

# Towards a new approach of organised crime in the EU – New challenges for human rights

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## I. The new Commission's proposal – In search of the true objectives

The concept of organised crime was posed again at the EU level in the beginning of 2005 through a Commission's proposal for a new framework decision regarding the delimitation of the aforementioned criminal offence.<sup>1</sup> Although since 1998 the EU had adopted a Joint Action<sup>2</sup> requesting the Member States to criminalise the participation in a criminal organisation and the EU itself approved the United Nations Convention (Palermo) against transnational organised crime in May 2004, in January 2005 it focused on this issue again despite the fact that several Member States (Greece being amongst them)<sup>3</sup> had already – in compliance with the above instruments – specified relevant crimes. Hence, the first question posed is what does this new intervention intend?

An answer is sought to the reasonable replacement of an old legal instrument, the Joint Action, which no longer exists after the Treaty of Amsterdam in the field of police and judicial cooperation in criminal matters (Art. 29 et sub. TEU), with its current corresponding instrument, the framework decision.<sup>4</sup> However, the Commission's explanatory memorandum of the new proposal<sup>5</sup> and furthermore the text of the proposed provisions are extremely enlightening about the new initiative's true objectives, which we will attempt to unveil below. Besides, this development makes clear that the new EU intervention must be understood in conjunction with the instrument to be replaced,<sup>6</sup> as well as in comparison with the relevant provisions of the Palermo Convention, which was approved by the EU. On the other hand it is self-evident that the illustration of the new EU objectives is also significant for the national legal orders, as it is quite possible that, in case of differences in comparison with the EU relevant choices, the Member States will have to

make new legislative adjustments to comply with its requirements.

Prior to any exploration of the Commission's new proposal, it is useful though to recall four important facts which should not evade our attention when discussing about the new attempts on the delimitation of organised crime as an offence in the EU:

1. The Union's institutional interventions regarding organised crime are of special interest to the Member States, not only because they concern their "immediate international neighbourhood", but mainly because the obligations that arise from the relevant decisions for them are of another league than those they usually undertake when signing an international treaty, such as the Palermo Convention against transnational organised crime.

2. According to the current Treaties' status, the EU's interventions in criminal matters are developed within a framework of significant democratic deficit<sup>7</sup> and non-obligatory institutional protection of fundamental rights.<sup>8</sup> This practically means that any deficiencies of the provisions against organised crime are multiplied geometrically,<sup>9</sup> especially if one considers the fact that European citizens suffering the consequences cannot appeal to the European Court of Justice, nor can they affect in any binding manner "at the moment of creation" the relevant provisions through their representatives in the European Parliament, since the latter possesses merely an advisory role for the legal acts of the Third Pillar (Art. 39 TEU). These legal acts are decided by the Council of Ministers, i.e., by an institution that does not have direct democratic legitimisation.

3. The prevailing objective of the EU's provisions against organised crime is the facilitation of police and judicial cooperation between the Member States' authorities for the purpose of combating it. In order to achieve this objective, given the differences in the Member States' criminal justice systems, the EU aims at exploring the minimum points of agreement amongst them, which consequently converts into minimum points of the Member States' obligation to harmonise their national legal orders. Hence, a dynamic of the national criminal justice systems' redefinition emerges, which is certainly not interested in the delimitation of a

<sup>1</sup> COM (2005), 6 final, 19.1.2005.

<sup>2</sup> 98/733/HLA, L 351, 1-2 on 29.12.1998. Regarding the notion of organized crime based on this specific Joint Action in the current legal regime see *Kaiafa-Gbandi*, The criminal law in the European Union, 2003, pp. 138 et sub., and particularly 142 et sub.

<sup>3</sup> The Greek state ratified the United Nations Palermo Convention and contemporaneously took into account the EU's Joint Action of 1998 for the combat of organized crime before enacting the relevant state law 2928/2001 on organized crime (see the explanatory report of the law 2928/2001).

<sup>4</sup> For this specific legal instrument see indicatively *Sachpekidou*, in: Staggos/Sachpekidou (eds.), The Law of European Communities and European Union, 2000, pp. 227-228.

<sup>5</sup> COM (2005), 6 final, 2-4.

<sup>6</sup> See Article 9 of the Commission's proposal which explicitly refers to the abolition of previous provisions.

<sup>7</sup> For this deficit, its special meaning for criminal law and the ways to overcome it see *Schünemann*, Alternativ-Entwurf, "Europäische Strafverfolgung", 2004, pp. 4, 22-23, as well as *Schünemann*, Die Grundlagen eines transnationalen Strafverfahrens, in: ders. (Hrsg.), Ein Gesamtkonzept für die europäische Strafrechtspflege, 2006, p. 95.

<sup>8</sup> The relevant EU Charter has merely an advisory character and the Union itself has not yet acceded itself to the ECHR.

<sup>9</sup> Particularly when these refer to EU autonomous actions, such as the immunities recognized for Europol members, see *Kaiafa-Gbandi* (note 2), pp. 192-193.

criminal offence, but in the facilitation of the Member States' cooperation.

4. The measures accompanying the struggle against organised crime in the EU<sup>10</sup> cannot be appreciated in their true dimensions if one does not clearly define first of all the field in which they institutionally assert application. In other words, what must be answered is whether organised crime's delimitation allows the expansion of the current aggressive policy against it in fields of conducts that do not justify (according to their wrongfulness) the adoption of similar measures.

## II. The proposed provisions

### 1. Crimes committed within the criminal organisation's framework

The effort of identifying the EU's actual objectives concerning its initiative for a new delimitation of organised crime should commence from the actual text of the proposed provisions.

The Union, following the recent Commission's proposal, continues to perceive organised crime based on a dipole:<sup>11</sup> namely, it is interested both in the penal rules for crimes usually committed in an organised way (for example the drugs or arms trafficking, the trafficking of human beings etc.), as well as in the participation in a criminal organisation.

