficient prevention and prosecution of organized criminality by the police authorities also often fails simply because, in all states, it is "simply" a radical expression of the balance of administrative, economic, military, and political power.
- Organized criminality reflects the ethical-moral contradictions in social systems and the living lie of middle-class respectability.
- White-collar criminality is often a sophisticated and particularly damaging form of organized criminality, the perception of which is also impaired because of failings in terms of definition and because of empirical failings.
- Crime in the world of business reflects the special features of the particular economic systems, technological developments, and the level of international integration and culminates in groups that operate across borders, some of which have become nothing more than a refuge for systemic illegality.
- Even more so than with conventional organized criminality, prompt prevention and effective prosecution of white-collar criminality is an obligation of social justice, which is frequently not fulfilled, because the individual and collective powers-that-be – in business, government, and politics worldwide – attach more importance to self-interest and presumption.

III. Questions and no answers

In Germany, the reputations of heads of big businesses have fallen lower than in any other member state of the EU. According to a survey by the German Banking Association of April 2008, only 15 percent of Germans consider the members of this professional group to be trustworthy. The dramatic loss of credibility is largely attributable to white-collar crime. The subject of "corruption" features prominently under this heading.

"Slush funds" and bribes have become part of company policy. This is more than remarkable because corruption is, in fact, extremely detrimental to the market economy. It is also against the law and contrary to legal certainty. Even bribes have to be financed, for example through inflated bills. This frequently leads to the misuse of development aid or European aid. European taxpayers are footing the bill. Corruption flourishes in the shadows and often feeds the powerful.

Many states have ignored corruption at home for a long time, while others even promoted bribery undertaken by national companies abroad. During the Cold War, Western governments used to give unconditional support to corrupt regimes in developing countries. In fact, corruption was seen as part of an advisable political strategy, while increasing global competition hiked up the value of bribes in international procurement.

It is not only for these reasons that everything must be done to prevent corruption in international business and government affairs. In trying to define the necessary measures, we should not perceive of corruption as an isolated phenomenon. Indeed, it involves all aspects of society as it interrupts the decision-making process at all levels, it restrains economic development, it disturbs social politics, and undermines the stability of entire countries. At the same time, we should not think that legal transplants alone can cure social diseases such as corruption.

It would be a serious analytical mistake to deal with corruption primarily according to criminal law guidelines. The complexity of the topic cannot be covered by the crude conceptual framework of criminal law. Corrupt interrelationships reflect changed corporate and business practices, the effects of which may be indicative of a change of awareness with dramatic repercussions. For quite some time now, it has become increasingly difficult in various parts of the world to distinguish between political parties, governments, business enterprises, the judiciary, the police, the army, and organized crime. The funding requirements of political parties, the power demands of individual politicians, and the profit expectations of companies clearly overlap more and more frequently. At the relevant points where they intersect, there is "white-collar" corruption that cannot be tackled by the relatively primitive categories of criminal law.

1. Do we know what we mean?

There is still no sufficiently unambiguous *and* generally recognized definition of corruption – not even in the United Nations Convention against Corruption. Many attempts have been made. The spectrum includes moral, ethical, criminological, political, economic, and regulatory perspectives. From one academic perspective, corruption is seen to be the abuse of a public office, a position in commerce or industry, or a political mandate for the benefit of another – at the instigation of the latter or on one's own initiative – with a view to obtaining an undue advantage for oneself or a third party, with the occurrence or expectation of damage or disadvantage to the general public or to an enterprise. According to another definition, corruption covers all forms of abuse of power aimed at obtaining unlawful advantages. In short:

Corruption is an attack on the proper performance of duties through an unlawful relationship of exchange between giver and receiver.

There is no uniform and fully recognized definition of corrupt conduct in the whole European legal and judicial arena. The term is used to describe a multitude of situations. One reason for this problem is that traditional designations and terms, which differ from one language to another, cannot always be reconciled. For example, in the EU treaties and documents, the English term "corruption" was translated as "*Bestechung*" in German, although the latter (English: "bribery") in no way includes all aspects of the phenomenon of corruption. "Corruption"

means, among other things, bribery, patronage, nepotism, and misappropriation of common property, and the illegal financing of parties or election campaigns.

The different terms and legal systems give rise to differences both in the legislation governing the bribery of members of parliament, party financing, and the distinction between corruption in the public and private sectors and in the level and type of penalties available.

Nevertheless, in one special area (protection of the European Communities' financial interests), there are the beginnings of a legal definition. According to the Convention on the Protection of the Communities' Financial Interests, the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way that damages the European Communities' financial interests constitutes passive corruption.

Each member state must ensure that the acts referred to are criminal offenses. The uniform combating of corruption in the private sector within the EU is to be ensured by means of the Framework Decision of July 22, 2003, on combating corruption in the private sector, which also includes an attempt to define the term.

Whether such definitions are practicable is open to debate. The situation is further complicated by the fact that corruption ceased, some time ago, to be concerned solely with the "classic" offenses of corruption on the part of public officials and now also relates to unlawful conduct in the private sector. In this context, the term "economic corruption" has gained currency. This is not a term of law but is commonly used in penal policy, criminal science, and criminology. Essentially, it describes dishonest conduct in the private sector that is more than ostensibly comparable with conventional corruption by public officials.

Economic corruption is said to exist where a private economic operator, secretly or covertly, receives or requests advantages for himself or another in return for economic conduct by another private economic operator, or grants or offers such as advantages to the other party, in contravention of generally recognized standards and with adverse effects on individuals or the general public.

If the foregoing is correct, economic corruption is therefore a kind of unwelcome competition in non-performance. Finally, one thing which economic corruption certainly has in common with corruption by public officials is that they both involve an unlawful exchange of advantages.

2. Do we know where we are?

The problem of definition is not only theoretical – it also has practical consequences. The quantitative reality of corruption-related crime is influenced by the understanding that each state brings to that term in the first place. In Germany, the actual extent of criminally corrupt conduct cannot yet be defined as accurately as is desirable, and this is even more true for the other 26 member states of the EU. To

judge by a standard legal commentary on the German Criminal Code, corruption cases do not figure largely in criminal prosecution in this country. The number of cases is low, and only a small proportion of those that come to light result in the bringing of charges. The number of unrecorded cases is very high because there are offenders on both sides of a corrupt relationship. Nevertheless, the damage caused by corruption is "unquestionably" very extensive.

