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The Coherence of the adopted measures, during the last years by the EU with regard to organised crime, namely the fight against human trafficking and the UN Convention on organised crime - the Palermo Convention and its 3 Protocols.

BRIEFING PAPER

The fight against organised crime has been at the forefront of the EU JHA agenda for the past decade. However, the EU has not been acting in a void. It has been instrumental in the development of global action in the field, in particular by participating in and concluding- within its respective powers- the UN Palermo Convention. This has resulted in a comprehensive EU criminal law and enforcement framework in the field of organised crime, money laundering and human trafficking and smuggling. The EU framework is largely consistent with global standards, with the exception perhaps of the prevention/rights field. In the light of the plethora of legal and policy instruments in place, the primary emphasis at this stage must be on the implementation of these instruments in Member States and an evaluation on how they work in practice. Particular emphasis must be placed on the protection of the rights of victims, in particular in the field of trafficking in human beings, but also the protection of fundamental rights and civil liberties, which may be challenged by the proliferation of enforcement tools and a broad definition of organised crime which may lead to the expansion of surveillance and the uncritical use of the European Arrest Warrant. Last, but not least, emphasis must be placed on the prevention of organised crime and trafficking to the extent that the EU has competence to act on these issues. The note contains a number of specific recommendations on each of these points.

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The Coherence of the adopted measures, during the last years by the EU with regard to organised crime, namely the fight against human trafficking and the UN Convention on organised crime - the Palermo Convention and its 3 Protocols.

Introduction

1. The past decade witnessed the adoption of a plethora of EU legislative measures and policy initiatives aimed at countering organised crime, including the trafficking of human beings. The fight against organised crime has been at the forefront of the EU JHA agenda, as evidenced by the two Action Plans to fight organised crime in 1997 and 2000, and the 1999 Tampere Conclusions and their Hague successors. The need to fight organised crime- including money laundering- comprehensively has also been central in accession negotiations. A Pre-Accession Pact on organised crime was adopted between the EU and the then 10 candidate countries in 1998, and fighting organised crime effectively is a necessary pre-condition for the timely accession to the EU of Bulgaria and Romania. Indeed, considerable pressure is being currently put to Bulgaria to speed up the reform of its justice system to fight organised crime effectively for its EU accession not to be delayed.

2. However, the EU has not been acting in a void. It has been instrumental in the development of global action in the field. The EC/EU (in accordance with their respective first/third pillar competences) has participated in all major negotiations leading to the adoption of international instruments aimed at countering organised crime - such as the 2000 Palermo Convention on transnational organised crime and its Protocols on human trafficking and smuggling. A great number of EU Member States- and the European Commission- are members of the Financial Action Task Force (FATF), which provides with a major impetus towards the adoption and implementation of global anti-money laundering standards. The EU and its Member States have thus been playing a leading part in the formulation of international standards in the field. On the other hand, subsequent EU action in the field has been largely justified on the basis that compliance with these very same international instruments is necessary and new EU measures have been heavily influenced by existing global standards. This briefing note will examine the coherence of this strategy as regards organised crime, human trafficking and smuggling and – briefly- money laundering.

Organised Crime

3. A central element in the fight against organised crime is the criminalisation of participation in a criminal organisation. This 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, ie 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 has 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.

4. The European Union responded 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' (98/733/JHA, [1998] OJ L351/1). The Joint Action provides a definition of a criminal organisation as 'a structured organisation, established over a period of time, of more than two persons, acting in concert with the view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least 4 years [including those stated in the Europol Convention with a similar threshold]…whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities' (Article 1) – this is an ambitious attempt to define organised crime groups, taking into account law enforcement perceptions, but a number of its elements (such as a 'structured' group and a 'period of time') are notoriously hard to define. The Joint Action then goes on to criminalise active participation in such an organisation, or, alternatively, conspiracy to commit any of the offences stated above (Article 2). 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). The Joint Action also includes rules on jurisdiction, judicial co-operation and liability of legal persons.

