

Criminal Law in the EU: greater harshness through harmonisation?¹

Mariana Chaves²

Abstract

This paper seeks to shed some light on the nature, scope and impact of harmonisation of national criminal law by the European Union. It will, more specifically, attempt to understand what is the main rationale behind the adoption of European criminal measures which harmonise national criminal offences and evaluate their impact on national legal orders. It will be argued that a main paradox emerges from this body of law, namely that notwithstanding the fact that the Treaty of the European Union envisaged harmonisation of national criminal law as being minimal, its scope and influence have been very broad, potentially bringing about a harsher criminal law across the EU. This broad scope was facilitated by a discourse of fight against organised crime which became the main rationale for the adoption of harmonisation measures. The EU's viewpoint on organised crime has been far-reaching. This is seen mainly in three elements: in the adoption of a very broad understanding of what a criminal organisation is; in the criminalisation of a wide range of offences under the "umbrella" of the fight against organised crime; and, finally, in the potential application of the measures adopted under this rationale to common criminality and to the indirect achievement of other goals. Ultimately, this broad approach led to an increase in criminalisation at national level, namely through the creation of new offences and through the expansion of the scope of existent ones.

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2 PhD candidate, London School of Economics and Political Science, m.chaves@lse.ac.uk

Introduction

European criminal law is one of the most dynamic areas of integration in the European Union. Its nature is in the process of being shaped and its impact on national legal orders is still largely unknown. This paper adopts a legal perspective and seeks to identify what the main rationale behind the adoption of European criminal measures which harmonise national criminal offences is, and assess their influence on national legal orders.³ A central paradox emerges from harmonisation in criminal matters, namely that although the harmonisation envisaged was minimal, its scope and influence have been very broad. The main rationale underlying the majority of measures adopted was the fight against organised crime, which the EU interpreted very broadly. It did so by adopting a broad definition of a criminal organisation, by criminalising a wide range of conducts under the “umbrella” of organised crime, and lastly by indirectly opening the door for the application of these measures to the domain of common criminality and to the protection EC interests. Finally, this broad approach was also reflected on national legal orders, leading to an increase in criminalisation at domestic level, specifically through the creation of new offences and through the expansion of the scope of existent ones, potentially bringing about a harsher⁴ criminal law across the EU.

The paper will be divided into three main parts. Section 1 will explain the scope of harmonisation of national criminal law in terms of the offences that are concerned. It will show how the Treaty envisaged harmonisation as being limited to the minimum elements constituent of crimes at least in the areas of organised crime, terrorism and drug trafficking and how measures were adopted in a wider range of subject matters, far beyond those three domains. Section 2 of the paper will seek to identify the main

³ Harmonisation of national criminal law refers to the minimum elements constituent of crimes and penalties (Articles 29 and 31 Treaty of the European Union - TEU). This paper will only consider the harmonisation of offences and not that of penalties.

⁴ Unless otherwise stated, when the words “harsh” or “lenient” are used in this paper the aim is not to pass any type of judgement on the particular law in question, but to acknowledge objectively that a certain measure is more harsh or lenient than usually found in the EU or than the measures previously existent at national level.

justification for the adoption of these measures. It will show how, historically, organised crime became the main motto for action and how the EU legislator cast the idea of organised crime very broadly. It will further explore how many measures in areas which range from sexual exploitation of children, to money laundering or cyber crime, for example, were also adopted under the same *rationale*, emphasising the already broad interpretation of the concept given to it by the EU. This section will then explore how this wide approach to organised crime facilitates the application of this legislation to other types of criminality and how it also serves other interests. Finally, section 3 will shed some light on the influence that these measures are having on national legal orders. It will show how the wide range of measures adopted and the broad definitions of crime put forward by those measures led to more criminalisation at national level, namely by enlarging the scope of pre-existent criminal offences or by requiring Member States to create new ones.

1 - The scope of harmonisation: minimum elements of crime v wide range of areas of intervention

The basic architecture of criminal law in the third pillar is laid down in Title VI of the Treaty of the European Union, under the heading of police and judicial cooperation in criminal matters. Article 29 TEU states that: *“Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through: **approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).**”*

Article 31 (3) provides: *“Common action on judicial cooperation in criminal matters shall include: progressively adopting measures establishing **minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.**”*

Harmonisation of national criminal law does not occupy a central role in these provisions, but rather a secondary role and is of a minimal nature. This is well perceived by the wording of Article 29 when it is stated that approximation should be pursued *“where necessary”*, therefore giving an idea that it is not always needed and that it should not be pursued when that is not the case. Furthermore, the Treaty also limits greatly the areas of harmonisation. Hence, harmonisation is envisaged clearly in only three areas of substantive criminal law, namely organised crime, terrorism and illicit drug trafficking; whilst it limits its depth to the minimum rules on the constituent elements of criminal acts and to penalties, as stated in Article 31 (e).

The secondary nature of harmonisation is reasserted by the Tampere European Conclusions which endorse the principle of mutual recognition as the cornerstone of the Area of Freedom, Security and Justice.⁵

Furthermore, the minimal nature attributed to harmonisation of national criminal law is perceived also in the fact that most Joint Actions and Framework Decisions focus only on minimum elements constituent of crimes and penalties and on their succinct text. Thus, the blueprint followed for harmonisation is the same throughout the majority of the Framework Decisions⁶ and it focuses mainly on minimum elements constituent of crimes and penalties as mentioned in the Treaty.⁷ The text of Framework Decisions is usually concise and short, except in what concerns the definition of the offence and in relation to penalties. The definition of offences is typically broad. Likewise, penalties receive added considerations and focus mainly on the establishment of minimum thresholds of maximum imprisonment sentences (there is no mention, for instance, of maximum sentences).

The text of the Treaty clearly envisages harmonisation in criminal matters as being minimal. There is no attempt to attribute a comprehensive and overarching competence of the European Union to harmonise national criminal laws. Main principles of criminal law are not mentioned and the areas of intervention, even if not exhaustively mentioned, are clearly limited. The general outline of the Framework Decisions also gives an idea that it is a minimal intervention with limited objectives that focuses on very specific elements of the national criminal systems.

This minimal nature has been acknowledged and criticised at times by some authors. Peers explains that *“The EU’s third pillar powers are limited by the principle of subsidiarity, which constrains EU action as regards the substantive criminal law with a minimal cross-border impact. Furthermore, EU powers can only be used in this area to set minimum standards (or ‘minimum rules’, according to the wording of Article 31(1)(e)), leaving Member States to elaborate wider definitions of the offences described by the EU third pillar measures or to set penalties exceeding the minimum*

⁵ Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, para 33.

⁶ The emphasis here will be on Framework Decision not only because since Amsterdam they have, in practice, been the only instrument adopted but also because many of the Joint Actions have already either been replaced by Framework Decisions or there are proposals to replace them in the future.