It is even more difficult to give a reasonably realistic, comprehensive, and useable assessment of the situation across Europe. Such an assessment should, logically, be based on meaningful processes to monitor implementation of the relevant provisions. This is, however, a pious hope. The contribution of international organizations to the implementation, in sovereign states, of the rules developed by them is naturally limited. Nevertheless, incentives for regulatory compliance can be provided. This can be achieved through international evaluation of the implementation of international provisions. Three models have been established:

- monitoring by the executive body of the relevant international organization
- evaluation by a special group of experts
- monitoring by some or all of the member states of the relevant regime ("peer review")

It is not all that surprising that the implementation of international recommendations on evaluation does not lead to a reduction in corruption itself. Firm conclusions cannot readily be drawn in this regard because, in practice, corruption is not even remotely measurable. This is true despite the various sets of case statistics and corruption-awareness indices. Whether one of the reasons for this immeasurability is that bribery is (allegedly) a "victimless" crime in which none of those involved has an interest in detection, is open to question.

Be that as it may, in contrast to the Council of Europe and the OECD, the EU has decided not to set up a specific committee to monitor its anticorruption rules. Nor is there any intensive monitoring of the rules that – particularly in the field of private-sector corruption – go beyond the mandatory provisions of the Council of Europe and the OECD. Even the EU Convention on the Fight against Corruption makes no provision for implementation review. The 1st Protocol to the Convention on the Protection of the Communities' Financial Interests does at least require member states to transmit to the Commission the texts of their laws concerning implentation.

It was against this background that the Commission adopted its First Report on the implementation by member states of the Convention on the Protection of the Communities' Financial Interests and its protocols on October 24, 2004. Even at that time, there were complaints about various shortcomings in the implementation of the provisions on bribery in the 1st Protocol. These included the fact that member states were very hesitant in ratifying the Convention and its protocols and showed no interest in considering the Commission's proposal for a directive

on the protection of the Communities' financial interests under criminal law for many years. The directive would transfer the fundamental provisions of the Convention and the protocols to the first pillar of the structure of the Union and allow the Commission to bring an action against defaulting member states before the European Court of Justice for failure to implement – an approach which, in light of the Lisbon Treaty, may need to be discussed.

In its aforementioned Second Report, the Commission comes to the conclusion that the harmonization objective of the instruments on the protection of the Communities' financial interests has still not been fully achieved for all 27 member states, either formally or materially. *De facto* the current system of protection creates a multi-speed situation. It results in a mixture of different legal situations in terms of the binding effect of the instruments on the protection of the Communities' financial interests in the individual member states' internal legal order. Formally, this situation does not produce the desired effective and dissuasive penal protection. Many of the responsible parties in certain "old" member states should remember this when it comes to assessing the situation in new member states such as Romania and Bulgaria.

Nevertheless, the Commission has made impressively clear statements and delivered resolute assessments. In its reports to the European Parliament and the Council, published on July 23, 2008, on progress in Romania and Bulgaria under the cooperation and verification mechanism, it points out that both countries faced serious challenges in the year of their accession, 2007, that is they needed to set up a functioning judiciary and to take effective action to tackle corruption and organized crime. At the time, the Commission and the other member states considered these challenges to be surmountable. In particular, there was agreement that concerted action against corruption and organized crime was absolutely necessary. The reasons for this are clear: Bulgarians and Romanians must be able to exercise in full their rights as citizens of the Union. They must be able to take full advantage of the opportunities created by membership in the EU. At the time, it was also generally acknowledged that the fundamental principles of the EU (rule of law, recognition and cooperation on the basis of mutual trust) would only be meaningful if the aforementioned problems were tackled at the root.

The cooperation and verification mechanism set up by the Commission is used to monitor progress and to provide support in remedying shortcomings. The European Anti-Fraud Office of the Commission (known more commonly as OLAF) plays an important role in this regard. The above-mentioned reports are the third in a series of reports to be produced on a six-monthly basis. Although initial successes have been recorded, it can nevertheless be observed that the Bulgarian and Romanian authorities are finding it difficult to make real progress in the areas of judicial reform and the fight against corruption and organized crime. There is little evidence that the system is functioning correctly. Progress is slowing and therefore proves to be less than expected. The following can be listed as successes for Bulgaria:

- amendment of the Constitution and adoption of a Code of Civil Procedure, a Law on the Constitution of the Courts, and the related implementing provisions
- establishment of a national security authority (SANS), which has been exercising its investigative powers since the beginning of April 2008
- restructuring of the border police
- closing of shops and petrol stations selling duty-free goods

It is beyond dispute that those two new member states have made extensive efforts to establish relevant institutions and procedures. However, there is still a lack of satisfactory results. The priorities now are to ensure that the institutions are able to function properly and that legislation is effectively implemented. However, there is unfortunately a whole raft of lacunae, as the example of Bulgaria shows. The situation in Romania is similar. The situation can be described as follows:

- overloading of the justice system as a result of deficiencies in the rules contained in the Criminal Code and the Code of Criminal Procedure
- inefficiency of the preliminary investigation procedure
- lack of certainty as a result of the unclear allocation of duties between the judiciary, the police, and other authorities
- unnecessary referral of cases back to the investigating authorities because of minor procedural errors
- delays in proceedings
- lack of procedural guarantees to prevent the reluctance of courts to deal with cases
- lack of an appropriate administrative apparatus within the prosecuting authorities and the judiciary
- lack of staff
- training and equipment deficiencies
- failure to investigate the suspicion of corruption and vote-buying in the local elections of 2007 and the by-elections of June 2008 in at least two towns
- inadequate efforts to combat corruption at the highest level and organized crime
- unreliability and inconsistency of the statistical data submitted
- little progress in the freezing or seizing of assets acquired through criminal activities
- insufficient proof of the capacity to administer EU funds properly
- obstruction of the prompt and effective prosecution of corruption and fraud cases through the creation of procedural barriers, delays in court proceedings, information leaks, and the suspected exertion of influence on the administrative and judicial authorities.

Up to now, Bulgaria and Romania have failed to provide evidence that the justice system is operating in this way. However, they should manage to dispel these doubts as to their abilities to combat corruption and organized crime rigorously. This would also have long-term positive effects on the economies of both countries. Bulgaria and Romania have a responsibility towards other member states not only in the sphere of judicial and home affairs but also in the joint administration of EU funds.

The Commission takes the view that aid is more effective than sanctions. Up to now, therefore, it has refrained from applying the safeguard clauses in the accession treaty. It has now become clear that the cooperation and verification mechanism must remain in place for some time to come. For that mechanism to succeed, it is essential that the recipient state is granted access to information and uses the advice given strategically so that appreciable progress is made on the reforms necessary.

3. Do we know where we come from?

As several observers point out we are confronted with an extreme susceptibility of the EU to corruption. This is based on the following facts and hypotheses:

- Subsidies, which are particularly attractive targets for criminals, account for over 90 percent of the EU budget.
- The area involving one of the greatest expenditures, the Common Agriculture Policy, is organized by an extremely complex web of regulations, rather than by free competition. This agricultural protectionism offers great opportunities for corruption, while the impenetrability of the web of regulations makes control more difficult.
- Only a small proportion of the EU budget is managed by the EU institutions themselves; about 80 percent is administered by the member states. This intertwining of administrations makes control more difficult.
- When it comes to the perception of – and importance attached to – corruption, there is a North-South divide in the EU. As a result, attempts to combat it at the EU level tend to be based on the lowest common denominator.
- Scandalous cases of "political corruption" at the EU level (e.g., legalized fraud involving donations, legalized nepotism, and legalized moonlighting by MEPs) undermine the credibility of attempts to combat corruption in the administration and world of business.

