

A Plea for A ‘European Anti-Mafia Court’

Inquiry on the Feasibility and Desirability of a Vertical Prosecutorial Forum Dealing with Transnational Organised Crime at the European Union Level

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Summary: 1. Introduction – 2. Organised Crime & European Union – 3. Joint Criminal Enterprise & ‘Mafia Method’ – 4. Vertical EU Prosecution of Organised Crime – 5. Critiques & Open Questions – 6. Conclusion – References.

Abstract: Calabrian ‘Ndrine, Albanian Mafia, Mocco Maffia, Camorra... these groups are spreading out across Europe without even being noticed much. The same groups then act, often undisturbed, to launder illicit proceeds into the economies of EU states that allow them to do so, first and foremost the Benelux states. Too many differences in views, too distorted a perception of security with respect to mafias by most EU states, too many different and uncoordinated national methods to respond effectively to criminal groups that, instead, act in a central and coordinated manner. The EU thus remains easy prey for criminal organisations. But then what is the way forward? The European Public Prosecutor’s Office was recently established, which has prosecutorial prerogatives based on a centralised system of investigation. The problem, however, may reside in the nature of the criminal proceedings that EPPO can begin as of today, which are initiated and concluded in a decentralised way in the national courts of the individual EU states where the EU Public Prosecutor decides to

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set up trials. And it is precisely here that we need to have the courage to change and favour a European Union spillover effect in criminal law issues, through the establishment of a ‘European Anti-Mafia Court’.

Keywords: Transnational Crimes, European Criminal Law, European Anti-Organized Crime Action, Joint Criminal Enterprise and Mafia Method, Vertical EU Prosecution, Narcotic Traffick, Money Laundering, European Fiscal Paradises.

1. Introduction

‘Garbage is gold’. In 1992, the Mafia boss Perrella, so-called ‘King of Waste’, described the waste business as “more valuable and less risky than the drug trade”¹. Following his declarations, investigations targeted huge nets of corruption: Fraudulent systems of politicians, entrepreneurs, and Organized Crime (OC) members were burying detrimental substances all over Italy, for years². These crimes resulted in a sharp increase of cancer rates among populations living nearby. In 2017, Perrella went undercover with a famous online newspaper to gather evidence. Months later, released videos proved that Perrella met with politicians, entrepreneurs, and Mafia associates for illegally disposing tons of garbage and toxic waste³. Other OC activities include drug and human trafficking, counterfeiting, money laundering and grand corruption. After the Berlin Wall’s fall, more than \$150 billion from Italian clans were illegally pumped via front men into Former East Germany⁴. These activities grew over the years, deeply influencing European Union (EU) Member States’ (MS) GDP.

OC exploits fiscal policies of certain MS (such as Luxembourg, Germany, the Netherlands, or Malta) for laundering profits⁵. It keeps its apparatus-

1. P. Grasso, *Prodotto interno mafia: così la criminalità organizzata è diventata il sistema Italia*, Einaudi, Torino 2011, p. 19.

2. A. Iacueli, *Le vie infinite dei rifiuti – il sistema campano*, Lulu.Com, Raleigh 2007, p. 12.

3. Backstair, *Inchiesta rifiuti, chi è Nunzio Perrella: da boss pentito a infiltrato per Fanpage.it* in «Fanpage», May 2018, <https://www.fanpage.it/attualita/inchiesta-rifiut>, accessed on 3 February 2022.

4. J. Roth, *The Mafia and Organized Crime in Germany – Transnational Organized Crime: Analysis of a Global Challenge to Democracy*, Transcript Verlag, Bielefeld 2014, p. 286.

5. S. Adamoli, *Organised Crime around the World* in «European Institute for Crime Prevention and Control», vol. 31, March 1998.

es strong by benefitting from MS individual interests and non-centralized operations. Thus, powers to investigate, prosecute and punish OC should be delegated to the EU for guaranteeing an effective response. Indeed, horizontal cooperation among MS is not the most efficient tool against OC. This article addresses the need and feasibility of an EU initiative to investigate, prosecute and adjudicate OC cases occurring in two or more MS. So, assuming the establishment of a *European Anti-Mafias Court* (EAC), why would the EU vertical prosecution of OC be a feasible and desirable outcome to yield better results against mafias? The analysis assumes the political will to assign such competence, an outcome also endorsed by many Anti-Mafia prosecutors, such as Nicola Gratteri⁶.