⁷ Articles 29 and 31 (e) TEU

levels required by EU measures.”⁸ Bosly and van Ravenstein contend that the two main limitations to harmonisation are the intergovernmental nature of Title VI which requires unanimity and, similarly to Peers, the principle of subsidiarity, mentioned by Article 2 TEU, and which requires that the EU should not intervene in matters that are better decided and handled at national level.⁹

Weyembergh voices some concerns with the limitations of the scope of harmonisation noting that “as regards the content of the adopted texts, most of the approximation efforts have concerned the substantive part of criminal law: generally speaking, criminal procedure has been neglected. Even as regards substantive criminal law, only some of its aspects have been approximated. The level of sanctions have been tackled but, despite certain developments, rather vaguely. Most efforts have concerned the definition of certain types of offences. However, numerous articles of framework decisions concerned are restricted in the sense that they grant to the Member States a possibility to derogate from the obligation contained therein. In that respect, one can speak of harmonisation ‘en trompe l’oeil’.”¹⁰

To be sure, the Treaty’s provisions very clearly lay down the fact that there is no comprehensive competence of the European Union to harmonise national criminal law, as the Treaty seems to confer competence only to adopt measures in the areas mentioned by Article 31 (e) - organised crime, terrorism and illicit drug trafficking. This limited approach in the depth of harmonisation contrasts greatly with the range of subject matters in relation to which measures have been adopted. Undeniably, Title VI is confusing at times and it is unclear at this stage if the competence to act in other domains besides those mentioned in Article 31 (e) exists. Whilst some authors argue that the competence provided by the provision is exhaustive,¹¹ others contend that the wording of Article 31 leaves room for some ambiguity.¹² The latter is created mainly

8 Peers, S. (2007) “EU Justice and Home Affairs Law”, Oxford EC Law Library, p. 287-288.

9 Bosly and van Ravenstein, “L’Harmonisation des incriminations”, p. 24, in Flore D. et al. (2003) “Actualités du droit penal européen”, Les dossiers de la Revue de Droit Penal et de Criminologie, 9, Bruxelles, La Chartre.

10 Weyembergh, A. (2005) “The Functions of Approximation of Penal legislation Within the European Union”, Maastricht Journal of European and Comparative Law, 12(2): p. 15

11 Vermeulen G. (2002) “Where do we currently stand with harmonisation in Europe?”, in Klip and Vander Wilt (Eds), in Harmonisation and Harmonising measures in criminal law”, Royal Netherlands Academy of Sciences, p. 65.

12 Mitsilegas V. (2009) “EU Criminal Law”, Modern Studies in European Law, Hart Publishing, p. 85 and Weyembergh A. (2005) “Approximation of criminal laws, the Constitutional Treaty and the Hague Programme”, Common Market Law Review, 42, p. 1569.

by the wording of Article 29, mentioned earlier, and which sets the broad goals and guidelines of intervention in criminal matters. The article seems not to delimit exhaustively the scope of intervention of the European Union by stating that a “*high level of safety... shall be achieved by preventing crime, organised and otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud.*” The use of the expression “in particular” seems to suggest precisely the non-exhaustive nature of the wording as noted by Mitsilegas.¹³ Peers¹⁴ (2006) and Bosly and van Ravenstein¹⁵ seem to have no doubts that harmonisation can be extended to other areas besides those mentioned in Article 31 (e).

Despite the uncertainty surrounding the scope of *letra legis* of the Treaty, a broad interpretation seems to be prevailing at this point. The EU’s intervention in criminal matters is being driven by an expanding in criminal matters and in particular in harmonising measures. Indeed, the European Union adopted a wide range of Framework Decisions aiming at harmonising the minimum elements of criminal offences and penalties at national level. The range of areas involved goes far beyond the list of competences referred to by Article 29, let alone Article 31. To be sure, Framework Decisions were adopted in areas as diverse as illicit drug trafficking¹⁶, sexual exploitation of children and child pornography¹⁷, terrorism¹⁸, standing of victims in criminal proceedings¹⁹, fraud and counterfeiting of non-cash means of payment²⁰, money laundering²¹, trafficking in human beings,²² corruption in the

13 Idem.

14 See n 10 above.

15 Bosly and van Ravenstein, p. 21, n 11 above.

16 Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335/8 [2004].

17 Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13/44 [2004].

18 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164/3 [2002] and Proposal for a Framework Decision amending the Framework Decision 2002/475/JHA on combating terrorism, COM (2007) 0650, Brussels, 6.11.2007.

19 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82/1 [2001].

20 Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, OJ L 149/1 [2001].

21 Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182/1 [2001].

22 Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 203/1 [2002].

private sector²³, crime against information system²⁴, environment²⁵ and ship-source pollution,²⁶ among others.

These trends of expanding competence are not necessarily surprising as they have been legitimated by several Action Plans and Programmes, which came to complement and assist the completion of the Area of freedom, security and justice or in the fight against organised crime.²⁷ The Vienna Action Plan, for example, set a road map for guidance on how best to implement the provisions of the Treaty of Amsterdam in an Area of Freedom, Security and Justice adopted in 1998 covered action in judicial cooperation in criminal matters and specifically how to tackle organised crime by facilitating procedures and approximating legislation where necessary.²⁸ It mentioned far more areas of crime than the ones mentioned in the Treaty: “...*this goes in particular for policy areas where the Union has already developed common policies, and for policy areas with strong cross-border implications such as environmental crime, high-tech crime, corruption and fraud, money laundering, etc.*”²⁹

This major intervention was also promoted by the Tampere Conclusions³⁰ - the landmark document for the development of the Area of freedom, security and justice until 2005, which confirmed the need for intervention in the same areas mentioned by the Vienna Action Plan: “*Without prejudice to the broader areas envisaged in the Treaty of Amsterdam and in the Vienna Action Plan, the European Council considers that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, Euro counterfeiting), drugs trafficking, trafficking in*

23 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192/54 [2003].

24 Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, OJ L 69/67 [2005].

25 Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, OJ L 29/55 [2003]

26 Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L255/164 [2005]

27 Vienna Action Plan, Tampere Conclusions and Hague Programme, Doc 16054/04, JAI 559, Brussels, 13 December 2004.

28 Para 17 of the Action Plan.

29 Para 18, Idem.

30 Tampere Conclusions, the European Council of Tampere specifically met to discuss justice and home affairs issues. Two broad themes emerged from the meeting: common EU asylum and migration policy and a Union wide fight against crime, n. 6 above.

human beings, particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime.”³¹

Finally, the Hague Programme, which replaced the Tampere Conclusions and provides the road map for police and judicial cooperation in criminal matters, calls for intervention in more general terms, namely in areas with a cross-border dimension and in those domains referred to by the Treaty: “*The European Council recalls that the establishment of minimum rules concerning aspects of procedural law is envisaged by the treaties in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. The approximation of substantive criminal law serves the same purposes and concerns areas of particular serious crime with cross-border dimensions. Priority should be given to areas of crime that are specifically mentioned in the Treaties.*”³²

2 - Organised crime as the main *rationale* for intervention

Historical overview of the fight against organised crime through harmonisation

The expansion of the areas of intervention, together with the minimal nature of measures, begs the question of what *rationale(s)* and *goal(s)* (if any) are behind the intervention of the EU in so many varied areas. Weyembergh argues that there is a lack of coherence in approximation as measures have been adopted in domains so diverse as drug trafficking, sexual exploitation of children, private corruption and money laundering.³³ Peers further notes the lack of a clear policy goal or programme namely because there has never been a formally agreed harmonization agenda of substantive criminal law but only *ad hoc* proposals by different Member States and the Commission. Even in the Tampere European Council, the Council never set out a precise agenda in this field, referring itself only to a non-exhaustive list of crimes with

31 Para 48, Tampere Conclusions, n. 6 above.

32 Page 29, point 3.3.2., Hague Programme, available at http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/doc/08_organised_crime_en.pdf

33 Weyembergh, p. 1585, n. 12.

no specific timetable for implementation.³⁴ Flore also remarks that European criminal law still lacks a coherent project.³⁵