5. The EU approach regarding the definition and criminalisation of organised crime was greatly influential in the drafting of the 2000 UN Convention against Transnational Organized Crime (the Palermo Convention). Organized criminal group was defined in very similar- almost identical- terms, with further elaboration as to the element of the sought benefit (groups must exist 'in order to obtain, directly or indirectly, a financial or other material benefit' Article 2(a)), and of what constitutes a 'structured' group ('a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure' Article 2(c) – the vagueness of this definition is evident, in particular by the fact that a structured group is seen as such even if it does not have a developed structure…) . Criminalisation of participation in an organised crime group is also very similar to the Joint Action.

Article 3 of the Convention maintains the two alternative options of criminalisation: of participation in an organised crime group and (leaving Contracting States the discretion to include further conditions to criminalise in comparison with the Joint Action) of conspiracy to commit serious crimes for the purpose of obtaining a benefit (Article 5(1)(a)). The Convention went one step further to the Joint Action by also criminalizing other forms of participation in the activities of an organised crime group, including 'directing' them (Article 5(1)(b)).

6. The UN Convention also includes a number of related provisions on corruption, money laundering and confiscation, the liability of legal persons, extradition and mutual legal assistance, joint investigation teams and police co-operation, and assistance to victims, where a comprehensive and constantly evolving EU framework already exists. Indeed, some of the provisions included in the Convention are carefully drafted to take into account the diversity of constitutional traditions in Contracting Parties – and EU action may be an example of best practice. Areas included by the Convention but where EU action is more limited- but this may be due to competence constraints – are the prevention of organised crime and the protection of witnesses. The Convention also introduces an offence of obstruction of justice (Article 23) which does not currently exist as such in EU law.

7. Going back to the criminalisation of organised crime, the Commission has come back early last year with a proposal for a Framework Decision which would replace the 1998 Joint Action and revise the EU organised crime offences (COM (2005) 6 final). The Commission's proposal aligned the definition of criminal organisation with the UN Convention and introduced directing a criminal organisation as an offence. However, it also repealed the Joint Action and UN Convention option to criminalise conspiracy instead of participation in an organised crime group. The Commission's proposal also included detailed provisions on penalties, mitigating circumstances, liability of legal persons, jurisdiction, and victim protection. It formed the basis for a 'consensus' reached by the Council in 27-28 April 2006.However, in the finally agreed version (latest doc. 9067/06), the Council maintained the alternative criminalisation of conspiracy (instead of participation in an organised criminal group), and avoided the criminalisation of the direction of an organised criminal group – the Commission has opposed both these developments. The Council aligned the definition of an organised crime group with the one included in the UN Convention and the Framework Decision now includes detailed provisions on penalties (minimum maximum of 2-5 years, and the commission of an offence within the framework of a criminal organisation is to be treated as an aggravating circumstance). The other provisions introduced by the Commission were maintained with smaller or larger amendments.

8. The Commission may have a point in criticising the maintenance in a harmonisation measure of two alternative options of criminalisation of organised crime. This does not help towards legal certainty and creates a potentially very extensive scope of criminalisation of organised crime across the EU. This is linked to the fact that both alternative offences are worded on very broad terms- 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. What is more worrying is that this may lead to considerable

diversity in implementation, at a time where 'organised crime' is an offence for which dual criminality has been abolished under the mutual recognition instruments (including the European Arrest Warrant, the European Evidence Warrant and measures on freezing and confiscation of assets). Moreover, the vague offence of organised crime is among the offences included in the mandate of Europol and Eurojust- which may be called to action for behaviour which is deemed as organised crime in one Member State but not in others. As far as the national level is concerned, the focus must be placed on how the EU and UN instruments are implemented and how the concept of organised crime is used in the national criminal justice systems.

