

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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A DEFINITION THAT DOES NOT WORK: THE IMPACT OF THE EU FRAMEWORK DECISION ON THE FIGHT AGAINST ORGANIZED CRIME

FRANCESCO CALDERONI*

1. Introduction

The deadline for the implementation of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime (hereinafter the FD) was 11 May 2010.¹ By 11 November 2012, the Council, based on a report drafted by the Commission, should “assess the extent to which Member States have complied with the provisions of this Framework Decision” (Art. 10 of the FD). Given this timeline, the forthcoming months, with the publication of the Commission report and the Council’s assessment of the FD, will be extremely important for the future of EU policy against organized crime.

The analysis of this particular field of EU action is relevant since there seems to be a contrast between the high expectations of EU citizens and the quality of EU measures in the area. Indeed, while surveys repeatedly show that European citizens are supportive of strong EU intervention in the fight against organized crime,² academics and policy makers have criticized the FD. Notwithstanding these criticisms, to date the EU has not yet conducted a study on the impact and effectiveness of the FD. While the Commission should produce a report on the implementation of the FD in 2012, previous experience suggests that the Commission’s report may be based only on the (frequently limited) information provided by the Member States.

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1. O.J. 2008, L. 300/42.

2. Commission, Opinions on organized, cross-border crime and corruption: Summary, Special Eurobarometer 245; “Press Release RAPID. The majority of EU citizens consider that more decision-making should take place at EU level in justice and home affairs policy areas.”, MEMO/08/470, 2 July 2008 <europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/470&format=PDF&aged=1&language=EN&guiLanguage=en> accessed 29 Dec. 2011.

This article analyses the impact of the FD, updating a previous study which evaluated the impact of this legal instrument at the moment of its entry into force.³

The main goal is to demonstrate that the FD “does not work”, i.e. that a) its provisions are so vague that most EU Member States do not need to change their national legislation to be formally compliant with it and b) the FD does not address the relevant inconsistencies between laws on organized crime. Just as Paoli discussed the paradoxes of organized crime, it appears legitimate to argue that there is a “paradox of the approximation of organized crime legislation”:⁴ the high compliance of national legislation with the FD is not the outcome of high levels of approximation; on the contrary, it is the consequence of excessively broad EU requirements hiding the strong discrepancies among national provisions. The paradox results in an approximation *en trompe l’oeil*, where EU intervention has only formally made national laws equivalent, without promoting any improvement in their consistency.

The paradox of the approximation of organized crime legislation may have direct implications for European citizens. The introduction of broad definitions and offences may infringe upon the basic principles of criminal law and even end up in an over-expansion of criminal law restricting civil rights and freedoms.

This article may also be interesting for the study of the evolution of the EU Area of Freedom Security and Justice (AFSJ) after the entry into force of the Treaty of Lisbon.⁵ Indeed, the FD is just one example of EU policy-making in the AFSJ. This has frequently been criticized for its lack of transparency, democratic accountability and effectiveness. The forthcoming developments concerning the FD will also signal whether the new institutional framework will bring any improvement to the quality of EU policies. Eventually, this study may contribute to the forthcoming evaluations of the FD by the EU institutions and further encourage the debate about the future development of EU policies in this area and more generally in the AFSJ.

The article is organized as follows. Section 2 provides a short background to the EU policies of approximation of criminal law and a synthesis of the main problems of the FD. Section 3 provides an overview of existing national legislation on organized crime among EU Member States and assesses the

3. Calderoni, *Organized crime legislation in the European Union: Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organized Crime* (Springer, 2010).

4. See Paoli, “The paradoxes of organized crime”, 37 *Crime, Law and Social Change* (2002), 51–97.

5. Since the Treaty of Lisbon entered into force, 1 Dec. 2009 and abolished the pillars division, the Area of Freedoms Security and Justice (AFSJ) is now very similar to other EU policies.

impact of the FD, demonstrating that this measure has not brought significant changes in the EU Member States, but also that it may result in unwarranted expansion of the scope of the organized crime laws. Section 4 concludes by arguing the possible future developments of EU policy on organized crime.

2. The EU policy in approximating organized crime legislation

2.1. *Approximation of criminal law in the EU*

Since its creation, the EU has had a vocation to influence the criminal legislation of the Member States. First, the Treaty of Maastricht of 1992 opened the possibility for EU intervention in criminal matters with the creation of the so-called Third Pillar of the Treaty on European Union, although with no explicit mention of any direct influence on criminal laws. Second, the Treaty of Amsterdam introduced for the first time the concept of approximation of criminal law in the Third Pillar, although with a very restrictive approach.⁶ The Third Pillar maintained this framework for more than ten years until the entry into force of the Treaty of Lisbon.

In general, EU policies in the field of the approximation of criminal law faced a number of problems.

The first problem had to do with the political desirability of a strong EU influence on national criminal legislation. For years, the competence of the European Community in criminal matters was excluded from the Treaties and very limited by the European jurisprudence.⁷ Even with the creation of the

6. A new concept within the Third Pillar, approximation is different from harmonization and can be defined as the process of modifying different criminal legislations in order to eliminate differences contrasting with the minimum standard set by a European legal measure; see Calderoni, *op. cit. supra* note 3, p. 4. The specific instrument for the approximation was the framework decision which was “binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods” (Art. 34 (2)(b) TEU Amsterdam). However, the literature pointed out that the binding effect was rather weak. See Bernardi, “Le rôle du troisième pilier dans l’eupéanisation du droit pénal: Un bilan synthétique à la veille de la réforme des traitées”, (2007) *Revue de Science Criminelle et de Droit Pénal Comparé*, 713, 722–723; Fletcher, Löff, and Gilmore, *EU Criminal law and justice* (Edward Elgar 2008), pp. 35 and 71; Mitsilegas, *EU Criminal law* (Hart Publishing 2009), p. 18; Obokata, “Key EU principles to combat transnational organized crime”, 48 *CML Rev.* (2011), 801, 808.

7. Only in 2005 did the case law open the way to EC competence in criminal matters (see Case C-176/03, *Commission v. Council*, [2005] ECR I-7879, for the environmental crimes case and Case C-440/05, *Commission v. Council*, [2007] ECR I-9097 for ship-source pollution) and the entry into force of the Treaty of Lisbon in 2009 finally enabled the approximation of criminal law that is necessary for the support of other EU policies (Art. 83 (2) TFEU). See Spencer, “Why is the harmonisation of penal law necessary?” in Klip and Van der Wilt (Eds.),

Third Pillar, EU influence was circumscribed by the concept of approximation of criminal law, which was narrowly, if ever, defined.⁸ Early efforts of approximation, backed by enthusiasm for the development of a common European criminal area, were soon faced with the narrow scope provided by the Treaties and with the reactions by policymakers and researchers.⁹ In particular, national policymakers soon limited the scope of approximation of criminal law. The Tampere European Council of October 1999 introduced the principle of mutual recognition as the cornerstone of the EU policies in the Third Pillar, notwithstanding the absence of any explicit mention of the principle in the Treaties.¹⁰ Concerning scholars' reactions, they showed

Harmonisation and harmonising measures in criminal law (Royal Netherlands Academy of Science, 2002); Vogel, "Why is the harmonisation of penal law necessary? A Comment" in Klip and Van der Wilt, *ibid.*; See Bernardi, *op. cit. supra* note 6; Mitsilegas, *op. cit. supra* note 6, pp. 65–84; Fletcher, Lööf, and Gilmore, *op. cit. supra* note 6, pp. 176–184.

8. Calderoni, *op. cit. supra* note 3.

9. An interesting example of the harmonization effort was the Corpus Juris Project, which produced an ambitious proposal to improve the fight against EC budget frauds. It suggested the adoption of a common core of EC offences and criminal procedure rules, including a European Public Prosecutor office. See Delmas-Marty (Ed.), *Corpus juris: portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne = introducing penal provisions for the purpose of the financial interests of the European Union* (Economica, 1997); Delmas-Marty and Vervaele (Eds.), *The implementation of the Corpus Juris in the Member States: Penal Provisions for the protection of European Finances* (Intersentia, 2000). The Commission was supportive of this approach, although it acknowledged the lack of a legal basis in the Treaties; See Commission, "Additional Commission contribution to the Intergovernmental Conference on institutional reforms. The criminal protection of the Community's financial interests: a European Prosecutor", COM(2000)608 final. It also drafted a Green Paper suggesting future developments in this area: "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor COM(2001)715 final". However, the Commission decided not to table a proposal and the Member States did not endorse the idea; see Joutsen, *The European Union and Cooperation in Criminal Matters: the Search for Balance*, vol. 25 (HEUNI, 2006), <www.heuni.fi/uploads/gg29d0zcr1rpk_1.pdf>. The possibility of establishing a European Public Prosecutor was however inserted in Art. 86 TFEU. Recently, DG JUSTICE of the Commission has commissioned a feasibility study on the creation of an European Public Prosecution Office from Eurojust (see European Union, "Service contract – 113038-2011 – TED Tenders Electronic Daily", 2011 <ted.europa.eu/udl?uri=TED:NOTICE:113038-2011:TEXT:EN:HTML&tabId=1> accessed 2 Jan. 2012).