The EAC could find legal basis in a Regulation establishing an EU felony of OC Association, correlated with all serious transnational crimes (environmental, drug trafficking, money laundering, grand corruption). A Directive would result in MS giving too much weight to (often unprecise) national perceptions, interpretations, and awareness of Mafias, impeding a successful initiative. The Italian experience and background against OC represent excellent instruments. The techniques of the only MS having a century of OC understanding and prosecution should have a leading role. Italian Anti-Mafia prosecutors may also find a common platform to share with EU colleagues on how to develop more efficient strategies against OC⁷. Furthermore, interesting is the comparability between two doctrines, one international (a) and one national (b): a. the Joint Criminal Enterprise (JCE) developed in international criminal law; b. the Italian Mafia Method (MM) doctrine for assessing the intent of the Mafia Association (MA) crime. International law (IL) does not envisage a crime similar to national MA crimes, apart from the definition addressed by the UN Convention against Transnational Organised Crime (Palermo Convention – UNTOC), which is nonetheless too vague compared to the concreteness of the OC phenomenon. So, this doctrines' similarity may be useful for defining the mens rea of an EU crime of OC Association. Thus, the Italian Anti-Mafia framework is considered as a role-model.

6. N. Gratteri, *Storia segreta della 'ndrangheta – una lunga e oscura vicenda di sangue e potere (1860-2018)*, Mondadori, Milano 2019, p. 208.

7. Redazione IM, *L'inefficienza europea nelle lotte alla mafia*, in «Il Mediterraneo», November 2019, <https://www.ilmediterraneo.org/24/11/2019/linefficienza-euro>, accessed on 10 July 2022.

This contribution proposes the creation of an imaginary entity, not yet comprehensively theorised nor considered in practice. Consequently, the methodology is primarily based on secondary sources. Chapter II is based on secondary findings introducing the EU dimension of OC. Regarding Chapter III, the brief comparison between JCE and MM doctrines is based on the jurisprudence of international criminal tribunals and Italian doctrine. Chapter IV is entirely based on secondary sources giving a comprehensive picture of the current EU situation and addressing the needs and proposals for a changing venue. Regarding the structure, Chapter II contextualises the EU dimension of OC. Chapter III considers JCE and MM in comparison, so as to assess elements of comparability between these two doctrines. Chapter IV weighs the proposal to establish an EAC against negative effects of decentralised actions. Chapter V briefly addresses critiques and open questions remain to be properly addressed by academia. Finally, the research question will be answered.

2. Organised Crime & European Union

The OC ‘value’ in Europe totals an amount of EUR 110 billion per-year⁸. Italian Mafias’ economic power comprises 15% of the Italian GDP⁹, with annual revenues over EUR 16 billion solely from environmental crimes (EC)¹⁰. ‘*Ndrangheta*’s worldwide revenues triple that of Facebook, with 50.000 affiliates worldwide dominating entire businesses markets: Canada, Australia, North and South America, European and East European countries¹¹. They practice both legal and illegal activities¹². Mafias’ ability to infiltrate and subjugate cardinal sourc-

8. Redazione FQ, *Mafie, 110 miliardi l'anno: ecco quanto vale l'economia criminale in Europa* in «Il Fatto Quotidiano», March 2015, <https://www.ilfattoquotidiano.it/2015/03/31/mafie-110>, accessed on 3 February 2020.

9. F. Mercadante, *È ora di trattare la mafia come un'impresa a tutti gli effetti. Ecco perché*, in «Il Sole 24 Ore», June 2018, <https://www.econopoly.ilsole24ore.com/2018/06/22/m>, accessed on 3 February 2020.

10. R. Battaglia, *Fatturato ecomafia, superati i 16 miliardi. +15% in un solo anno* in «Valori», July 2019, <https://valori.it/fatturato-ecomafia-2019-supera-16-miliardi/> accessed on 3 February 2020.

11. R. Saviano, *Antonio Pelle boss di 'Ndrangheta – Kings of Crime* in *Imagine*, 2019, <https://www.youtube.com/watch?v=3HxyqUDq2pI>, accessed on 3 February 2022.

12. UNICRI, *Organized Crime and the Legal Economy – The Italian Case*, 2016, http://www.unicri.it/services/library_documentati, accessed on 3 February 2022.

es of power belonging to the highest levels of the political, entrepreneurial and masonic worlds are at the basis of their dominance¹³. These relationships are ever growing, characterising OC as states within the state¹⁴. Mafias' prosperity transcends EU borders, benefitting from loopholes, concessions and differences in the political, legal, fiscal and social views among states¹⁵. The EU is regarded by clans as 'hunting ground'.

Free movements of goods, people and capital rendered MS easy targets for criminal activities, mainly due to a lack of stringent border controls¹⁶. Authorities encounter many difficulties in tracing and detecting the transport of illicit goods/services and the consequent laundering and concealment of criminal proceeds. Over the years, the EU has shown a genuine interest in enhancing its fight against OC. Mafias must be fought using supranational countermeasures capable of harmonising MS national legislations into a single framework. While clans have no difficulties in connecting with other OC groups and laundering money abroad, law enforcement agencies display great inefficiency in coordinating measures between them¹⁷. In Germany, for example, the danger is not the presence of Italian clans' members, but the billions of mafias' euros invested in the national economy¹⁸. An increasing number of MS sectors are gradually and inconspicuously infiltrated.

3. Joint Criminal Enterprise & 'Mafia Method'

IL does not envisage a crime similar to national crimes of association, such as the Italian MA crime, on the basis of which the mere affiliation to, or partic-

13. DIA, *Attività svolta e risultati conseguiti dalla Direzione Investigativa Antimafia*, 2019, <http://direzioinvestigativaantimafia.inte>, accessed on 4 February 2020.