It is argued here that it is possible to identify a main driving force of intervention in criminal matters and in particular in the large majority of harmonisation measures adopted - the fight against organised crime. The latter has been, in fact, the main *rationale* driving the expansionist dynamic of the EU's harmonisation in criminal matters, which can be identified both in the grounds for adoption of measures as well as in the goals these pursue. First, the fight against organised crime "*has been one of the main motors for the advancement of European integration in the field of criminal law*".³⁶ Indeed, historically organised crime has been a main motto for harmonisation measures ever since the adoption of the Treaty of Maastricht and was also of central importance in relation to cooperation in criminal matters even prior to this signing of the Maastricht Treaty. During the Maastricht years organised crime emerged as the main narrative for intervention in criminal matters and became the leading motto for the adoption of the bulk of legislation in criminal matters. This primary role is seen, for instance, in the Action Plan to combat organised crime adopted in 1997 and which stated that "*Organised crime is increasingly becoming a threat to society as we know it and want to preserve it. Criminal behavior no longer is the domain of individuals only, but also of organizations that pervade the various structures of civil society, and indeed society as a whole. Crime is increasingly organizing itself across national borders, also taking advantage of the free movement of goods, capital, services and persons.*"³⁷ Furthermore, the importance of the action against organised criminality was reasserted in several Joint Actions and Conventions. The Joint Action on making it a criminal offence to participate in a criminal organisation³⁸ states in the Preamble that "*the Council considers that the seriousness and development of certain forms of organised crime require strengthening of cooperation between the Member States of the European Union, particularly as regards the following offences: drug trafficking, trafficking in human beings, terrorism, trafficking in works of art, money laundering, serious economic crime, extortion and other acts of violence against the*

34 Peers, p. 402, n. 10.

35 Flore D. (2003) "Un Droit Penale Europeen: Hasard ou Necessite", in Actualites du Droit Penal Europeen, Les Dossiers de la Revue du Droit Penal et de Criminologie (9), La Chartre, Bruxelles, p. 16.

36 Mitsilegas, p. 93, n.14.

37 Para 1 of the "Action Plan to Combat Organised Crime", adopted by the Council on 27 April 1997, OJ C251/1 [1997]

38 Joint Action 98/733/JHA of 21 December 1998, OJ L 351/1 [1998]

life, physical integrity or liberty of a person, or creating a collective danger for persons.” Joint Actions on subject matters ranging from money laundering and proceeds of crime to trafficking in human beings and sexual exploitation of children, among others, were thus adopted, all with the same broad purpose of fighting organised crime. The list of conducts mentioned in the former Joint Action was considerable. This view that organised crime was to be understood as including a wide range of criminality was confirmed in other measures and domains besides harmonisation of national criminal law. It was visible, for example, in the Joint Action establishing a programme of exchanges, training and cooperation for persons responsible for action to combat organised crime, the so-called “Falcone Programme” in which it was stated to be necessary *“to adopt a broad approach to phenomena of organised crime, including economic crime, fraud, corruption and money-laundering.”*³⁹

The importance of the fight against organised crime was further confirmed by the Amsterdam Treaty. The importance of action along these lines is reasserted, for instance, by the Tampere European Council Conclusions, in which the Presidency called for *“efforts to agree on common definitions, incriminations and sanctions [which] should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, Euro counterfeiting), drugs trafficking, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime.”*⁴⁰ The Hague Programme further elaborated on this and organised crime was given a separate section whilst the Commission made clear that *“Fighting against organised crime is a priority of the Commission’s action”*, namely through the development of common methodologies, crime statistics systems, crime proofing legislation, an EU anti-corruption policy, the strengthening of Europol and Eurojust, the strengthening of the investigation resources and tools to address the financial aspects of organized crime and the prevention of human trafficking.⁴¹

After Amsterdam, measures were adopted in almost all areas referred to by the previously mentioned documents. Many of them replaced Joint Actions and

39 Joint Action 98/245/JHA of 19 March 1998, OJ L 99/8 [1998].

40 Para 48 of the Presidency Conclusion of the Tampere European Council, Tampere, 15 and 16 October 1999.

41 Section 8 of the Hague Programme, n. 35 above.

Conventions already in force whilst some others were adopted anew. Similarly to what was seen during the Maastricht period, organised crime is the main narrative for intervention in the majority of the measures adopted which is clearly seen in the Preamble of most of these new Framework Decisions. As mentioned earlier, measures were adopted in areas which range from illicit drug trafficking,⁴² to trafficking in human beings,⁴³ or crimes against information system.⁴⁴ The latter, for example, states in its preamble that “*There is evidence of attacks against information systems, in particular as a result of the threat from organised crime, and increasing concern at the potential of terrorist attacks against information systems which form part of the critical infrastructure of the Member States.*”⁴⁵ The Framework Decision on sexual exploitation of children and child pornography also requires that “*Penalties must be introduced against the perpetrators of such offences which are sufficiently stringent to bring sexual exploitation of children and child pornography within the scope of instruments already adopted for the purpose of combating organised crime...*”⁴⁶ whereas the Framework Decision on money laundering recalled that “*money laundering is at the heart of organised crime and should be rooted out wherever it occurs.*”⁴⁷

A broad approach to the concept of organised crime by the EU legislator

Organised crime *per se*

The central measure in force in relation to organised crime is the Joint Action making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.⁴⁸ The Joint Action refers to two types of conduct that shall be

42 See n. 18 above.

43 See n. 24 above.

44 See n. 26 above.

45 §2 of the preamble of the Framework Decision, n. 26.

46 §9 of the preamble of the Framework Decision, n. 19.

47 §6 of the preamble of the Framework Decision, n. 23.

48 See n. 41 above. A Framework Decision on the fight against organised crime whose definition correspond largely to the ones of the Joint Action was already adopted but is not yet in force. OJ L 300/42 [2008]. For a detailed analysis of the Joint Action see Mitsilegas V. (2001), “Defining organised crime in the European Union: the limits of European criminal law in an area of ‘freedom, security and justice’”, *European Law Review*, 26; and for an analysis of the Framework Decision see Calderoni F. (2008), “A Definition that Could not Work: the EU Framework Decision on the Fight against Organised Crime”, *European Journal of Crime, Criminal Law and Criminal Justice*, 16.

punishable by Member States (one or both conducts can be criminalised). The first is the agreement to take part in such activities, even if an offence is not carried out (the so-called “participation in a criminal organisation” or “membership of a criminal organisation”); whilst the second is to actively take part in the actual execution of the offences related to criminal organisations (even if no offence is actually committed) or to organise activities that might contribute to the achievement of the organisation’s criminal activities (i.e. the actual commitment of an offence or the “conspiracy” to commit an offence).⁴⁹

The criminalisation of participation in a criminal organisation, the first offence described by the Joint Action, is one of the two key legal approaches to organised crime and is considered the more extreme one, usually adopted by countries which have particular problems with organised crime, such as Italy or the USA.⁵⁰ Not only did the EU choose to follow such an approach (although it also followed other approaches as will be seen below), but it did so in a very broad manner by adopting a wide legal definition of what is to be considered a criminal organisation.

The Joint Action defines a criminal organisation 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 the offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.*”⁵¹ The first striking element of this definition is the requirement of only three members for an association to be considered a criminal organisation. Indeed, the

49 Article 2, of the Joint Action on organised crime, n 41. The text of the Article specifically holds that: “*To assist the fight against criminal organisations, each Member States shall undertake, in accordance with the procedure laid down in Article 6, to ensure that one or both types of conduct described below are punishable by effective, proportionate and dissuasive criminal penalties: (a) conduct by any person who, with the intent and with the 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 were not actually committed; - the organisation’s other activities in the further knowledge that this participation will contribute to the achievement of the organisations criminal activities falling within Article 1; (b) conduct by any person consisting in 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.*”

50 Leong A. (2007) “The disruption of International Organised Crime: an analysis of legal and non legal strategies”, International and Comparative Criminal Justice, Ashgate, p. 91.