By examining first of all the legal setting for crimes committed in an organised way where matters appear to be simpler, we note that, in contrast to the Joint Action of 1998, where a relevant provision was not included, a general provision is now proposed (Art. 3 para. 2 of the proposed framework decision). According to this provision, the Member States are now called to take all necessary measures, so that if the relevant offences are committed within a criminal organisation's framework they will be punished with longer imprisonment sentences than those foreseen by national laws for the respective common offences. This provision is already known from certain other framework decisions which attempted to harmonise the content of typical organised crime offences, such as the framework decision for combating trafficking of human beings<sup>12</sup> or drug trafficking.<sup>13</sup> However, the novel element in the proposed provision is that the relevant obligation is now imposed upon Member States for all crimes considered feasible to be committed by a criminal organisation, and which, as we will later see, are neither restricted in number nor are they specifically

enumerated. The first new fact is therefore the generalised increase of the foreseeable sentences for the whole spectrum of crimes that may constitute the object of a criminal organisation's activities.

Nonetheless, the arising question is what the actual reason of this increase is. If the perpetrator of these crimes is a member of the organisation, as must be the case before stating that the crime is "committed within the framework of the organisation",<sup>14</sup> then the increased wrongfulness that could be detected in the organised commission of these acts, in view of a contemporaneous infringement of public order and also a greater effectiveness in the infringement of legally protected rights within this framework, is already met by the affirmation of a cumulative sentence for the actual committed crime and the crime of participation in a criminal organisation itself, which the Union requests also from the Member States to penalise. Moreover, the increase of the sentences concerning the crimes committed within the organisation's framework (e.g. human trafficking) does not answer an additional offensiveness which is not encountered on the sentence level, but on the contrary constitutes a forbidden double assessment of the same elements and violates for this reason the proportionality principle.

Certainly, the Commission in the Explanatory Memorandum finds the increase "in the specific risk of individuals acting within the framework of a criminal organisation" while it also mentions that the same method was selected in the framework decision for the fight against terrorism, the only difference being that in that case, there are stricter sentences for a list of specific offences, whereas here the austerity in sentencing concerns all offences that can be committed by a criminal organisation,<sup>15</sup> according to the analysis undertaken in the following paragraphs. However, any dangerousness that may be attributed to persons involved in a criminal organisation is logically already evaluated through the punishment of participation in the organisation. Therefore the EU-intended increase of the sentences for crimes committed within the framework of a criminal organisation cannot be justified in this way either.

On the other hand the adoption of the same choices which were selected in the framework decision on terrorism is completely inappropriate because in the case of terrorism, the incurred sentence framework is justifiably increased to the extent that terrorist acts infringe upon another legally protected right beyond the one directly infringed by the main offence committed in the form of a terrorist crime.<sup>16</sup> According to the aforementioned ascertainments, one could endorse that the new EU proposition requires a generalised

<sup>10</sup> For obtaining a view on these measures, see *Symeonidou-Kastanidou*, The EU initiatives for combating terrorism and organised crime, Poiniki Dikaiosyni 2004, pp. 191 et sub.

<sup>11</sup> For the systematic combat of organized crime see more broadly *Kostara*, in: EEPD (eds.), Minutes of 6<sup>th</sup> Panhellenic Congress of EEPD, pp. 71 et sub.; *Livos*, in: EEPD (eds.), Minutes of 6<sup>th</sup> Panhellenic Congress of EEPD, pp. 54-56.

<sup>12</sup> Article 3 para. 2(d) of 2002/629/HLA, L 203/1-4 on 1.8.2002.

<sup>13</sup> Article 4 para. 3 of 2004/757/HLA, L 335/8-11 on 11.11.2004.

<sup>14</sup> For this acknowledgement see also the Explanatory Memorandum of the proposed framework decision, COM (2005), 6 final, 6.

<sup>15</sup> COM (2005), 6 final, 6-7.

<sup>16</sup> See *Kaiafa-Gbandi*, Terrorism as a criminal offence and challenges for a criminal law based on the rule of law, Poinika Chronika 2005, p. 873; *Symeonidou-Kastanidou*, The law on European arrest warrant and terrorism, Poiniki Dikaiosyni 2004, pp. 780-781.

sentence increase for offences committed within the framework of criminal organisations due to a false transcription of the model contained in the framework decision on terrorist acts and in violation of the prohibition to assess two times the same element against the defendant. This fact constitutes already an extremely serious violation of a fundamental human right enshrined in the proportionality principle, according to which the citizen should never face for his/her actions a stricter sentence than that justified by the wrongfulness of the specified actions and his/her guilt for these.

## 2. The concept of criminal organisation

Even though the above ascertainment has already a significant importance, it should not escape our attention that the *main* interest of the EU is focused on the criminalisation of the acts linked to the participation in a criminal organisation.<sup>17</sup> The criminalisation of these acts is not only the "key" for effectively combating organised crime, since the state does not need to wait for the violation of certain legally protected rights *per se* before intervening, but is also contemporaneously the most effective way of interstate cooperation against it. If harmonisation is achieved for a general type of crime at a preparative stage of the secondary criminal acts, as this may occur through a unified concept for the punishment of participation in a criminal organisation, then the cooperation of police and judicial authorities of each Member State does not need to depend on double criminality and the harmonisation of a large spectrum of different crimes committed by criminal organisations.<sup>18</sup>

In the Commission's new proposal, the notion of criminal organisation constitutes the exclusive base for the organised crime's conception. Namely, in contrast to the Joint Action of 1998 and the United Nations Convention, the EU discards the Anglo-Saxon conspiracy model, according to which the agreement alone with one or more persons for the committal of certain offences is sufficient for the defendant's conviction.<sup>19</sup> This new characteristic is important, especially if one takes into account the slide towards the convictions' punishment that the aforementioned model connotes. However, it should be clear that even according to the Joint Action of 1998, the Member States could select whether they would use for the criminalisation of organised crime the Anglo-Saxon conspiracy model or the participation in a criminal organisation. This means that the slide towards an absolute repression with subjective characteristics was not a one-way road for the EU. Nevertheless it is still important that through the Commission's new proposal, the EU silently

but clearly rejects the version of punishing the mere agreement to commit an offence within the framework of combating organised crime<sup>20</sup>, while this possibility still appears in the Palermo Convention.

