

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**  
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

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**The Council Framework Decision  
on the Fight against  
Organised Crime:  
What can be done to strengthen  
EU legislation in the field?**

NOTE





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

**The Council Framework Decision on the**  
**Fight against Organised Crime:**  
**What can be done to strengthen EU**  
**legislation in the field?**

**NOTE**

**Abstract**

The 2008 Framework Decision on the fight against organised crime provides a sophisticated framework of criminalisation on participation in a criminal organisation. However, it requires improvement both in terms of legal certainty and its scope, and in terms of the level of harmonisation it achieves. The Framework Decision is drafted in broad and vague terms which may lead to overcriminalisation. A greater degree of harmonisation is necessary not only to ensure a level playing field among Member States, but also to facilitate the operation of other elements of European criminal law. The Lisbon Treaty includes a number of provisions which may serve as legal bases for the further development of the law in the field. Any new proposal should be based on a thorough evaluation of the implementation of the 2008 Framework Decision by Member States and of the interpretation of the relevant concepts by national courts.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).

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## **TABLE OF CONTENTS**

<b>LIST OF ABBREVIATIONS</b>	<b>4</b>
<b>EXECUTIVE SUMMARY</b>	<b>5</b>
<b>1. INTRODUCTION</b>	<b>8</b>
<b>2. THE CRIMINALISATION OF PARTICIPATION IN A CRIMINAL ORGANISATION AT EU LEVEL</b>	<b>8</b>
2.1. History and context	8
2.2. Synergies with international fora – the European Union and the United Nations Convention on Transnational Organised Crime (the Palermo Convention)	9
2.3. The 2008 Framework Decision on the fight against organised crime	11
<b>3. AN ASSESSMENT OF THE 2008 FRAMEWORK DECISION</b>	<b>14</b>
3.1. Vagueness leading to over criminalisation	14
3.2. Limited harmonisation	15
<b>4. THE IMPORTANCE OF CRIMINALISATION OF PARTICIPATION IN A CRIMINAL ORGANISATION FOR OTHER EUROPEAN CRIMINAL LAW MEASURES</b>	<b>16</b>
4.1. Participation in a criminal organisation as an aggravating circumstance	16
4.2. Participation in a criminal organisation as a money laundering offence	17
<b>5. THE CRIMINALISATION OF PARTICIPATION IN A CRIMINAL ORGANISATION IN THE CONTEXT OF MUTUAL RECOGNITION IN CRIMINAL MATTERS</b>	<b>18</b>
<b>6. ORGANISED CRIME IN THE WORK OF EUROPOL AND EUROJUST</b>	<b>19</b>
<b>7. THE CRIMINALISATION OF ORGANISED CRIME AND THE LISBON TREATY</b>	<b>22</b>
7.1. Harmonisation of substantive criminal law	22
7.2. Organised crime in the work of Europol and Eurojust post-Lisbon	23
7.3. Harmonisation of criminal procedure	23
<b>8. CONCLUSIONS AND RECOMMENDATIONS</b>	<b>24</b>
<b>REFERENCES</b>	<b>27</b>

## **LIST OF ABBREVIATIONS**

<b>JHA</b>	Justice and Home Affairs
<b>OCTA</b>	Organised Crime Threat Assessment
<b>SOCTA</b>	Serious and Organised Crime Threat Assessment

## EXECUTIVE SUMMARY

### Background

The European Union has been a pioneer in developing a comprehensive criminal law framework against organised crime. The latest piece of EU legislation in the field, the 2008 Framework Decision on the fight against organised crime, reflects the synergy between the EU and international *fora* such as the United Nations in the development of global standards in the field. The Framework Decision provides a sophisticated framework of criminalisation on participation in a criminal organisation. However, it requires improvement both in terms of legal certainty and its scope, and in terms of the level of harmonisation it achieves.

### Aim

This note will provide an analysis and evaluation of the Framework Decision. The latter will be examined from a historical and contextual perspective, and its main provisions will be analysed and critically evaluated. The note will examine the impact of the criminalisation of the participation in a criminal organisation in terms of legal certainty, but also in terms of the degree of harmonisation achieved. It will be argued that further harmonisation is necessary not only in terms of domestic criminal law, but also in order to facilitate the operation of other aspects of European criminal law including penalties for other offences, the operation of the principle of mutual recognition in criminal matters, and the work of Europol and Eurojust. The note will then explore the opportunities offered by the Lisbon Treaty for further action on harmonisation of the criminal law on organised crime.

### KEY FINDINGS

- The European Union has been a pioneer in developing a comprehensive criminal law framework against organised crime.
- The latest piece of EU legislation in the field, the 2008 Framework Decision on the fight against organised crime, reflects the synergy between the EU and international *fora* such as the United Nations in the development of global standards in the field.
- While it provides a sophisticated framework of criminalisation on participation in a criminal organisation, the Framework Decision requires improvement both in terms of legal certainty and its scope, and in terms of the level of harmonisation it achieves.
- The Framework Decision attempts to reconcile two seemingly different objectives: to introduce a specific offence of participation in a criminal organisation, which is distinct from other association/membership offences in domestic criminal justice systems; and at the same time not to be too rigid and narrow in its definition of organised crime, by taking into account the view that criminal organisations do not always operate under a hierarchical structure.

- The result of this effort is a seemingly contradictory definition of a criminal organisation which has the potential to lead to over criminalisation, as the elements of a criminal organisation are defined very broadly and with flexible, ambiguous criteria.
- A greater degree of harmonisation is necessary not only to ensure a level playing field among Member States, but also to facilitate the operation of other elements of European criminal law. These include the operation of the principle of mutual recognition in criminal matters and the work of bodies such as Europol and Eurojust.
- The Lisbon Treaty includes a number of provisions which may serve as legal bases for the further development of the law in the field.
- Any new proposal should be based on a thorough evaluation of the implementation of the 2008 Framework Decision by Member States and of the interpretation of the relevant concepts by national courts.
- Amending the 2008 Framework Decision must ensure both a higher degree of harmonisation and a narrower criminalisation of participation in a criminal organisation which will achieve legal certainty and justify the need for the separate and distinct criminalisation of participation in a criminal organisation from other related offences.

## RECOMMENDATIONS

- **Recommendation 1:** The European Parliament should request the Commission to carry out a detailed evaluation of the implementation by Member States of the 2008 Framework Decision on organised crime. The evaluation should cover both the legislative implementation of the Framework Decision and the interpretation of the relevant concepts by national courts.
- **Recommendation 2:** The European Parliament should request the Commission to provide detailed information on the implementation of other measures of substantive EU criminal law which include participation in a criminal organisation as an aggravating circumstance. Data should cover both the legislative implementation and the interpretation of participation in a criminal organisation as an aggravating circumstance by national courts.
- **Recommendation 3:** The European Parliament should request the Commission to provide detailed information on the implementation of the prohibition of the laundering of proceeds from organised crime by EU Member States. Data should cover both legislative implementation and case-law.
- **Recommendation 4:** The European Parliament should ask Europol to give a detailed explanation of how it uses the legal definition of organised crime (in particular the participation in a criminal organisation and the definition of an organised crime group) in its operational work, and in particular in the development of the Organised Crime Threat Assessments (OCTAs).