The Corpus Juris is interesting for the analysis of organized crime legislation as it provided a definition of conspiracy/criminal association (the name changed in the translations in different languages). The Corpus Juris opted for the continental/civil law model. See Manacorda, "La parabole de l'harmonisation pénale: à propos des dynamiques d'intégration normative relatives à l'organisation criminelle" in Delmas-Marty and others (Eds.), *Les chemins de l'harmonisation pénale: Harmonising criminal law* (Société de législation comparée, 2008), pp. 282–283.

10. The principle of mutual recognition implies that judicial decisions in criminal matters issued by a Member State are enforced by other Members States with no or minimum validation

scepticism about projects tending towards the unification of national criminal legislation, arguing that unification “must be viewed as an ideological option instead of a need”.¹¹ As a result of the reception by policymakers and academics, approximation of criminal legislation in the EU has basically been confined to support for the implementation of mutual recognition.¹²

The second problem was the low quality of most legal instruments of approximation, due to different factors. First, the institutional framework of the Third Pillar required the unanimity of EU Member States for the adoption of a framework decision. This mechanism generated long negotiations and difficulties in achieving a consensus, also considering that the process of enlargement of the EU brought the number of Member States from 12 to 27 in 15 years. Inevitably, the legal measures adopted within the Third Pillar were the result of complex compromises among the different Member States. As a consequence, the significance of the measures was significantly watered down. EU policymaking in this area often ended up in the adoption of “minimum common denominator” instruments, with most Member States not needing to amend their national legislation to comply with EU standards.¹³ The second factor was that there was no agreed process for the selection of the sectors to be approximated. Most often, they were decided in reaction to particular sensational events. EU approximation was most driven by the need

procedures. See Kerchove and Weyembergh (Eds.), *Vers un espace judiciaire pénal européen* (Ed. de l'Université de Bruxelles, 2000); Vermeulen, “Where do we currently stand with harmonisation in Europe?” in Klip and Van der Wilt op. cit. *supra* note 7; Peers, “Mutual recognition and criminal law in the European Union: has the Council got it wrong?”, 41 CML Rev. (2004), 5–36; Perron, “Perspectives of the harmonization of criminal law and criminal procedure in the European Union” in Husabø and Strandbakken (Eds.), *Harmonization of criminal law in Europe*, vol. 3 (Intersentia, 2005); Weyembergh, “Approximation of criminal laws, the Constitutional Treaty and The Hague Programme”, 42 CML Rev. (2005) 1567–1597; Weyembergh, “The functions of approximation of penal legislation within the European Union”, 12 MJ (2005), 149–172; Vogel, “The European Integrated Criminal Justice System and its constitutional framework”, 12 MJ (2005), 125, 131; Lavenex, “Mutual recognition and the monopoly of force: Limits of the single market analogy”, 14 *Journal of European Public Policy* (2007), 762–779; Mitsilegas, op. cit. *supra* note 6, p. 116.

11. Vermeulen, op. cit. *supra* note 10, p. 73

12. Manacorda, “La risposta penale contro la criminalità organizzata dans le droit de l'Union Européenne” in Manacorda (Ed.), *L'infraction d'organisation criminelle en Europe: Allemagne – Espagne – France – Italie – Union Européenne* (Presses Universitaires de France, 2002), pp. 271–275; Manacorda, “Introduction. L'intégration pénale indirecte: une première définition” in Giudicelli-Delage and Manacorda (Eds.), *L'intégration pénale indirecte: Interactions entre droit pénal et coopération judiciaire au sein de l'Union européenne* (Société de législation comparée, 2005), p. 28; Kimmo Nuotio, “Harmonization of Criminal Sanctions in the European Union – Criminal Law Science Fiction” in Husabø and Strandbakken, op. cit. *supra* note 10; Weyembergh, op. cit. *supra* note 10.

13. Lavenex, op. cit. *supra* note 10, 770; Monar, “Justice and Home Affairs”, 49 JCMS (2011), 145–164.

to show that “the EU is doing something about this”, rather than by a sound decision-making process selecting the priorities to improve mutual cooperation in criminal matters.¹⁴ As a third factor, EU measures were drafted without any previous study. The EU did not conduct any gap analysis to identify loopholes and inconsistencies among national laws, no comparative studies to recognize existing legal traditions and trends.¹⁵ Finally, the evaluation of the impact of EU measures was very limited. Indeed, the Commission’s reports on the implementation of the legal instruments were restricted to the information provided by the Member States. Very frequently, only a part of Member States provided any information to the Commission.¹⁶

The above factors crucially influenced the quality and the added value of the EU legal instruments approximating national criminal legislation. The FD was no exception and its final text raised several issues.

2.2. *The main criticisms of the Framework Decision among scholars and EU institutions*

Organized crime has always been one of the drivers of the process of approximation of criminal law in the EU. Consensus about the need for international action against organized crime has always been high. Remarkably, organized crime, along with terrorism and drug-trafficking, was included in the list of crimes enabling approximation of criminal legislation since the Treaty of Amsterdam (Art. 29 TEU, Amsterdam version).

Indeed, the FD was the third and latest international legal instrument directly addressing national criminal laws on organized crime. The first legal measure in chronological order was the Joint Action on Making it a Criminal Offence to Participate in a Criminal Organization in the Member States of the European Union (hereinafter the Joint Action).¹⁷ It was the first harmonization measure providing a legal definition of criminal organization

14. Weyembergh, op. cit. *supra* note 10, 1585; Vermeulen, op. cit. *supra* note 10, p. 71.

15. Manacorda, “Le mandat d’arrêt européen et l’harmonisation substantielle: le rapprochement des incriminations” in Giudicelli-Delage and Manacorda, op. cit. *supra* note 12, p. 72; Vermeulen, op. cit. *supra* note 10, p. 71; Van der Wilt, “Some Critical Reflections on the Process of Harmonisation” in Klip and Van der Wilt, op. cit. *supra* note 7, p. 84; Vander Beken, “Freedom, security and justice in the European Union” in Klip and Van der Wilt, op. cit. *supra* note 7, p. 97; Spinellis, “Harmonisation and harmonising measures in criminal law: Objections to harmonisation and future perspectives” in Klip and Van der Wilt op. cit. *supra* note 7, 90–93.

16. De Biolley and Weyembergh, “L’évaluation dans le cadre du troisième pilier du traité sur l’Union européenne” in Weyembergh and De Biolley (Eds.), *Comment évaluer le droit pénal européen?* (Ed. de l’Université de Bruxelles, 2006), p. 84.

17. O.J 1998, L. 351/1–3.

and was adopted in 1998.¹⁸ The second measure was the United Nations Convention against Transnational Organized Crime, adopted in 2000 (hereinafter the UNCTOC).¹⁹

These instruments, along with the FD, constitute an unmatched international legal *corpus* attempting to harmonize and approximate national legislation on organized crime. These efforts have been in place for some years now. Indeed, the Joint Action dates back more than 13 years, and the UN Convention has just celebrated the eleventh anniversary from its signature. Given the existence of two previous instruments on the same topic, the FD could legitimately be expected to be a sound legal instrument of high quality, based on a careful analysis of the limitations of the previous measures.

Notwithstanding the above premises, the FD was the object of a number of criticisms about its excessive broadness and actual enforceability of the adopted provisions. In synthesis, criticisms about the FD focused on three issues.

18. Mitsilegas, "Defining organised crime in the European Union: The limits of European Criminal Law in an Area of 'freedom, security and justice'" 26 *EL Rev.* (2001), 565–581; Joutsen, *International cooperation against transnational organized crime: the practical experience of the European Union*, vol. 59 (UNAFEI, 2002), Resource Material Series; Joutsen, *op. cit. supra* note 9; Vincenzo Militello, "Participation in a Criminal Organisation as a Model of European Criminal Offence" in Militello and Huber (Eds.), *Towards a European Criminal Law against Organised Crime: Proposals and Summaries of the Joint European Project to Counter Organised Crime* (Iuscrim, 2001); Fijnaut, "Controlling organised crime and terrorism in the European Union" in Bassiouni and others (Eds.), *European cooperation in penal matters: Issues and perspectives* (Cedam, 2008).

19. General Assembly Resolution 55/25 of 15 Nov. 2000. See also United Nations, "Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Convention against Transnational Organized Crime" A/55/383 Add. 1 of 3 Nov. 2000; UN Office on Drugs and Crime, "Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto" (United Nations, 2006); UN Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2004); See also Gastrow, 'The Origin of the Convention' in Albrecht and Fijnaut (Eds.), *The Containment of Transnational Organized Crime: Comments on the UN Convention of December 2000* (Edition Iuscrim, 2002); Fijnaut, "The UN Convention and the Global Problem of Organized Crime" in Albrecht and Fijnaut, *ibid.*; Kilchling, "Substantive aspects of the UN Convention against Transnational Organized Crime: A step towards an 'Organized Crime Code'?" in Albrecht and Fijnaut, *ibid.*; Vincenzo Militello, "Participation in an Organized Criminal Group as International Offence" in Albrecht and Fijnaut, *ibid.*; Vlassis, "Drafting the United Nations Convention against Transnational Organized Crime" in Williams and Vlassis (Eds.), *Combating Transnational Crime: Concepts, Activities and Responses* (Frank Cass, 2001); Vlassis, "The United Nations Convention on Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (The International Centre for Criminal Law Reform and Criminal Justice Policy, 2002); Orlova and Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organized Crime in International Law", 27 *Houston Journal of International Law* (2005), 267–310.