Thus, the differentia in this field at a European level is created exclusively by the organised character of a criminal act and therefore it is now of central importance to delimit the criminal organisation's notion. The latter along with the notion of participation in it is what eventually defines the scope of the offence.

If one carefully observes the definition of the criminal organisation's notion in Art. 1 of the Commission's new proposal, one will notice two improvements in comparison to the corresponding settings of the applicable Joint Action of 1998.<sup>21</sup> The first one is related to the fact that, while the elements of "a structured group, established over a period of time, of more than two persons, acting in concert with a view to committing offences" are the same, the concept of "a structured group" is now expressly defined, even if this means just copying the corresponding content of the framework decision regarding terrorism and the United Nations Convention against transnational organised crime. The second improvement concerns the linkage of organised criminal acts to the "direct or indirect acquisition of financial or other material benefits", an element which was not present at all in the Joint Action of 1998 and was obviously added in the EU's attempt to approximate the corresponding elements of the United Nations Convention. Nonetheless, both improvements are far from leading the definition of organised crime to a level that corresponds truly to a serious and self-contained offensiveness of organised criminal actions with such characteristics that justify their exceptionally strict treatment.

This is the case because the notion of a structured group is broadly defined since it has been actually copied by the UN Convention. I had also the opportunity in the past to criticize this definition<sup>22</sup>, which essentially excludes only the random coexistence of certain persons for the immediate committal of a crime, while in all other aspects it constitutes more a definition of the non-structured than structured group. According to the meaning of the word itself, in order a group of more than two persons to be structured, it is necessarily required: a) one or more persons be the decision makers and

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<sup>17</sup> On the combat of organised crime primarily through the control of such behaviours see *Verbruggen*, in: Albrecht/Fijnaut (eds.), *The Containment of Transnational Organized Crime*, 2002, pp. 113 et sub.

<sup>18</sup> *Verbruggen* (note 17), pp. 129-130.

<sup>19</sup> For the model's presentation and its critique see, *Kaiafa-Gbandi* (note 2), pp. 164 et sub., where further bibliographic references can be found.

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<sup>20</sup> Unfortunately the Council has reached on 27.4.2006 consensus on a Framework Decision on the fight against organized crime, according to which Member States still have the option of regarding as an offence under the notion of organized crime a type of conduct that belongs to the category of conspiracy (see procedure file with reference CNS/2005/0003/Summaries).

<sup>21</sup> Concerning the notion of criminal organisation in the Joint Action of 1998 see *Kaiafa-Gbandi* (note 2), pp. 146 et sub.

<sup>22</sup> *Kaiafa-Gbandi*, *European Convergence and Criminal Law*, Poiniki Dikaiosyni 2001, p. 1288; see also *Militello*, in: *Militello/Huber* (eds.), *Towards a European Criminal Law against Organized Crime*, 2001, p. 103; *Mitsilegas*, *ELReview* 2001, 576.

give directions for its activity, b) allocation of roles amongst its members for the execution of its plans, c) functional (even de facto) respect of the above structure and d) capability of substituting its members for the execution of its plans, exactly as an organisation which has the dynamic of facing effectively inherent to its criminal activity challenges and crises.

Even after the Commission's new proposal for the establishment of a criminal organisation, it still suffices – as it also sufficed under the Joint Action of 1998 – to intend to commit “offences which are punishable by deprivation of liberty or a detention order of a maximum sentence of four years at least or a more serious sentence”. This practically means that the spectrum of planned offences capable of establishing a criminal organisation for (European) legal orders, such as the Greek, is not limited to serious offences and essentially includes the majority of misdemeanours, since according to the Commission's proposal, it suffices to be offences punishable by deprivation of liberty of a maximum of at least four years. Hence, one reasonably wonders to what extent the special offensiveness attributed to the operation of criminal organisations can be regarded of such magnitude to expressly found a serious and self-evident threat for public order itself (independently of certain offences' committal), when their intended action could be linked to non-serious misdemeanours (e.g. common thefts) or refer to individual legally protected rights but not necessarily the most important ones. In other words, what is challenged is whether the specific delimitation of criminal organisations clearly depicts as a determinant factor of their operation “their polemic power against society”,<sup>23</sup> which supposedly supported the need for their special treatment.

However, at this point one could possibly contend that the Commission's new proposal in its Explanatory Memorandum expressly notes that through the above punishment level for crimes committed by a criminal organisation it wished to accurately convey the category of “serious offences”,<sup>24</sup> as the United Nations Convention does. Nevertheless, the United Nations Convention makes use of the term “serious offence” within the criminal organisation's definition itself.<sup>25</sup> And certainly this fact is of particular importance. Because for a legal order like the Greek one, where sentences of three or five years can correspondingly become monetary or be suspended, they cannot be considered sentences for serious offences. Therefore, the national legislator, by safeguarding the Convention objectives, may very well define the offences he/she deems serious, as it has already been done in the currently applicable section 187 para.1 of the Greek Criminal Code (G.C.C.), and diverge from the above incurred sentence limits. However, when the concept of a criminal organisation is defined by exclusive reference to the commission of offences with a certain level of incurred sentences, then the crucial element of the offences' severity to which a criminal organisation's existence must be linked, can be – in view of

the national legal orders' divergences in sentences – rendered totally ineffective.

In the explanatory memorandum of the Commission's new proposal it is stated of course that the referral method to a certain level of incurred sentence in order to prosecute for serious offences is preferable than a method leading to a compilation of a list of offences committed by criminal organisations.<sup>26</sup> Nevertheless, as we face here an issue with transnational dimensions, it would be more appropriate if the severity of an organisation's planned crimes was not weighted only against the foreseeable sentence. The reason for this is that the divergences among the states, regarding the level of the sentences' severity for the offences each one considers serious, are significant. Therefore, the incurred sentence's level should only be a minimum requirement but not necessarily a sufficient criterion for the seriousness of crimes that an organisation may commit in order to be classified into an organised crime. This should evidently emerge from the framework decision itself which is planned to regulate the issue in order to avoid falling into disproportionate expansions of criminalisation.