- **Recommendation 5:** The European Parliament should ask Eurojust to give a detailed explanation of how it uses the legal definition of organised crime (in particular the participation in a criminal organisation and the definition of an organised crime group) in its operational work, and whether differences in definitions at national level pose obstacles to Eurojust's work.
- **Recommendation 6:** In the light of the outcome of the detailed evaluation of the implementation of the 2008 Framework Decision on organised crime, the European Parliament should consider the option of supporting the amendment of the Framework Decision.
- **Recommendation 7:** When considering proposals to amend the 2008 Framework Decision, the European Parliament should take into account the multitude of aims and functions of the criminalisation of the participation in a criminal organisation as outlined above, as well as the impact of uncritical criminalisation on legal certainty and fundamental rights.
- **Recommendation 8:** When considering proposals to amend the 2008 Framework Decision, the European Parliament must aim to ensure both a higher degree of harmonisation and a narrower criminalisation of participation in a criminal organisation. The latter will achieve legal certainty and justify the need for the separate and distinct criminalisation of participation in a criminal organisation from other related offences.

## 1. INTRODUCTION

This note will provide an analysis and evaluation of the current EU legal framework on the criminalisation of participation in a criminal organisation. The focus will be on the main EU legislative instrument in the field, the 2008 Framework Decision on organised crime. The Framework Decision will be examined from a historical and contextual perspective, and its main provisions will be analysed and critically evaluated. The note will examine the impact of the criminalisation of the participation in a criminal organisation in terms of legal certainty, but also in terms of the degree of harmonisation achieved. It will be argued that further harmonisation is necessary not only in terms of domestic criminal law, but also in order to facilitate the operation of other aspects of European criminal law including penalties for other offences, the operation of the principle of mutual recognition in criminal matters, and the work of Europol and Eurojust. The note will then explore the opportunities offered by the Lisbon Treaty for further action on harmonisation of the criminal law on organised crime.

## 2. THE CRIMINALISATION OF PARTICIPATION IN A CRIMINAL ORGANISATION AT EU LEVEL

### KEY FINDINGS

- The European Union has been a pioneer in developing a comprehensive criminal law framework against organised crime.
- The latest piece of EU legislation in the field, the 2008 Framework Decision on the fight against organised crime, reflects the synergy between the EU and international *fora* such as the United Nations in the development of global standards in the field.
- While it provides a sophisticated framework of criminalisation on participation in a criminal organisation, the Framework Decision requires improvement both in terms of legal certainty and its scope, and in terms of the level of harmonisation it achieves.

### 2.1. History and context

The fight against organised crime has been at the forefront of the EU Justice and Home Affairs (JHA) agenda, as evidenced by the two Action Plans to fight organised crime in 1997 and 2000, the 1999 Tampere Conclusions and the 2004 Hague Programme. A central element in this context is the criminalisation of participation in a criminal organisation. Defining organised crime activities and treating them as criminal offences is an important signal of the focus of criminal justice policy on combating this phenomenon. It is also an essential task in order to define and clarify the mandate of EU criminal justice bodies such as Europol and Eurojust (combating organised crime is a central task to both). However, defining and criminalising organised crime is a legally complex task, as it is difficult to translate into a legal norm providing a sufficient degree of legal certainty and precision the multifarious activities of organised criminals. Thorny issues in this respect involve the legal

definition of organised criminal groups, in particular with regard to the degree of organisation, the structure (or not) of such groups and the number of people involved. Further issues of difficulty include the *mens rea* requirements, i.e. the degree of knowledge or intention of somebody to participate in organised crime activities, but also the degree of actual participation required for criminalisation – with the main concern being, like in the terrorist offences, that there is a danger criminalizing mere support of the aims of a group without actually committing a criminal act. Added to this complexity have been the significant differences between EU Member States in their criminal law treatment of organised crime, with a number of Member States not including organised crime-specific offences in their criminal law.

The European Union responded to these challenges in 1998 by a third pillar Joint Action 'on making it a criminal offence to participate in a criminal organisation to participate in a criminal organisation in the European Union'<sup>1</sup>. The Joint Action was adopted to implement Recommendation 17 of the 1997 European Union Action Plan to Combat Organised Crime<sup>2</sup>. It provided an ambitious attempt to define organised crime groups, taking into account law enforcement perceptions, and criminalised active participation in such an organisation, *or*, alternatively, conspiracy to commit any of the offences stated in the instrument. The use of these two very different alternative approaches to criminalisation is striking in an instrument which attempts to harmonise criminal law, but can be explained as necessary to achieve compromise – and unanimous agreement in the Council- in the light of very different national legal approaches to organised crime (with the conspiracy alternative satisfying in particular the English legal tradition)<sup>3</sup>.

## **2.2. Synergies with international *fora* – the European Union and the United Nations Convention on Transnational Organised Crime (the Palermo Convention)**

The model adopted in the EU in 1998 has proven to be quite influential in the adoption of the 2000 United Nations Convention on Transnational Organised Crime (the Palermo Convention). The Convention includes a specific provision on the criminalisation of participation in an organised crime group. Article 5 calls upon each State Party to establish the following as criminal offences, when committed intentionally:

- (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
  - (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
  - (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

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<sup>1</sup> Joint Action 98/733/JHA, OJ L351, 29 December 1998, p.1.

<sup>2</sup> European Union Action Plan to Combat Organised Crime, OJ C251, 15 August 1997, p.1

<sup>3</sup> For an analysis of the Joint Action, see V .Mitsilegas, *Defining Organised Crime in the European Union: the Limits of European Criminal Law in an Area of Freedom, Security and Justice*, European Law Review, vol.26, December 2001, pp.565-581.

- a. Criminal activities of the organized criminal group;
- b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim<sup>4</sup>.

Organised criminal group is in turn defined as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Palermo Convention, in order to obtain, directly or indirectly, a financial or other material benefit'<sup>5</sup>.

The provisions on the criminalisation of participation in a criminal organisation have been the outcome of lengthy negotiations, reflecting the difficulty of State Parties to reach agreement as regards the criminalisation of organised crime. It has been noted that it was recognised in negotiations that it would be difficult for many states to envisage legislation that would make mere participation in an organised criminal group a criminal offence<sup>6</sup>. Reflecting different national approaches, the Convention actually maintains the model introduced by the 1998 EU Joint Action offering various criminalisation alternatives. The option criminalising of participation in a criminal organisation in Article 5(a)(ii) is coupled with the option of criminalising the agreement to commit a serious crime (Article 5(a)(i)). The latter wording is based on the offence of conspiracy which reflects the common law tradition<sup>7</sup>.