The first issue is the very limited description of the typical features of organized crime in Article 1.²⁰ The criminal organization is defined in very vague terms. Firstly, the structured association is defined with a negative definition (Art. 1(2): "... 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"). This provision defines what a criminal organization is *not*, but does not provide any hint on the elements which may positively describe a criminal organization. Secondly, there is no mention of the *modus operandi* of the criminal organization. The FD does not refer to elements such as intimidation, violence and threat, which are the most typical features of organized crime.²¹ Thirdly, other important characteristics are referred to in very elusive terms. For example, the association must be "established over a period of time". This clause is extremely broad and may be interpreted in different ways. Requiring a stable and continuous group, or even a permanent group, would have resulted in an unsatisfactory solution, excluding more flexible criminal organizations. Even worse, it would have overburdened the bodies involved in law enforcement with excessive evidentiary requirements. However, the current provision appears debatable. Indeed, it focuses on the actual duration of the group ("... established over a period of time...") instead of its potential for duration. A better formulation should have focused on the group's potential to last and continue its criminal activities for a significant or undetermined period.

The definition as described appears too vague to comply with the general principles of criminal law, such as the principle of legality, clarity and proportionality.²² It has a very limited selective capacity which is likely to

20. Article 1. Definitions. For the purposes of this Framework Decision:

1. "criminal organization" 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;
2. "structured association" 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.

21. Finckenauer, "Problems of definition: What is organized crime?", 8 *Trends in Organized Crime* (2005), 63, 66; Bäckman, "The inflation of crime in Russia" in *Organised Crime & Crime Prevention – what works? Rapport fra NSJK:s 40. forskerseminar. Espoo, Finland 1998* (Scandinavian Research Council for Criminology, 1998), 26; Spinellis, "Grèce/Greece", 68 *Revue internationale de droit pénal* (1997), 813; Vermeulen, op. cit. *supra* note 10; Albanese, *Organized Crime in Our Times*, 5th ed. (Anderson Publishing, 2007).

22. Mitsilegas, op. cit. *supra* note 18, 570; Joutsen, "International Instruments on Cooperation in Responding to Transnational Crime" in Reichel (Ed.), *Handbook of Transnational Crime and Justice* (Sage, 2005), p. 423; Verbruggen, "On containing organised crime using 'container offences': Some reflections on substantive criminal law issues" in Albrecht and Fijnaut (Eds.), op. cit. *supra* note 19, p. 130.

result in the extension of the concept of organized crime to groups which do not present significant danger to the society.²³ As already argued in the literature, “there is a danger, generally, in the promiscuous use of the label organized crime with reference to perpetrators of ‘crimes that are organized,’ and also with criminal networks that lack what we regard as the essential defining elements of being criminal organizations.”²⁴ Indeed, the lower end of the concept of criminal organization as defined by the FD is very close to the mere complicity in a crime by more than two offenders.²⁵ To be in line with the general principles of criminal law, national legislators will likely have to implement the FD with more detailed specifications.²⁶ As a result, the implementation process may eventually lead to inconsistencies in the national provisions.

The second issue is the quantitative selection of the predicate offences of a criminal organization.²⁷ Article 1 includes among the possible predicate offences all those punished with at least four years of maximum imprisonment. This solution does not take into account that sanctioning policies among different legal systems may vary significantly.²⁸ The offences selected by the mentioned threshold are likely to differ to some extent.²⁹ The solution adopted by the FD is questionable. Some States may raise the penalties for some offences in order to have them falling within the possible predicate offences; other States may reduce the penalties for the opposite purpose. An alternative to the existing solution was the drafting of a list of offences recognized as typical of organized crime. This was suggested by a research project at the EU level and the option was discussed during the

23. Mitsilegas, op. cit. *supra* note 18, 577; Symeonidou-Kastanidou, “Towards a new definition of organised crime in the European Union”, 15 *European Journal of Crime, Criminal Law and Criminal Justice* (2007), 83, 93.

24. Finckenaue, op. cit. *supra* note 21, 77–78.

25. Symeonidou-Kastanidou, op. cit. *supra* note 23, 97; Ambos, “Is the development of a common substantive criminal law for Europe Possible? Some preliminary reflections”, 12 *MJ* (2005), 173, 182–186; Paoli and Fijnaut, “Introduction to Part I: The History of the concept” in Fijnaut and Paoli (Eds.), *Organised crime in Europe: concepts, patterns and control policies in the European Union and beyond* (Springer, 2004) p. 41; Militello, op. cit. *supra* note 19, 103.

26. Symeonidou-Kastanidou, op. cit. *supra* note 23, 97–98; Mitsilegas, op. cit. *supra* note 18, 576–577; Calderoni, “A definition that could not work: the EU Framework Decision on the Fight against Organised Crime”, 16 *European Journal of Crime, Criminal Law and Criminal Justice* (2008), 265, 275; Lahti and Sahavirta, “Finland”, 78 *Revue internationale de droit pénal* (2007), Rapports nationaux 1, 103.

27. Predicate offences are the offences which must be committed or planned by a criminal organization.

28. Militello, op. cit. *supra* note 18, 25.

29. Vlassis (2002), op. cit. *supra* note 19, p. 92; Kilchling, op. cit. *supra* note 19, p. 91.

negotiations for the UN Convention.³⁰ Concern emerged that the changing nature of organized crime and the development of new forms of criminality could have made the list quickly obsolete or too rigid. Further, the inclusion of some specific offences, like terrorist offences, in such a list, proved to be a very sensitive point for some countries.³¹ The option for a list of offences was consequently discarded in favour of the quantitative threshold. However, this solution, coupled with the broad definition of criminal organization, resulted in a further extension of the scope of the FD.³²

The third issue is the double model offence. Article 2 of the FD requires Member States to ensure that their criminal law covers two types of conduct, alternatively or cumulatively.³³ The two types of conduct correspond to the two traditional criminal organization offences, namely the civil law criminal association and the common law conspiracy.³⁴ This approach was firstly introduced in the Joint Action and has since been maintained also in the UNCTOC and in the FD. The aim of the double model offence is to offer a solution acceptable to countries from either the common law or the civil law tradition.³⁵ This would ensure higher political support to the implementation

30. For the research project, see Militello, *op. cit. supra* note 19; for the Palermo Convention see Vlassis, *op. cit. supra* note 19, 81; For the different lists proposed, see “Travaux Préparatoires of the negotiations . . .” cited *supra* note 19.

31. Vlassis (2002), *op. cit. supra* note 19, p. 88.

32. In this regard, Militello (*op. cit. supra* note 19, 102) argued that a better solution would have been to leave the specification of the concept of serious offences to the individual States at the moment of ratification/implementation. In order to ensure some homogeneity, the international legal instruments might have included a list of offences which have to be considered as serious..

33. “Each Member State shall take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organization 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 organization or its intention to commit the offences in question, actively takes part in the organization’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 organization’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”.

34. Criminal organization offences are criminal offences that require more than one person in order to be committed and some sort of agreement, group, association or organization among the offenders. Traditionally, the most important archetypes of COOs are the conspiracy model and the criminal association model. See, with further references, Manacorda, *op. cit. supra* note 9, 270–273; see also Maljević, ‘Participation in a Criminal Organisation’ and ‘Conspiracy’: *Different Legal Models Against Criminal Collectives* (Duncker & Humblot, 2011); Schloenhardt, “Palermo on the Pacific Rim: Organised crime offences in the Asia Pacific Region”, UNODC – Regional Centre for East Asia and the Pacific, August 2009, Study Series.

35. Vlassis (2002), *op. cit. supra* note 19, p. 92; Schloenhardt, *op. cit. supra* note 34, 49.

of the legal instruments thus providing stronger cooperation in the enforcement of organized crime.³⁶ However, it is clear from the analysis of the preparatory works of the three instruments that the inclusion of two model offences is the result of a political compromise. Particularly, in the EU, the adoption of the FD was subject to the unanimous approval of all EU Member States. During the negotiations, common law countries objected to the Commission's proposal of a single model for offences based on the concept of criminal organization.³⁷ During the negotiations of the FD, common law countries exerted pressure to include in the final document a model offence based on the offence of conspiracy.³⁸ In this perspective, it seems legitimate to argue that the current double model offence was the price for reaching unanimity on the FD, rather than the outcome of a deliberate policy choice.³⁹

Although strong political support is a fundamental element for the successful drafting and implementation of international legal instrument, it is reasonable to wonder whether a high price for such an objective has been paid. The double model offence does not achieve the objective of a better harmonization of organized crime offences among different legal systems.⁴⁰ On the contrary, it waters down the main characteristics of organized crime to the point where the participation in a criminal organization becomes a meaningless container, equalizing very distant criminal law approaches.⁴¹ Not surprisingly, the literature argued that most countries will not have to amend or modify their national legislation to comply with the international legal instruments.⁴² Further, the inclusion of the two model offences has prevented the creation of a new model offence capable of overcoming the difficulties and problems concerning both the conspiracy and the criminal association models.