If we would like to draw a conclusion at this point regarding the way through which the Commission's new proposal defines the criminal organisation, we could say that – despite any improvements made in comparison to the current legal settings – the basic drawbacks of the extremely broad definition of a structured group which is adopted for criminal organisations and of their linkage even to non serious (at least for the Greek legal order) offences remain intact. So it is highly probable that, if the Commission's proposal becomes applicable law and the national legislator does not take any heed of the organised crime's true offensiveness, section 187 para. 1 G.C.C. might be altered and these changes will consequently lead to a great expansion of the criminal offence of participating in a criminal organisation.

Thus, it is evident that the EU dangerously broadens the notion of organised crime by keeping on the one hand at a minimum level the requirements for a criminal organisation as a structured group and accepting on the other hand essentially that a criminal organisation can have as an object of referral even non serious offences. Consequently, however, neither does a more particular legal right violated by the criminal organisations' existence emerge (and hence the channel of criminally sanctioning mere thoughts remains open) nor certainly is the proportionality principle being served.

### *3. Offences regarding the participation in a criminal organisation*

Nonetheless the situation does not seem any better in the field of conducts that Member States are called to criminalise as participation in a criminal organisation. More specifically, one notes that Art. 2 and 3 of the Commission's new proposal leave untouched the majority of the problems which

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<sup>23</sup> *Livos* (note 11), p. 48.

<sup>24</sup> Explanatory Memorandum in COM (2005), 6 final, 5.

<sup>25</sup> Art. 2(a).

<sup>26</sup> COM (2005), 6 final, 5.

characterise the conducts' description on the participation in a criminal organisation, according to the Joint Action of 1998 settings.<sup>27</sup> On the other hand the new elements that are found concern mainly expansions of criminalisation than a delimitation with guarantees for the citizen.

More specifically, beginning from the new elements, one notes that they concern on the one hand the requirement to foresee a distinct punishment for the offence of directing a criminal organisation and, on the other hand, the requirement to punish with a minimum maximum range of five years incurred sentence the participation in a criminal organisation and ten years its direction.<sup>28</sup> Certainly, both these new elements are not true innovations for the EU contemporary interventions in the field of criminal law. The distinct culpability of directing a criminal organisation (for stricter treatment reasons) is already familiar to us from the framework decision against terrorism,<sup>29</sup> while we are well aware of the EU intervention on the harmonisation of the sentences' level – which was made possible through the Treaty of Amsterdam (Art. 31 para. 1(e) TEU) – from several other framework decisions, apart from the one against terrorism.<sup>30</sup> Therefore, one could argue that these are probably expected changes and as such it is quite likely they will become EU's applicable law following the acceptance of the Commission's proposal.

However, we should not overlook the following: The transfer of special criminalisation from the terrorism enacted articles in the case of a criminal organisation's direction, clearly means that the EU is attempting to equate organised crime with terrorism.

The second observation concerns the regulation of sentences in Art. 3 of the proposal. The EU has certainly jurisdiction pursuant to the TEU (Art. 31 para.1(e) ) to intervene for the harmonisation of sentences especially in the field of terrorism and organised crime. However, it is self-evident that in order the provided by the EU levels of sentences to acquire obligatory force on Member States, these levels must not contest the proportionality principle. And this should occur not only at a EU level, where the proportionality principle must be primarily checked through the balance of the conduct the Union wishes Member States to criminalise and the sentence level it requires for it,<sup>31</sup> but at a national

level as well, since a Member State cannot be obliged in the name of harmonisation with other Member States to foresee in its national criminal law sentences disproportionately high for the infringement of legally protected rights of lesser importance than for the infringement of others much more serious.<sup>32</sup>

The sentences provided for the acts of participation in a criminal organisation and direction of an organisation in Art. 3 para.1 of the Commission's proposal do not correspond, at least in some cases, with the proportionality principle, not even at the EU level. If one compares the offences of the planning which may establish the notion of organised crime pursuant to Art. 1 of the proposal with the sentences for the offences of participation in a criminal organisation or its direction, one will note that the EU requires Member States to provide higher sentences for participating in a criminal organisation or directing it than for certain crimes the organisation may commit itself. Certainly, one could endorse that this should not surprise us at all since, according to the prevailing view, the participation in a criminal organisation infringes public order<sup>33</sup> and is not linked to the jeopardy of individual legally protected rights which may be violated by the organisation's actions. However, the infringement of public order due to the existence of a criminal organisation is not irrelevant to the offensiveness of crimes it plans to commit.<sup>34</sup> In other words, the threatened infringement of public order because of a criminal organisation's existence that "specialises", to name but one example, in committing thefts, varies from the threatened infringement that may occur from an organisation planning to commit robberies, human trafficking, etc. However, according to the Commission's proposal, while the notion of organised crime does not exclude the actions of organisations committing crimes with incurred maximum sentences of four years imprisonment, it is considered justified that participation in an organisation for the commission of even such offences to be threatened with a maximum sentence of five years at least and the direction of such an organisation with a maximum sentence of ten years at least. The discrepancy at this point becomes obvious, because any infringement of public order at such a

<sup>27</sup> See *Kaiafa-Gbandi* (note 2), pp. 153 et sub.

<sup>28</sup> Collate the Commission's proposal with the relevant opinion of the European Parliament on 26.10.2005 (T6-0405/2005), which proposes the enactment of subsequent sentences as well as the increase of sentences when the organization has a mafia form or its aim is terrorism or human trafficking.

<sup>29</sup> Article 2 para. 2(a), 2002/475/HLA, L 164, 3-7 on 22.6.2002.

<sup>30</sup> E.g. the framework decision on trafficking in human beings.

