The Fight against Organized Crime within the European Union

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Abstract: *The European Union has unequivocally and decisively engaged in the fight against organized crime since the adoption of the Treaty of Amsterdam and the resolution of the European Council meeting in Amsterdam on 16 and 17 June 1997, setting up the first action plan against organized crime. Previously, Council resolutions of 23 November 1995 on the protection of witnesses in the fight against international organized crime and of 20 December 1996[1] on individuals who cooperate with the judicial process in the fight against international organized crime were adopted. Further, in 1998 a document on criminalization was adopted in order to suppress the different forms of participation in a criminal organization: namely, Action commune 98/733/JAI of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union - JO de l' Union europeenne no. 351, 29/12/1998.*
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1. BACKGROUND

The European Union has unequivocally and decisively engaged in the fight against organized crime since the adoption of the Treaty of Amsterdam and the resolution of the European Council meeting in Amsterdam on 16 and 17 June 1997, setting up the first action plan against organized crime[2]. Previously, Council resolutions of 23 November 1995 on the protection of witnesses in the fight against international organized crime and of 20 December 1996[3] on individuals who cooperate with the judicial process in the fight against international organized crime were adopted. Further, in 1998 a document on criminalization was adopted in order to suppress the different forms of participation in a criminal organization: namely, *Action commune 98/733/JAI of 21 December 1998* on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union - *JO de l' Union europeenne nr. 351 du 29/12/1998.*

In the view of the foreign doctrine[4], the concept of a criminal organization is difficult to define and, also, can only be criminalized in a delicate way, especially since the related criminal rules connected with the French pattern of wrongdoers or with the "conspiracy" of British law are not very compatible. The approximation of the two legislative systems in this field has only reached an opinion placed between two methods of criminalization, one inspired by the French law and the other by the Anglo-Saxon one.

A few years later, the European Commission deemed it necessary to provide the Union with a more ambitious and clearer text, which could no longer be interpreted differently, in order to truly harmonize criminal laws and to sanction the phenomenon[5].

[1] G. Antoniu, *Normative Activity of the European Union II*, Revista de drept penal (Criminal Law Journal), no. 2, 2007, p. 36;
[2] J. P. Labode, *Etat de droit et crime organize, Les apportes de la Convention des Nations unies contre la criminalite transnationale organisee*, Dalloz publishing house, 2005, p. 77;
[3] G. Antoniu, *Normative Activity of the European Union II*, Revista de drept penal (Criminal Law Journal), no. 2, 2007, p. 36;
[4] D. Fontanaud, *Criminalite organisee, Revue Internationale de Droit Penal, Le Droit Penal de l'Union Europeenne, 77 annee, nouvelle serie*, 2006, Eres publishing house, pp. 193-199;
[5] G. Antoniu, *Normative Criminal Activity of the European Union 3*, Revista de drept penal, no. 3, 2007, p. 9; G. Antoniu, *Normative Criminal Activity of the European Union 3*, Revista de drept penal, no. 1, 2007, p. 25;

In this regard, a Communication (not made public) of 29 March 2004 on actions taken in the fight against terrorism and other severe forms of crime, the Commission highlighted that the anti-organized crime mechanism within the European Union had to be renewed[6]. The development of a Framework Decision aimed to renew the joint action started since 1998 was announced. This is part of a "reform" consisting of replacing the original text with a Framework Decision representing the appropriate instrument for the approximation of criminal legislations within the Union following the Treaty of Amsterdam. As a result, it was agreed to take into account the United Nations Convention against Transnational Organized Crime[7], also called the Palermo Convention, which constitutes the international framework[8], and was approved by the European Community on 21 May 2004.

This international legal act supports the business community by balancing opportunities on the international market, "*level the player field*", a phrase used in the US after adopting the "*Foreign Corrupt Practices Act"* in 1977, which describes the frustration of Americans on their European partners who could still legally offer bribes abroad in order to obtain economic benefits and to mask certain illicit operations[9].

2. CRIMINALIZATION

Action commune of 1998, still in force, defines the criminal organization as "a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities".