36. Vlassis (2001), op. cit. *supra* note 19, p. 360.

37. Mitsilegas, op. cit. *supra* note 18, 570; Calderoni, op. cit. *supra* note 26, 278.

38. "IE and UK thought that the alternative option of criminalizing conspiracy from the 1998 Joint Action should be maintained. UK referred to the evidentiary difficulties UK prosecutorial authorities would be faced with when trying to prove membership of a criminal organization. In view of these legitimate law enforcement concerns and at the suggestion of BE, the Presidency proposes to reinsert the alternative referring to conspiracy." (Council Doc. 9864/05 of 8 June 2005, 6, fn. 3).

39. Mitsilegas, op. cit. *supra* note 18, 571; Manacorda, 'La risposta . . .', op. cit. *supra* note 12, 287–288; Manacorda, op. cit. *supra* note 9, pp. 284–285.

40. Vermeulen, op. cit. *supra* note 10, pp. 71–74; Manacorda, 'La risposta . . .', op. cit. *supra* note 12, 270 and 287–288; Weyembergh, op. cit. *supra* note 10, 1582; Calderoni, op. cit. *supra* note 26, 280–282; Fijnaut, op. cit. *supra* note 18, p. 261.

41. Manacorda, op. cit. *supra* note 9, 281; Manacorda, 'La risposta . . .', op. cit. *supra* note 12, 287; Bäckman, op. cit. *supra* note 21, 32; Verbruggen, op. cit. *supra* note 22.

42. Joutsen, op. cit. *supra* note 9, 39; McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (OUP 2007), pp. 60–62; Calderoni, op. cit. *supra* note 3.

The debate about the FD was not merely confined to academic arguments, but also involved European institutions and national governments. Firstly, the approval of the final text of the of the FD in 2006 was accompanied by a statement of the European Commission, joined by France and Italy, in which they showed their disappointment with the finally approved text.⁴³ This declaration revealed that issues such as the double model offence approach represented a critical point in the negotiations of the FD. One of the institutions of the EU openly demonstrated dissatisfaction with it and this was shared by two important EU Member States. Secondly, Eurojust in its 2010 Annual Report argued that “notable differences can be found (e.g. type of predicate offences, continuity, penalties, etc.) and some Member States have not provided for offences relating to participation in a criminal organization in their criminal codes but have provided for offences of conspiracy to commit particular crimes”.⁴⁴

Lastly, the European Parliament has recently adopted the *Resolution on organized crime in the European Union*.⁴⁵ The Parliament acknowledged the “extremely limited impact on the legislative systems of the Member States of Framework Decision 2008/841/JHA on organized crime, which has not made any significant improvement to national laws or to operational cooperation to counter organized crime”.⁴⁶ It asked the Commission to table a new proposal for the end of 2013, with “a more concrete definition of organized crime that better identifies the key features of the phenomenon, focusing in particular on the key concept of organization and also taking into account new types of organized crime”.⁴⁷ Furthermore, the Parliament explicitly required the Commission to make “a study of the abolition of the current dual approach

43. “The Commission considers that the Framework Decision . . . fails to achieve the objective sought by the Commission in relation to Joint Action 98/733/JHA . . . and in relation to the United Nations Convention Against Transnational Organized Crime . . . to which the Community has been a party since 29 Apr. 2004. The Framework Decision does not achieve the minimum degree of approximation of acts of directing or participating in a criminal organization on the basis of a single concept of such an organization, as proposed by the Commission . . . Furthermore, the Framework Decision enables Member States not to introduce the concept of criminal organization 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 the approximation of legislation on the fight against transnational organized crime as provided for in the Hague Programme.” (Council Doc. 9067/06 of 10 May 2006). See also Calderoni, *op. cit. supra* note 26, 279.

44. Eurojust, “Annual Report 2010”, 47 <www.eurojust.europa.eu/press_annual_report_2010.htm>.

45. European Parliament, Resolution of 25 Oct. 2011 on organised crime in the European Union P7_TA(2011)0459.

46. *Ibid.*, para 7.

47. *Ibid.*

(which criminalizes both membership and conspiracy) and the identification of a range of typical offences which, regardless of the maximum sentence permitted in the legal system of Member States, could be deemed to constitute such a criminal offence".⁴⁸ Notably, the Parliament's resolution appears in line with the above mentioned arguments made by the literature concerning the quality of the FD.

In conclusion, the EU policies of approximation of criminal laws and the FD met strong criticisms about their lack of legitimacy, quality and effectiveness, both among scholars and policymakers. These arguments point out that the European legislature may have missed an important opportunity to learn from past errors and overcome the most critical points of previous international legal measures on organized crime. Contrarily, it seems that the Council privileged consistency with previous international legal instruments over more penetrating and effective solutions when drafting the FD.

Given this problematic background, the Commission and the Council are likely to face a critical decision in the forthcoming assessments, not only for the destiny of the FD, but also for the EU approach in the field of approximation of criminal law, and even for the EU policy in the AFSJ in general. Once again, there is the risk that EU institutions may disregard the opinion of the scholars and of practitioners and, instead of tackling the problematic issues, aim at a compromise solution, resulting in a static, *trompe l'oeil*, approximation. The choice of the Commission and the Council will determine whether the AFSJ will turn back from a merely reactive approach, mainly driven by the need to respond to external events such as scandals, terrorist attacks and sensational cases, to adopt a more strategic, evidence-based policy grounded on adequate preliminary analysis of specific problems.

In the light of these considerations, detailed analysis of the actual impact of the FD in Member States' legislation is an important prerequisite for the assessment by the EU institutions. While the Commission's reports have frequently been influenced by the provision of information by the Member States, the next section attempts to evaluate the implementation of the FD and to verify the above discussed criticisms on the basis of a comparative analysis of national organized crime legislation of EU Member States.

48. Ibid.

3. The impact of the Framework Decision on the fight against organized crime

3.1. *Tradition and innovation: Problems and frictions among EU Member States' organized crime legislation*

The analysis of EU Member States legal traditions and specific laws against criminal organizations, with the aim of identifying problems and frictions, is a preliminary step for the assessment of the impact of the FD.

There are three main approaches to the criminalization of organized crime among the Member States of the EU. Each approach developed a different solution to criminal organization offences (hereinafter COOs) and it is inherently related to the different legal traditions of European countries. They are the civil law, the common law and the Scandinavian approach. The *civil law approach* is based on the concept of criminal association or criminal organization. In general, it punishes the participants in an association which has the purpose of committing crimes. The most direct origin of the approach can be traced back to the 1810 French Criminal Code, with the offence of *association de malfaiteurs* (Arts. 265 et seq.). The idea of association or organization has always been at the centre of this approach. Even today, all EU Member States from the civil law tradition have in their criminal legislation an offence amenable to this model.

The *common law approach* is based on the offence of conspiracy as developed by English courts throughout more than six centuries of jurisprudence. Conspiracy can be defined as the agreement to commit a crime, and the concept and proof of the agreement is its main element. This approach can be found in the UK jurisdictions⁴⁹ as well as in the countries whose legal systems are strongly influenced by English law, namely Cyprus, Ireland and Malta.

The *Scandinavian approach* has been traditionally based on the rejection of COOs for organized crime cases. This is because Scandinavian criminal law relies heavily on the aggravating circumstances and the general rules on complicity to punish groups or organizations.⁵⁰ Indeed, even today Denmark and Sweden do not have any COO, notwithstanding their ratification of the

49. For criminal matters, the UK comprises three jurisdictions: England & Wales, Scotland, and Northern Ireland. Although they generally share very similar legislation, this article refers to England & Wales unless differently stated.

50. Cornils and Greve, "Denmark on the road to organised crime" in Fijnaut and Paoli (Eds.), *Organised crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond* (Springer 2004); Asp, "Sweden", 78 *Revue internationale de droit pénal: Rapports nationaux* (2007), 2–280; Flyghed, "Sweden" in Den Boer (Ed.), *Organised crime: A catalyst in the Europeanisation of National Police and Prosecution Agencies?* (European

UN Convention and the entry into force of the FD. Only Finland has introduced such an offence and, in line with the Scandinavian traditions, the text of the offence reveals a particular consideration for citizens' rights and freedoms. Indeed, the offence requires that at least one predicate offence "or its punishable attempt is committed", a unique solution among all EU Member States (Chapt. 17, section 1(a) of the Criminal Code). The offence also shows some influence of the EU Joint Action of 1998, since paragraph 4, the definition of criminal organization, is drawn from the international measure.