Other arguments are brought into play as well: The key aspect of the EU budget, it is claimed, is that the better part of it is disbursed as subsidies. However, so the argument, subsidizing tends "inherently" to encourage people to fabricate the prerequisites for receiving subsidies or conceal details from the taxman in the case of concessions. The complexity of the rules governing how subsidies are awarded, which is often not justified by any sensible market requirements and appears to be

misused through targeted lobbying, further increases the temptation. In the final analysis, the public seldom perceives EU budget funds as taxpayers' money. This makes it easier to view the budget as a "self-service store" and encourages the view that misappropriating funds from the budget is a mere peccadillo.

It is true that the prices of EU agricultural products are kept artificially high, often at many times the price that would otherwise be paid on world markets. If EU farmers sell their products on the world market, they can claim "refunds" to cover their "losses." Time and again, this leads to large fraud involving exports of, for example, dairy products, beef, and cereals. Reforms will have to change this system. At the same time, the EU's external customs duties are determined by a whole host of criteria – which makes it difficult to prove compliance. The problem of control is exacerbated by the fact that agricultural lobbies in the member states tend to be particularly influential, which makes it impossible to implement effective rules in the manner desired.

The peculiar intertwining of member states' and supranational powers and duties with regard to implementation and control, it is claimed, also increases susceptibility to corruption. The member states are said to have no great incentive to combat corruption effectively, as it is "only" the EU that pays the price of corruption that may have an effective "functional" value for the local economy. What is more, claim procedures may prove counterproductive. Which is, of course, a classic dilemma.

4. Do we know where we go?

Corruption is one of the oldest and most effective means of social, economic, and state self-organization. It is now depicted even as a "growth sector." The idea that there should be a Europe-wide sense of what is and is not fair, of what eases or threatens our co-existence, lies at the interface between naivety and despair. It is ultimately a paradox. We have corrupt structures in society, business, and politics that the crude framework of criminal laws is entirely incapable of accommodating. The same is true of objective structures. Social institutions, political parties, democratic and undemocratic governments, the judiciary, the administration, but also the police, the army, and business enterprises have created "productive" associations in a number of countries around the world. Their potential capacity easily outstrips that of conventional criminal organizations.

As indicated earlier: The proposition that a distinction between spoils and profit can be drawn is sustainable only in fairy-tales ("The emperor's new clothes"). Be that as it may, the fact that the profit-making intentions of economic agents, the ambitions of politicians, and the financing requirements of parties and the greed of public officials are increasingly interconnected can no longer be ignored. This leads to a particularly "high-powered" corruption with which the comparatively simple terminology of criminal law cannot contend.

The day-to-day business of politics offers a broad spectrum of possibilities for the emancipation of entrepreneurial spirit, expertise, and democratic control.

The toolbox is overflowing and contains well-paid jobs, favors, legislative initiatives, subsidies, and promises of pensions. In a world in which material prosperity has become the meaning of life, and there is no longer any discernible connection between work and income, corruption is everywhere. It has a crucial pivotal function. Observance of the law is no longer a *modus vivendi* for communities as mutually supportive associations. Criminal-law provisions to combat corruption may result in a dual paradox: In principle, their ability to steer behavior cannot be guaranteed to the extent necessary because of the undefeatable human constants of greed, openness to temptation, and ambition for power. Criminal law is apparently supposed to appeal to our morality, but it can do nothing to change the basic principles of institutions and individuals. Criminal justice does not replace upbringing. It cannot condition the morality, of citizens, business leaders, and politicians. Ideally, it protects legal interests through prevention and punishment.

In the case of corruption, however, something else, something much more important might be at work. The influencing of human behavior that it seeks to achieve is always connected with humiliation. As long as those involved will not or cannot understand that conducting a corrupt relationship puts their self-respect at risk, all debate on the fight against corruption remains futile. A lack of respect for individual dignity will lead to the devaluing of all relationships, the hallmarks of which should be work and loyalty. Nevertheless, the corruptive acceptance of money is an attack on self-respect.

IV. Conclusions

The Commission has a serious interest in combating corruption effectively but lacks the powers to do so. The member states have the powers but are often not interested. While corruption is becoming increasingly transnational, as critics argue, penalties and law enforcement systems are still organized nationally, with the result that the risk of prosecution and conviction is relatively small. Anti-corruption policy tends to be made up on the fly because it is usually a reaction to scandals and crises. Consequently, it is often hurried and not thought through.

Political corruption in the EU is generally seen as particularly rife. It is a widespread perception that Members of the European Parliament are legally defrauding millions in the form of donations, employing spouses and other relatives at the taxpayer's expense, and receiving more than one salary.

Proposals for far-reaching reforms (for example, standardizing the VAT rate, harmonizing criminal law, or abolishing subsidies) are thought to have no chance of success, and therefore the tendency to engage in corrupt practices at the EU level is not expected to decline significantly. Suspicions have even been voiced that the lack of scope for control and imposing penalties at the EU level is due to a secret plan on the part of each individual member state to ensure it has the same possibilities to engage in fraud.

However, as of yet there is no reliable evidence for such a strategy, which would be tantamount to a special form of conspiracy. Nevertheless, it is debatable wheth-

er the historical background and current objectives of the EU budget have created specific risks and whether the budget's political implications and characteristics have not helped to create an environment that attracts crime. Nobody should look for quick and easy answers. In the next few years in particular, the EU is facing some highly complex tasks. The effective protection of its financial interests will determine whether the EU's taxpayers and voters will retain or regain their faith in the historically necessary continuation of European integration.

References

Corruption and integration – Does the expansion of the European Union represent a risk factor? *European Journal of Crime, Criminal Law and Criminal Justice* 12(4) (2004): 301–320.

Corruption as business practice? Corporate criminal liability in the European Union. *European Journal of Crime, Criminal Law and Criminal Justice* 15(3–4) (2007): 383–405.

Corruption as business practice? In: Review 2008, ed. M. Kreutner. 2nd International Anti-Corruption Summer School "Practice meets science." July 10–19, 2008. Altlengbach, Österreich, 59–75.

The European budget – A breeding ground for corruption? In: Trade, integration and economic development – the EU and Latin America, ed. G. Tondl. Wien/New York. (2008): 131–139.

No punishment for bribery? When corruption is business as usual. In: Corruption – SIAK Scientific Series, No. 5, ed. Republic of Austria, Federal Ministry of the Interior, Law Enforcement Academy, Institute for Science and Research. Wien. (2010): 65–95.