51 Article 1, Idem..

idea that one has of a criminal organisation is usually not one association with only three members. On the other hand, this broad understanding is not compensated by other requirements of structure or of any link to (illegal) business minded activities, through the introduction of, for example, an element of entrepreneurship in the definition, which is common to national legal orders.⁵² Furthermore, the definition offered includes cases where the offence committed is an “end in itself” or a means of obtaining material benefits. The commission of offences as an end in itself is also extremely broad and it was even dropped from the text of the Framework Decision which will replace the Joint Action.⁵³ In this new version, a criminal organisation will be considered “a structured association... of more than two persons acting in concert with the view to committing offences... to obtain, directly or indirectly, a financial or other material benefit.”⁵⁴ Yet, the notion of “financial or material benefits” is broad and vague. Is a material benefit of £100 or £200 enough to be included in the range of the concept of organised crime? And what can be considered a material benefit?

Traditionally, definitions of criminal organisations tend to be narrower. For example, even if only a small number of members is required, such an element is usually compensated for by other more clear and objective elements as can be seen in the definition used in 1998 by the BundesKriminalAmt (Germany's Federal Criminal Police Office): “*Organised crime if the planned violation of the law for profit or to acquire power, which offences are each, or together, of a major significance, and are carried out by more than two participants who co-operate within a division of labour for a long or undetermined time span using (a) commercial or commercial like structures, or (b) violence or other means of intimidation, or (c) influence on politics, media, public administration, justice and the legitimate economy.*”⁵⁵

While internationally there is a clear trend to broaden definitions of organised crime, as seen for instance in the United Nations Convention against Transnational Organised Crime, still the concept is more limited than the EU’s in that it refers to the crimes mentioned in the Convention which provides more legal certainty than the mere “*offences which are punishable by deprivation of liberty or a detention order of*

52 Symeodidou-Kastanidou E. (2007) “Towards a New Definition of Organised Crime in the European Union”, *European Journal of Crime, Criminal Law and Criminal Justice*, p.98-100 and Leong, p. 15 (see footnote x).

53 See Article 1(1) of the Framework Decision, n. 59.

54 *Idem*.

55 In Leong, p. 17, n. 62.

a maximum of at least four years or a more serious penalty.”⁵⁶ The UN Convention defines organised crime as: *“a structured group of three or more person existing for a period of time and acting in concert with the aim of committing one of the more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”*⁵⁷ The EU’s definition contrasts largely with the traditional understanding of what organised crime even if its evolution is taken into account. Indeed, in general, concerns with organised crime have evolved from specific concerns with organisations such as the Mafia and “La Cosa Nostra” and other Mafia-like organisations to looser forms of hierarchical, structured, and more business minded or even terrorist linked organizations.⁵⁸ Nonetheless, as has been shown, the EU’s approach is much broader and does not require some of the typical links of other definitions.

Literature on organised crime also tends to require more elements than those mentioned by the Joint Action and Framework Decision in order to categorise an offence as one of organised criminality or a group as a criminal organisation. Abadinsky, for example, mentions eight attributes of organised crime, namely the non-ideological nature of the group, the existence of an hierarchy, a limited or exclusive membership which perpetuated it self, the willingness to use violence and bribery, a specialisation of division of labour, monopolistic and being governed by rules and regulations.⁵⁹ Maltz on the other hand identifies only four main characteristics, namely varieties of the crimes committed, an organised structure, the use of violence and corruption.⁶⁰ The definition adopted by the EU measures is certainly looser than these, thus stricter from a legal point of view. Levi suggests that such a broad definition of organised crime results from a tension between *“a) those who want the legislator to cover a wide set of circumstances to avoid the risk that any major criminal might ‘get away with’, and b) those who want the law to be quite tightly drawn to avoid the overreach of powers which might otherwise criminalise*

56 15 November 2000; A/RES/55/25

57 Article 2 (a) of the Convention.

58 For a historical evolution of organised crime see Leong, n.62.

59 Abadinsky H. (1985) “Organised Crime”, Nelson Hall Chicago, 2nd Edition, p. 5-7.

60 Maltz M.D. (1976) “On defining organised crime: the development of a definition and a typology”, in *Crime and Delinquency*, 22, p. 338-340. For more examples of definitions of organised crime see, for instance, Bay J. (1998) “Definitions of Organised Crime in the EU: a Criminological Perspective” in “Organised Crime and Crime Prevention – What Works?”, Scandinavian Research Council for Criminology and Finknauer J.O. (2005) “Problems of definition of what is organised crime”, *Trends in Organized Crime*, 8, n 3.

groups who are only of a modest threat.” Such tension is usually solved in favour of the loose definitions with concerns over security⁶¹ which seems to have been the case in the EU context.

To be sure there is no agreement on a common definition of what organised crime across the EU, not least because both the Joint Action and the Framework Decision give Member States the option to criminalise only one or both the participation in the criminal organisation or the conspiracy to commit actions, besides the commission of the offences itself. In this sense, Mitsilegas stresses that “...*the concept of organised crime is far from harmonised at EU level. This is striking in the light of the fact that organised crime has the substantial transnational dimension and forms the basis of co-operation between national judicial and police authorities across the EU... and justifies to a great extent the existence... of Union criminal justice bodies such as Europol and Eurojust.*” The author argues that it is necessary to look at the “*ultimate aim of harmonisation of substantive criminal law in this context.*” and then notes “*The Commission talks about harmonisation across the EU but the Council documents refer to ‘prosecutorial benefits’ at national level. If one looks at the Framework Decision strictly as necessary to ensure the prosecutorial efficiency at the national level, then the lack of clarity and the absence of a high level of harmonisation is perhaps not as crucial.*”⁶²

The lack of a clear and common definition certainly is not desirable from the perspective of legal certainty. Nonetheless, it offers other benefits from a law enforcement point of view: the loose concept of “criminal association” leaves the door open to the interpretation of whether or not a specific offence is to be considered one of organised crime, and loose and broad definitions potentially incorporate more behaviours in its context than stricter ones. i.e. the definition of organised crime given by the Joint Action and Framework Decision has the potential to include a wide range of criminality even if only loosely related to the traditional understandings of organised crime. This overarching nature of organised crime has been explored by the EU and is better explored in the two following sections.

61 Levi M. (2006) “Organised crime and terrorism”, in *The Oxford Handbook of Criminology*, Maguire M., Morgan, R. and Reiner R. (Ed.), Oxford Press, p. 780.

62 Mitsilegas, p. 97, n. 14 above. Calderoni also argues, in regards to the Framework Decision, that the definition given is not able to harmonise national laws, n. 59 above.

Criminality related to organised crime

Besides the criminalisation of the membership of a criminal organisation, a second legal technique to fight organised crime consists of the criminalisation of specific offences committed by members of an organised criminal group. Such an approach focuses on legal measures in several areas related to organised crime. Van Duyne identifies three main areas of legal intervention in cross-border organised crime, namely, human misery and trafficking, economic crime and corruption and money laundering, and prohibited goods,⁶³ whilst terrorism is increasingly being brought into such a context.⁶⁴ The EU adopted legislation in all four areas and went further by criminalising offences against information systems and directly linking them to organised crime as it will become apparent below. Furthermore, similarly to the approach with regard to the legal definition of organised crime, the definitions agreed to are very broad which leads to a high minimum standard of harmonisation across the EU. Ultimately, this is leading to more criminalisation at national level, as it will be demonstrated in the final section of this paper. This section will explore the wide range of measures adopted in order to fight organised crime.