The three approaches focus on different aspects of criminal organizations and this has frequently created frictions in international cooperation against organized crime. For example, the civil law approach mainly revolves around the proof of a relatively stable association or organization among different individuals. This does not always require the existence of a specific agreement among all members, an element which is the core of the offence of conspiracy adopted by common law countries. Conversely, a simple agreement to commit a crime frequently does not satisfy civil law countries, where in some cases the criminal law explicitly excludes mere agreements from the scope of criminal law.⁵¹ Furthermore, both the civil and common law approaches may encounter difficulties in international cooperation with Scandinavian countries, since these legal systems will require proof of the commission of specific predicate offences, which may not always be possible (e.g. the criminal organization has not yet committed any offence or evidence is still weak) or required (e.g. the offence of conspiracy does not require proof that the agreement was successful). Not surprisingly, the frictions between these approaches and legal traditions were among the main drivers for the development of the above-mentioned international legal instruments in the field of organized crime.⁵²

Even within the same approach, EU Member States have adopted very different, and frequently contrasting, definitions and approaches to organized crime. For example, some civil law countries have innovated their criminal laws, introducing special COOs, specifically drafted to address organized crime groups. The archetype of this trend is the Italian mafia-type criminal

Institute of Public Administration 2002); Kruize, "Denmark", in Den Boer, *ibid.*; Hietalahti, "Finlande/Finland", 68 *Revue internationale de droit pénal* (1997), 773–791; Bäckman, *op. cit. supra* note 21.

51. A clear example is Art. 115 (1) of the Italian Criminal Code which states that "except differently stated by the law, whenever two or more persons agree to commit a crime and this is not committed, none is punishable for the mere agreement" (author's translation).

52. Martin, "Dual criminality in organized crime cases", 62 *Revue internationale de droit pénal* (1991), 175–181; Bay, "Definitions of organized crime in the European Union: A criminological perspective" in *Organised Crime & Crime Prevention – what works? Rapport fra NSJK:s 40. forskerseminar. Espoo, Finland 1998* (Scandinavian Research Council for Criminology 1998) 27–28; Manacorda, "La risposte ...", *op. cit. supra* note 12.

association (Art. 416-bis of the Italian Criminal Code), adopted in 1982. Several countries followed this path, including Belgium (Arts. 324-bis et seq. of the Criminal Code), Luxembourg (Arts. 324-bis et seq. of the Criminal Code), Austria (§ 278a of the Criminal Code), Romania (Arts. 7 et seq. of law 39 of 2003) and Greece (Art. 187 of the Criminal Code). In these cases, national legislators have introduced different concepts and definitions, specifying the objectives, the activities, the *modi operandi* of criminal associations. Although the intention to provide precise definitions of the criminalized conduct is praiseworthy, this has also increased the inconsistencies among different COOs, inevitably affecting international cooperation among Member States. For example, the mentioned Article 416-bis of the Italian Criminal Code punishes mafia groups not only when their goal is the commission of offences, but also when they more generally aim “to acquire, directly or not, the management of or even just the control over economic activities, the concession of authorizations, public procurement contracts or public services, or to obtain illegal profits or advantages for themselves and for others” (author’s translation). This provision allows prosecution of mafia organizations aiming at infiltrating the legitimate economy through illicit influence, even if the proof of any offence is lacking or difficult to achieve (e.g. obtaining the award of public works contracts by local politicians in exchange for votes or other forms of support). At the same time, it differs from the offences provided by other Member States, since it extends its scope beyond organizations aiming to commit offences. Other legal systems may therefore request evidence of the commission of one or more specific offences as a condition for cooperation.

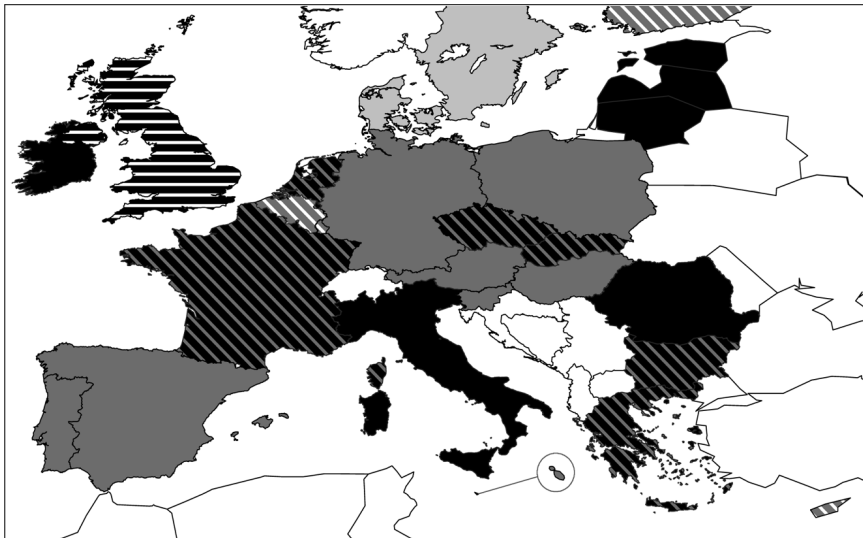
The analysis reveals a variety of legal solutions and approaches among EU Member States. While diversity *per se* should not be necessarily considered a problem, the present state of affairs suggests that frictions and inconsistencies among national laws may actually occur. A further example relating to the penalty provided for the mere participation in a criminal organization may clarify this. Penalties vary significantly among EU Member States (See Map 1). The standard penalty for the mere participation in a group ranges from a maximum of two years of imprisonment in Finland (and three years in Belgium, Luxembourg and Cyprus) to a maximum of fifteen years in Lithuania and twenty years in Romania.⁵³ Furthermore, for conspiracy the penalty is normally proportionate to the penalty for the most serious one agreed offence. This does not even consider the general rules on the imposition of penalties and the presence of aggravating circumstances (both







53. According to Art. 7(2) of Romanian law 39 of 2003 the penalty for the COO cannot exceed the penalty for the most serious crime which falls within the aim of the criminal organization.

as general provisions and specific for participation in a criminal organization) and the possibility of different penalties for leaders, organizers, directors, financiers.

Such disparity in penalties among EU Member States may hinder effective international cooperation against criminal organizations. For example, in Finland the penalty for participation in a criminal organization is below the threshold of three years of maximum imprisonment for a European Arrest Warrant, or for a European Evidence Warrant for carrying out a search or seizure, without verification the double criminality of the act.⁵⁴ Consequently an EAW or an EEW for search/seizure issued by Finland would be subject to verification of double criminality.

Map 1 – Maximum penalty for participation in a criminal organization



- | | | | |
|---|------------------------------------|---|------------------------------|
|  | Up to 3 yrs max impr. |  | Over 10 years max impr |
|  | Max impr. more than 3 up to 5 yrs |  | Proportionate to the offence |
|  | Max impr. more than 5 up to 10 yrs |  | N.a. |

Source: author's elaboration

54. See Art. 2(2) of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) and Art. 14(2) of Council Framework Decision 2008/978/JHA of 18 Dec. 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

In this general context of differing traditions and diverging innovations, two broad trends emerge.

The first is the slow and laborious convergence toward the civil law model offence of Member States belonging to the common law (Ireland, Malta, Cyprus) and Scandinavian traditions (Finland).⁵⁵ These countries have introduced new COOs in their criminal legislation. The international legal instruments on organized crime, and particularly the civil law model of criminal association, have partially inspired the drafting process of these new offences. Remarkably, common law countries have introduced criminal association offences without being obliged to do so, since the traditional conspiracy would have satisfied their international obligations. However, this process is far from straightforward. For example, concerning the introduction of the offence of participation in a criminal organization in Ireland, it was argued that “the Irish definition was coined without any specific examination of the area and with no regard to Irish circumstances. Conforming to international obligations overrode the need to enact legislation that was tailored to Ireland’s criminal justice problems”.⁵⁶ In 2009, Ireland amended the Criminal Justice Act 2006 and the offences relating to criminal organizations (Criminal Justice (Amendment) Act 2009). Once again, one of the motives was to comply with international obligations.⁵⁷ In addition, the difficulties in the implementation of the new legislation (Davey argued that no prosecutions were brought in the first two years,⁵⁸ although unsuccessful prosecutions would be a better indicator of failure) induced the legislature to “simplify the existing offence of participation in a criminal organization”, with the purpose of enhancing “the ability to bring prosecutions for offences of directing or participating in organized crime”.⁵⁹ The Irish example suggests that the transplantation of legal concepts and offences is not an easy step. Indeed, the United Kingdom, Sweden and Denmark still show considerable reluctance to the introduction of new COOs. The criticisms regarding the quality of the civil law model offence may have played a role in this reticence.⁶⁰

55. For Ireland, see Section 72 of the Criminal Justice Act 2006; For Malta, see Art. 83A of the Criminal Code; for Cyprus Art. 63A and 63B of the Criminal Code; for Finland, see Chapter 17(1)(a) of the Criminal Code.