14. F. Armao, *Criminal Clusters: State and Organized Crime in a Globalised World*, in «The European Review of Organised Crime», Vol. 1 Issue 1, June 2014, pp. 122-156.

15. N. Gratteri, *Storia segreta della 'ndrangheta – una lunga e oscura vicenda di sangue e potere (1860-2018)*, cit., pp. 183-207.

16. T. Obokata, *Key EU Principles to Combat Transnational Organized Crime*, in «Common Market Law Review», Vol. 48, May 2012, pp. 801-828.

17. Europol, *Italian Organized Crime, Threat Assessment 2013*, <https://www.europol.europa.eu/publications-docume>, accessed on 10 August 2022.

18. J. Roth, *The Mafia and Organized Crime in Germany – Transnational Organized Crime: Analysis of a Global Challenge to Democracy*, cit., p. 286.

ipation in an OC organisation envisages the crime¹⁹. Notwithstanding, within IL, the JCE doctrine was established as a form of liability. It applies to anyone contributing to the (attempted) commission of a crime by a group of persons acting with a ‘common purpose’. Such contribution is intentional and either: i. made with the aim of furthering the criminal activity or criminal purpose of the group or ii. made in the knowledge of the intention of the group to commit the crime²⁰. The criminal activity is then carried out either jointly or by some member. Article 416-bis Italian Penal Code (IPC) establishes that whoever is part of a ‘Mafia-type association’ formed by 3 members, or more is punished with reclusion from 10 to 15 years. Whoever promotes, directs or organises such association is punished with reclusion from 12 to 18 years.

The MA is established when participants (having common criminal purposes and exploiting the intimidatory force of the associative tie, the condition of subjugation and the code of ‘silence’ imposed among society) directly/indirectly acquire the management or control of economic activities, concessions, authorizations, public contracts and services, realise illegal profits or advantages for themselves or others, impede or obstruct the free exercise of the vote or procure electoral votes useful for the interests of the organisation²¹. The Court must evaluate whether the perpetrator(s): i. is guilty of having knowingly committed a crime producing damage and ii. is aware that the association of which he is part deploys a particular type of intimidating force, so-called ‘Mafia Method’ (MM). This ‘force of intimidation’ is the capacity to instil fear and determine a diffuse status of psychological coercion. Any third party external to OC suffering such conditions is obliged to behave against his will, fearing retaliations²².

Both within and outside the OC association and after having agreed a common criminal purpose, the MM subjugation is determined by the impossibility

19. G. Calvetti, *Il Tribunale per la ex-Iugoslavia: l'attività svolta e il suo prossimo scioglimento*, Giuffrè, Milano 2007, p. 5; Article 416-bis, Italian Penal Code.

20. R. Cryer, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge 2019, p. 349.

21. R. Aleo, *L'Art. 416-bis C.P. nuovamente al vaglio della corte di Cassazione: la natura oggettiva del metodo mafioso*, in «SalvisJuribus», May 2020, <http://www.salvisjuribus.it/lart-416-bis-c-p-nuov>, accessed on 12 July 2022.

22. G. Tringali, *Il concorso esterno in associazione di tipo mafioso: il delitto imperfetto*, in «StudioCataldi», January 2016, <https://www.studiocataldi.it/articoli/20408-il-concorso-estern>, accessed on 12 July 2022.

to withdraw from the association 'tie' or the common criminal purpose established, under threat of death. Non-member co-perpetrators can be criminalised too²³. The mens rea threshold for 'external participation' in MA requires that the defendant: ii. aimed to contribute to the realisation of the crime, not with the intention to 'be part of the organisation itself' but as 'knowledge of the contribution' given to members in the conduct of being part of the MA and for facilitating specific crimes and i. had knowledge of the OC member(s)'s associative tie and intentions regarding the aided/abetted conduct. Indeed, liability is externally found in situations of 'proximity' with OC associations²⁴. While members aim to realise the association's common purpose, external contributors are essential for realising such scopes. The association's objectives (desired by affiliates) are only known by contributors that generally reap personal benefits.

The JCE doctrine resembles much of the MM mens rea, although some elements slightly differ. Firstly, the two JCE mens rea conditions are disjunctive, while the conditions for (internal and external) MA are conjunctive; both must be satisfied. Yet, while the first JCE mens rea condition substantively matches that of MA, the second is equivalent to the mens rea for 'external' MA. Indeed, the mens rea of both the first JCE form and MA are directed at members acting with the intention to further the common criminal purpose. The second form of JCE prosecutes persons that may not be direct perpetrators of International Core Crimes but contribute with knowledge of the group's criminal intentions²⁵. In parallel, the 'external' MA mens rea criminalises 'white-collar' not affiliated with the organisation, but vital for OC crimes' commission. These external individuals act with knowledge and awareness of OC's criminal features, purposes and dangerousness²⁶.