<sup>31</sup> See e.g. the difference between sentences for crimes causing harm and crimes of endangerment or even the difference between sentences for environmental crimes and other crimes such as drug trafficking.

<sup>32</sup> Certainly, the latter constitutes an obligation of each member state to verify it either via its responsible minister who participates in the Council or later during the incorporation of a framework decision in the state's national legal order through its national parliament, since a state is allowed to appear neither as having a self-contradictory criminal system, nor as violating constitutionally and more broadly ECHR-EU Charter of Fundamental Rights entrenched principles, such as the proportionality principle between the crime and its sentence.

<sup>33</sup> See particularly the analysis of *Manoledakis*, Freedom and Security, 2002, pp. 104-106, in view of the relevant Greek national law 2928/2001; see also *Livos* (note 11), pp. 48-51.

<sup>34</sup> For the corresponding problem in the section 187A of the Greek Criminal code (G.C.C.) see, *Kaiafa-Gbandi*, Poinika Chronika 2005, pp. 875-876.

preliminary stage before the crimes' committal, such as the planning of criminal acts within an organisation's framework, cannot justify the imposition of even greater sentences than those imposed for the crimes' committal through which the public order's violation would be promoted.<sup>35</sup>

It is noteworthy that the Commission's proposal, while it includes a specific provision for special circumstances that may be taken into account by member states as mitigating sentencing reasons (Art. 4), does not make any effort to clarify that the eventual non-committal of any of the organisation's planned crimes should also constitute a mitigating circumstance. This fact, in combination with the content of Art. 4 of the Commission's proposal, leads us to the inference that according to the EU, the sentence's reduction is justified only when a member of such an organisation renounces his criminal activities and assists the authorities by providing them with information they would not otherwise have been able to obtain and not simply when the wrongfulness of an illegal conduct appears reduced.

The picture of the aforementioned legal status quo along with the unreasonable requirement to increase sentencing for all crimes that may be committed by an organisation within its framework, reveals that the EU has submitted its new proposal against organised crime not only to make improvements but also to deal with it more strictly and especially in accordance with the provisions for terrorism.

Moving now to the description of conducts that member states need to be penalise as criminal offences in relation to criminal organisations, we observe that the Commission's new proposal (Art. 2(b) ) requires Member States to criminalise<sup>36</sup> the active participation in criminal activities of an organisation with the intention and knowledge either of the aim and its general criminal activity or its intent to commit criminal offences establishing organised crime pursuant to Art. 1, while in this active participation in the

criminal activities it is expressly stated that actions of financing, new members recruitment, etc. are included as long as they are undertaken with the knowledge that such participation will contribute to the accomplishment of the organisation's criminal activities.

If we focus our attention on the existing unsolved problems, which one finds also in the Joint Action of 1998,<sup>37</sup> we can comment the following:

The Commission's proposal continues to refer to active participation in criminal activities of an organisation and not the integration of a person as a member of the organisation with certain duration. This referral does not exclude cases such as a person's repeated but occasional participation (with the special necessary mens rea), even if this person is on all other accounts an extraneous, e.g. a non-member of the organisation. However, the self-existent offensiveness that must be established by the action of the specific person punished for the public order's infringement, to the extent that the offensiveness here does not depend on the commission of the organisation's criminal plans, it necessarily requires the person to be essentially linked to the criminal organisation for a period of time and have undertaken a role during the allocation of its tasks in the preparation and committal of crimes. Only in this way is the personal contribution made clear, i.e., the person's contribution through his/her actions to the ad hoc wrongfulness of the public order's essential jeopardy due to the operation of a criminal organisation. In other words, the ad hoc wrongfulness can be identified only when the linkage between a person and an organisation allows us to say that the support of its activities is granted through his/her contribution whenever it appears necessary. Only in this way can the conduct, which is specified in various participating actions during the group's independent criminal activities, offer a dynamic to the organisation itself and therefore become dangerous per se for the legally protected public order. Otherwise, we do not need to refer to offences regarding the participation in a criminal organisation, like the title of Art. 2 of the Commission's new proposal does, nor concern ourselves with the organisation itself but with the criminal activities of more than two persons. Unequivocally, this disengagement makes easier the fight against criminal organisations since it is not necessary to prove one's integration as a member in the organisation for his/her punishment. However, this means that the linkage of the punishable act with the ad hoc offensiveness, which constitutes the reason of the specific crime's existence, is also lost.

The Commission's proposal, although it makes improvements on the issue of criminalising participation conduct in all the organisation's criminal activities with the exemplary reference to "the provision of information, material means, recruiting new members as well as any other type of funding of its activities",<sup>38</sup> does not exclude,

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<sup>35</sup> It would not be convincing to argue that the sentence for participation in a criminal organisation concerns a more continuous threat against public order, during the duration of which the organisation may alter its activities and decide upon the committal of even more serious crimes, because the problem exists when such a scenario cannot be proved in the specific case.

<sup>36</sup> See at this point the crucial difference between the Greek and the English version of the Commission's proposal. In the Greek version the Commission's proposal requires member states to criminalise two distinct conducts: a) the active participation in criminal activities of an organisation with the intention and knowledge either of the purpose and its general criminal activity or its intent to commit criminal offences establishing organised crime pursuant to Art. 1 and b) the active participation in all the other activities of the organisation, which include actions of financing, new members recruitment, etc. again with the knowledge that such participation will contribute to the accomplishment of the organisation's criminal activities. This is probably a mistake in the translation which followed at this point the text of the 1998 Joint Action.

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<sup>37</sup> *Kaiafa-Gbandi* (note 2), pp. 153 et sub.