Human smuggling and trafficking

9. EU action to combat human smuggling and trafficking began slowly in the 1990s, with significant boost being given by the Amsterdam Treaty, which 'communitarised' parts of action in these fields and incorporated the Schengen acquis in the EC/EU legal framework (Article 27 of the Schengen Convention focused on human smuggling). The Community and the Union according to their respective competences participated in the negotiations of the 2000 Palermo Convention, which also includes two Protocols on trafficking and smuggling. The result of these efforts in the EC/EU framework has been the adoption of a series of measures aiming to counter these phenomena.

10. On human smuggling, 2002 saw the adoption of a first pillar Directive and a third pillar Framework Decision on the facilitation of unauthorised entry, transit and residence (OJ [2002] L328/17 and OJ [2002] L328/1 respectively). The need for two separate instruments was dictated by Member States' view that, while the definition of unauthorised entry etc could be a matter for the first pillar, its criminalisation was a third pillar issue- it remains to be seen if this will change after the ECJ ruling on environmental crime, which prompted the Commission to argue that this, along with a series of other 'dual-pillar' instruments, must be recast to be totally communitarised. The Directive defined facilitation as assisting intentionally a third country national to enter or transit an EU Member State in breach of its aliens' laws and assisting intentionally 'for financial gain' a third country national to reside in an EU MS irregularly. The definition goes beyond the UN smuggling Protocol, which requires 'a financial or other material benefit' as a condition for the criminalisation of procuring of illegal entry. The disassociation of the financial gain element from the facilitation offence for the purposes of entry and transit raised concerns among humanitarian NGOs, who felt that they would be prosecuted for assisting third country nationals, including asylum seekers, to enter the EU. For that reason, and after protracted negotiations, a clause was added in the Directive granting Member States the discretion not to impose sanctions where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

11. The Framework Decision introduces a series of criminal sanctions, including heavier penalties if the offences are committed for financial gain or if they are committed within the framework of an organised crime group or they endanger the lives of the smuggled persons. The latter two elements are

also mentioned in the UN smuggling Protocol, but the latter includes a further aggravating circumstance when smuggling entails inhuman or degrading treatment, including exploitation. Moreover, the UN smuggling Protocol contains provisions on ensuring the safety and humane treatment of smuggled persons who are intercepted at sea, and a series of detailed provisions on prevention, which are absent from the EC/EU documents.

12. On human trafficking, the Council adopted in 2002 a Framework Decision defining and criminalizing it (OJ [2002] L203/1). The definition – and criminalisation - of human trafficking in the Framework Decision follows very closely the definition adopted in the UN 2000 Protocol on human trafficking- importantly, the offence includes trafficking for the purpose of labour exploitation. A notable omission from the EU text is trafficking for the purpose of removal of organs. Indeed, a proposal tabled some years ago by the Greek EU Presidency to criminalise the trade in human organs has been blocked in the Council. On penalties, the Framework Decision is silent on penalty levels for the standard offence, but introduces a minimum maximum custodial sentence of 8 years when a series of aggravating circumstances apply – including the endangerment of the victim's life, the vulnerability of the victim, serious violence or harm to the victim and commission within the framework of a criminal organisation. There has been great controversy during negotiations on the penalty levels, with Member States having considerably diverging views as to the gravity of the offences.

13. The UN Protocol also contains detailed provisions on prevention and assistance to victims. The EU framework does not include much on prevention. The Framework Decision includes a general provision on victim protection, which is really limited to children. For adults the only protection provided is that – similarly to the organised crime Framework Decision - prosecution of the trafficking offences must not be dependent on the report or accusation of the victim. However, in 2004 the Council adopted a first pillar- Title IV- Directive on the residence permit to third country nationals who are victims of trafficking. The Directive defines the conditions under which Member States may give limited duration residence permits to victims who co-operate in the fight against trafficking or illegal immigration. It is a very limited protection – even more limited in the light of the fact that countries such as the UK have decided not to opt in even in these quite diluted standards – since protection is given only to victims who co-operate with the relevant State authorities; it applies to persons that the authorities identify as useful; the duration of the reflection period for the victim to decide to co-operate is left to the Member States; the duration of the residence permit is also left to the discretion of Member States and is dependent on the usefulness of the victim to the investigations or judicial proceedings and their intention to co-operate; and the permit may be withdrawn at any time if the conditions for their issuing are not fulfilled- it will not be renewed if the authorities think the conditions for granting it no longer apply or proceedings have been terminated. This is a considerably watered down proposal from the Commission's initial draft which called for a 6-month residence permit and a 30 days reflection period. It is also at odds with the spirit of the UN Convention and the need to protect victims, as it is conceived exclusively from a prosecutorial/law enforcement logic. In view of the very