Secondly, the 'associative tie' and the 'force of intimidation' are other elements that may differentiate the two doctrines. Yet, coercion characterises both situations. Both systems of criminality impede the withdrawal from the associative bond by resorting to deadly threats against participants. In light

23. R. Aleo, *L'Art. 416-bis C.P. nuovamente al vaglio della corte di Cassazione: la natura oggettiva del metodo mafioso*, cit.

24. G. Tringali, *Il concorso esterno in associazione di tipo mafioso: il delitto imperfetto*, cit.

25. R. Cryer, *An Introduction to International Criminal Law and Procedure*, cit., p. 349.

26. G. Tringali, *Il concorso esterno in associazione di tipo mafioso: il delitto imperfetto*, cit.

of a new EU crime of OC Association backed by a doctrine for assessing OC groups' mens rea, the above comparability may be relevant. It must be stressed that, although JCE and MA show similarities, the doctrinal architecture differs: JCE concerns a mode of liability, while 'participation in a criminal organisation' is a separate criminal offence. Still, JCE and MA doctrines may be ideally combined, on the substantive point of view, to establish a EU principle for attributing associatory liability to OC members and key contributors.

4. Vertical EU Prosecution of Organised Crime

A leading German criminalist once said: "When you only have a certain pool of personnel, you can't fight bike-gang crime and Mafia crime at the same time. Hardly any light is being shed on OC structures in the area of white-collar crime". In Lower-Saxony, one chief superintendent affirmed: "the problem is a political one. You can do your best, but still fail when those pulling the strings are doing so from abroad"²⁷. Germany is particularly susceptible to money laundering because of its economy and immense importance as a financial epicentre. Authorities frequently do not know how to identify and investigate money laundering in practice²⁸. Furthermore, this crime is often ignored in the interest of obtaining new customers. An example is the 'Uzbek' case, where a German bank could not be stopped from accepting a dubious Uzbek national as a customer: a well-known oligarch from Russia, member of the criminal organisation 'Solnzevskaja'²⁹.

Similar schemes apply in other MS. Furthermore, OC activities are not limited to money laundering³⁰. Many luxury resorts in the Costa Brava were built by Italian clans, similarly for several tourist attractions in Aberdeen. These are

27. J. Roth, *The Mafia and Organized Crime in Germany – Transnational Organized Crime: Analysis of a Global Challenge to Democracy*, cit., p. 292.

28. Committee on Homeland Security and Governmental Affairs (US Senate), *Failure to Identify Company Owners Impedes Law Enforcement*, 2006, <https://books.google.it/books?id=eG58dLSdMRMC&> accessed on 16 July 2022.

29. J. Roth, *The Mafia and Organized Crime in Germany – Transnational Organized Crime: Analysis of a Global Challenge to Democracy*, Transcript Verlag, Bielefeld 2014, p. 292.

30. R. Saviano, *Gomorra*, Mondadori, Milano 2006, p. 124.

just a few examples of a more expanded phenomenon³¹. OC manages hundreds of B2C activities, such as, *inter alia*, restaurants and casinos, but also B2B activities, in almost all MS. Additionally, 'Ndrangheta controls Rotterdam and Antwerp ports, where tons of illicit goods transit daily³². Noteworthy is the different modalities of checks between Italian and Northern European ports. Italian authorities check an average of 10/100 transiting containers, while only 1/100 are opened in Rotterdam and Antwerp³³. This is one of several differences seriously affecting MS capacity to intercept illegal fluxes in the EU.

Another problem is the ability of the Italian Mafia to obtain annual EU funds destined to MS citizens³⁴. Every year, clans acquire 24,5 billion Euros deriving from the Union and destined for agricultural, livestock and food distribution purposes. Investigations also discovered misuses of funds to sustain the migration crisis³⁵. Without concerted action, the legitimization of the phenomenon will grow. In this light, this thesis theorises the creation of a centralised EAC competent to prosecute OC throughout the EU. The following subchapters outline mafias' characteristics and presence within MS, drawbacks of the current framework, lacunas of the existing EU OC definition and the necessity for a more structured EU venture. Then, the specific features of the proposed EAC are addressed.

4.1. Mafias' Functional Diversification & European Misconceptions

The main obstacle to a centralised intervention is the misconception of mafias among MS, mainly due to OC's 'functional diversification' strategy abroad³⁶.

31. P. Campana, *Understanding Then Responding to Italian Organized Crime Operations across Territories*, in «Oxford University Press», Vol. 7 Issue 3, August 2013, pp. 316-325.

32. N. Gratteri, *Storia Segreta della 'Ndrangheta – Una lunga e oscura vicenda di sangue e potere (1860-2018)*, Mondadori, Milano 2019, pp. 183-207.

33. C. Braga, *Commissione parlamentare di inchiesta sulle attività illecite connesse al ciclo dei rifiuti e su illeciti ambientali ad esse correlati*, 2014, <http://www.senato.it/service/PDF/PDFServer/BGT/1064090.pdf>, accessed on 10 July 2022.