<sup>38</sup> At this point the relevant provision of the framework decision for the combat against terrorism was again adopted.

however, the expansive function of the above provision to the extent that it does not provide in an abstract level a stable criterion for the description of this participation. If we would like to be consistent with the wrongfulness attributed to organised crime with reference to the jeopardy of public order in view of a criminal organisation's existence and operation, then the participation in the organisation's criminal activities should at this point as well concern at a minimum conducts which contribute directly to this danger and demonstrate their contribution in the required wrongfulness per se by supporting the existence, expansion, structure or operation's functionality of the organisation itself.<sup>39</sup> The recruitment of new members or financing the organisation's activities enumerated in the Commission's new proposal certainly have such characteristics, but not in any case the provision of any type of information or material means. In other words, it is not the same to process as an organisation's technician special electronic programs in order the organisation is able to traffic safely pornographic material through the internet, and provide information about where to buy large capacity or cheap electronic devices the organisation will use for its activities. The Commission's new proposal, while it makes some improvements by enumerating certain cases that truly indicate the above wrongfulness per se, does not manage to fully exclude the dangers of expanding punishment to conducts which do not add anything to the dynamic of the organisation as such.

Drawing a more general conclusion on the conducts that according to the Commission's new proposal Member States should characterise as an offence in relation to the participation in a criminal organisation we can say that the EU's tendency for a wider and stricter penal coverage of conducts that could be included in the notion of organised crime remains clear: the expansion of the by a criminal organisation planned offences which are not characterised pursuant to the proposal's letter as serious, the limitation of the participation in a criminal organisation to conducts of participating in different criminal activities and not necessarily in the organisation itself, as well as the non-definition of a clear criterion regarding the extent of criminalising participation in the organisation's criminal activities, are the three nodal points which prove the above argument. If one now combines the above elements with the observations regarding the sentencing level, then a complete picture appears which clearly needs serious improvements in order to protect fundamental rights, such as the principle of not punishing mere thoughts, the principle of *nulla poena sine culpa* as well as the proportionality principle between the imposed sentence and the committed crime.

See Art. 2 para. 2(b), 2002/475/HLA on 22.6.2002, L 164, 3-7.

<sup>39</sup> Collate the interesting proposal of the common European programme of Palermo city and Max-Planck Institut in *Militello* (note 22), p. 8.

#### 4. Liability of legal entities

Finally, there are another two thematic axes in the Commission's new proposal which are relevant to the delimitation of the organised crime's punishability: the first one concerns the liability of legal entities and the other one the jurisdiction on organised crimes.

The question, whether the Commission's new proposal establishes an obligation for Member States to foresee criminal liability even for legal entities involved in organised crime and what the extent of such obligation is, is very important for legal orders such as the Greek one, where a similar liability is unknown for its criminal system. Besides, it is noteworthy that the wording of the proposal's Art. 5 and 6, which refer to the relevant criminal liability and legal entities' sanctions, constitutes a true copy of the corresponding articles of the framework decision against terrorism.<sup>40</sup> In the explanatory report it is expressly stated that the amendment of the relevant provisions of the 1998 Joint Action was necessary in order to base the legal entities' criminal liability on what has been accepted pursuant to more recent applicable EU legislative acts, as well as to achieve a parallelism with the act of combating terrorism.<sup>41</sup>

The content of Art. 5 refers to "(legal entities) being held liable for offences" which are linked to organised crime and establishes as a prerequisite of attributing such criminal liability the participation in an organisation's criminal activities of individuals who have a leading position within the legal entity and act during the aforementioned acts' committal for its benefit or omit to exercise an authority of controlling other persons, who commit the same acts for the legal entity's benefit. The adoption of a form which corresponds to the "theory of identification", i.e., a perception equating the corporation with certain leading executives and consequently deeming their actions as actions of the legal entity itself,<sup>42</sup> becomes clear at this stage.<sup>43</sup> However, it is still important that while the phrasing of Art. 5 ("liability for offences"), as well as the Commission's explanatory report expressly stating that the term liability "should be construed so as to include criminal liability as well"<sup>44</sup> leads us to the conclusion that this article establishes criminal liability for legal entities, too, Art. 6, which specifies the sentences, negates such a conclusion. The formulation of Art. 6 makes clear that the obligation of Member States is eventually created only for taking measures regarding fines,

<sup>40</sup> Articles 7 and 8, 2002/475/HLA on 22.6.2002, L 164, 3-7.

<sup>41</sup> Explanatory memorandum COM (2005), 6 final, 8.

<sup>42</sup> For this and other relevant views on the establishment of legal entities' criminal liability see, *Dimakis*, in: SEE (ed.), 12<sup>th</sup> Panhellenic Congress 2003, pp. 228 et sub.

<sup>43</sup> Essentially, the above provision depicts, as far as liability is concerned, the Corpus Juris settings, but it also expands them. See Art. 13 (of the Florence Plan) in *Delmas-Marty/Vervaele* (eds.), The implementation of Corpus Juris in the member states, Vol. I, pp. 193-194; see also critique of *Kaiafa-Gbandi*, The European attempt to form common criminal rules, *Poinika Chronika* 2001, pp. 103 et sub.

<sup>44</sup> Explanatory memorandum COM (2005), 6 final, 7.

which may be all the same “criminal or non-criminal”, which means that the Member States have the right to choose even exclusively administrative sanctions for legal entities.

According to the above facts, one could argue that we should not be really disturbed by the framework created for the legal entities’ criminal liability at the EU level, even if there is no express reservation concerning the respect of the Member States’ legal principles on the establishment of a similar responsibility, as it happens in the United Nations Convention (Art. 10). Thus, each Member State can avoid establishing criminal liability for legal entities, if it wishes so, by resorting to administrative penalties. However, one should not overlook the EU gain in the long run from the above setting, namely the obligatory consolidation of the criteria for holding liable legal entities, as well as the express record of its view that this liability includes the criminal one *as well*. Indeed, given the dynamic of developments within the EU, especially in the area of criminal matters,<sup>45</sup> it is quite probable that the Union will return to regulate this specific issue through the enactment of a strict criminal liability provision for legal entities, which will be obligatory for Member States. Therefore, the raised objections of constitutionality regarding the legal entities’ criminal liability must remain active in the discussion currently conducted at a European level.<sup>46</sup>