The European Union has been instrumental in negotiating the Palermo Convention. Its negotiating position with regard to the (then) third pillar aspects of the Convention was outlined in a Joint Position which was adopted before the entry into force of the Amsterdam Treaty<sup>8</sup>, while subsequent negotiating mandates to the Commission as regards the (then) first pillar elements of the Convention can be found in an *ad hoc* manner in various Council Conclusions<sup>9</sup>. The Joint Position was justified as necessary in order to 'contribute as fully as possible to the negotiation of the proposed convention and to avoid incompatibility between the proposed convention and instruments drawn up in the Union'<sup>10</sup>. In this light, the Joint Position called for account to be taken of measures already adopted or in the course of preparation or adoption in accordance with the 1997 EU Action Plan on Organised Crime<sup>11</sup>. Particular emphasis in this context was placed in the need for Member States to ensure consistency between the UN Convention and the 1998 EU Joint Action on the criminalisation of participation in a criminal organisation as regards the definition of such participation and its criminalisation<sup>12</sup>. The Joint Position then went on to provide detailed guidelines on the negotiating position with regard to the scope of the Convention and the definition of organised crime, which mirrors the definition adopted at EU level. According to the Joint Position,

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<sup>4</sup> United Nations Convention Against Transnational Organized Crime, 2000, article 5

<sup>5</sup> *Ibid.*, Article 2(a).

<sup>6</sup> D. McClean, *Transnational Organized Crime. A Commentary on the UN Convention and its Protocols*, Oxford University Press, 2007, p.60.

<sup>7</sup> Mc Clean, *op. cit.*, p.62.

<sup>8</sup> Joint Position 1999/235/JHA of 29 March 1999 defined by the Council on the basis of Article K.3 of the Treaty on European Union, on the proposed United Nations convention against organised crime, OJ L87, 31 March 1999, p.1.

<sup>9</sup> See for instance the conclusions of the Telecommunications Council of 2 May 2000 (Council doc. 8058/00, Presse 127-G) according to which 'the Council authorised the Commission to negotiate on behalf of the Community the draft UNTOC with regard to measures against money laundering, one of the main strands of the Convention, which fall within the scope of the Community's powers, taking the provisions of the 1991 money laundering Directive as a basis.'

<sup>10</sup> Joint Position 1999/235/JHA of 29 March 1999, Preamble, recital 8.

<sup>11</sup> *Ibid.*, Preamble, recital 5.

<sup>12</sup> *Ibid.*, Article 1(2). The Joint Position also called for consistency between the Convention and the 1998 EU Joint Action on confiscation – see Article 1(6).

'insofar as the other provisions of the draft convention are concerned, it should apply as broadly as possible to the activities of criminal organisations and to international cooperation for combating such organisations. In principle, the relevant provisions of the draft convention should encompass the activities of persons, acting in concert with a view to committing serious crime, involved in any criminal organisation which has a structure and is, or has been, established for a certain period of time. They should not be limited to groups with a highly developed structure or enduring nature, such as mafia type organisations; and the organisations need not necessarily have formally defined roles for their participants or continuity of membership.'<sup>13</sup>

The substantive provisions of the Palermo Convention as regards the criminalisation of organised crime demonstrate that the 'consistency' objective outlined in the 1999 EU Joint Position has been largely achieved. As seen above, the definition of an organised crime group and the criminalisation of participation in a criminal organisation in the Convention<sup>14</sup> largely mirror the provisions of the EU 1998 Joint Action on making it a criminal offence to participate in a criminal organisation in a Member State of the EU<sup>15</sup>.

### **2.3. The 2008 Framework Decision on the fight against organised crime**

The adoption of the Palermo Convention in turn led to calls to amend the Joint Action in order to align Union law with the Convention. In this context, the Commission tabled in 2005 a proposal for a Framework Decision 'on the fight against organised crime' aiming at replacing the 1998 Joint Action<sup>16</sup>. According to the Commission, the new proposal took into account developments since 1998, including the introduction of Framework Decisions as a form of third pillar law in Amsterdam and the need to take into account of subsequent legislative developments such as the 2000 United Nations Convention on Transnational Organised Crime (the Palermo Convention) and the EU Framework Decision on terrorism<sup>17</sup>. The Commission proposal harmonised further the crime of participation in a criminal organisation (by deleting the conspiracy variant)<sup>18</sup>, aligned EU law with the Palermo Convention by the criminalisation of directing a criminal organisation<sup>19</sup> and the definition of an organised crime group (including what constitutes a 'structured' group)<sup>20</sup>, added provisions on mitigating circumstances<sup>21</sup> as well as specific provisions on penalty levels<sup>22</sup> and introduced specific provisions on the position of victims, along the lines of the Framework Decision on terrorism<sup>23</sup>.

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<sup>13</sup> Ibid., Article 1(3).

<sup>14</sup> Ibid., Articles 2 and 5 respectively.

<sup>15</sup> Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351, 29 December 1998, p. 1

<sup>16</sup> Commission Proposal for a Council Framework Decision on the fight against organised crime, COM (2005) 6 final, Brussels 19 January 2005

<sup>17</sup> Ibid., pp.3,4.

<sup>18</sup> Article 2 of the proposal.

<sup>19</sup> Ibid., Article 2(b).

<sup>20</sup> Ibid., Article 1.

<sup>21</sup> Ibid., Article 4.

<sup>22</sup> Ibid., Article 3.

<sup>23</sup> Ibid., Article 8.

Negotiations have resulted in the adoption of a third pillar Framework Decision 'on the fight against organised crime'<sup>24</sup>. The Framework Decision builds upon the Palermo Convention<sup>25</sup> and repeals the 1998 Joint Action<sup>26</sup>. Its approach is based on criminalising participation in a criminal organisation. According to the Framework Decision,

- 'criminal organisation' means 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, to obtain, directly or indirectly, a financial or other material benefit';
- 'structured association', in turn, means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure<sup>27</sup>.

However, the criminalisation of participation in a criminal organisation is not the only option offered to Member States. In contrast with the original Commission proposal, the Framework Decision has retained the dual framework established by the 1998 Joint Action and subsequently followed by the Palermo Convention with regard to the criminalisation of participation in a criminal organisation. According to Article 2 of the Framework Decision,

Each Member State shall take the necessary measures to ensure that *one or both* of the following types of conduct related to a criminal organisation are regarded as offences:

(a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation's criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such 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 referred to in Article 1, even if that person does not take part in the actual execution of the activity.