34. Coldiretti Relazioni Esterne, *Mafia, dal latte ai fondi UE business da 24,5 miliardi* in Coldiretti, January 2020, <https://www.coldiretti.it/economia/mafia-dal-latte-ai-fondi-ue>, accessed on 16 July 2022.

35. G. Righi, *Mafia capitale e il business dei migranti*, 2018, http://tesi.luiss.it/22673/1/079252_RIGHI_GIANL, accessed on 16 July 2022.

36. P. Campana, *Eavesdropping on the Mob: the functional diversification of Mafia activities across territories*, in «European Journal of Criminology», Vol. 8 Issue 3, May 2011, pp. 213-228.

Generally, Mafia-like OC uses violent methods. Yet, they do not do so everywhere. Instead, they diversify activities and *modus operandi* across MS: They may afford illegal ‘protection’ in one location (usually, the territory of origin where no competitor is allowed), while they just trade on markets in other places (non violent methods, low-profile and avoidance of moral panic)³⁷. Nonetheless, this is not a static process; OC may import ‘protection’ activities into new MS, if left free to act. The misconception derives from mafias’ ‘invisibility’ by not breaking laws of MS where they invest capital. Still, the same families operate as legal entrepreneurs in certain MS, while maintaining illegal roots, methods and resources in others³⁸.

Gratteri claimed that: “Foreign authorities say that in their country nothing happens; [...] they believe that a crime takes place only when you have a dead body, gun shots against the shutters and burnt-out cars. But, if in need to launder money in Germany or the Netherlands, OC is extremely careful so that nothing takes place there, not even the theft of a bicycle”³⁹. MS do not know how to counter mafias. OC groups prosper from chaotic bureaucracy and absence of frameworks fronting mafias’ continuous transformations, then leading to ‘normative paradises’⁴⁰. The most advanced OC perpetrate crimes in one country, while their economic power remains safely hidden abroad. Among MS, there is a clear reluctance to acknowledge the magnitude of mafias’ activities, particularly among academics and governments⁴¹.

There is a general refusal among MS in respect of a common recognition of this problem as having a strong impact on EU societies, economies and politics. For instance, there have been reports claiming that Mafia members were influencing German politics⁴². Without a common understanding of these dynamics, such conditions are bound to increase without MS even realising

37. P. Campana, *Understanding Then Responding to Italian Organized Crime Operations across Territories*, cit., pp. 316-325.

38. F. Allum, *Italian Organized Crime in the UK: Continuing the Debate*, in «Policing: A Journal of Policy and Practice», 7 (2), 2013, Oxford University Press, pp. 227-232.

39. R. Bindi, *commissione parlamentare di inchiesta sul fenomeno delle mafie e sulle altre associazioni criminali anche straniere*, 2014, <http://documenti.camera.it/leg17/resoconti/c>, accessed on 10 April 2022.

40. N. Gratteri, *Storia segreta della 'ndrangheta – una lunga e oscura vicenda di sangue e potere (1860-2018)*, cit., p. 208.

41. F. Allum, *Italian Organized Crime in the UK: Continuing the Debate*, cit., pp. 227-232.

42. D. Andreatta, *Mapping the Risk of Serious and Organized Crime Infiltration in Europe*, Transcrime Report, 2018, <https://www.transcrime.it/wp-content/uploads/2018/04/Mapping-the-Risk-of-Serious-and-Organized-Crime-Infiltration-in-Europe-2018.pdf>, accessed on 10 April 2022.

it. There is also a lack of European data, which is why Italian intelligence is vital. Some MS possess several data, while others do not⁴³. An effective OC counteraction must be based on comprehensive analysis taking into account as much information as possible, so as to depict a realistic picture of clans' transnational activities. Yet, this remains quasi-impossible without centralised interventions.

4.2. *Existent Framework & Weaknesses*

While the EU adopted some measures against OC, issues such as State sovereignty, human rights protection and the practical struggle in upholding key EU principles affect MS ability to counter OC. Several EU Framework Decisions (FD) were adopted, however producing little results due to inconsistencies in imposing penalties and MS non-compliances with these decisions. This mainly derives from different national perceptions of specific criminal offences, excluding a common understanding of OC: A unique multifaceted phenomenon composed by the sum of specific criminal conducts to be countered on a common basis⁴⁴. A well-organised EU approach would need to involve, *inter alia*, a combination of measures common to all MS, including measures: a. facilitating cross-border arrest and surrender procedures; b. facilitating collection and sharing of evidence during both investigation and trial phases; c. combating money laundering and facilitating asset seizures and forfeiture across the Union. MS already adopted some types of a and b tools⁴⁵. Yet, instruments adopted need amendments. Regarding type a tools, the European Arrest Warrant is a decent device.