Legalising corruption? In: Review 2010, ed. M. Kreutner. 3rd International Anti-Corruption Summer School "Practice meets science." (2010): 23–34.

Corruption as a business practice? Corporate criminal liability in the European Union. In: Unsichere Zeiten -Herausforderungen gesellschaftlicher Transformation, Hrsg., H-G. Soeffner. Verhandlungen des 34. Kongresses der Deutschen Gesellschaft für Soziologie in Jena 2008. Bd. 1, Wiesbaden 1. Auflage (2010): 115–136.

Financial crisis and systemic criminality – Corruption by incompetence? In: Korruptionsbekämpfung als globale Herausforderung, Hrsg., L. Achataler, D. Hofmann, M. Pázmándy. Wiesbaden 1. Aufl. (2011): 73–82.

Financial crisis or financial crime? Competence and corruption. In: Financial crimes a threat to global security, ed. M. Edelbacher, P. Kratcoski, M. Theil. Boca Raton, Florida. (2012): 217–264.

Finanzmafia –Wieso Banker und Banditen ohne Strafe davonkommen. Frankfurt am Main (2011).

9.2 Transnational Organized Crime and European Union: Aspects and Problems

by Vincenzo Militello[*]

1. The fight against criminal organizations and their ability to carry out illegal activities that reach beyond national boundaries has long since signaled the need to go beyond a type of European integration that is confined to merely economic aspects. Amongst the objectives of the European Union – implicitly dealt with in the 1992 Maastricht Treaty, and then expressly in the 1999 Amsterdam version – there is the intent to create not only a shared space for goods and citizens, but also for "justice, freedom and security" (today art. 3, in the TEU post-Lisbon).

The fight against organized crime in particular represents a "bridgehead" in the European campaign to harmonize criminal laws in the member states. The peculiar ability of criminal organizations to expand beyond national borders, facilitated by the abolition of the barriers once restricting the movement of people and goods within the EU, has gradually affected the traditional national authority in the field of criminal law. Formerly, such national sovereign authority had prevented any European interventions in this area and, even when the need for greater European cooperation in the fight against transnational crime had been acknowledged, it still influenced the guidelines developed by the European Union. The reason was not only resistance against giving up part of one's national sovereignty, but also the need to reconsider the consequences of such a new transnational dimension on the traditional guarantees given under national systems of criminal law.

After explaining what role the harmonization of criminal law plays in the current European Union treaties (2.), we will discuss how the difficulty of defining the concept of transnational organized crime may lead to European interventions that go beyond the limits of "reasonableness" (3.). In order to avoid such a risk, it is useful to refer to other relevant international sources, such as the 2000 Palermo UN Convention (4.). Nevertheless, the more recent European decisions on the

* Professor of Criminal Law, University of Palermo.

matter (in particular, a resolution by the European Parliament of October 25, 2011) seem to have paid a lot of attention to the main problems involved (5.).

However, the effectiveness of normative instruments in tackling organized crime highlights a more general problem. The European Union's action concerning criminal law shows the need to rethink the traditional guarantees and fundamental principles developed within the political context of nation states: In order to maintain the criminal law system as a means to protect all citizens, it is necessary to reconsider traditional guarantees within the framework of the new European dimension. This difficult topic will be addressed in the final sections of this essay – with reference to the European Court of Human Rights (6.) and the European Charter of Fundamental Rights as counterweights meant to avoid unbalanced European action against organized crime (7.).

2. Over the last decade, the competencies of the European Union in matters of criminal law have progressively grown. The Lisbon Treaty extended the rules regarding a harmonization of criminal offenses and their penalties to up to ten areas of "particularly serious crime with a cross-border dimension" (art. 83.1.1 TFEU).[1] A EU intervention is also granted in cases where "the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union Policy in an area which has been subject to harmonization measures" (art. 83.2).[2] Lastly, a special area is defined regarding offenses against the Union's financial interests (art. 325 and art. 86.2).[3]

---

1 | A different view is propounded by *Satzger*, Internationales und Europäisches Strafrecht, Baden-Baden 2010 (4. ed.), p. 117, who holds that the Lisbon Treaty has narrowed the scope to harmonize questions of criminal law. However, the Treaty does not seem to limit but rather enhance possibilities for harmonization, as it specifies areas that may be integrated (see below).

2 | See *Bernardi*, La competenza penale accessoria dell'Unione Europea: problemi e prospettive, in www.penalecontemporaneo.it, 2 s.; *Grasso*, Il Trattato di Lisbona e le nuove competenze dell'Unione, in Studi in onore di Mario Romano, Napoli 2011, 2326 s.; *Sicurella*, Questioni di metodo nella costruzione di una teoria delle competenze dell'Unione Europea in materia penale," ibid., 2626; *Siracusa*, Il transito del diritto penale di fonte europea dalla 'vecchia' alla 'nuova' Unione post-Lisbona, in Riv.trim.dir.pen.ec. 2010, 796 s. See also *Heger*, Perspektiven des Europäischen Strafrechts nach dem Vertrag von Lissabon, in ZIS 2009, p. 410.

3 | The autonomy of this specific area is claimed by *Sieber*, Einführung, in: Europäisches Strafrecht, Sieber et al. (cur.) Köln 2011, n. 175; *Sicurella*, "Prove tecniche" per una metodologia dell'esercizio delle nuove competenze concorrenti dell'UE in materia penale, in L'evoluzione del diritto penale nei settori di interesse europeo alla luce del Trattato di Lisbona, Grasso etal. (ed.), Milano 2011, 42 s. See also *Grandi*, Riserva di legge e legalità penale europea, Milan 2010, 125 s. The three different juridical grounds for European intervention in criminal matters are also highlighted by the European Commission in a recent

The tendency to expand the EU's competencies regarding criminal law and to diversify areas of intervention reflects the ever-greater role played by the European Union and its institutions. After all, the EU's citizens have supported European action in the fight against crime, which is perceived as one of the EU's main objectives, as shown by *Eurobarometer* data (in issue nos. 74 and 75, Autumn 2010 and Spring 2011).

In this respect it seems curious that, in par. 83.1.2. TFEU, organized crime is listed last among the sectors that can be subject to harmonization, as this seems to neglect the fact that organized crime, as a clear example of transnational crime,[4] has very much accentuated the need that member states coordinate their national criminal policies both within the EU and within the wider context of the United Nations.[5]

Since 1997, organized crime, along with terrorism and drug trafficking, has been named in European Treaties as a possible subject for the harmonization of criminal law (par. 31.1.e EUT Amsterdam version, already referred to by par. 61.1.a ECT).[6] Harmonization of criminal legislation is aimed at "developing a close coop-

communication [COM(2011) 573 of 20.11.2011] "Towards a European Union's Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law", 5-6. On this aspect, see *Klip*, European Criminal Policy, (2012) 20 Eur.J.Crime Cr.L.Cr.J., 6 s.