This dual approach to criminalisation is further reflected in the provisions on the penalties for participation in a criminal organisation. Article 3(1) of the Framework Decision calls upon Member States to take the necessary measures to ensure that:

(a) the offence referred to in Article 2(a) [participation in a criminal organisation] is punishable by a maximum term of imprisonment of at least between two and five years; or

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<sup>24</sup> Council Framework Decision 2008/841/JHA, OJ L 300, 11 November 2008, p.42.

<sup>25</sup> Ibid., Preamble, recital 6.

<sup>26</sup> Ibid., Article 9.

<sup>27</sup> Ibid., Article 1. The definition is very similar to the one of a terrorist group in Article 2 of the Council Framework Decision on combating terrorism- Council Framework Decision 2002/475/JHA, OJ L164, 22 June 2002, p.3. However, unlike the terrorism Framework Decision, the 2008 Framework Decision has not criminalised the direction of an organised crime group.

(b) the offence referred to in Article 2(b) [conspiracy-type offence] is punishable by the same maximum term of imprisonment as the offence at which the agreement is aimed, *or* by a maximum term of at least between two and five years

This dual approach to criminalisation followed by the Framework Decision has caused the reaction of the Commission which issued (jointly with France and Italy) a strongly worded statement which is annexed to the Framework Decision. It states that:

'The Commission considers that the Framework Decision on the fight against organised crime *fails* to achieve the objective sought by the Commission in relation to Joint Action 98/733/JHA on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, and in relation to the United Nations Convention Against Transnational Organised Crime [...] to which the Community has been a party since 29 April 2004. The Framework Decision *does not* achieve the minimum degree of approximation of acts of directing and participating in a criminal organisation on the basis of a single concept of such an organisation, as proposed by the Commission and as already adopted in Framework Decision 2002/475/JHA on the fight against terrorism. Furthermore, the Framework Decision enables Member States *not* to introduce the concept of criminal organisation *but to continue to apply existing national criminal law* by having recourse to general rules on participation in and preparation of specific offences.

The Commission is therefore obliged to note that the Framework Decision does not achieve the objective of approximation of legislation on the fight against organised crime as provided for in the Hague Programme<sup>28</sup>.

Further elements of the Framework Decision are the introduction of the treatment of the commission of an offence within the framework of a criminal organisation as an aggravating circumstance<sup>29</sup>, as well as standard provisions on liability of legal persons<sup>30</sup> and jurisdiction<sup>31</sup>. As with the provision on aggravating circumstances, provisions which may have a substantial impact on domestic criminal justice systems - are the provisions establishing mitigating circumstances<sup>32</sup> and the provisions relating to the absence of a requirement of a report or accusation by victims to conduct investigations or prosecutions into organised crime<sup>33</sup>.

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<sup>28</sup> Council of the European Union, Proposal for a Council Framework Decision on the fight against organised crime, Council document 9067/06, Brussels, 10 May 2006. Emphasis added.

<sup>29</sup> Council Framework Decision 2008/841/JHA, Article 3.

<sup>30</sup> *Ibid.*, Articles 5 and 6.

<sup>31</sup> *Ibid.*, Article 7.

<sup>32</sup> *Ibid.*, Article 4.

<sup>33</sup> *Ibid.*, Article 8.



### 3. AN ASSESSMENT OF THE 2008 FRAMEWORK DECISION

#### KEY FINDINGS

- The Framework Decision attempts to reconcile two seemingly different objectives: to introduce a specific offence of participation in a criminal organisation, which is distinct from other association/membership offences in domestic criminal justice systems; and at the same time not to be too rigid and narrow in its definition of organised crime, by taking into account the view that criminal organisations do not always operate under a hierarchical structure.
- The result of this effort is a seemingly contradictory definition of a criminal organisation which has the potential to lead to over criminalisation, as the elements of a criminal organisation are defined very broadly and with flexible, ambiguous criteria.
- A greater degree of harmonisation is necessary not only to ensure a level playing field among Member States, but also to facilitate the operation of other elements of European criminal law. These include the operation of the principle of mutual recognition in criminal matters and the work of bodies such as Europol and Eurojust.
- Any new proposal should be based on a thorough evaluation of the implementation of the 2008 Framework Decision by Member States and of the interpretation of the relevant concepts by national courts.
- Amending the 2008 Framework Decision must ensure both a higher degree of harmonisation and a narrower criminalisation of participation in a criminal organisation which will achieve legal certainty and justify the need for the separate and distinct criminalisation of participation in a criminal organisation from other related offences.

The 2008 Framework Decision aims at providing an up-to-date, sophisticated criminal law framework to combat organised crime, and is largely consistent with the criminalisation approach taken by the drafters of the Palermo Convention the content of which the European Union helped to shape. However, translating the complex phenomenon of organised crime into clear and unambiguous law which would take into account the legal and constitutional specificities of all EU Member States is far from an easy task. In this light, there are two main concerns with regard to the criminalisation of the participation in a criminal organisation in the 2008 Framework Decision:

#### 3.1. Vagueness leading to over criminalisation

The Framework Decision attempts to reconcile two seemingly different objectives: to introduce a specific offence of participation in a criminal organisation, which is distinct from other association/membership offences in domestic criminal justice systems; and at the same time not to be too rigid and narrow in its definition of organised crime, by taking into account the view that criminal organisations do not always operate under a hierarchical structure, but may also operate in networks. The result of this effort is a seemingly



contradictory definition of a criminal organisation: on the one hand, criminalisation requires participation in a *structured association established over a period of time* (structure and duration being the distinguishing features of the organised crime offences); on the other hand, in case the above requirements prove to be too narrow, a 'structured association' does not really have to be that structured: it does not have to have formally defined roles for its members, continuity of its membership, *or a developed structure*. As regards duration, it is enough for such an association not to be randomly formed for the immediate commission of an offence.

The ambivalence in this wording has the potential to lead to over criminalisation, as the elements of a criminal organisation are defined very broadly and with flexible, ambiguous criteria. Great discretion, with limited guidance, is left to the national legislator and judge to implement and interpret these provisions. The drafting of the Framework Decision does not contribute to legal certainty in this context. The European Parliament has attempted to address this lack of legal certainty in its opinion to the draft of the 2008 Framework Decision by proposing the following wording as regards the structure and duration of a criminal association:

'Structured association' means an association that is not randomly formed for the immediate commission of *one or more acts giving rise to a number of different, or a series of, offences* and that does not need to have formally defined roles for its members, continuity of its membership or a *hierarchical structure*.<sup>34</sup>

The above wording is indeed a good starting point in achieving legal certainty in the criminal law on organised crime, in narrowing the scope of the criminal law, but also in distinguishing organised crime and the participation in a criminal organisation from other offences and forms of criminality.

### 3.2. Limited harmonisation

The broad and vague nature of the terminology used in the Framework Decision has the potential to lead to significant differences in the implementation of the latter in the Member States. If the provisions of the Framework Decision are copied *verbatim* in national law, judges will potentially have significant difficulties in reaching a coherent interpretation across the EU, but also within individual Member States. An in-depth study on how the Framework Decision has been implemented and how national courts have interpreted implementing legislation is essential in order to evaluate the provisions of the latter.