Europol and Eurojust were established with the aim of advancing type b measures. However, better procedures for collecting and sharing evidence can surely be developed. Type c instruments, contrarily, are mostly undeveloped and EU attempts to collectively respond to OC in this respect did not

43. M. Angelini, *From Illegal Markets to Legitimate Businesses: The Portfolio of Organized Crime in Europe*, Transcrime Report, 2015, <http://www.transcrime.it/wp-content/uploads/2015/12/ocp.pdf> accessed on 12 July 2022.

44. T. Obokata, *Key EU Principles to Combat Transnational Organized Crime*, in «Common Market Law Review», Vol. 48, May 2012, pp. 801-828.

45. P. Campana, *Understanding Then Responding to Italian Organized Crime Operations across Territories*, cit., pp. 316-325.

produce effective results. Between 2010 and 2014, only 2,2% of assets deriving from a crime were seized or frozen within the EU, while only 1,1% of these assets were actually confiscated, leaving the remaining 98.1% at the disposal of criminal groups⁴⁶. A new type c instrument is the EU Regulation 2018/1805 on the mutual recognition of freezing and confiscation orders⁴⁷. Such a new tool would partially improve the current framework. Being a regulation, it is directly applicable and has a wider scope than the instrument it will replace. Further, it introduces strict and clear deadlines for recognizing and executing freezing and confiscation orders⁴⁸. Being relatively new, Regulation 1805 still lacks a concrete understanding of its potential effectiveness⁴⁹. Moreover, it must compensate for years of quasi-inactivity in asset recovery at the EU level.

A European Public Prosecutor's Office (EPPO) was also established in 2017. Its mandate is limited to individuating, prosecuting and indicting authors of crimes damaging the EU budget (such as fraud, corruption or cross-border VAT fraud) above €10 million⁵⁰. Even though it just became operational (in 2021) and is quite limited in scope, EPPO represents the embryonic product of a possible EU centralised action. It operates as a single office across MS, combining European and national law-enforcement efforts in a unified, seamless and efficient approach⁵¹. Almost all MS consented to EPPO's creation, functioning through a centralised prosecution and decentralised adjudication of cases. EPPO has jurisdiction on the basis of territoriality and nationality. In this respect, issues arise due to variant national interpretations regarding the territoriality principle, or the definitions of 'suspect' and 'accused'⁵². These diverse conceptions may, *inter alia*, create confusion and hinder EPPO from fully

46. M. Letizi, *Come cambia l'Asset Recovery nell'Unione alla luce del recente Regolamento (UE) 2018/1805* in «Il Sole 24 Ore», 2020, <https://www.diritto24.ilsole24ore.com/art/avvocatoAf>, accessed on 16 October 2022.

47. C. Cirlig, *Mutual recognition of freezing and confiscation orders*, 2018, <http://www.marinacastellanea.it/blog/wp-content/>, accessed on 10 July 2022.

48. *Ibidem*.

49. L. Bodrero, *An Alternative Method to Combat the Mafia: Confiscation of Criminal Assets – Transnational Organized Crime: Analysis of a Global Challenge to Democracy*, Transcript Verlag, Bielefeld 2014, p. 278.

50. N. Vandystadt, *Frequently Asked Questions on the European Public Prosecutor's Office*, 2018, <https://ec.europa.eu/commission/presscorner/deta>, accessed on 12 July 2022.

51. *Ibidem*.

52. A. Klip, *European Criminal Law*, Intersentia, Cambridge 2016, p. 515.

adhering to the legality principle, considering it will have to adapt its actions to many different conceptions of the criminal law.

The 2017 PIF Directive is EPPO's legal basis⁵³. Yet, several factors led to fragmentation. Firstly, the EPPO Regulation only applies to certain MS through enhanced cooperation. Secondly, its material competence is drawn from the implementation of the PIF Directive in each MS, leading to inconsistencies⁵⁴. Thirdly, the territorial and personal competences of EPPO are derivative from national laws, being them entirely dependent upon the existence of MS jurisdiction over particular acts. Finally, the rules on the exercise and reallocation of competence are unclear, potentially detrimental to the defence's rights⁵⁵. An appropriate consideration of the problem should start by recognizing the need to reform EU Treaties to provide an explicit basis for the creation of directly applicable norms and penalties, and eventually protect EU interests. EPPO's competence would then flow naturally from the applicable substantive law, upholding consistency and certainty. A centralised EU initiative against serious OC could, in turn, find legal basis on these possible new formulations.

4.3. *The European Union Definition of Organised Crime Does Not Work*

The OC definition adopted by the EU FD 2008/841 is uncertain and vague. This claim is based on legislative and criminological arguments. The FD defines a "criminal organisation" as "a Structured Association (SA), established over a period of time, of more than two persons acting in concert"⁵⁶. The SA concept is negatively formulated, stating what a SA is not without giving some positive features. The text only specifies two extremes of a SA's possible range of variation. The lower extreme excludes random groups formed to commit a single crime, while the higher extreme excludes "complex structures", "formal hierarchy" and "con-

53. I. Grassle, *Protection of the Union's Financial Interests (PIF Directive)*, 2020, <https://www.europarl.europa.eu/legislative-train/the>, accessed on 12 July 2022.