56. Davey, “Organised crime in Ireland: A policy analysis of the introduction of organised crime to the Irish Statute Book” (Master’s dissertation, Dublin Institute of Technology 2008), 41. <http://www.dit.ie/cgi/viewcontent.cgi?article=1006&context=aaschssldis>.

57. Criminal Justice (Amendment) Act 2009: Explanatory and Financial Memorandum (Irish Statute Book 2009), 1 <www.irishstatutebook.ie/pdf/2009/en.act.2009.0032.pdf>.

58. Davey, *op. cit. supra* note 56, 32.

59. Criminal Justice (Amendment) Act 2009, cited *supra* note 57, 2.

60. Joutsen, *International Cooperation against Transnational Organized Crime: Criminalising Participation in an Organized Criminal Group*, vol. 59 (UNAFEI 2002),

The second trend concerns Member States which have more recently acceded to the EU. In some of these countries, COOs are often drafted very similarly (if not identically) to the model offences of the international legal instruments. In particular, the above criticized notions of criminal organization and structured association have found their way into the criminal law of some EU Member States.⁶¹ This may be the result of criminal justice reforms adopted under (national or European) pressure to gain accession to the Union. Legislators may have renounced a critical analysis of international/European models in favour of a swift adoption of norms formally compliant with the EU requirements.⁶²

While the above trends uncover some slow changes (not always for the better), most EU Member States (and particularly the major ones) have not amended their COOs significantly or the changes did not pay great attention to the FD requirements. This is especially the case for the older and more powerful Member States. For example, the UK, Germany, France, Italy, the Netherlands and Portugal maintained their offences, although the inconsistencies among these legislations are still relevant.⁶³ For example, in Germany, the jurisprudence has consistently applied a restrictive interpretation of Article 129 of the Criminal Code on criminal organization. In particular, it required that the members of the association pursue a common goal and feel part of a common union, where the individual will is submitted to the common will of the group.⁶⁴ This interpretation makes the offence

Resource Material Series 423; Harding, "The offence of belonging: Capturing participation in organised crime" (2005) *Criminal Law Review*, 690–700.

61. See Bulgarian Criminal Code, Art. 93(20); Romanian law 39 of 2003, Art. 2(a); Slovakian Criminal Code, art. 129(2). Interestingly, criticisms about the introduction of new organized crime legislation based on need to comply with European measures were encountered also in other countries. See the Irish example *supra* at notes 57 *et seq.* and Greece (Symeonidou-Kastanidou, *op. cit. supra* note 23).

62. De Hert and Pitto, "Mutual Trust and Enlargement" in Weyembergh and De Biolley (Eds), *La Confiance Mutuelle dans l'Espace pénal Européen/Mutual Trust in the European Criminal Area* (Editions de l'Université de Bruxelles 2006); for example, for Hungary, see Fehér and Geller Balázs, "Hongrie/Hungary" 69 *Revue internationale de droit pénal* (1998), 389–404; Karsai and Végvári, "Hungary", 78 *Revue internationale de droit pénal: Rapports nationaux* (2007), 1–188; for Slovenia, see Jakulin, "Slovénie/Slovenia", 69 *Revue internationale de droit pénal* (1998), 501–511.

63. In 2010, Spain introduced an interesting reform, criminalizing the participation in criminal organizations and criminal groups along with the traditional offence of illicit association. The FD and the UN Convention against Transnational Organized Crime have partially influenced the new Spanish discipline, although the stronger influences come from the national jurisprudence and doctrine. For more details, see Fiscal General del Estado, "Circular 2/2011, sobre la reforma del Código Penal por Ley Orgánica 5/2010 en relación con las organizaciones y grupos criminales" (Fiscalía General del Estado, 2 June 2011).

64. Volk, "La risposte pénale contre les organisations criminelles en droit allemand" in Manacorda (2002) *op. cit. supra* note 12, p. 24; Fornasari, "Le strategie di contrasto alla

hardly applicable to most criminal organizations, where a few individuals coordinate or take decisions for all the participants.⁶⁵ This interpretation by the German jurisprudence is unique among all EU Member States. As a result, the German COO requires an element which is rarely found among criminal organizations and is also irrelevant for all other EU legislations. Clearly, this may create frictions in international cooperation. This approach has not been modified up to the present day, and significantly restricts the application of Article 129 which, in practice, is more frequently used as a instrument to enable more powerful investigative measures.⁶⁶ Furthermore, the UK remains the only common law country relying solely on the traditional offence of conspiracy to enforce criminal organizations. In general, the offence of conspiracy has been frequently criticized by common law scholars and its usefulness in organized crime cases is debated.⁶⁷ Nevertheless, the UK has so far maintained conspiracy as the only COO for tackling criminal organizations. On the one side, this has been reflected in the negotiations of the FD, resulting in the above criticized compromise solution of the double model offence (see above section 2.2). On the other side, as already discussed in this section, the common law approach focuses on the agreement to commit a crime, independently from its actual commission and this is at odds with most EU Member States legislation.

In conclusion, this section has showed that a common understanding of the concept of criminal organization is far from being realized and legal approaches vary significantly among national legal systems. This situation creates problems and frictions between differing national legislation, and may have noticeable impact on international cooperation. Indeed, it is in contrast with the creation of a common European approach to organized crime, making it difficult for law enforcement agencies and supranational bodies such as Europol and Eurojust to cooperate, since they have to coordinate a number of different legislative provisions and conceptions of criminal organizations.

criminalità organizzata: aspetti comparatistici nell'esperienza europeo-continentale" in Fornasari (Ed.), *Strategie di contrasto alla criminalità organizzata nella prospettiva di diritto comparato* (Cedam 2002), p. 177; Council of Europe, *Effectiveness of provisions on membership in criminal organisations* (Council of Europe 2004), 22; Kinzig, "Les règles de fond sur la lutte contre le crime organisé. Fight against organised crime in criminal law", paper presented at the XVII International Congress of Comparative Law (2006), 6–7; Weisser, "Germany" 78 *Revue internationale de droit pénal: Rapports nationaux* (2007), 1, 163; Wenin, "La criminalità organizzata nell'esperienza giuridica tedesca" in Fornasari (Ed.), *Modelli sanzionatori per il contrasto alla criminalità organizzata. Un'analisi di diritto comparato* (Università degli Studi di Trento 2007), pp.259–260.

65. Volk, op. cit. *supra* note 64, p. 25.

66. Kinzig, op. cit. *supra* note 64, 7–8.

67. UK Home Office, *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime* (Home Office 2004); Harding, op. cit. *supra* note 60.

These difficulties may prevent the strengthening of mutual trust among EU Member States, which is a fundamental prerequisite for the smooth functioning of international cooperation. Police, prosecutors and judges may have difficulties in applying provisions which are not only different from their domestic legislation, but may even be in contrast with it. Inevitably, this would make procedures and operations more burdensome and costly.⁶⁸

3.2. *Assessment of the impact of the Framework Decision*

A previous study on the impact of the FD at the moment of its entry into force raised doubts about its actual added value.⁶⁹ In particular, it highlighted that most EU Member States were already in compliance with EU standards. Indeed, 16 Member States were considered fully compliant with the FD, and 9 were not compliant only in one out of nine indicators.⁷⁰ The remaining two Member States were Sweden and Denmark which, as already mentioned, have a traditional distrust towards COOs. Consequently, notwithstanding the requirements by international measures, they had not yet introduced any such offence.

The requirements of the FD which turned out to be most problematic in the previous analysis concerned the aggravating circumstance of Article 3(2),⁷¹ and the liability of legal persons of Article 5.⁷² The low level of compliance of

68. For further detailed examination of these problems, see Weyembergh, *op. cit. supra* note 10.

69. The assessment of the level of approximation was made through a set of 17 indicators of approximation, each based on one specific requirement of the FD: Number of members (Art.1); Number of predicate offences (Art.1); Type of predicate offences (Art.1); Structure of the group (Art.1); Continuity of the group (Art.1); Additional requirements (Art.1); Offences relating to participation in a criminal organization (Art.2); Standard penalty for participation/membership (Art.3); Aggravating circumstance (Art.3); Special circumstances (Art.4); Crimes committed by persons having a leading position within the legal person (Art.5); Crimes made possible by lack of supervision or control (Art.5); Criminal/non-criminal fines (Art.6); Other sanctions (Art.6); Territorial jurisdiction (Art.7); Jurisdiction over offences committed by a national (Art.7); Jurisdiction over offences committed for the benefit of a legal person established in the territory (Art.7). For further details, see Calderoni, *op. cit. supra* note 3.

70. Calderoni, *op. cit. supra* note 3, p. 161.

71. Art. 3(2) of the FD: "Each Member State shall take the necessary measures to ensure that the fact that offences referred to in Article 2, as determined by this Member State, have been committed within the framework of a criminal organization, may be regarded as an aggravating circumstance".