4 | Along with terrorism, especially after the 9/11 attacks: see *Marauhn/Meljnik*, Völkerrechtliche Massnahmen zur Bekämpfung von organisierter Kriminalitat und Terrorismus, in Organisierte Kriminalität und kriminelle Organisationen, Gropp-A.Sinn (Hrsg.), Baden Baden 2006, 479 s.; *Kress/Gazeas*, Terrorismus, in Europäisches Strafrecht (cit. nt. 136), 349.

5 | On this matter see *Herlin-Kernell*, The Treaty of Lisbon and the Criminal Law: Anything New Under the Sun?, in Eur. J. Law Reform 2008, 331; *Hegler*, Europäische Strafgesetzgebung, in ZIS 2009, 340; *Bernardi* (quoted in note 2), 2 nt. 7; *A. Centonze*, Criminalità organizzata e reati transnazionali, Milan, 2008, 25 s., 367 s. For a critical assessment see *Elholm*, in Does EU Criminal Cooperation necessary mean Increased Repression?, (2009) 17 Eur.J.Crime Cr.L.Cr.J., 191 s., 219 s. For United Nations documents see A compilation of UN Document 1975–1998, Bassiouni-Vetere (eds.), New York 1998. See also *Fijnaut*, Transnational Crime and the Role of UN in Its Containment through International Cooperation: A Challenge for the 21st Century, (2000) 8 Eur.J.Crime Cr.L.Cr.J., 119 s., 124 s.; *Mueller*, Transnational Crime: Definitions and Concepts, in Combating Transnational Crime. Concepts, Activities and Responses, Williams/Vlassis (eds.), London 2001, 13 s.; *Michelini/Polimeni*, Il fenomeno del crimine transnazionale e la Convenzione delle N.U. contro il crimine organizzato transnazionale, in Criminalità organizzata transnazionale e sistema penale italiano. La convenzione ONU di Palermo, Rosi (ed.), Milan, 2007, 2 s., 6.

6 | For the link between these sectors see, for instance, *Zeder*, Mindestvorschriften der EU in materiellen Strafrecht: Was bringt der Vertrag von Lissabon Neues?, in Era forum 2008, 211 s.; and also, *Militello*, Agli albori di un diritto penale comune in Europa: il contrasto al crimine organizzato (The dawn of a common criminal law in Europe: the contrast against

eration in the fields of Justice and Home Affairs," something beyond the scope of the original intent of the European Economic Community (art. B EUT, Maastricht version of 1992). In the 1990s, the importance of cooperation against cross-border crime, including its organized forms, led to a two-fold intervention strategy: The mutual recognition of judicial decisions and an approximation of criminal law. These two approaches will have to be integrated in order to overcome differences between the criminal justice systems of individual member states (as highlighted in art. 67.3 and 82.1 TFEU).[7]

Within this general framework, the European Union has adopted many regulations to fight criminal organizations. Even before the Amsterdam Treaty came into effect (May 1, 1999), this was regarded as one of the first "European duties of incrimination"[8]: At the end of 1998 the Council passed a "joint action" concerning the involvement in criminal organizations in the EU's member states.[9] This innovative point was also included in the 1997 Action Plan against Organised Crime,[10] which has long represented a European policy program on criminal matters.[11]

---

organized crime) in Il crimine organizzato come fenomeno transnazionale (Organized crime as a transnational phenomenon), Militello-Paoli-Arnold (ed.), Milan, 2000, 34 s.

7 | For recent studies see *M.Harms/P.Knauss*, Das Prinzip der gegenseitige Anerkennung in den strafrechtlichen Regelung der EU, in FS-Roxin, Heinrich et al. (eds.), Berlin 2011, 1479 s., 1486; *Suominen*, The Principle of Mutual Recognition in Cooperation in Criminal Matters, Antwerpen 2011, 51 s., 56 s. The lack of consideration for the connection highlighted in this article characterizes the radical criticism on the principle of mutual recognition made by *Schünemann*, for instance in Ein Kampf ums europäische Strafrecht – Rückblick und Ausblick, in FS-Szwarc, Joerden et al. (Hrsg.), Berlin 2009, 109 s. 119 s. A contrary opinion is held by *Klip* (quoted in note 3) 5, who points out that the European arrest warrant was successful in a context that lacked the harmonization of domestic legislations. – Actually, this proves quite the contrary: The differences between national criminal law systems the basis for the resistance against the European arrest warrant in several countries (e.g., Germany and Italy).

8 | Even if, originally, the concept had a weaker meaning as there was no judicial control in case of non-fulfillment by the member states. For an in-depth examination of such a delicate issue see *Paonessa*, Gli obblighi di tutela penale, Pisa 2009, 10 s., 14 s.

9 | Joint Action of 12.21.1998, in OJECL351 29.12.1998, which accompanies the other two joint actions dealing with illicit proceeds and corruption in the private sector, respectively 3.12.1998, in OJEC L 333 of 9.12.1998, and 22.12.1998, in OJEC L 357 of 31.12.1998.

10 | The plan was published in OJEC C 251 of 15.8.1997. An updated list of other European actions and documents relating to organized crime can be found in *Kress/Gazeas*, Organisierte Kriminalität, in Europäisches Strafrecht, 327 s.

11 | The first Action Plan on the topic was followed by a similar document (in OJEC C124/1 of 3.5.2000) on the Prevention and Control of Organized Crime at the Beginning of the Millennium. References to organized crime are also contained in the wider "The Hague Pro-

However, the outstanding importance thus accorded to the topic of organized crime is not reflected in article 83.1.2 of the Treaty, where, as pointed out earlier, the reference to organized crime is only to be found at the end of a long list of criminal activities requiring harmonization – a list on which terrorism is named first (unlike art. 31.1.e of the Amsterdam version of the TEU, where terrorism was only mentioned after organized crime).[12] Such a marginal placement of organized crime, together with the traditional vagueness of the concept, carries the risk that the scope of the legal provisions of article 83.1.2 will be widened excessively, so as to (ideally) include any form of crime among the fields of possible European harmonization.[13]

This risk has to be avoided, in order to prevent a definition of organized crime so wide that, although it is endorsed by art. 83.1.2, TFEU, will be nothing but a worthless duplicate concerning many of the criminal activities named in the same article. In particular, the trafficking in human beings, drugs, and arms, but also money laundering and corruption, are all activities that share the characteristic that they are "normally" carried out in organized forms, especially when performed transnationally.[14]

---

gramme: strengthening Freedom, Security and Justice in the European Union"(in OJEC C 53/1 of 3.3.2005), especially par. 2.3, 2.6, 2.7.