54. P. Caeiro, *A European Contraption: The relationship between the competence of the EPPO and the scope of Member States' jurisdiction over criminal matters*, in *The European Public Prosecutor's Office at Launch*, Wolters Kluwer, Milano 2020, p. 61.

55. *Ibidem*, p. 61.

56. F. Calderoni, *A Definition that Could not Work: the EU Framework Decision on the Fight against Organized Crime*, in «European Journal of Crime», Vol. 16, August 2008, pp. 265-282.

stant composition” as mandatory requirements⁵⁷. The described range comprises a broad variety of different OC, including groups that may differ significantly in their social threat and seriousness of criminal intent. The ‘established over a period of time’ and ‘concert among members’ requirements restrict the scope’s application. Then, the vague SA definition may foster problems for the legality principle and have repercussions on certainty, clarity and precision of criminal law⁵⁸.

This definition deprives the SA notion of a large part of its selective potential. Moreover, such uncertainty and differences among MS will likely jeopardise the FD’s original objective⁵⁹. Criminologically, the FD definition covers an extremely broad range of phenomena without addressing typical OC features. The latter should be indicated to distinguish serious OC from mere ‘crimes that are organised’. The main studies on OC identified four features: a. continuity: A stable structure of continuous and indefinite commission of crimes, independently of its membership; b. violence: use or threat to use violence towards other criminal groups, minor criminals, legal/illegal competitors and victims; c. enterprise: The group’s main goal are profit and power, usually pursued through the production and/or exchange of illegal goods/services; d) immunity: The group exerts influence on other subjects to shield its activities from sanction(s)⁶⁰. None of these characteristics are defined, rendering the EU OC notion completely detached from the main research in the field.

Moreover, the OC criminal plan must include offences punishable with at least four years of imprisonment. The aim of this limitation is to restrict the applicability of the OC concept to serious crimes. Yet, it results in a rigid approach producing unintended problems. Indeed, the level of penalties varies significantly among MS and no EU framework for criminal sanctions exists. Different offences may fall within the OC notion according to MS sanction regimes, resulting in different applications of the concept and hindering MS authorities’ coordination⁶¹. Besides, as several OC activities are perpetrated

57. *Ibidem*, pp. 265-282.

58. V. Mitsilegas, *Defining Organized Crime in the European Union: The Limits of European Criminal Law in an Area of Freedom, Security and Justice*, in «European Law Review», Vol. 16, December 2001, pp. 565-581.

59. *Ibid.* 56, cit., pp. 265-282.

60. J. Finckenauer, *Problems of Definition: What is Organized Crime?*, in «Trends in Organized Crime», Vol. 8 Issue 3, March 2005, pp. 63-83.

61. F. Calderoni, *A Definition that Could not Work: the EU Framework Decision on the Fight against Organized Crime*, cit., pp. 265-282.

conjunctively in many MS, criminal treatments may vary much depending on which MS prosecutes a specific offence. The adoption of this FD reflects a contentious criminal policy attitude towards the OC concept: Instead of focusing on OC distinctive features, it transforms the concept into a generic 'box' serving ideological and mutual cooperation aims⁶².

The OC tag produces consequences on police control and derogations to standard procedural guarantees: States' reactions are proportional to crimes' seriousness. The FD definition, however, does not focus on OC distinctive seriousness able to rationalise a substantial intensification of investigation, prosecution and sanctioning regimes. It precludes from establishing a unique threshold for applying the OC notion, leaving the risk for either excessive or insufficient counteraction⁶³. The FD allows MS not to introduce the OC concept and continue applying national laws on participation/preparation of specific crimes. It does not direct towards a common EU offence of OC participation, allowing each MS to maintain national disciplines without substantial changes⁶⁴. A comprehensive EU initiative against OC should adopt an OC definition mirroring the Italian Anti-Mafia law. The latter recognizes all OC distinctive features, particularly the coercing 'associative tie' and the 'force of intimidation', elements differentiating serious OC from 'crimes that are organised'.

4.4. A European Holistic Venture against Organised Crime

A solution designating the enlargement of EPPPO's competences and the creation of an EAC would allegedly create a democratic deficit and a problem for MS sovereignty and human rights compliance. This is mainly associated with the reluctance of states to delegate criminal law competences to supranational institutions. Unfortunately, this approach extremely hinders effective action against OC⁶⁵. The EU remains the most advanced regional concentration in

62. *Ibidem*, pp. 265-282.

63. E. Symeonidou-Kastanidou, *Towards a New Definition of Organized Crime in the European Union*, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 15 Issue 1, March 2007, pp. 83-103.

64. F. Calderoni, *A Definition that Could not Work: the EU Framework Decision on the Fight against Organized Crime*, cit. pp. 265-282.