Another, more obvious challenge to achieving harmonisation is the maintenance in the Framework Decision of the dual approach to criminalisation: Member States may choose to criminalise either participation in a criminal organisation or conspiracy. Moreover, both these offences are worded on very broad terms- as mentioned above, the concept of a criminal organisation is very broad and vague and conspiracy does not have to involve the actual execution of a criminal activity.

A certain degree of harmonisation as regards the criminalisation of the participation in a criminal organisation at EU level is necessary to achieve legal certainty in the criminal law in the field. Harmonisation will help to achieve a level playing field and legal certainty as

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<sup>34</sup> European Parliament legislative resolution on the proposal for a Council Framework Decision on the fight against organised crime, P6\_TA(2005)0405, OJ C272 E/428, 9.11.2006, amendment 10- Article 1(2).

regards the prosecution of participation in a criminal organisation in Member States both as regards the authorities involved (in terms of judicial co-operation) and as regards the individuals affected (especially if they intend to move within the borderless Area of Freedom, Security and Justice where the *ne bis in idem* principle may be triggered). Harmonisation will also help achieve greater consistency in EU criminal law more generally (as participation in a criminal organisation is used as an aggravating circumstance in a series of other EU criminalisation instruments) as well as facilitate the operation of the principle of mutual recognition in criminal matters and the work of EU criminal justice bodies such as Europol and Eurojust.

## 4. THE IMPORTANCE OF CRIMINALISATION OF PARTICIPATION IN A CRIMINAL ORGANISATION FOR OTHER EUROPEAN CRIMINAL LAW MEASURES

### KEY FINDINGS

- A greater degree of harmonisation is necessary not only to ensure a level playing field among Member States, but also to facilitate the operation of other elements of European criminal law.
- A greater degree of harmonisation of the criminal law on organised crime will contribute towards achieving effective harmonisation with regard to other EU criminal law offences.
- This is the case in particular where participation in a criminal organisation is used as an aggravating circumstance for a series of other offences (including attacks against information systems and trafficking in human beings).
- Harmonisation of organised crime offences will also contribute to greater harmonisation of money laundering offences, in the light of the fact that organised crime is a money laundering predicate offence under EU law.

### 4.1. Participation in a criminal organisation as an aggravating circumstance

Along with the criminalisation of participation in a criminal organisation as such, EU law has used the latter as an aggravating circumstance for a series of other offences where there has been harmonisation at EU level. This means that participation in a criminal organisation will increase the penalties imposed for the criminal offence in question. Participation in a criminal organisation has been used as an aggravating circumstance for a series of offences including attacks against information systems,<sup>35</sup> facilitation of unauthorised entry, transit and residence (when committed for financial gain)<sup>36</sup>, and more recently, trafficking in

<sup>35</sup> Council Framework Decision 2005/222/JHA on attacks against information systems, OJ L69/67, 16.3.2005, Article 7(1). See also the draft Directive on attacks against information systems, aiming to replace the 2005 Framework Decision (Council document 11566/11, Brussels 15 June 2011, Article 9(4)).

<sup>36</sup> Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L328/1, 5.12.2002, Article 1(3).

human beings<sup>37</sup>. The differences in the national legal definition of participation in a criminal organisation may lead to significant divergences between Member States as regards the severity of punishment of a wide range of offences across the EU.

The use of participation in a criminal organisation as an aggravating circumstance reflects a view of the value of participation not as a 'self-standing' criminal offence, but rather as conduct which may be taken into account when other offences are prosecuted. An alternative approach, privileging a self-standing participation offence and its prosecution, was put forward by the European Parliament in its reading on the draft Framework Decision. The Parliament put forward a series of aggravating circumstances to be taken into account *for* an organised crime conviction. Participation in a criminal organisation would be aggravated when:

- (a) the aim of the criminal organisation is terrorism ;
- (b) the criminal organisation organises trafficking in human beings ;
- (c) the criminal organisation is of the mafia type, i.e. it makes use of the intimidation inherent in bonds of association and of the power over others and code of silence which arise from that intimidation for the purposes of committing offences, acquiring directly or indirectly the power to manage or control economic activities, licences, authorisations, public contracts and services, gaining unjust enrichment or advantage for itself or others, impeding or obstructing the free exercise of the right to vote, or procuring votes for its members or for others in elections<sup>38</sup>.

These proposals were not adopted by Member States. The final version of the Framework Decision includes the rather tautological and discretionary aggravating circumstance of the offences of participation or conspiracy being committed 'within the framework of a criminal organisation.'<sup>39</sup>

## 4.2. Participation in a criminal organisation as a money laundering offence

Organised crime is one of the money laundering predicate offences. The third money laundering Directive<sup>40</sup> calls upon Member States to ensure that money laundering of proceeds from serious crime is prohibited<sup>41</sup>. Serious crime includes inter alia 'the activities of criminal organisations as defined in Article 1 of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.'<sup>42</sup> As mentioned above, the 1998 Joint Action has been subsequently replaced by the 2008 Framework Decision. The lack of legal certainty and some degree of harmonisation as regards what constitutes participation in a

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<sup>37</sup> Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L101/1, 15.4.2011, Article 4(2)(b). See also the latest draft of the draft Directive on combating the sexual abuse, sexual exploitation of children and child pornography, Council document 11987/11, Brussels, 27 June 2011, Article 9(1)(e).

<sup>38</sup> European Parliament legislative resolution on the proposal for a Council Framework Decision on the fight against organised crime, New Article 3(2b)-Amendment 16.

<sup>39</sup> Council Framework Decision on the Fight Against Organised Crime, Article 3(2).

<sup>40</sup> Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L309, 25.11.2005, p. 15

<sup>41</sup> Ibid., Article 1(1) and (2) together with Article 3(4).

<sup>42</sup> Ibid., Article 3(5)(c).

criminal organisation may thus have an impact on the level of harmonisation as regards the prohibition of money laundering.

## 5. THE CRIMINALISATION OF PARTICIPATION IN A CRIMINAL ORGANISATION IN THE CONTEXT OF MUTUAL RECOGNITION IN CRIMINAL MATTERS

### KEY FINDINGS

- A greater degree of harmonisation is necessary not only to ensure a level playing field among Member States, but also to facilitate the operation of the principle of mutual recognition in criminal matters at EU level.
- This is the case in particular in the light of the fact that participation in a criminal organisation is included in the list of the offences for which the verification of dual criminality is not required in the various mutual recognition instruments.