12 | This impression is strengthened by the lack of reference to organized crime among the priorities named by the European Council in relation to matters referred to by art. 83.1: see The Stockholm Programme, an Open and Secure Europe Serving the Citizen, adopted by the EU Council on 3.3.2010, in OJEC C 115 of 4.5.2010, par. 3.3 (where the priorities are as follows: trafficking in human beings, terrorism, drug trafficking, sexual exploitation of children and child pornography, cyber-crime). Appropriately, the European Parliament has nevertheless pointed out the non-exhaustive character of "these objectives... and that the order of priorities could have been better structured" and, at the same time, it also accurately highlighted how "the fight against terrorism and organized crime is and must remain a key priority within the framework of internal security strategy": Committee on Civil Liberties, Justice and Home Affairs, Report on the European Union's Internal Security Strategy [2010/2308 (INI)] rep. on 24.4.2012 (Rapporteur *Rita Borsellino*).

13 | This argument is expressed by *Grandi*, Riserva (quoted in note 3 – Rule of Law), 120 at fn 25. On the spaces of uncertainty of the concept of organized crime in the previous 2008 Framework Decision (mentioned below in this article), see e.g. *Calderoni*, A definition that could not work: the EU Framework decision on the fight against organized crime, (2008) 16 Eur.J.Crime Cr.L.Cr.J., 270 s.; *Pasculli*, Una umanità una giustizia. Contributo allo studio della giurisdizione penale universale, Padova 2011, 92.

14 | See *Sanchez Garcia de Paz*, Perfil criminologico de la delincuencia transnacional organizada, in Serta – In memoriam A. Baratta, Madrid 2004, 641 s. See also the Europol Reports on the phenomenon, compiled annually since 2000, Europol (ed.), 2000 European Union Organised Crime Situation Report, Luxembourg 2001, in specie 10 s.; on this topic see *A. Sinn*, Das Lagebild der organisierten Kriminalität in der EU - Tendenzen, rechtliche

In order not to lose sight of the real meaning of organized crime, it is necessary to identify its typical characteristics. A definition of organized crime is even more important if we consider that, even before the Lisbon Treaty came into effect, many criminal activities now enumerated in article 83.1.2 had already been the object of European decisions. These measures established minimum standards concerning both illicit conducts and corresponding penalties.[15] Therefore, the fact that the Amsterdam Treaty only referred to organized crime, terrorism, and drug trafficking did not hamper the further inclusion of several of the sectors, now expressly contained in the list referred to by art. 83.1[16] as areas of European harmonization.

Besides, the current Treaty on the Functioning of the European Treaty envisages the possibility to extend harmonization measures to forms of crime that are not explicitly listed in art. 83.1.2. This will happen with regard to the evolution of crime, for example, when new criminal activities surface that are similar to those that are already the object of a possible harmonization of criminal law (art. 83.1.3). Nevertheless, two characteristic elements are necessary a particular "seriousness" and a "cross-border dimension" of the crime. Therefore, future efforts to harmonize criminal law may not exploit the vague definition of organized crime. In particular, formal procedures (unanimity of the Council and consent of the

---

Initiativen und Perspektiven einer wirksamen OK-Bekämpfung, in Organisierte Kriminalität (quoted in note 4), 503 s. Lastly, a confirmation of the connection pointed out in this article can be found in the Internal Security Strategy for the EU, approved by the Council of Europe on 25 and 26 March 2010 (Internal Security Strategy for the European Union – Towards a European Security Model, Luxembourg 2010, 14).

15 | The following framework decisions go in the same direction: the decision of the Council of 29.5.2000 on protecting the euro against counterfeiting (2000/383/JHA); FD of 28.5.2001 combating fraud and counterfeiting of non-cash means of payment (2001/413/JHA); FD of 26.6.2001 on money-laundering and confiscation of crime-related proceeds (2001/500/JHA); FD of 13.6.2002 on combating terrorism (2002/475/JHA); FD of 19.7.2002 on preventing and combating trafficking in human beings (2002/629/JHA); FD of 28.11.2002 on the strengthening of the legal framework to prevent the facilitation of unauthorized entry, transit and residence (2003/568/JHA); FD of 27.1.2003, on the protection of the environment through Criminal Law (2003/80/JHA) (annulled by the Court of Justice–Great Chamber, 13.9.2005, case C-176/03); FD of 12.7.2005 against ship-source pollution (annulled by the Court of Justice–Great Chamber, 23.10.2007, case C-440/05); FD of 22.12.2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA); FD of 24.2.2005 again on confiscation (2005/212/JHA); FD of 28.11.2008 amending the framework decision 2002/475/JHAon combating terrorism (2008/919/JHA).

16 | See articles 29 and 31 (e) TEU, Amsterdam version, according to which all areas of "organized and non-organized" crime may be the object of criminal harmonization measures. See *Satzger* (nt. 1) II ed. 2008, 114–15.

Parliament) may not be taken as the sole basis to extend areas that are subject to harmonization. On the contrary, it will be necessary to verify that each new form of crime that is to be the subject of harmonization meets the two above-mentioned conditions ("seriousness" and "cross-border dimension") referred to in the Treaty.

3. However, the reference to the transnational dimension of a specific crime may turn out to be rather useless when it comes to determining which new criminal phenomena should be subject to a harmonized legal reaction by the European Union. In fact, in the Lisbon Treaty system, the transnational dimension is not derived solely from the "nature" and "impacts" of the offenses discussed, that is, the objective fact that criminal activities affect different states, there is also reference to the "need to combat" particular types of crime "on a common basis." Such a perspective is no longer objective, as it expresses the wish to harmonize criminal law across a number of states – and such a definition will not be able to limit an (over-)extension of legal harmonization.

In order to avoid this risk, the above-mentioned indications included in art. 83.1.3 should not be considered the only elements that define the transnational dimension of European harmonization in criminal law. Here, it is useful to refer to the concept mentioned in art. 3(2) of the 2000 UN Convention of Palermo that was also signed by the EU. This document refers to criminal offenses occurring in more than one state and involving organized criminal groups and views the involvement of a criminal organization as a particularly serious offense, because it makes it more difficult to ascertain the liability of individual participants.

Provided that European harmonization follows the standards set for its extension to new forms of crime and respects the principle of subsidiarity, this will legitimate further European interventions, especially as action by individual states will not produce results (art. 3ter TUE). It is precisely this difficulty to fight transnational criminal groups that establishes a "special need to combat them on a common basis," as referred to by art. 83.1.3; otherwise such a requisite would appear empty or dangerously vague.[17]

4. The reference to organized crime in the above-mentioned European treaties is not to be interpreted as a merely criminological concept, with an inevitably uncertain definition.[18] Rather, the concept of organized crime as object of action by the Union has to be derived from supranational measures with defined legal characteristics, at least on the international level.

---

17 | The wording appeared problematic in the decision of 20.6.2009 on the Lisbon Treaty of the German Bundesverfassungsgericht (*Neue Juristische Wochenschrift* 2009, 2288 n. 359).