72. The FD requires Member States to introduce the liability of legal persons for the participation in a criminal organization committed, for the benefit of the legal person, either a) by a person having a leading position within the legal person or b) by a person under the authority of, and due to a lack of supervision or control by a person having a leading position within the legal person.

EU Member States with these requirements does not appear a sufficient justification for the adoption of the FD. They are accessory issues compared to the problems of the offences of participation in a criminal organization. As for the liability of legal persons, other international measures had already required its introduction (e.g. the OECD Convention on Combating Bribery of Foreign Public Officials or the UNCTOC) and therefore the FD was not necessary. Further, the provision on the aggravating circumstances revealed some problems of interpretation, probably due to a mere error of transcription, which makes it a very problematic provision.⁷³ Except for these minor issues, EU Member States showed very high levels of compliance with the requirements of the FD even before its entry into force.

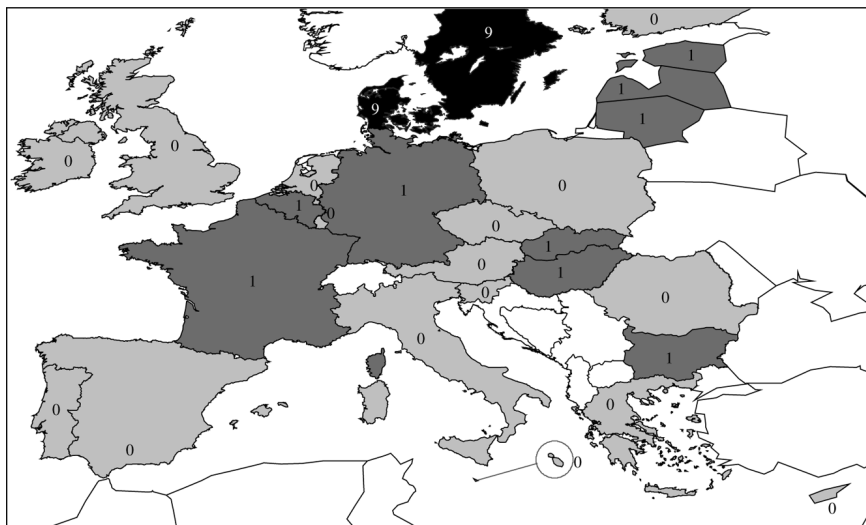
Update of the comparative analysis to the end of 2011 substantiates the already mentioned paradox of the approximation of organized crime legislation. The FD contains such broad provisions that the level of compliance with the EU requirements is high, notwithstanding the inconsistencies highlighted above in section 3.1.⁷⁴ The changes in EU Member States legislation after the entry into force of the FD and the expiry of the deadline for its implementation have modified the situation (see Map 2). New provisions or amendments to organized crime legislation have been introduced in Bulgaria, the Czech Republic, Finland, Ireland, Italy and Spain. Further, a new Criminal Code has been approved in Romania since 2009, but its entry into force is still pending. Overall, the majority of EU Member States complies with most of the provisions set by the FD and this comes as no surprise, given broadness of the EU requirements. At the same time, no Member State changed its national legislation in the parts which were not complying with the FD requirements. This is not just a matter of minor

73. The final text version is probably the result of a mere error of transcription which has altered the original meaning of the text. During the negotiations the provision always referred to Art. 1 (definition of criminal organization and of the predicate offences). See Commission, Proposal for a Council Framework Decision on the fight against organised crime, COM(2005)6, 5–6; Council Doc. 9067/06 of 10 May 2006, cited *supra* note 43. The final text of the FD unexpectedly changed and referred to Art. 2 (offences relating to the participation in a criminal organization). There is no trace of the reasons underlying this change in the documents of the Council. The outcome is rather tautological, since the current text suggests that the participation in a criminal organization may be aggravated when committed within the framework of a criminal organization. During a meeting, the author discussed this problem with the Commission unit responsible for the FD and the officials agreed on the issue. Without doubt, this is a problematic provision which should be corrected. See also Calderoni, op. cit. *supra* note 3, p. 39.

74. The update excluded the indicators concerning the optional requirements of the FD and also those on the liability of legal persons (which should be covered by other international instruments) and the indicator on the aggravating circumstance of Art. 3(2) (as argued in the previous footnote the provision is flawed and should be amended). Overall, the updated assessment of the impact of the FD was based on 9 indicators.

amendments, as demonstrated, for example, by the lack of any COO in Denmark and Sweden. As argued above, this type of offence is contrary to the Scandinavian approach to COOs. This signals that legal traditions have prevailed over international and European legal measures. Overall, the analysis substantiates the *trompe l'oeil* nature of the FD: its provisions are so broad that all the significantly diverging national legislation of the EU Member States are formally in compliance with them.

Map 2 – EU Member States' compliance with the Framework Decision on the Fight against Organized Crime. Number of non-complying indicators (out of 9 indicators)



Light grey box: Full compliance

Dark grey box: 1 indicator

Black box: Over 1 indicator

Source: author's elaboration

In particular, except for Denmark and Sweden, the problems of compliance with the FD concern only one specific indicator for nine Member States. Lithuania (Art. 25(4) of the Criminal Code), France (Art. 450-1(1) of the Criminal Code), Hungary (Art. 137(8) of the Criminal Code) and Slovakia (Arts. 11 and 129(4) of the Criminal Code) do not comply with the FD

requirements relating to the type of predicate offences that can be committed by a criminal organization. As already mentioned, the FD prescribes that a criminal organization should have the aim to commit offences punishable with at least four years of maximum imprisonment (Art. 1 of the FD). Nevertheless, the mentioned Member States set a higher threshold. France, Hungary and Slovakia require that a criminal organization aims at crimes punishable with at least five years, while Lithuania requires that a criminal organization commits one or more serious or grave crimes (penalty exceeding six and ten years of maximum imprisonment respectively).

Furthermore, Estonia (Art. 255(1) of the Criminal Code) and Bulgaria (Art. 93(20) of the Criminal Code) explicitly require that the criminal organization is potentially permanent. This approach may contrast with the requirement of the FD that a criminal organization need not have “continuity of its membership”. However, the national provisions may be interpreted with more flexibility and this may bring them in line the EU requirements without the need of any amendment.

Belgium does not seem to comply with the FD since it requires additional elements restricting the scope of the national laws. Articles 322 et seq. of the Criminal Code on criminal association require that the association aims at threatening persons or properties (“*dans le but d’attenter aux personnes ou aux propriétés*”). Unless interpreted in a very broad sense, this may exclude a number of offences perpetrated by criminal organizations (e.g. criminal groups aiming at forgery of documents, corruption of public officials, infiltrating public procurement procedures). Article 324 on criminal organization require the use of intimidation, threat, violence, “*manoeuvres frauduleuses*” or corruption or the exploitation of enterprises (“*structures commerciales ou autres*”) to dissimulate or facilitate the commission of crimes. This provision exceeds the EU requirements and restricts the scope of the offence, potentially leaving out of the domain of the norm groups which do not use such *modi operandi*. Remarkably, this solution has been deliberately adopted by Belgium in order to limit the application of the broad definition adopted by the international legal instruments on organized crime.⁷⁵

75. Belgium has always paid great attention to the reference to the *modi operandi* of the criminal organizations also in international *fora*. Indeed, during the negotiations of both the Joint Action and the UNCTOC, the Belgian delegation proposed to mention the *modi operandi* of criminal organization, i.e. the use of intimidation, threat, violence, fraud or corruption; See Traest, “Les règles de fond sur la lutte contre le crime organisé/Fight against organised crime in criminal law” in Dirix and Leleu (Eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law* (Bruylant 2006), p. 762; McClean, op. cit. *supra* note 42, p. 39. These proposals were not retained in the final texts. Further, Belgium made a statement on Art. 1 of the Joint Action: “The Belgian delegation considers that the definition of ‘criminal organization’ given in Article 1 includes the *modi operandi* used by the perpetrators of

Consequently, it does not seem likely that Belgium will change this provision (already slightly modified to comply with the UNCTOC)⁷⁶ to implement the FD. Although the aim of restricting the application of such broad international models is laudable, it appears that Belgian criminal law may not cover any form of active participation in a criminal organization's criminal activities, as requested by the FD.

Latvia (Art. 224 of the Criminal Code) explicitly requires that the criminal organization is armed. Therefore, a group which is not armed, or whose armed nature was impossible to prove, may fall outside of the scope of this offence. This contrasts with the requirements of the FD which does not mention the armed nature of the criminal organization.

The already mentioned interpretation of Section 129 of the German Criminal Code, requiring that all members of a criminal organization are subject to the "common will" of the group may hinder the full compliance of Germany with the requirements of the FD, since this requirement restricts the scope of application of the participation in a criminal organization to a limited number of cases.

Remarkably, the wide variety in penalties among Member States (see above, section 3.1) does not pose any problem of compliance with the FD. All EU Member States comply with the requirement of a maximum penalty of at least between two and five years of deprivation of liberty. The differences emerging for the example of the previous section are all in line with the EU requirements.