The extent to which the European Union has developed a clear and sufficiently harmonised criminal offence of participation in a criminal organisation matters significantly for the operation of a key form of integration in criminal matters in the EU, namely the mutual recognition of decisions and judgments<sup>43</sup>. One of the key features of the application of the principle of mutual recognition in criminal matters in the European Union – exemplifying the view of mutual recognition as a reflection of mutual trust between the authorities of Member States<sup>44</sup> - has been the abolition of the requirement to verify the dual criminality of the act for a series of offences. The abolition of dual criminality was introduced by the Framework Decision on the European Arrest Warrant<sup>45</sup> and this model has been replicated in one form or another in all subsequent mutual recognition measures (see the subsequently agreed Framework Decisions on the mutual recognition of orders freezing of property or evidence,<sup>46</sup> judgments imposing financial penalties<sup>47</sup>, and confiscation orders<sup>48</sup>; the Framework Decision on the European Evidence Warrant, where some inroads to the abolition of the principle of dual criminality have been introduced<sup>49</sup>; and the Framework Decisions on the application of mutual recognition in the field of the transfer of sentenced persons<sup>50</sup> on the mutual recognition to judgments and probation decisions<sup>51</sup>, and on the

<sup>43</sup> V. Mitsilegas, *EU Criminal Law*, Hart, 2009.

<sup>44</sup> On the principles behind the application of mutual recognition in criminal matters in the EU, see V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', in *Common Market Law Review*, vol.43, 2006, pp. 1277-1311.

<sup>45</sup> See in particular Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.2002, p.1

<sup>46</sup> Framework Decision 2003/577/JHA, OJ L196, 2 August 2003, p.45.

<sup>47</sup> Framework Decision 2005/214/JHA, OJ L76, 22 March 2005, p.16.

<sup>48</sup> Framework Decision 2006/783/JHA, OJ L328, 24 November 2006, p.59.

<sup>49</sup> Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L350, 30 December 2008, p.72. Germany pushed for the insertion in the Framework Decision of an option to reintroduce dual criminality; it may by a declaration reserve its right to make the execution of an Evidence Warrant subject to the verification of dual criminality in cases related to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion or swindling if it is necessary to carry out a search or seizure for the execution of a Warrant, except where the issuing authority has declared that the offence concerned under the law of the issuing Member State falls within the scope of the criteria indicated in the declaration (Article 23(4)).

<sup>50</sup> Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L327, 5 December 2008, p.27.

mutual recognition of decisions on supervision measures<sup>52</sup>, where Member States retain however the option not to abolish dual criminality)<sup>53</sup>. Participation in a criminal organisation is included in the list of the offences for which the verification of dual criminality is not required in these instruments.

However, a closer look at the mutual recognition Framework Decisions reveals that they do not contain a definition of, but rather a general reference to, 'participation in a criminal organisation' in this context. They do not cross-refer to the relevant EU harmonising texts (the 1998 Joint Action or the 2008 Framework Decision for the instruments adopted subsequently) to define what constitutes participation in a criminal organisation for the purposes of the application of mutual recognition in criminal matters. The definition of what constitutes participation in a criminal organisation appears thus to be left to national law. It is true that national law may constitute the implementation of the 1998 Joint Action and /or the 2008 Framework Decision on organised crime. However, the lack of clarity and low level of harmonisation introduced by the above instruments challenges the smooth operation of mutual recognition, the fundamental rights of the defendant and the legitimacy of the system itself. In an era where the existence and extent of mutual trust is tested, Member States have gradually been backtracking from the abolition of dual criminality in mutual recognition instruments<sup>54</sup>, and the European Commission<sup>55</sup> and national parliaments<sup>56</sup> have expressed proportionality concerns with regard to the use of the Framework Decision on the European Arrest Warrant by national authorities, further clarity as to what constitutes the criminal offences for which the dual criminality test has been abolished, and in particular as regards the offence of participation in a criminal organisation is essential.

## 6. ORGANISED CRIME IN THE WORK OF EUROPOL AND EUROJUST

### KEY FINDINGS

- A greater degree of harmonisation is necessary not only to ensure a level playing field among Member States, but also to facilitate the work of bodies such as Europol and Eurojust.
- Further harmonisation is necessary to clarify the scope of Eurojust and Europol's powers.

<sup>51</sup> Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L337, 16 December 2008, p.102.

<sup>52</sup> Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L294, 11 November 2009, p.20.

<sup>53</sup> For an analysis, see V. Mitsilegas, 'The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?', in *European Law Review*, vol.34, 2009, pp.523-560.

<sup>54</sup> See above. The extent of the abolition of the requirement to verify dual criminality is also a central issue in the current negotiations for a Directive on a European Investigation order, to replace inter alia the Framework Decision on the European Evidence Warrant.

<sup>55</sup> *Report from the Commission to the European Parliament and the Council on the Implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2011) 175 final, Brussels, 11.4.2011.

<sup>56</sup> House of Lords, House of Commons, Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, 15<sup>th</sup> Report, session 2010-12, HL paper 156, HC 767.

- It is also necessary to compare the legal definitions of organised crime with the use of the term by Europol and Eurojust in their operational/threat assessment work.

Clarity in the definition of the legal elements of organised crime is crucial to the development of the work of EU bodies in the field of criminal justice including Europol and Eurojust, as the existence of an organised criminal structure has been a key requirement for the initial mandate of Europol and subsequently Eurojust<sup>57</sup>. The new Decisions on Europol and Eurojust have reframed their mandate to move away from an organised crime requirement to serious crime more generally. The Europol Decision, which was published in May 2009<sup>58</sup>, extended Europol's competence by extending Europol's competence from serious cross-border *organised* crime to serious cross-border crime in general<sup>59</sup>. The wording of the Europol Convention with regard to the requirement for offences to constitute cross-border serious crime in order to fall within Europol's mandate and in the retention of the list of offences for which Europol is currently competent to act has been retained<sup>60</sup>. Council Decision 2009/426/JHA on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime<sup>61</sup>, aligned Eurojust's mandate with that of Europol<sup>62</sup>.

The move to broaden the mandate of Europol and Eurojust from organised to serious crime has led commentators to argue that the relevance of the concept of organised crime in the EU appears to be diminishing<sup>63</sup>. However, organised crime remains central to the mandate of Europol and Eurojust. It is the first in the list of offences mentioned in the provision delineating Europol's competence<sup>64</sup>. In this light, clarity as to what constitutes organised crime – and participation in a criminal organisation- is key towards achieving legal certainty with regard to the mandate and powers of Europol and Eurojust. A degree of harmonisation is also required to facilitate the work of EU bodies in the field. In its recently published Annual Report for 2010<sup>65</sup>, and referring to the 2008 Framework Decision on participation in a criminal organisation, Eurojust notes that:

'Legislation on this topic varies greatly between the Member States. There are notable differences on specific topics (e.g. type of predicate offences, continuity, penalties, etc) and some Member States have not provided for offences relating to participation in a criminal organisation in their criminal codes but have provided for offences of conspiracy to commit particular crimes. This situation might explain the considerable differences between Member States' case referrals to Eurojust relating to the crime type

<sup>57</sup> V. Mitsilegas, *EU Criminal Law*, Hart 2009.