Human misery

Human misery and trafficking is one of the cross-border crimes market as mentioned by van Duyne⁶⁵ in which the EU also intervenes. Trafficking of human beings usually relates to very organised and established networks of criminals. A first attempt to criminalise trafficking on human beings was made with the Joint Action on combating trafficking of human beings and sexual exploitation of children.⁶⁶ The Framework Decision on the trafficking of human beings followed the Joint Action.⁶⁷ The latter states in the Preamble its underlying rationale for the protection of human dignity and other human rights, as it endorses such protection through the criminalisation of the action of trafficking for the purposes of sexual exploitation and forced labour.⁶⁸ Furthermore, it holds that its aim is to complement existing measures

63 Van Duyne P., Ruggiero V., Scheinost M, Valkenburg W. (Ed) (2007) Cross-border crime in a changing Europe, Tilburg University, Institute of Criminology and Social Prevention, Prague, p.4-11.

64 Laqueur W. (1999) "The new terrorism: Fanaticism and the Arms of Mass Destruction", Oxford University Press, 217

65 van Duyne, p. 6, n. 76.

66 OJ L 63/2, [1997]

67 See n.19 above.

68 Recital (3) of the Preamble, idem.

such as the UN Convention against transnational organised crimes⁶⁹ and the Joint Action on making it a criminal offence to participate in a criminal organisation.⁷⁰ The Framework Decision defines the offence of trafficking of human beings for the purposes of labour exploitation or sexual exploitation as the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including the exchange or transfer of control over that person. It specifies that such acts shall be punishable where use is made of coercion, force or threat, including abduction or where use is made of deceit or fraud or there is an abuse of authority or of a position of vulnerability or where payments or benefits are given or received to achieve consent of the person.⁷¹ Also in the context of “human misery and trafficking” comes the adoption in 2004 of the Framework Decision on combating the sexual exploitation of children and child pornography.⁷² The Framework decision particularly requires the criminalisation of the coercion, recruitment and engaging of a child into prostitution or pornographic performances;⁷³ equally, it requires the criminalisation of the production, distribution, dissemination or transmission, supply, acquisition or possession of child pornography.⁷⁴

Economic crime

The fight against organised crime has also focused greatly on the protection of the stability of the financial system of the EU. The Council adopted a Joint action in 1998,⁷⁵ which was partially replaced by the Framework Decision on money laundering, on the identification, tracing, freezing and confiscation of the instrumentalities and the proceeds from crime.⁷⁶ The Framework Decision’s preamble declares that “money laundering is at the very heart of organised crime and should be rooted out wherever it occurs.”⁷⁷ The Joint Action and the Framework Decision call upon Member States to ensure that no reservations are made to Article 6 of the Council of Europe money laundering Convention⁷⁸ which *inter alia* categorises

69 Recital (4) of the, *idem*.

70 Recital (8), *idem*.

71 Article 1, *idem*.

72 See n. 19 above.

73 Article 2, *idem*.

74 Article 3, *Idem*.

75 OJ L 333/1, 9.12.1998

76 See n. 23 above.

77 Recital (6) of the Framework Decision.

78 Article 1 of the Framework Decision. The Joint Action contained a similar call.

money laundering as serious crimes in general.⁷⁹ The Convention in its version of 1990 defined “*laundering offences*” as *the conversion or transfer of property for the purpose of concealing or disguising the illicit origin of property or assisting in doing so; the concealment or disguise of the true nature, source, location, etc, knowing that such property was proceeds; the same as to the acquisition, possession or the use of property; and the participation, attempt, conspiracy, aiding, abetting, or facilitating and counselling the commission of an offence.*”⁸⁰

The emphasis in relation to financial crime is also seen in more measures, namely the Framework Decision on combating fraud and counterfeiting of non-cash means of payment.⁸¹ The Framework Decision calls for the criminalisation, at least in respect of credit cards, Euro cheque cards, other cards issued by financial institutions, travellers cheques, Euro cheques, other cheques and bills of exchange, of “*the theft or other unlawful appropriation of a payment instruments*”; of “*the counterfeiting or falsification of a payments instrument in order for it to be used fraudulently*”; of “*the receiving, obtaining, transporting, sale or transfer to another person or possession of a stolen or otherwise unlawfully appropriated, or of a counterfeiting or falsified payment instrument in order for it to be used fraudulently*”, and of “*the fraudulent use of a stolen or otherwise unlawfully appropriated or of a counterfeited or falsified payment.*”⁸² Performing these same acts intentionally, without right “*introducing, altering, deleting or suppressing computer data*”, by interfering with the functioning of a computer programme or system,⁸³ or the fraudulent making, receiving, obtaining, sale or transfer to another person or possession of “*instruments, articles, computer programmes and any other means peculiarly adapted for the commission of the previous referred offences*”⁸⁴ shall also be considered a criminal offence.

79 OJ L 182/1 [2001]

80 Article 6 (1) of the Convention on laundering, search, seizure and confiscation of the proceeds from crime, Strasbourg, 8. XI. 1990, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/141.htm>. The Convention was amended in 2005 – Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, Warsaw, 16.V.2005, available at <http://conventions.coe.int/Treaty/EN/Treaties/Word/198.doc>; the contents of Article 6 were moved to Article 9.

81 See n. 22 above.

82 Article 2 of the Framework Decision.

83 Article 3, Idem.

84 Article 4, Idem.

The Framework Decision on confiscation of crime related proceeds, instrumentalities and property⁸⁵ also plays an important role in the weakening of the foundations of organised crime. It requires Member States to take the necessary measures to enable the confiscation of instrumentalities and proceeds from criminal offences punishable for deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.⁸⁶ It also provides for the confiscation of proceeds originated from crimes mentioned in the Framework Decisions on the counterfeiting of the Euro, money laundering, trafficking of human beings, facilitation of unauthorised entry, transit and residence, sexual exploitation of children and child pornography, drug trafficking and terrorism provided that the offences other than money laundering are punishable with a custodial sentence of a maximum of at least between 5 and 10 years of imprisonment and, regarding money laundering of a maximum of at least 4 years of imprisonment⁸⁷, among other typical dispositions⁸⁸.

Prohibited goods

The Framework Decision on drug trafficking does not refer to organised crime directly in its preamble. This silence is understandable given that Article 31 TEU particularly refers to drug trafficking as one of the areas where the EU has competence to adopt harmonising measures where necessary. This implies that the link to organised crime as a means to justify the adoption of a measure is not necessary in this case. Regardless, much of the concern with organised crime around the world has been due to its association with illegal drugs⁸⁹ and so it was earlier in the EU. This was particularly visible in the pre-Maastricht and Maastricht era. For example, in the first European Council Conclusions to address the issue of combat against organised crime –the European Council in Rome in 1990 – the Member States emphasised the “*considerable importance attaching to the systematic and sustained strengthening of the action taken by the Community and its Member States to combat*

85 OJ L68/49 [2005]

86 Article 2 of the Framework Decision.

87 Article 3 (1) and (2), *Idem*.

88 Similarly, to many other Framework Decisions, the participation, instigation and attempt shall be punishable (Article 5). The offences applicable shall be effective, proportionate and dissuasive and, at least in serious cases, penalties shall involve deprivation of liberty (Article 6). Legal persons shall also be held liable when the offences mentioned are committed for the benefit of the legal person by any person acting individually or be any person part of the legal organ that has a legal position within the legal person (Article 7). Legal persons shall also be sanctioned by effective, proportionate and dissuasive sanctions such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision or a judicial cessation order (Article 8).