Nonetheless, even if one deemed that the above objections could be surmounted for certain legal systems, the Commission’s proposal, which does not exclude the legal entities’ criminal liability, does not provide (apart from a

conduct committed for the benefit of the legal entity through the exertion of leading power or a relevant omission) any other criterion for holding the legal entity criminally liable, such as the infringement of enterprise obligations that could be attributed to an organisational error or internal structural enterprise error, which its members could have avoided, provided they followed a conduct normally required by them.<sup>47</sup> In other words, in the case of organised crime, exactly as in the framework decision against terrorism, the EU promotes a model of strict liability for the legal entity, which compulsorily bears the burden of the acts or omissions of its leading executives, in order to increase the effectiveness in suppression. However, it seems to overlook the fact that in this way, it inevitably leads to legal forms of collective objective responsibility for the legal entity’s members as well, since they are essentially encumbered with the monetary sentences imposed on the legal entity itself. Such a model may be compatible with other branches of law, but not with criminal law. Hence, it cannot be acceptable for the Commission to link it to the legal entities’ criminal liability. Nevertheless, even at the level of administrative penalties, this form creates problems, if one examines in depth the character of the specific fines, which are extremely similar to criminal sentences<sup>48</sup> and therefore, their imposition should be linked to similar with the criminal law guarantees.<sup>49</sup>

##### 5. The provision of jurisdiction

While completing the delimitation of organised crime by the EU, one must consider the provisions for the establishment of Member States’ jurisdiction on the prosecution of participating acts in criminal activities of a criminal organisation. The link between this thematic axis and the punishability limits is not self-evident. However, if one considers that there are crimes referring exclusively to national legally protected rights,<sup>50</sup> such as the infringement of the military service, public order etc., then it is understood that, if the jurisdiction’s provision allows in similar situations to prosecute and apply the criminal rule even when the

<sup>45</sup> See the Hague Programme on EU actions in the field of criminal matters in Annex I of the Presidency of the European Council of Brussels Conclusions, 4-5.11.2004, 14292/1.04 Rev 1, 11 et sub.

<sup>46</sup> The attribution of criminal liability to legal entities contravenes Greek legal system (sections 2 and 7 para. 1 of the Greek Constitution), if we take into account that this development violates the general culpability principle of the Greek legal system and also that legal entities never act upon themselves. (see indicatively *Kaiafa-Gbandi*, Criminal law in the turn of 2000: With a view to the future and without evaluating the past, *Yperaspisi* 2000, pp. 69 et sub.; *Spyrakou*, *Mnimi II*, Vol. 1, pp. 394 et sub.). It has been argued that the recognition of legal entities’ criminal liability does not violate section 7 of the Greek Constitution because in these cases an act can still be found and that is “an act of a person” who commits the offence for the legal entity’s benefit (*Dimakis*, [note 42], p. 242 n. 86). However, the issue in criminal law is not the existence of an act by any person, but of the person who is punished for it. In other words, the construction of acts without any ontological background through the accountability of one’s action to another person or a legal entity, which cannot even act by itself, constitutes a direct violation of the principle encapsulated in section 7 of the Greek Constitution, because if one can be punished without committing any act or omission, that means he/she could be punished after all for the state of his/her thoughts per se.

<sup>47</sup> For the various views requiring similar criteria before holding legal entities criminally liable see *Dimakis* (note 42), pp. 234 et sub., where further bibliographic references can be found; see also the interesting model of quasi criminal liability’s establishment on legal entities proposed by *Papakiriakou*, *Das Griechische Verwaltungsstrafrecht in Kartellsachen, Zugleich ein Beitrag zur Lehre vom Verwaltungs und Unternehmensstrafrecht*, 2002, pp. 273 et sub. (particularly pp. 298 et sub. and p. 312).

<sup>48</sup> *Papakiriakou*, *Tax Criminal Law, The criminal protection of the tax claims of the Greek state and European Union in the Greek legal system*, 2005, pp. 91 et sub. and particularly pp. 126 et sub.

<sup>49</sup> *Papakiriakou*, *Das Europäische Unternehmensstrafrecht in Kartellsachen*, 2002, pp. 298 et sub., n. 43; *Tax Criminal Law*, pp. 136 et sub.

<sup>50</sup> *Mylonopoulou*, *International Criminal Law*, 2<sup>nd</sup> edition, 1993, pp. 70 et sub.

legally protected right threatened by the classified act is foreign, there is an indirect but clear expansion of the criminal offence through the rules governing the jurisdiction's provision.

In its new proposal, the Commission remains on the issue of jurisdiction approximately within the same framework as the provisions of the Joint Action of 1998 (Art. 4). In other words, it states that each Member State must make sure that its jurisdiction will cover at least the cases where the acts of directing or participating in criminal or other activities of a criminal organisation are committed in part or in whole on its territory, irrespectively of where the criminal organisation may have its base or pursue its criminal activities.<sup>51</sup> In the following example we can realise what this provision practically means: if someone sends money from Greece to a criminal organisation which is based and operates abroad in order to financially assist it, Greece will be called according to the above provision to establish jurisdiction for the prosecution and punishment of this conduct.

When, however, the acts of participation in an organisation's criminal activities or support of it are committed from Greece and are directed to a third state, to the extent that the organisation is based and operates there, then what is threatened is not the public order of Greece but that of a third state, which constitutes a foreign institution and is not basically protected by the provisions classifying the relevant conducts in the other national legal orders. Therefore, the above provision on jurisdiction simultaneously expands the relevant criminal offence, since it requests from Member States to essentially protect the public order of other countries as well, even those outside the EU, by applying their criminal rules and displaying international solidarity against organised crime. Even though this starting point is understandable in view of organised crime's international activities, it must not be ignored that this may create inter-systematic contradictions within a legal order, when the latter does not offer similar protection through the expansion of its jurisdiction for other more significant foreign legally protected rights than public order (e.g. in the case of high treason against another state).<sup>52</sup> Besides, any state wishing to protect its public order from similar acts due to the serious risk of organised crime, it suffices merely to include the relevant cases in a provision similar to our section 8 G.C.C. and punish acts against it, even if they were committed abroad and regardless if they are deemed criminal there as well. In other words, the loopholes for the legal protection of the states' public order, even without the setting proposed by the Commission, could also cease to exist. However, the EU has decided that Member States should offer protection to the

public order of other states on an international level as long as the infringement was commenced from them.