18 | This opinion is maintained by Ambos/Rackow, Erste Überlegungen zu den Konsequenzen des Lissabon-Urteils des BVG für das Europäisches Strafrecht, in ZIS 2009, 402.

There are three different international regulatory frameworks: the above mentioned European Joint Action of 1998; the Palermo UN Convention of 2000 on transnational organized crime; and the more recent Framework Decision of the Council of 2008 on the fight against organized crime (2008/841/JHA of October 24, 2008).

In all of these texts criminal organization are being described using naturalistic and normative elements, both of which require further definition. Among the naturalistic elements, the most recent formulation in the 2008 Framework Decision stresses the participation of more than two people in a crime and its persistence over a period of time. The requisites concerning the "seriousness" of the offense and the existence of a "structured association," on the other hand, are normative and need to be evaluated. Generally, the references here are too narrow in one case and too vague in the other.

The "seriousness" of the relevant "offenses" is defined as follows: The crimes in question must be punishable by detention of at least four years (art. 1.1). In this way, however, the law ends up including criminal activities that are viewed very differently by individual criminal law systems. Thus, the reference to a specific penalty neglects to address the still very considerable differences between criminal law systems in different EU countries.[19]

On the other hand, the definition of "structured association" does seem to appear vague: Excluded from this are only groups "randomly formed for the immediate commission of an offence." Subsequently, however, it is specified that "the group does not need to have formally defined roles for its members, continuity of its membership, or a developed structure" (art. 1.2 FD 2008).

The wording of this provision is overly general, and it fails to draw a distinction between organized crime and other cases, in which a number of people commit a single offense. In order to define such a difference, elements of criminal organizations, such as a division of tasks involving at least three people and with the intent of committing multiple offenses, will have to be included.

The unclear approach adopted by the Framework Decision was probably caused by the need to find a compromise with criminal justice systems based on Common Law. Within these systems, the offense of "conspiracy" encompasses both the simple agreement to commit an offense, and the commission of one or more offenses by an organized group. This same model is to be found in international documents (art. 2.1.a-b) FD 2008).[20]

The first such definition of "conspiracy" describes the subjective and objective factors that justify prosecution for the participation in a criminal organization. On the subjective level, it is stressed that the perpetrator must have had knowledge of

19 | For an example see *Militello*, Partecipazione all'organizzazione criminale e standard internazionali di incriminazione, in Riv. it. dir. proc. pen. 2003, 188 s.

20 | On this dual model see *Maliević*, Participation in a Criminal Organisation and Conspiracy, Freiburg-Berlin, 2011, 123 s.

the criminal group's illegal activities or at least of its illegal aims; on the objective level, it is pointed out, that he/she will have to have actively participated in the group's criminal activity. This is followed by a long list of examples (art. 2.a).

The second definition of "conspiracy" describes the agreement, even with just one other person, to commit a serious offense with the aim to directly or indirectly obtain a financial or other material benefit. Here, the derivation from the Anglo-Saxon concept of conspiracy is very clear, and includes precisely the agreement between two or more persons to engage jointly in an unlawful act or a lawful act carried out by illegal means. The specific dangerousness of criminal organizations – as different from the simple complicity in a crime – is thus lost.

This problem cannot be solved by reference "to aims of benefit" agreed upon before the crime was perpetrated. The intent to illegally acquire material benefits is typical for a great number of offenses – it is a necessary condition, but it is not sufficient to justify prosecution for participating in an organized criminal group.

The criminalization of the agreement to carry out a particular offense conflicts with the traditions of criminal systems that punish only criminal acts that have been perpetrated. In this regard, the European Framework Decision recognize the possibility that state parties agree that an act of furtherance of the unlawful agreement is needed in order to justify prosecution for the participation in a criminal organization. Such an approach, although it may jeopardize the process of harmonization, would be in line with the "harm principle."

A whole system of rules defines liability for the participation in a criminal organization. The 2008 Framework Decision mentions terms of imprisonment (art. 3); the possibility to consider the commission of a serious offense within the framework of a criminal organization as an aggravating factor (art. 3 co. 2); the possibility that crown witnesses may receive reduced sentences or none at all (art. 4) and the liability of legal persons for offenses established in art. 1 and 2, with corresponding penalties (art. 5–6).

5. The European Parliament, in an important resolution on organized crime, recently adopted by a large majority, seems to have become aware of the problematic nature of some of the European regulations mentioned.[21] The Parliament calls for greater harmonization and demands clearer definitions of the offenses. Moreover, it points to the need to go beyond the current dual approach regarding liability (membership/conspiracy) (par. 7).

Particular attention is given to the fight against the proceeds of crime. The Parliament stresses that, besides the "extended confiscation" and the seizure of assets registered in the name of third parties, there is a need for legislation allowing the use of confiscated assets for social purposes (par. 8–9). Specific attention is also given to the protection of witnesses and informers (par. 12) and the creation

21 | Resolution of EU-Parliament P7_TA(2011)0459 (Rapporteur S. *Alfano*) approved by the Plenary Assembly on 25.10.2011.

of a special Committee of the European Parliament (par. 15). This Special Committee on Organized Crime was set up in March 2012 with the task of analyzing and assessing the implementation of the Union's legislation on organized crime, corruption, and money laundering. The resolution also calls for the extension of the remit of the European Public Prosecutor's Office to include cross-border organized crime and corruption, and it stresses the importance of strengthening agencies such as Eurojust, Europol, and OLAF (par. 18–23).

Beyond the individual measures tackled in the resolution, it is worth highlighting the scope and organic structure of the document. It expresses an integrated approach to the phenomenon similar to that to be found in theoretical analyzes of organized crime.[22] The European Parliament has adopted other similar documents on this topic: for example, the Action Plan of 1997,[23] the Joint Action of 1998 on the participation in a criminal organization,[24] and the proposal for a Framework Decision on the same matter.[25] The added value of the more recent resolution lies in that it is not bound to a specific precedent. The resolution was adopted by the Parliament in its autonomy, and it may encourage further initiatives by the Parliament and the Council.

The document, however, also has some weak points. Firstly, it does not devote adequate attention to prevention, which is indispensable in the fight against organized crime. In order to tackle the phenomenon effectively, it will be necessary to develop social prevention measures and to heighten the regard for legality in our societies. Such an integrated approach has been highlighted, for example, in the Memorandum on the Prevention and Control of Organised Crime (2000).[26]

An additional weakness of the 2011 Resolution is its inadequate focus on the harmonization of penalties. This aspect is especially pertinent, as there still are considerable discrepancies between the legal systems of the member states.[27]

Lastly, the mechanisms to combat organized crime are not balanced by references to a need to harmonize legal guarantees, something that is needed to translate them into the different legal systems. In this respect, the rather general reference to basic rights and fundamental freedoms, included in the opening remarks

---

22 | Recently, e.g. see *Spapens*, Macro Networks, Collectives, and Business Process: An integrated Approach to Organized Crime (2010) 18 Eur.J.Crime Cr.L.Cr.J., 185 s.