89 Levi, p. 788, n. 16.

drugs and organised crime.”⁹⁰ This link was reasserted in other Conclusions as, for instance the European Council Presidency Conclusions in Cardiff on 15 and 16 of June 1998 where it was noted that further measures were to be promoted “*stepping up the fight against drugs and organised crime.*”⁹¹ Furthermore, it is clear from the text of the Framework Decision that it also applies to organised crime, namely because specific penalties are required for such cases. The Framework Decision cannot thus be separated from the rationale used for the adoption of other measures as drug traffic and organised as so deeply intertwined.

The Framework Decision calls for the criminalisation of the “*production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs*”; of the “*the cultivation of opium poppy, coca bush or cannabis plant*”; of the “*possession or purchase of drugs with a view to conducting one of the activities listed in (a)*”; and of the “*manufacture, transport and distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs.*”⁹²

Terrorism

Terrorism is specifically mentioned by the Treaty as one of the three areas of harmonisation but, like drug trafficking, it falls under the broad context of the fight against organised crime in the EU. First, the Framework Decision on combating terrorism, the Joint Action on organised crime and the Proposal for a Framework Decision on organised crime all make the link between the two.⁹³ Second, the types of values protected by the Framework Decision (namely the political system and democratic ideology of the EU) are common to many values and interests protected by measures on organised crime as will be seen further below. Finally, doctrine tends to associate the two more and more nowadays. Indeed, terrorism and organised crime have traditionally had very different motivations, while terrorist groups tend to be

90 Page 14 of the European Council Presidency Conclusions, Rome, 14 and 15 of December 1990, available at http://www.europarl.europa.eu/summits/rome2/rd1_en.pdf

91 Para 2 of the European Council Presidency Conclusions, Cardiff, 15 and 16 of June 1998, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/54315.pdf

92 Article 2 of the Framework Decision, n.18.

93 See recital 5 of the Framework Decision on terrorism, n. 20 above; Intent 3 of the Joint Action on organised crime, n. 41 above; and page 3 of the text of the Proposal for a Framework Decision on the fight against organised crime COM(2005) 6 final, Brussels, 19.1.2005.

ideologically, politically or religiously motivated aiming at the creation of psychological repercussions and widespread fear, organised crime groups tend to be self-interested and economically driven. Nonetheless, in recent years there is a growing awareness that both might be linked⁹⁴ and although they have distinct objectives, they have common enemies: the authority and the state.⁹⁵

The definition adopted and proposed by the EU, is one of the widest ever adopted or proposed by national legislators or academics. The Framework Decision offers one of the broadest definitions of all the examples given. It states that acts committed with an *“aim of seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences.”*⁹⁶

Cyber crime

Finally, an area of relative innovation by the EU is the internet and the need to adopt legislation in cyber crime control. The Council Framework Decision on attacks against information systems⁹⁷ deals with potential *“...threats from organised crime and increasing concern at the potential of terrorist attacks against information systems which form part of the critical infrastructure of the Member States. This constitutes a threat to the achievement of a safer information society and of an area of freedom, security and justice.”*⁹⁸

94 Leong, p. 3, n. 62.

95 Laqueur, p. 217, n. 77.

96 Article 3, Idem, The Article continues in more detail stating that those offences can be the following: namely: “(a) attacks upon a person’s life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) threatening to commit any of the acts listed in (a) to (h)96.” “Any action involving aggravated theft, extortion or drawing up false administrative documents with the view of committing any of the acts mentioned earlier, shall be considered terrorist linked activities.”

97 See n. 27 above.

98 Recital (3) of the Framework Decision.

Accordingly, an effective response to those threats requires a comprehensive approach to network and information society, as provided for in the *eEurope Action Plan: an information society for all*⁹⁹ and in the Council Resolution on a European approach towards a culture of network and information security.¹⁰⁰ The Framework Decision provides for the criminalisation of access without a right to the whole or any part of an information system;¹⁰¹ of the intentional serious hindering or interruption of the functioning of an information system by inputting, transmitting, damaging, deleting, deteriorating, altering, suppressing or rendering inaccessible computer data, when committed without right;¹⁰² the same is applicable to data in a computer system.¹⁰³ The Framework Decision contains further details on penalties and liability of legal persons.¹⁰⁴

Organised crime as an umbrella for the pursuit of other goals

The EU's broad understanding of organised crime allows for such a *rationale* to serve as an "umbrella" for the achievement of other goals beyond the fight of organised criminality, namely to address common criminality and the protection of EC policies. Problematically, this expands the EU's competence to the realm of common criminality and indirectly to first pillar which in theory still lies within the Member States' realm of competence. Indeed, measures adopted under the *rationale* of organised crime are potentially applicable to common criminality, i.e. while the Preambles justify the adoption of the legislation in order to fight organised crime, no where in the text of the Framework Decisions or Joint Actions the applicability only in such cases is required. Thus, they are potentially applicable to, for instance, money laundering, fraud, counterfeiting of non-cash means of payment, cyber crime and other offences mentioned above even if these are not undertaken in the context of a

99 COM (2002)363 final, Brussels, 28.5.2002.

100 Doc 15723/02. Brussels, 28 January 2003.

101 Article 2 of the Framework Decision. Member States may chose to criminalise such conduct only in the cases where it's not minor or when a security rule was infringed.

102 Article 3 of the Framework Decision

103 Article 4, *Idem*.

104 The instigation, aiding and abetting and attempt shall also be punishable. Penalties shall be effective, proportionate and dissuasive for the majority of the crimes except for the illegal system and data interference which shall be punishable by criminal penalties of a maximum of at least between one and three years of imprisonment (Article 6 (2)). The later shall be aggravated to a maximum of at least between two and five years if committed in the context of a criminal organisation(Article 7 (1)). Legal persons shall be liable under the typical conditions (Article 8) and the traditional sanctions shall be applicable (Article 9).

criminal organisation. This is also clear from the fact that most of these Framework Decisions have particular provisions requiring harsher punishment when the offences are committed in the context of a criminal organisation, which *a contrario* implies that Framework Decisions are also applicable to offences committed outside criminal organisations.

The application of the Framework Decision on money laundering has been an example of this potentially broad scope of EU's Framework Decisions. In Greece, for instance, individuals who were not members of a criminal organisation have been convicted for money laundering for the purchase of a stolen car, for the purchasing and selling of clocks and jewellery or for the purchase of bicycles from a racketeer. Accordingly, all of these offences were previously considered misdemeanours and now come under the broad umbrella of the definition of money laundering and are considered as aiding or abetting organised criminal activities.¹⁰⁵ This potentially broad scope of measures aimed primarily to engage in controlling organised crime led Symeodidou-Kastanidou to argue that "*The measures adopted to combat organised crime in theory, primarily affect people who have nothing to do with it. Hence, organised crime seems to be utilised as a pretext for the deformation of our political system's liberal character*".¹⁰⁶ This trend of generalisation of the application of measures to acts that are not necessarily related to organised crime partly empties the main *rationale* of the fight against organised crime and the focus strictly on serious criminality. Furthermore, it opens further paths of intervention of the EU in national criminal law thus allowing it to pursue other goals beyond the ones clearly stated further emphasising the continuously expanding scope of harmonisation on criminal matters.