<sup>58</sup> Council Decision 2009/371/JHA establishing the European Police Office (Europol), OJ L121, 15 May 2009, p.37.

<sup>59</sup> *Ibid*, Article 4(1).

<sup>60</sup> See Article 4(1) (but also Article 3 on Europol's objective) and the annex to the Decision respectively.

<sup>61</sup> Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L138, 4.6.2009, p. 14

<sup>62</sup> *Ibid.*, amended Article 4(1)(a) – 'the types of crime and the offences in respect of which Europol is at all times competent to act'

<sup>63</sup> See also N. Dorn, 'The End of Organised Crime in the European Union', in *Crime, Law and Social Change*, vol.51, 2009, pp.283-295.

<sup>64</sup> Article 4(1) of the Europol Decision- and see Article 4(1)(a) of the Eurojust Decision.

<sup>65</sup> Eurojust Annual Report 2010, Council document 9361/11, Brussels, 26 April 2011.



'participation in a criminal organisation', with some Member States registering no cases with this crime type'<sup>66</sup>.

It is also important to compare the legal definitions of participation in a criminal organisation with the organised crime concepts used by Europol and Eurojust in their intelligence/analysis work. The 2009 Europol EU Organised Crime Threat Assessment for instance puts forward an Organised Crime Group typology categorising organised crime groups on the basis of their geographic location of their strategic centre of interest and their capability and intention: to use systematic violence or intimidation against local societies to ensure non-occasional compliance or avoid interferences; to interfere with law enforcement and judicial processes by means of corruptive influence or violence/intimidation; to influence societies and economies; and to elude law enforcement attention<sup>67</sup>. This approach is significant in the light of the targets set by the Policy cycle for serious international and organised crime, recently agreed by the Council<sup>68</sup>, whose first step is policy development on the basis of a European Union Serious and Organised crime Threat Assessment (EU SOCTA) that must provide for a complete and thorough picture of criminal threats impacting the European Union<sup>69</sup>.

The use of organised crime terminology by Eurojust is also of interest. The Eurojust Annual Report for 2010<sup>70</sup> contains a section on 'organised crime activities', where it is stated that 'the organised crime-related cases referred to Eurojust in 2010 have reflected the Council Conclusions on the fight against crimes by mobile (itinerant) criminal groups)<sup>71</sup>. These Conclusions in turn<sup>72</sup> have adopted the following definition:

'A mobile (itinerant) criminal group is an association of offenders, who systematically acquire wealth through theft of property or fraud, having a wide ranging area of operations and are internationally active.'<sup>73</sup>

The relationship of this definition with the one on the 2008 Framework Decision has not been clarified. Moreover, it is important to note here that operational concepts are defined in Council Conclusions and not in legislation which has to be scrutinised post-Lisbon by both the Council and the European Parliament. Further work needs to be done to compare operational definitions with legal definitions on organised crime, to ascertain the extent to which they reflect each other with full respect for human rights.

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<sup>66</sup> Ibid, p.34.

<sup>67</sup> Europol, *OCTA – EU Organised Crime Threat Assessment 2009*, European Police Office, 2009, point 5.1.

<sup>68</sup> Draft Council Conclusions on the creation and implementation of a EU policy cycle for organised and serious international crime, Council document 15358/10, Brussels, 25 October 2010.

<sup>69</sup> For further information on the use of the term of 'organised crime' in Europol's Organised Crime Threat Assessments, see Sheptycki, James et al., *International Organised Crime in the EU*, European Parliament Study, 2011 (*forthcoming*)

<sup>70</sup> Eurojust Annual Report 2010, *op.cit.*.

<sup>71</sup> Ibid., p.33.

<sup>72</sup> 3051<sup>st</sup> Justice and Home Affairs Council meeting, Brussels, 2 and 3 December 2010.

<sup>73</sup> Ibid., Point 1.

## 7. THE CRIMINALISATION OF ORGANISED CRIME AND THE LISBON TREATY

### KEY FINDINGS

- The Lisbon Treaty includes a number of provisions which may serve as legal bases for the further development of the criminal law on organised crime.
- Article 83(1) TFEU provides a legal basis for further harmonisation of criminal offences and sanctions in the field.
- An additional legal basis is provided by Article 83(2) TFEU, to the extent that harmonisation of the criminal law on organised crime is deemed necessary for the effective implementation of a Union policy in an area which has been subject to harmonisation measures. This is relevant in cases where the criminalisation of organised crime is deemed necessary in order to achieve internal market objectives (e.g. in the field of public procurement rules).
- Measures relating to criminal procedure (e.g. witness protection measures) can be adopted post-Lisbon if related to the rights of victims: Article 82(2) TFEU confers competence to the EU in the field if these measures are necessary to facilitate the operation of mutual recognition.
- If a legal basis under Article 82(2) TFEU is not found, it is noteworthy that the Treaty of Lisbon allows the expansion of EU competence to legislate on criminal procedure following unanimity in the Council and the consent of the European Parliament (Article 82(2)(d) TFEU).

### 7.1. Harmonisation of substantive criminal law

The Treaty of Lisbon grants the European Union express competence to proceed to further harmonisation of substantive criminal law in the field of organised crime. According to Article 83(1) TFEU,

'The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.'

The exhaustive of such areas of crime which follow on includes organised crime. Article 83(1) TFEU can thus form the legal basis for a Directive amending/replacing/repealing the 2008 Framework Decision on organised crime as regards the definition of criminal offences and the imposition of criminal sanctions.

Article 83 TFEU further provides an alternative legal basis for harmonisation in the field. According to Article 83(2),



'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.'

This provision can serve as a legal basis for the adoption of substantive criminal law related to organised crime, but also linked to the operation of the internal market. Criminalisation of organised crime in the context of public procurement law is an example of potential intervention. The use of Article 83(2) TFEU may provide the advantage of ensuring the participation of the United Kingdom in any future measure on organised crime. The United Kingdom currently has the right not to participate in proposals submitted under Title V of the TFEU (on the Area of Freedom, Security and Justice). However, it is submitted that this 'opt-out' is limited as regards proposals submitted under Article 83(2) TFEU, as these are related to other areas of EU law and policy from which the UK does not have an opt-out. A UK opt-out in this context would undermine the coherence of the underlying Union policy.<sup>74</sup>

## **7.2. Organised crime in the work of Europol and Eurojust post-Lisbon**

Serious crime seems to have replaced organised crime as the key focus in the development of Europol and Eurojust in the post-Lisbon era. The future mandate of both bodies is defined by reference to 'serious crime.' Article 85(1) TFEU states that Eurojust's mission 'shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases' while Article 88(1) TFEU states that Europol's mission 'shall be to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.' While organised crime no longer plays a leading role in the development of Europol and Eurojust, it will certainly remain within their remit and any future legislation on criminalisation in the field will have a significant impact on their work.