Nonetheless, one should definitely require for the operation of a similar provision that the act in question to be punishable as an act of organised crime in the country where the organisation is based or pursues its criminal activities. Otherwise, the lack of a relevant crime shows that if the state itself does not protect its public order from similar acts, then it cannot consequently raise the issue of solidarity with other states.

On the basis of the aforementioned thoughts, we observe that the EU aims at leading Member States to an indirect expansion of punishability of participation in a criminal organisation through the provisions on jurisdiction with the ultimate goal of achieving again a more effective suppression, since the more states have jurisdiction to prosecute a conduct, the more are the chances of punishing it.

### III. The true provisions' objectives

At this point we can summarise our conclusions on the delimitation of the organised crime's punishability, as it appears pursuant to the EU's new proposal. Despite the important limitation of organised criminal activities to acts that aim to obtain financial or other material benefits and their disconnection from the Anglo-Saxon conspiracy model, the dominance of the effectiveness objective in the fight against organised crime is clear in the EU's new approach, which continues to be defined with such a broadness which categorically serves the needs of prosecution authorities. From the previous analysis it has been ascertained that the Union not only has not ensured the true limitation of organised crime to organisations which from their structure have the potential to really offend the public order by committing acts of "serious criminal wrongfulness", but it is also not disturbed by the possibility of the expansion of punishability to conducts which neither constitute participation in the organisation itself, nor from the infringement of the proportionality principle in the sentencing field, nor even from the probable abolition of the notion of crime itself with its classical guaranteeing form, in order to make the imposition of sentences to legal entities feasible as well. And all this was made true within a framework whose purported ultimate goal is achieving an international protection umbrella for the member states' public order. The fact that any guarantees for the citizen are regarded as having secondary importance is probably self-evident.

Nonetheless, the worst is that the EU attempts through its new proposal to lead the fight against organised crime on the same path as the fight against terrorism by referring to a necessary parallelism of the two.<sup>53</sup>

However, apart from the concept of organisation, any other parallelism with terrorism is inappropriate. Because the wrongfulness of terrorist acts, which can according to their own objective characteristics harm a state or an international organisation by infringing various important individual

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<sup>51</sup> See also article 15 of the Palermo Convention.

<sup>52</sup> In this direction also *Symeonidou-Kastanidou*, *The Law 2928/2001 "for the citizen's protection from criminal organisations' crimes"*, *Poiniki Dikaiosini* 2001, p. 696, regarding the section 187 para. 5 through which the United Nations Convention was ratified and incorporated into the Greek national legal system according to the 1998 Joint Action guidelines.

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<sup>53</sup> Explanatory memorandum of the Commission's proposal COM (2005), 6 final, 4.

and/or social legally protected rights,<sup>54</sup> is quite different. Therefore, when it is compared to that of organised criminal activities, the only thing achieved is the unduly expansion of the punishability of the latter.

Certainly, parallelisms are of crucial importance for the EU, as one can ascertain from the 2004 Commission's announcement to the Council and European Parliament on the actions which must be undertaken in the fight against terrorism.<sup>55</sup> In that announcement, it is expressly noted, *inter alia*, that the parallelism is a necessary contribution to the fight against terrorism: "a) where the group's terrorist motives have not yet become visible; b) where the group commits criminal offences in particular to obtain sources of finance, without it being possible to charge it with terrorist offences at that stage; c) in the case of links, or even confusion, between terrorist organisations and organised criminal groups (e.g. use of terrorist methods by criminal groups, as terrorist organizations drift into Mafia-type techniques)". Hence, it becomes obvious that because in some cases it is difficult to attribute the character of terrorist acts to certain conducts, the problem is solved by the adoption of legal provisions for other sectors which are similar to those for terrorism. In this way, however, instead of criminal law acting as a boundary of criminal policy<sup>56</sup> and imposing a different treatment to different categories of wrongdoing, it becomes its instrument and naturally loses its guaranteeing role.

For this reason, if the Commission's new proposal, which applies measures of the ambitious and dynamic program of Hague<sup>57</sup> regarding an area of freedom, security and justice, eventually becomes the applicable Union law,<sup>58</sup> it is important for Member States to safeguard the distinct character of organised crime from terrorism as well as maintain the criminal character in its true dimension, by

demonstrating the due but unfortunately forgotten respect to the European citizen's fundamental rights.

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<sup>54</sup> *Kaiafa-Gbandi*, *Poinika Chronika* 2005, p. 873 and *Symeonidou-Kastanidou*, *Poiniki Dikaiosini* 2004, pp. 780-781, 784-785.

<sup>55</sup> COM 2004, 221 final, 5 et sub. and particularly 8.

<sup>56</sup> For this significant function of criminal law see *v. Liszt*, *Strafrechtliche Aufsätze und Vorträge*, Bd. II, 1905, p. 80. In relation to the contemporary influence of criminal policy on the criminal procedural law, see *Paraskeuopoulos*, *The impact of contemporary criminal policy in criminal procedural law*, *Poinika Chronika* 2002, pp. 583 et sub.

<sup>57</sup> For the Hague programme (2005-2009) see n. 43. Collate also COM (2005), 12 final, section 3.1, as well as COM (2005), 184, final section 3.3 and COM (2004), 401 final, section 2.8.

<sup>58</sup> On 26.10.2005 the European Parliament adopted a resolution and made recommendations for amending the Commission's proposal within the context of expressing its opinion according to the current legislative procedure (see T6-0405/2005). The most important element of all probably is that the European Parliament has expressed its opposition towards the enforcement of Europol's role for combating organised crime, as long as Europol continues to evade the Parliament's democratic scrutiny.