The legislations of most European Union countries also punish participation in a minimal structure and stability association which aims to commit crimes of a certain severity. In this regard and for illustrative purposes I have shown above the incompatibility between French and English law[10].

The text also contains an original element regarding the obligation to incriminate the deed, giving the Member States the option to choose one of the two types of conduct described above as punishable.

Paragraph 1 of *Article 2* was republished:

"To assist the fight against criminal organisations, each Member State shall undertake (...) to ensure that one or both of the types of conduct described below are punishable by effective, proportionate and dissuasive criminal penalties:

[6] D. Fontanaud, *Criminalite organisee, Revue Internationale de Droit Penal, Le Droit Penal de l'Union Europeenne*, 77 annee, nouvelle serie, 2006, Eres publishing house, p. 198;

[7] P. Dungan, *Reflections on the Organized Crime, Revista de drept penal*, no. 4, 2006, p. 56; C. Sambrook, *The UN Convention against Corruption. A Step forward from the OECD Convention: Pluses and Minuses from a Comparative Perspective*, Romanian Journal of International Law, no. 2, 2006, p. 68; Y. Dandurand, *Strategies and practical measures to strengthen the capacity of prosecutors services in dealing with transnational organized crime, terrorism and corruption*, Crime, Law and Social Change, no. 47, 2007, pp. 234-236;

[8] N. Queloz, *Les actions internationales de lutte contre la criminalite organisee* : le cas de l`Europe, Revue de science criminell, 1997, p. 765;

[9] J. Lelieur, M. Pieth, Recueil Dalloz 2008, *Dix ans d'application de la convention OCDE contre la corruption transnationale*, Chroniques, p. 1086;

[10] B. de Lamy, *La loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité*. Crime organisé, Recueil Dalloz, 2004, Chroniques, p. 1910;

a.) (a) conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in:

- the organisation's criminal activities falling within Article 1, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the Member State concerned, even where the offences concerned are not actually committed,

- the organisation's other activities in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities (...);

(b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences falling within Article 1, even if that person does not take part in the actual execution of the activity."

The first condition is to actively participate the organization's criminal activities or activities of another nature. It is an objective notion regarding the indictable offence of criminal association within the meaning of French law. This participation is materialized at least in the deeds preliminary to committing a crime.

The second perspective consists of repressing an agreement on a criminal activity and does not require material participation in a crime, or at least in a preliminary deed. It is a much more subjective notion, where the crime is characterized by an "agreement", a "plot" to commit crimes.

It gives Member States the possibility to simultaneously criminalize both aspects in their national legislations.

Among other things, the difficulty of legislative harmonization lies in the fact that, no matter the criminalization option ascertained and no matter the possible divergences pertaining to the criminalization method, the Member States will not come to an agreement regarding a general principle of cooperation due to the shortcomings limited by the requirement of double criminality. The provision on mandating European affairs, among other things, confirmed this waiver by the Member States to use the existence of double criminality for the crimes of participation in a criminal organization.

The proposal for the Framework Decision on the fight against organized crime, adopted by the Commission on 19 January 2005, reiterates the definition of a "criminal organization" in the *Action commune*, only borrowing one element from the United Nations Convention against Transnational Organized Crime. Therefore, it is specified that the objective of the organization is to obtain a financial advantage or another material advantage, confirming that this concept of organized crime must be synonymous with the notion of illegal "profit", obtained by criminal means.

The idea that the criminalization of participating in an organized criminal group implies that the aim is to commit a "serious crime" is preserved. The criterion here, similarly to the one ruled by *Action commune*, is that of an offense punishable by deprivation of liberty or a detention order of a maximum of at least 4 years or longer. Certain forms of participation that were not expressly provided for by the *Action commune* are criminalized in a specific way. The text provides for the sanction of any person who, with intent, actively takes part in the organization's criminal activities or other activities, by providing information or material means or to recruit new participants, in the further knowledge that his participation will contribute to the achievement of the organization's criminal activities

3. PENALTIES

Only *Art. 2* of *Action commune* provides sanctions that are "effective" and "proportionate".

On the other hand, as a textual complementing, *Art. 3* of the proposal for the Framework Decision is very innovative and directly concerns the national laws. Imprisonment term intervals are prescribed depending on the different degrees of involvement in the illicit activities of the criminal organization.