## **7.3. Harmonisation of criminal procedure**

The European Parliament legislative resolution on the proposal for the 2008 Council Framework Decision<sup>75</sup> included a proposal for a provision on witness protection<sup>76</sup> which was not included in the finally adopted text. The Lisbon Treaty contains an express legal basis for the adoption of minimum standards in criminal procedure. According to Article 82(2) TFEU,

'To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters

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<sup>74</sup> For an analysis, see V. Mitsilegas, *EU Criminal Law*, Hart, 2009, chapter 1.

<sup>75</sup> European Parliament legislative resolution on the proposal for a Council Framework Decision on the fight against organised crime, *op.cit.*

<sup>76</sup> *Ibid.*, new Article 8b.

having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules.'

However, competence to the EU in this context has been conferred only for rules on the rights of the defendant, on the admissibility of evidence, and on the rights of the victims of crime. In this light, proposals for the protection of witnesses in organised crime cases could be tabled under a victims' rights heading to the extent that this is not addressed in the current Commission proposals on victims' rights.<sup>77</sup> If a separate proposal on the rights of victims covering specifically witness protection schemes is tabled, it needs to be demonstrated that such a measure is necessary to facilitate the operation of mutual recognition to satisfy the requirements of Article 82(2) TFEU.

If such a legal basis is not found, it must be reminded that the Treaty of Lisbon allows the expansion of EU competence to legislate on criminal procedure following unanimity in the Council and the consent of the European Parliament.<sup>78</sup>

## 8. CONCLUSIONS AND RECOMMENDATIONS

The European Union has been pioneering in developing a comprehensive criminal law framework against organised crime. The latest piece of EU legislation in the field, the 2008 Framework Decision on the fight against organised crime, reflects the synergy between the EU and international *fora* such as the United Nations in the development of global standards in the field. The Framework Decision provides a sophisticated framework of criminalisation on participation in a criminal organisation. However, it requires improvement both in terms of legal certainty and its scope, and in terms of the level of harmonisation it achieves.

As regards the scope of criminalisation, the Framework Decision attempts to reconcile two seemingly different objectives: to introduce a specific offence of participation in a criminal organisation, which is distinct from other association/membership offences in domestic criminal justice systems; and at the same time not to be too rigid and narrow in its definition of organised crime, by taking into account the view that criminal organisations do not always operate under a hierarchical structure, but may also operate in networks. The result of this effort is a seemingly contradictory definition of a criminal organisation which has the potential to lead to over criminalisation, as the elements of a criminal organisation are defined very broadly and with flexible, ambiguous criteria. Great discretion, with limited guidance, is left to the national legislator and judge to implement and interpret these provisions.

Harmonisation is limited by both the broad and vague nature of the terminology used in the Framework Decision- which has the potential to lead in significant differences in the implementation of the latter in the Member States- and by the maintenance in the

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<sup>77</sup> See Commission proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime, COM (2011) 275 final, Brussels, 18.5.2011.

<sup>78</sup> Article 82(2)(d) TFEU confers EU competence for 'any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.'

Framework Decision of the option for Member States to criminalise either participation in a criminal organisation or conspiracy.

A certain degree of further harmonisation as regards the criminalisation of the participation in a criminal organisation at EU level is necessary to achieve legal certainty in the criminal law in the field. Harmonisation will help to achieve a level playing field and legal certainty as regards the prosecution of participation in a criminal organisation in Member States both as regards the authorities involved (in terms of judicial co-operation) and as regards the individuals affected (especially if they intend to move within the borderless Area of Freedom, Security and Justice where the *ne bis in idem* principle may be triggered). Harmonisation will also help achieve greater consistency in EU criminal law more generally (as participation in a criminal organisation is used as an aggravating circumstance in a series of other EU criminalisation instruments) as well as facilitate the operation of the principle of mutual recognition in criminal matters and the work of EU criminal justice bodies such as Europol and Eurojust.

The Lisbon Treaty includes a number of provisions which may serve as legal bases for the further development of the law in the field. Any new proposal should be based on a thorough evaluation of the implementation of the 2008 Framework Decision by Member States and of the interpretation of the relevant concepts by national courts. Amending the 2008 Framework Decision must ensure both a higher degree of harmonisation and a narrower criminalisation of participation in a criminal organisation which will achieve legal certainty and justify the need for the separate and distinct criminalisation of participation to other related offences. At the same time the impact of criminalisation on other elements of *European* criminal law, including the operation of mutual recognition and the work of Europol and Eurojust, should be taken into account.

## RECOMMENDATIONS

- **Recommendation 1:** The European Parliament should request the Commission to carry out a detailed evaluation of the implementation by Member States of the 2008 Framework Decision on organised crime. The evaluation should cover both the legislative implementation of the Framework Decision and the interpretation of the relevant concepts by national courts.
- **Recommendation 2:** The European Parliament should request the Commission to provide detailed information on the implementation of other measures of substantive EU criminal law which include participation in a criminal organisation as an aggravating circumstance. Data should cover both the legislative implementation and the interpretation of participation in a criminal organisation as an aggravating circumstance by national courts.
- **Recommendation 3:** The European Parliament should request the Commission to provide detailed information on the implementation of the prohibition of the laundering of proceeds from organised crime by EU Member States. Data should cover both legislative implementation and case-law.
- **Recommendation 4:** The European Parliament should ask Europol to give a detailed explanation of how it uses the legal definition of organised crime (in particular the participation in a criminal organisation and the definition of an

organised crime group) in its operational work, and in particular in the development of the Organised Crime Threat Assessments (OCTAs).

- **Recommendation 5:** The European Parliament should ask Eurojust to give a detailed explanation of how it uses the legal definition of organised crime (in particular the participation in a criminal organisation and the definition of an organised crime group) in its operational work, and whether differences in definitions at national level pose obstacles to Eurojust's work.
- **Recommendation 6:** In the light of the outcome of the detailed evaluation of the implementation of the 2008 Framework Decision on organised crime, the European Parliament should consider the option of supporting the amendment of the Framework Decision.
- **Recommendation 7:** When considering proposals to amend the 2008 Framework Decision, the European Parliament should take into account the multitude of aims and functions of the criminalisation of the participation in a criminal organisation as outlined above, as well as the impact of uncritical criminalisation on legal certainty and fundamental rights.
- **Recommendation 8:** When considering proposals to amend the 2008 Framework Decision, the European Parliament must aim to ensure both a higher degree of harmonisation and a narrower criminalisation of participation in a criminal organisation. The latter will achieve legal certainty and justify the need for the separate and distinct criminalisation of participation in a criminal organisation from other related offences.

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