The potential application of such measures to other realms of criminality beyond organised crime is seen in a second dimension, which is intertwined with the protection of EC policies. This is so because the concept of organised crime of the EU also facilitates the pursuit of other goals, such as the protection of the EU's political system (Framework Decision on terrorism), of immigration and labour markets (Framework Decision on trafficking of human beings), or of the financial system (Framework Decisions on money laundering, fraud, etc), all of which are goals of the

105 All cases from Symeodidou-Kastanidou, p. 90-93, n. 65.

106 Symeodidou-Kastanidou, p. 93, n. 65.

single market which as a consequence largely benefits from the narrative of the fight against organised crime. Measures to fight human trafficking or money laundering in the context of the third pillar, for example, were adopted mainly to complement and render efficacy to a vast bulk of legislation on the topic already existent in the realm of the first pillar. Money laundering was the object of several measures adopted in the realm of the first pillar in the nineties, directed at the single market. European legislation has been adopted since 1991 to protect the financial system and financial activities from being misused for money laundering. The first measure adopted in the context of the fight against money laundering was the 1991 Directive on the “*prevention of use of the financial system for the purpose of money laundering.*”¹⁰⁷ The Directive was adopted in the context of the freedom of establishment and single market provisions, based on a threat posed to the financial system, although its scope went well beyond a strictly financial rationale and established a comprehensive framework of repression and prevention of money laundering. The Commission then replaced the Directive of 1991 by a recent Directive in 2001 and by another in 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.¹⁰⁸ The Directive now covers the laundering of drug trafficking, organised crime and fraud as defined in the EU instruments, corruption in general, and of offences that generate considerable proceeds and which are punishable by severe sentences of imprisonment, in accordance with the law of the Member State. Furthermore, the criminalisation of trafficking of human beings came to complement a broad range of measures to fight irregular immigration, namely the Directive on facilitation of unauthorised entry, transit and residence¹⁰⁹ and the Framework Decision on strengthening the penal framework to prevent the facilitation on unauthorised entry, transit and residence.¹¹⁰

Organised crime can be interpreted very loosely as it was seen in the previous section. Accordingly, particularly in regards to white collar crime, Lacey and others observe that “*we could develop an expanded perspective which would also label as ‘organised’ or ‘professional’ crime the apparently ‘respectable’ activities of corporations and companies who systematically violate environmental laws or take calculated risks in terms of the safety of their products in order to increase their*

107 OJ L 166/77, [1991]

108 OJ L 309/15, [2005]

109 OJ L 328/17, [2002]

110 OJ L 328/1, [2002]

*profits. Indeed, the line between legitimate and illegitimate profit-oriented activity turns out to be exceedingly fine.” “The idea of organised crime is open to reconstruction in the light of reflection about forms of criminal behaviour which exists”.*¹¹¹ The question to be asked with regard to the EU context is why the reconstruction of the idea of organised crime has been framed in this particularly wide ranging, broad and loose manner. It seems at this stage that the EU is using the rationale of the fight against organised crime, in relation to which it has specific competences to legislate under Article 31 (e) TEU, to regulate other areas directly or indirectly related to EU’s interests in relation to which EU’s competence is yet uncertain or even in relation to areas which are still strictly a matter of national competence, such as common criminality.

3 - The EU broad approach and the increase in criminalisation at national level

As seen previously, harmonisation of criminal law has been expanded to a considerable number of areas of intervention. Nonetheless, the measures adopted do not aim at harmonising fully national criminal law. On the contrary, their aim and object is, as seen, very limited. Furthermore, the effectiveness of Framework Decisions is limited. Article 34 (b) states that they are binding upon Member States upon the result to be achieved, whilst leaving to national authorities the choice of form and methods. In practice, Framework Decisions are very similar to Directives although two main differences tame substantially their effectiveness. First, Framework Decisions do not have direct effect and second the Commission has no mandate to oblige Member States to implement a Framework Decision or sanction that lack of implementation (there is no “enforcement action” against a Member States in the context of the third pillar). However, despite the fact that harmonisation of criminal law was envisaged to be minimal and that Framework Decisions have a limited effectiveness, the influence they exert on national legal orders, potentially or actually, is significant.

This section will thus explore how the expanding intervention of the EU in harmonisation matters reflects on national criminal laws, namely by leading to an increase in criminalisation at domestic level, which is particularly visible in two

¹¹¹ Lacey N., Wells C., Meure D. (1990) “Reconstructing Criminal Law”, Law in Context Series, Weidenfeld and Nicolson, London, p. 440.

types of modifications required by the implementation of the Framework Decisions. First, the latter are requiring Member States to introduce, on occasion, new types of criminal offences that did not exist in their legal orders. Second, Framework Decisions are often enlarging the pre-existent national definitions of punishable conducts, which leads to the existence of more acts considered as criminal because the definitions given are broader. This occurs primarily because the concepts of criminal behaviours agreed to at European level have a broader scope than that of many pre-existent national legal offences. Ultimately, this is leading to a more restrictive criminal law across the EU, as more and more actions are punishable. This influence of EU measures on national laws is also made possible potentiated by the fact that Framework Decisions (and Joint Actions) establish the minimum standard for national laws, which tends to affect only more lenient domestic legislation than the European standard. Thus, as the objective envisaged is the one of minimal harmonisation, which leaves Member States the option to adopt or maintain more restrictive national legislations than the ones provided for by the Framework Decisions, only national laws which do not yet have that level of restrictiveness will be forced to change. This modification will be towards the criminalisation of new conducts or towards the broadening of the scope of existing criminal offences. This phenomenon is not observable in all adopted EU measures but there are a considerable number of examples.¹¹²

Stricter national law under the rationale of organised crime

Examples can be found with regard to trafficking in human beings, countries such as Estonia and Poland did not have criminal offences corresponding with the conducts described in the Framework Decision, while all other Member States already contained provisions relating to such acts.¹¹³ Even in countries where such acts were already considered as offences, the definition of trafficking in the Framework Decision is broader than most pre-existing definitions in national laws and even in international instruments. This is because the EU introduced the additional general element of “labour exploitation”, while most legislations covered trafficking only for

112 The data collection and thus the conclusions derived are still preliminary at this stage.

113 Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, Brussels, 02.05.2006, COM(2006) 187 final, page 6.

the purposes of sexual exploitation, prostitution or forced or slave labour, while the purposes of labour exploitation are usually covered by legislation on smuggling of human beings (the concept itself is very general and difficult to circumvent). The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, for example, also offers a very broad notion of trafficking,¹¹⁴ but instead of the explicit purpose of “labour exploitation”, it mentions “forced labour or services, slavery or practices very similar to slavery”,¹¹⁵ in a more limited formulation than that of the Framework Decision.

Dutch law did not include in its definition of trafficking any other purpose beside sexual exploitation.¹¹⁶ However, with the Framework Decision, the provision was amended in order to include “coerced or forced work or services, slavery and practices and bondage comparable to slavery.”¹¹⁷ Likewise, Portuguese law, in the earlier versions of the Portuguese Penal Code, only considered trafficking of persons for the purpose of sexual exploitation.¹¹⁸ However, in 2007 the crime was expanded in order to incorporate the purpose of labour exploitation and extraction of organs¹¹⁹ thus complying with the Framework Decision. The crime was also moved from the section of crimes against the “sexual freedom of the person” to the section of “crimes against personal freedom”.¹²⁰ Such a change was welcomed by legal commentators who had long been calling for such an expansion in the categorisation of the crime.¹²¹

Likewise, the Framework Decision on terrorism also offers examples of the increasing scope of national criminal laws. The definition of terrorist offences led to the adoption of new criminal offences in most Member States and to an enlargement

114 “The recruitment, transportation, transfer, harbouring or receipt of a person, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”, Article 3 of the Protocol to Prevent Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention Against Organised Crime, A753/383, Annex II.

115 “The exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices very similar to slavery, servitude or the removal of organs.”, *Idem*.

116 Article 250a of the Criminal Code, after changes introduced by the Act of 13 July 2002.

117 Article 1 of the Framework Decision, n. 24.

118 Article 169 in the version of Decreto Lei 48/95 of 15 of March and following the alterations of Lei 99/2001 of 25 of August.