For the crime of running and organizing a criminal organization, the maximum imprisonment sentence should not be less than 10 years. For other offenses, the maximum imprisonment sentence may not be less than 5 years.

In addition, the proposal for the Framework Decision provides for aggravating the punishment for a certain number of crimes committed within a criminal organization. Here we are talking about a kind of aggravating circumstance consisting of taking into account the punishment for committing serious crimes, the particular injuriousness of individuals who are members in criminal organizations, namely, a "mafia" type association or an (organized) street gang.

Finally, *Art. 4* of the proposal for a Framework Decision allows applying mitigating circumstances where the offender waives his illicit activities and provides certain useful information to the administrative or judicial authorities.

4. THE LEGAL PERSONS

Article 3 of the Action commune provides that each Member State shall ensure that legal persons may be held criminally, being liable for offences which are committed by that legal person, in accordance with procedures to be laid down in national law. The sanctioning must have the specificity imposed by the subject of the crime which is that legal person. Virtually this does not fall within the scope of the actual criminal liability of the legal persons, but of a liability that may be criminal, civil or administrative, in view of the nature of the crime committed[11].

This liability of the legal person does not exclude the criminal liability of the natural persons who are perpetrators of or accomplices to these crimes.

The sanctions on legal persons must be "effective" and "proportionate". The text emphasizes that the nature of the sanction can be material or economic.

Further, *Art. 5* of the proposal for the Framework Decision of 19 January 2005 provides a principle of liability of legal persons for the offences committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person. The term "liability" must be interpreted in a manner that covers both criminal and civil liability, as well as any other liability[12].

The second paragraph states, inter alia, that a legal person may be held liable even if the lack of supervision or control by a person with competence in exercising control has made it possible to commit crimes. The third paragraph states the possibility of cumulating both the liability of the natural person and of the legal person, but the sanction and/or punishment ruled for each will be different.

Art. 6 of the proposal deals with penalties and sanctions for legal persons. These sanctions must be effective, proportionate and dissuasive; to include criminal or non-criminal fines at least. Other penalties commonly applicable to legal persons are also included.

[11] G. Antoniu, *Criminal Activity of the European Union*, Revista de drept penal, no. 3, 2007, p. 11;

[12] B. de Lamy, *La loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité*. Crime organisé, Recueil Dalloz, 2004, Chroniques, p. 1910; J. Lelieur, M. Pieth, Recueil Dalloz 2008, *Dix ans d'application de la convention OCDE contre la corruption transnationale*, Chroniques, p. 1086;

5. TERRITORIAL JURISDICTION

Art. 4 of the Action commune provides that each Member State shall ensure that the crimes of participating in an criminal organization which take place in its territory are subject to that State's jurisdiction regardless if the entire illicit activity takes place on the State's territory or only a part thereof.

The proposal for the Framework Decision includes an *Art. 7*, entitled "Jurisdiction and coordination of prosecution". This is a new article in relation to Joint Action 98/733/JHA. Without regulating all issues on jurisdiction, the text provides, as a rule, that each Member State shall ensure that its jurisdiction covers at least the cases in which an offence was committed in whole or in part within its territory, wherever the criminal organisation is based or pursues its criminal activities.

When the offence falls within the jurisdiction of more than one Member State, the Member States concerned shall cooperate and consult each other for coordinating their actions and deciding which of them will prosecute the offenders.

6. INITIATION OF CRIMINAL PROCEEDINGS

Art. 8 of the proposal for the Framework Decision is dedicated to the protection and assistance of the victims, a principle according to which the investigations into, or prosecution of, the offence of participating in a criminal organization are not dependent on a report or accusation made by a person subjected to the offence, namely, the prior complaint of the victim is not a prerequisite. In such cases of organized crime, in most situations, the victims are often afraid of reprisals from the "mafia" organizations on themselves or on their families, which is why they are reluctant to file a complaint and notify the authorities. It is known that the perpetration of criminal offences is often preceded by pressure on the victims, adopting a passive conduct that will ensure the success of the criminal offences and their non-denunciation.

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