The impact of the FD, after the expiry of the deadline for its implementation, appears to be low. This measure was drafted in such broad terms that most EU Member States were already in full compliance with it before its entry into force. This may have been the result of the complex institutional setting of the Third Pillar, requiring unanimity of all the Member States, but also of the lack of previous comparative analysis of the national legislation. Furthermore, among the few Member States with some possible inconsistencies with the requirements of the FD, no Member State has changed its national legislation to achieve higher compliance. While some new codes, new provisions and new amendments have been approved in the last years, the influence of the EU models has largely remained in the political

the offence. The *modi operandi* cover the use of intimidation, threats, violence, fraudulent manipulation or corruption or the use of commercial or other structures to dissimulate or facilitate the perpetration of offences"; O.J. 1998, L 351/3.

76. At first, the reference to the *modi operandi* was in Art. 324bis (the definition of criminal organization). In 2005 the law ratifying the UNCTOC moved the reference from Art. 324bis to Art. 324ter of the Criminal Code. The reference now applies only to the offence of participation in a criminal organization (Art. 324ter[1]). See Verbruggen and Traest, "Belgique" 78 *Revue internationale de droit pénal: Rapports nationaux* (2007) 1, 28.

declarations. The traditional approaches to COOs (civil law, common law and Scandinavian approach) showed significant resistance against legal transplants, particularly from a supranational source. It is highly possible that the very poor quality of the FD (broad definitions, quantitative selection of predicate offences, double model offence) further decreased its appeal for national legislators.

All the above discussed problems of compliance may result in the expansion of the scope of organized crime legislation. Independently of their effectiveness and opportuneness (which should be assessed by policy makers, prosecutors, lawyers, police and legal scholars), all the mentioned national provisions have a scope which is narrower than the model offences provided by the FD. Enforcing compliance with the EU requirements in this field may result in obliging Member States to extend the scope of their criminal laws. This is particularly problematic given the poor quality of the EU measure and the generic provisions defining the criminal organization and criminalizing the participation in it.

In conclusion, the impact of the FD on the national legislation appears questionable. The FD is a measure of poor legal quality which does not address the inconsistencies and frictions among Member States' national legislation. On the one side, this is the cause of the extremely limited impact of the FD on the national laws. On the other side, however scarce may be the influence of the FD, it may end up in an unwarranted extension of the scope of criminal law and in particular of the existing offences of participation in a criminal organization.

4. Conclusions: future developments

This article identified the main problems of EU policies of approximation of organized crime legislation, with a particular focus on the FD. Subsequently, it demonstrated that existing legislation among the Member States may cause frictions and ultimately hinder the strengthening of mutual trust and the smooth functioning of international cooperation. The analysis of the implementation of the FD demonstrated that the definition of criminal organization "does not work" and has had a very limited impact in reducing the inconsistencies and improving harmony among national laws. On the contrary, the FD may force Member States to over-extend the scope of their national provisions on organized crime.

In this general context, the future developments are particularly uncertain. The Treaty of Lisbon has significantly changed the institutional and legal

framework of the AFSJ.⁷⁷ However, these improvements should not be expected to have immediate effects in the field of the approximation of organized crime legislation. Indeed, all acts adopted under the Third Pillar will remain in force until their repeal, annulment or amendment. Furthermore, for a period of five years the power of the Commission to bring Member States before the Court for infringement of their duties to implement EU measures is frozen and the jurisdiction of the Court will remain as under the previous legal framework, unless the acts in force are amended. This power may be useful not only to bring Member States to modify their national legislation to ensure compliance with the FD (for the few provisions which do not comply with the very broad requirements of the FD), but even more importantly it may allow the Commission to play a more active role and stimulate a substantial approximation of the national legislation.

Several considerations suggest that improvements in this field are not around the corner. First, it is hard to expect a new proposal for an EU Directive on organized crime, or even an amendment of the FD, in the next months. The current Commission Work Programme for 2012 does not include any legislative initiative in the field of organized crime legislation.⁷⁸ According to Article 76 TFEU the initiative may come from one quarter of Member States, but this appears difficult to imagine, given the inconsistency among national legislation in this field.

Second, the Council will hardly support a new Directive or amendment to the FD. This would imply the application of the Treaty of Lisbon, which has reduced the influence of the Council on the AFSJ. Indeed, the only Directives adopted until now in the field of substantive criminal law are the new 2011 Directive on trafficking in human beings and the 2011 Directive on sexual exploitation of children and child pornography.⁷⁹ However, these initiatives had started in 2008 as new Framework Decisions and were “lisbonised” during their drafting process, due to the entry into force of the Treaty of

77. Peers, “Finally ‘fit for Purpose’? The Treaty of Lisbon and the end of the Third Pillar legal order” 27 YEL (2009); Mitsilegas, op. cit. *supra* note 6; Monar (Ed.), *The Institutional Dimension of the European Union’s Area of Freedom, Security and Justice* (P.I.E Peter Lang 2010).

78. Commission Legislative and Work Programme 2012: Delivering European Renewal COM(2011)777 final vol 1/2.

79. Directive 2011/36/EU of the European Parliament and of the Council of 5 Apr. 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, O.J. 2011, L 101/1 and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, O.J. 2011, L 335/1.

Lisbon.⁸⁰ Two new Directives in nearly two years and a half is not a steady pace, and this is probably due to the EU institutions' need to adapt to the new institutional and legal framework.

For the reasons above, it seems also unlikely that a new Directive will be adopted or that the FD will be amended before the expiry of the 5-years period, on 1 December 2014. After that date, the Commission will be able to play a more active role, but much will depend on its political priorities.

Overall, it seems that even a poor instrument such as the FD may remain in force for a long time and this may protract its negative effects.

Given these premises, it is probable that the FD will be the measure of reference for the next years. As already mentioned in the introduction, in the forthcoming months the Commission will draft a report on the implementation of the FD, based on the information provided by the Member States. Subsequently, the Council will be called to assess the FD. This round of evaluation should be conducted with particular attention to avoid repeating previous mistakes (*humanum fuit errare, diabolicum est per animositatem in errore manere*). Better evaluation is indeed one of the priorities of the Stockholm Programme, adopted at the end of 2009.⁸¹ It calls for independent and peer-reviewed assessments whose results should be shared with the Parliament. In particular, the Stockholm Programme explicitly provides that "judicial cooperation in criminal matters should be pursued as the first policy for evaluation".⁸² However, it is still rather unclear how these mechanisms will be developed and whether they will significantly improve the current, extremely limited, evaluation by the Commission. Certainly, the Commission

80. See Commission Legislative and Work Programme 2009: Acting now for a better Europe COM(2008)712 final, 9; Commission, Adopted Commission Initiatives 2010, 13 <ec.europa.eu/atwork/programmes/docs/execution_report_2010.pdf> accessed 29 March 2012.

81. See Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen COM(2009)262; Council, The Stockholm Programme – An open and secure Europe serving and protecting the citizens Council doc. 17024/09; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm Programme – COM(2010)171. Remarkably, for the first time in the history of the EU, the Commission's Action Plan did not satisfy the Council, due to a number of departures from the Stockholm Programme. For this reason, the Council urged the Commission "to take only those initiatives that are in full conformity with the Stockholm Programme" and asked a review by June 2012; Council Conclusions on the Commission Communication "Delivering an area of freedom, security and justice for Europe's citizens – Action Plan implementing the Stockholm Programme" COM (2010)171 final, 3018th JHA Council meeting, 3 June 2010; see also Monar, op. cit. *supra* note 13.

82. Council, "The Stockholm Programme", cited *supra* note 81, 15.

may provide further information about this process in its review of the Action Plan to implement the Stockholm Programme due by June 2012.⁸³

Although the overall context is not particularly favourable for any speedy alteration of the EU policy in the field of approximation of organized crime legislation, some elements may spur some change. European institutions and agencies have shown awareness of the limits of the FD. In addition to the Commission, which showed its disagreement with the final text of the FD adopted by the Council, also Eurojust and the European Parliament argued that the FD is not currently satisfactory in some points. In particular, the Parliament urged the Commission to consider a thorough revision of the FD and present a new proposal.

For these reasons, the forthcoming months will be crucial for the destiny not only of the FD, but also for the whole EU policy in the AFSJ. These passages may represent a turning point not only in the field of organized crime legislation, but also for the EU policy of approximation of criminal law (other measures share the problems of the FD). Eventually, the Council, which has so far been the major player in the former Third Pillar, may be called to reconsider its policy. So far, the Council has normally privileged consistency with previous instruments (Joint Action of 1998) and international treaties (the UNCTOC) over the introduction of new, more evidence-based, solutions. The consequences and risks of this approach are now emerging at various levels. Addressing and solving the critical issues of the FD would require the Council to radically depart from its previous methods and develop an autonomous, knowledge-based approach to organized crime legislation. Such a change is a daunting challenge EU institutions will soon have to face, but it would surely improve the quality and effectiveness of EU measures, increase trust and legitimacy levels in a field of particular concern for EU citizens and will also finally return to the EU the leading role in the field of organized crime legislation it has held for years.

83. See note 81 *supra*.

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