119 Lei 59/2007 of 4 of September.

120 *Idem*.

121 Paulo Costa (2004) “Trafico de Pessoas, Algumas consideracoes legais”, *Socius* working papers, n.º 8, *Socius – ISEG/UTL*, Lisboa, p. 8.

of the definition already in existence in France, Germany, Italy, Portugal, Spain and the UK.¹²² Besides, the definition adopted and proposed by the EU, is one of the largest ever adopted or proposed by national legislations or academics. The definition of terrorism has always involved a great amount of controversy.¹²³ Before the implementation of the Framework Decision, the majority of States treated terrorist actions as common offences. This changed with the Framework Decision, which obliged the 27 Member States to specifically define terrorist offences.¹²⁴ Only six Member States had specific criminal dispositions covering terrorism: France, Germany, Italy, Portugal, Spain and the UK, which basically treated terrorist crimes as common offences with a particular motivation. France, for instance, criminalized as “terrorist” an act that can seriously alter public order through threat or terror. Portugal included acts that were able to prejudice national interests, to alter or disturb the State’s institutions, force public authorities to do or not to do something or threaten individuals or groups. Spain treated subverting constitutional order and seriously altering public peace as terrorist acts. Italy had a law similar to Spain’s, criminalising terrorist actions as those that are able to subvert the democratic order. Finally, the UK defined terrorist offences as acts capable of influencing the government or intimidating the public order or a section of the public with the purpose of supporting a political, religious, or ideological cause.¹²⁵ The six countries which already criminalised terrorist acts had to enlarge the number and type of behaviours to be included in their definitions. The remaining EU Member States were required to create a “new offence” that covers conducts that either were not punished before or were punished as “common” criminality and hence considered less serious or morally wrong, rather than specifically labelled as terrorist crimes, as they are now.

122 Proposal for a Council Framework Decision on combating terrorism, Brussels, 19.9.2001, COM (2001) 521 final, page 6 and 7.

¹²³ Saul B. (2003) “International Terrorism as a European Crime: the policy rationale for criminalisation”, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 11/4, 323-349, p. 135. Different authors proposed different criteria to determine what defines and act as terrorist, and thus what distinguished it from other types of crimes.

124 Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, Brussels, 02.05.2006, COM(2006) 187 final, page 6.

125 *Idem*, pages 3, 6 and 7.

In relation to illicit drug trafficking there are also some relevant changes in national legislations. The national legislation of at least four Member States¹²⁶ did not include “illicit drug trafficking” as a particular criminal offence, although they often focused on punishing related offences, such as production, cultivation, extraction, acquisition, and possession, among others.¹²⁷ A study by the United Nations showed that there were considerable differences between national laws.¹²⁸ German law, for instance, criminalised “illicit narcotics trafficking” and Italian law, the “distribution of illegal drugs”.¹²⁹ The use of the expression “drug trafficking” is necessarily broader than the latter, because “drug” includes more substances than “narcotics”. Indeed, marijuana or even a prescription medication can be included in the concept of “drug”, while only opium, morphine or, in the broad sense, cocaine and heroin are considered “narcotics.”¹³⁰ Hence, to criminalise the trafficking of drugs is more restrictive than to criminalise the trafficking of narcotics or illegal drugs and while the former would not, *strictu sensu*, be considered a criminal offence under German law it is required to be so following the Framework Decision on drug trafficking. Moreover, the necessity of the substance to be “illicit” is also dropped. This means that the trafficking of drugs that are not prohibited must now also be criminalised in Italy. Finally, trafficking is a broader concept than mere “distribution”, hence Italian law must also enlarge the punishable conduct to cover cases which are not distribution but which might be considered trafficking.

Furthermore, the Framework Decision on attacks against information systems also emphasises this trends. The proposal for a Framework Decision holds that national laws in this area contained significant gaps and differences. Spain, The Netherlands and Poland for instance did not criminalise the unauthorised but intentional access to information systems altogether (so-called “hacking”), whose criminalisation is now

126 The data was collected from the UN Report by Savona (1995) covering Germany, Italy, Poland and the UK.

127 Proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking COM (2001) 259 final, Brussels, 23.5.2001, page 5.

128 Proposal for a Council Framework Decision laying down the minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, Brussels, 23.5.2001, COM (2001) 259 final, page 5.

129 Savona E. (1995) “Organised crime across-borders”, The European Institute for crime prevention and control, affiliated with the United Nations, HEUNI Papers N 6, p. 27-28.

130 Definitions from the Oxford Advanced Learners Dictionary, Ed. Sally Wehmeier, 2002, Oxford University Press.

called for by Article 3 of the Framework Decision.¹³¹ Greece, Italy and Slovenia, on the other hand, only criminalised hacking when the system is protected by security measures, condition not required by the Framework Decision. Finally, Greece did not criminalise the illegal interference of data, whereas the United Kingdom, Belgium, Spain and Finland criminalised only the alteration, damaging or deterioration of computer data,¹³² but not the deletion, suppression or rendering inaccessible of the same data, as required by the Article 4 of Framework Decision.

These examples of actual and potential extended criminalisation in the EU space reflect the paradox of minimum harmonisation in criminal matters: while the harmonisation of criminal law is to focus merely on minimum elements constituent of crimes, as seen earlier, this is sufficient to substantially change the national legal orders, increasing its scope both qualitatively and quantitatively. This increased scope suggests that the EU measures are making more harsh the criminal law of a number of national legal orders, as these are required to criminalise more offences than before.

To be sure, the harshening of national legal systems is a phenomenon common to many western legal orders for some decades now. Whilst the USA and the UK are the most striking examples in this matter,¹³³ many other European countries have been evolving towards a harsher penalty either through the imposition of harsher sentences or by passing stricter statutes (although the studies available focuses almost exclusively on punishment and not on the definition of offences).¹³⁴ This suggests that European measures came to potentiate these trends by bringing about broader definitions of crimes into national legal orders.

131 Delmas-Marty M., Giudicelli-Delage G., Lambert-Abdelgawad E. (2003) "L'Harmonisation des Sanction Penales en Europe", Societe de Legislation Compare, Unite Mixte de recherch  de Droit Compare de Paris, Vol. 5, p. 355-356.

132 Idem

133 See, for examples, Simon J. (2007) "Governing through crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear", Oxford University Press; Garland, D. (2001) "The Culture of Control: crime and social order in contemporary society", Oxford University Press; Lacey N., "Escaping the Prisoner's Dilemma", The Hamilton Lectures, Cambridge University Press, 2007; and Hudson, B., "Diversity, crime and criminal justice", in The Oxford Handbook of Criminology, Eds Maguire, M., Morgans, M. and Reiner, R., Oxford University Press, 2007.

134 Cavadino M., Dignan J. (2005) "Penal Systems: a Comparative Approach", Sage

Conclusion

Harmonisation of criminal law was envisaged as minimal not only in its content – minimum elements constituent of crimes and penalties – but also in the areas of intervention that are clearly mentioned in the Treaty – organised crime, terrorism and drug trafficking. Nonetheless, such a minimal nature has been hardly kept and what has been seen is a dynamic of expansion of the number of areas in which the EU intervenes and of further criminalisation. Organised crime has been the key rationale for the adoption of the majority of measures and the enactment of a very broad approach in this domain has facilitated its application to petty criminality and the indirect attainment of other objectives. Furthermore, EU measures are leading to an increase in criminalisation in several national legal orders by creating new criminal offences and by enlarging the scope of pre-existent ones. The overall dynamic of this field is definitely one of increasing intervention and criminalisation which comes to emphasise the existent trends of harsher criminal law seen in many western democracies.