23 | EU-Parliament, Comm. On Civil Liberties and Internal Affairs, Report on the Action Plan against organised Crime, doc-it\RR\331\338487 – PE 223.427/def., n. 17 (rapporteur. *Cederschöld*).

24 | EU-Parliament, Report on the 1998 Joint Action against Organised Crime (rapporteur. *Orlando*).

25 | EU-Parliament, Comm. LIBE Resolution 28.09.2005 (rapporteur *Dunn*).

26 | Prevention and Control of Organized Crime at the Beginning of the Millennium (see nt. 11).

27 | See e.g. *Bernardi*, L'armonizzazione delle sanzioni in Europa: linee ricostruttive, in Per un rilancio del progetto europeo, Grasso/Sicurella (cur.), Milano 2008, 381 s.

of the Framework Decision of 2008, is just a "style clause," that is, something that cannot be translated consistently into the different national constitutional traditions. What is really needed is a supranational framework of guarantees.

6. The fight against illicit proceeds, particularly through confiscations and penalties, is a crucial field. This aspect of organized crime is not explicitly discussed in the 2008 Framework Decision, yet it is the object of many harmonization measures laid out in previous Framework Decisions, and it is forcefully addressed in the above-mentioned resolution of the European Parliament.[28]

Here, especially for Italian scholars, the most problematic point regarding the protection of the rights of individuals, concerns confiscation undertaken as a preventive measure. On this topic, the ECHR has stressed the need for guarantees (in particular, *Sud Fondi SRL c. Italia* Jan. 20, 2009). However, the overall validity of the seizure of proceeds of crime was not denied, something that has become crucial in Italy's fight against organized crime (recently, see *Bongiorno et al. c. Italia* Jan. 5, 2010).

Nevertheless, although Italy has recently improved its compliance with the rulings of the ECHR, the actual impact of the relevant case law is still limited to a few areas – areas that are undoubtedly important, yet this is not sufficient to overhaul a whole legal system as needed in the fight against organized crime.[29]

7. A firmer basis to achieve such a goal may be found in the European Charter of Fundamental Rights, which is now legally binding and has the same status as the EU Treaty. The Charter contains a long list of rights that aim to expand and harmonize the overall level of justice in Europe, and it thus runs counter to an uncritical increase of the use of repression at a national level.[30]

---

28 | See the Framework Decision of 26.6.2001 on money laundering and confiscation (2001/500/JHA) and the Framework Decision of 24.2.2005 on confiscation of crime-related proceeds (2005/212/JHA). In the European Parliament Resolution see, especially, D and points 8–10.

29 | On this aspect, see the recent collection of essays edited by *Manes/V.Zagrebelsky*, La convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano, Milan, 2011, and also *Militello*, Der Einfluss der Entscheidungen des Europäischen Gerichtshofes für Menschenrechte auf die italienische Strafrechtsordnung, in Strafrecht und Wirtschaftsstrafrecht - Festschrift für K. Tiedemann, Sieber et al. (Hrsg.), München 2008, 1421 s.

30 | *Militello*, I diritti fondamentali fra limite e legittimazione di una tutela penale europea, in Ragion pratica 2004, 139 s. On the importance of the Charter, see the recent and precise analysis by *Manacorda*, Carta dei diritti e CEDU: una nuova topografia delle garanzie penalistiche in Europa, in La convenzione europea dei diritti dell'uomo (quoted above in note 29) 147 s.; see also *Maugeri*, I principi fondamentali del sistema punitivo comunitario: la giurisprudenza della Corte di giustizia e della Corte Europea dei diritti dell'uomo, in Per

The expansion of EU action into the area of criminal law has long been criticized, and even the end of the Rule of Law has been predicted should this continue.[31] However, there are also many attempts to explore new directions: from *corpus juris* to Euro-crimes, from the European project for combating organized crime to the recent Manifesto on the European Criminal Policy.[32]

Today, the framework offered by the Treaty of Lisbon seems to have largely overcome many of the disadvantages produced by the lack of democratic legitimation for a European intervention in matters of criminal law. The Treaty provides legislative procedures, including the co-participation of the European Council and Parliament, in order to safeguard democratic values. Nevertheless, the EU may still get involved in areas to do with criminal law without intervening too much in areas of national sovereignty. The principles of proportionality and subsidiarity that have to guide interventions in criminal law can draw important lessons from the values enshrined in the European Charter of Fundamental Rights, which constitutes, at the same time, the limit and the foundation of the new Criminal Law of the European Union.

---

un rilancio del progetto europeo, 88 s.; *Cortens/Limborgh*, Grondrechtenbeschermingna het Vertrag von Lissabon, in Universalis.Liber amicorum C. Fijnaut, Antwerpen 2011, 41 s.

31 | See e.g. *Albrecht/Braum*, Defizite europäischer Strafrechtsentwicklung, Kritische Vierteljahreschrift für Gesetzgebung und Rechtswissenschaft 1998, 465 s.; *Hassemer*, "Corpus Juris": Auf dem Weg zu einem europäischen Strafrecht?, ivi 1999, 133 s., 136; *Braum*, Das "corpus juris" – Legitimität, Erforderlichkeit und Machtbarkeit, in Juristenzeitung 2000, 493 f.; *P.A. Albrecht et al.*,11 Thesen zur Entwicklung rechtsstaatlicher Grundlagen europäischen Strafrechts, KritV 2001, 279 s.; *Moccia*, L'involuzione del diritto penale in materia economica e le fattispecie incriminatrici del corpus juris, in Bartone (ed.), Diritto penale europeo, Padova 2001, 34, 54; *Kaiafa-Gbandi*, Bemerkungen zur Entwicklung rechtstaatlicher Grundlagen europäischen Strafrechts, KritV 2001, 290.

32 | Cf. The implementation of the corpus juris in the member states, Delmas-Marty/Vervaele (eds.), Antwerp 2000; Towards a European Criminal Law Against Organised Crime. Proposals and Summaries of the Joint European Project to Counter Organised Crime, Militello/Huber (eds.), Freiburg 2001; Wirtschaftstrafrecht in der Europäischen Union, Tiedemann (Hrsg.), Berlin 2002; *Schünemann*, Alternative Project for a European Criminal law and Procedure, in Bassiouni/Militello/Satzger (eds.), European Cooperation in Penal Matters: Issues and Perspectives, Padova 2008, p. 119 ss.; amplius *Id*. Ein Gesamtkonzept für die europäische Strafrechtspflege. A Programme for European Criminal Justice, Köln 2006. Lastly, the Manifesto sulla politica criminale europea, in ZIS 2009, 737 (on this, see Satzger, La carenze della politica criminale europea. Appendice al manifesto del gruppo scientifico internazionale "European Criminal Policy Initiative", in Riv. it. dir. proc. pen. 2010, 127 s.).