limited protection it eventually gives and the very strict conditions of granting, the effectiveness of such a measure for the authorities is highly doubtful.

Money laundering

14. The fight against money laundering is inextricably linked to the fight against organised crime (including human trafficking), as depriving criminals from their proceeds of crime is deemed imperative. The Community – whose 'old' 15 – and the Commission -are all FATF members – has developed over the years a detailed and very sophisticated anti-money laundering (aml) regime, culminating in the recent adoption of the 3rd money laundering Directive. This is not the place for a detailed analysis of the comprehensive EU anti-money laundering framework, but the following developments in the 3rd money laundering Directive – which was justified to align the EU framework with the revised FATF standards - may be controversial: the extension of the aml regime to cover terrorist finance, in view of the differences between the two: terrorist finance may involve 'clean', and not always 'dirty' money, it may involve small sums, and it may involve transactions outside the financial system (in this context, the position on the surveillance of charities raise a number of complex issues); the extension of aml duties to the legal profession, which may challenge fundamental fair trial rights and the administration of justice in Member States; and, from an institutional point of view, the increased use of Comitology (and thus limited scrutiny) to define – and extend the scope of- key concepts in the aml enforcement field, such as beneficial ownership, politically exposed persons, business relationship and shell bank. Perhaps more importantly, concerns are raised by what can be called 'implementation fatigue', with the third money laundering Directive being adopted shortly after the expiry of the implementation deadline for the second.

Recommendations for action

The EU has adopted a panoply of enforcement measures to tackle organised crime. Action is largely consistent with other international initiatives, including those by the UN and the FATF, fora in which the EC/EU plays an active role. In the light of the plethora of legal and policy instruments in place, the primary emphasis at this stage must be on the implementation of these instruments in Member States and an evaluation on how they work in practice. Particular emphasis must be placed on the protection of the rights of victims, in particular in the field of trafficking in human beings, but also the protection of fundamental rights and civil liberties, which may be challenged by the proliferation of enforcement tools and a broad definition of organised crime which may lead to the expansion of surveillance. Last, but not least, emphasis must be placed on the prevention of organised crime and trafficking to the extent that the EU has competence to act on these issues. Specific recommendations include:

- rather than adopting new enforcement instruments, prioritising the implementation of existing measures and the ratification by those Member States which have not done so of the Palermo Convention and its Protocols

- by way of exception from the above: urgently agreeing a strong criminal law framework against trafficking in human organs, which is a great motivating factor for both organised crime and human trafficking
- closely monitoring of the implementation of the Framework Decision on organised crime, with particular focus on how the organised crime offences are used by the police, investigators and prosecutors in Member States
- monitoring how 'organised crime' has been used to request the execution of European Arrest Warrants (and in the future, confiscation orders) in Member States
- placing greater emphasis on victim protection, in particular regarding the victims of trafficking in human beings. The implementation of the relevant Directive must be closely monitored and evaluated, and if deemed ineffective, a new instrument must be adopted
- focusing efforts on prevention. The UN instruments may provide a useful starting point in this context.
- Enhancing the dialogue with third countries, both on organised crime in general but also on human trafficking and smuggling. Try to address the root causes of these phenomena.
- Monitoring very closely the impact of the anti-money laundering duties on the work of lawyers and the extent to which the right to fair trial and the proper administration of justice are challenged in Member States