65. *Ibidem*.

terms of human rights assurances and practices. There is no reason to claim that MS would not assure compliance with human rights obligations among each other⁶⁶. What the EU needs to commonly agree on is not only the offences' definitions, but also a standard set of procedural safeguards for suspects and defendants⁶⁷. This is to avoid variances in treatment depending on which MS arrests, prosecutes or punishes. The resulting instrument, however, should not disregard the Italian reluctance towards over-lenient legislation and over-superficial approaches. For example, a criticised instrument of the Italian tradition is Article 41-bis, whereby the most dangerous individuals are kept in 22/24h daily isolation, the remaining hours in groups of 4 but under 24h/7days surveillance⁶⁸.

It is not a matter of disgrace for human rights, but a necessity for security reasons. Indeed, several prisons are controlled by clans, and bosses are able to maintain control over their associates outside. The only way to obstruct their power is to keep the heads of the groups in total isolation⁶⁹. An EU proposal envisaging some device similar to Article 41 bis is advisable. The same priority associated to terrorism must be applied to OC⁷⁰. For terrorism, all MS agreed on promulgating extraordinary security measures, frequently leading to disregards for basic human rights. OC must be considered equal and even more dangerous, as sometimes OC is even a supplier for terrorists⁷¹. States are more likely to cooperate with each other when they share similar history, values and legal traditions⁷². Regarding the proposal, the EU is a regional concentration able to accommodate the implementation of an instrument of such calibre and where this experiment would have higher chances of success. Yet, fragmented views due to MS' false perceptions of their public security and legislative rightness remain

66. T. Obokata, *Key EU Principles to Combat Transnational Organized Crime*, cit., pp. 801-828.

67. *Ibidem*.

68. V. Zeppilli, *Il 41-bis*, in «StudioCataldi», 2020, <https://www.studiocataldi.it/articol>, accessed on 11 October 2022.

69. V. Musacchio, *In Europa non hanno capito cos'è il 41 bis e sottovalutano le mafie in Polizia Penitenziaria*, 2020, <https://www.poliziapenitenziaria.it/in-europ>, accessed on 10 September 2022.

70. M. Shaw, *When Terrorism and Organized Crime Meet*, in «Policy Perspectives», Vol. 6, Issue 7, October 2018, pp. 1-4.

71. Financial Intelligence Agency, *Il terrorismo e il suo finanziamento: l'esperienza europea*, 2018, <https://www.google.com/url?sa=t&rct=j&q=>, accessed on 10 September 2022.

72. T. Obokata, *Key EU Principles to Combat Transnational Organized Crime*, cit., pp. 801-828.

a vivid internal challenge. Meanwhile illegal funds are daily pumped into MS's economies⁷³.

A meaningful EU venture against OC could be modelled on the Italian experience of mafias' 'pool-based' prosecution. In 1980, the Italian judge Rocco Chinnici pressured the government to create the so-called Anti-mafia pool, a group of specialised Anti-mafia prosecutors working on the same investigation(s)⁷⁴. Their strategy was sharing information and developing means of investigation against the Sicilian Mafia, decreasing risks and personal responsibilities while distributing the workload amongst them⁷⁵. The rationale at the basis of this approach was that, while mafias were moving on the territory with a unitary and top-down method, the counter-reaction of the state could not be fragmented⁷⁶. The importance of this strategy was also its secrecy to prevent moles, however, it limited evidence gathering outside the group of trusted members. Also, it rendered pool members vulnerable targets of mafia retaliation, with their deaths automatically concluding the investigation⁷⁷. Indeed, this was the result after the killings of Chinnici, Falcone and Borsellino. This was not determined by the inefficiency of the "pool method", but rather an absence of political support, and even more so, the willingness of their death by corrupt state apparatuses⁷⁸.

Recently, the UN 'Falcone Resolution' was unanimously voted in Vienna, establishing the necessity to follow, at the international level and with a common path, the Falcone's *modus operandi*: The "Follow the Money" doctrine⁷⁹. Falcone was the first to theorise that effective counteraction of OC requires tracking dirty investments rather than untraceable illegal products.

73. N. Gratteri, *Storia segreta della 'ndrangheta – una lunga e oscura vicenda di sangue e potere (1860-2018)*, Mondadori, Milano 2019, p. 208.

74. L. Zingales, Rocco Chinnici: *l'inventore del pool antimafia*, Limina, Arezzo 2006, p. 15.

75. R. Mancuso, *Il pool antimafia – continuiamo a ricordare*, in «StudioCataldi», 2012, https://www.studiocataldi.it/news_giuridich, accessed on 11 October 2022.

76. A. Ribaldo, *L'Onu vota la "Risoluzione Falcone". Il metodo del giudice ispirerà la lotta alle mafie del mondo*, in «Corriere della Sera», 2020, https://www.corriere.it/cronache/20_ottobre_1, accessed on 18 October 2022.

77. Redazione Focus, *Giovanni Falcone e Paolo Borsellino: il coraggio di essere eroi*, in «Focus», 2020, <https://www.focus.it/cultura/storia/giovan>, accessed on 10 September 2020.

78. J. Sacco, *Giovanni Falcone e Paolo Borsellino: due eroi contro la Mafia*, in «University of Malta Publishing», 2013, <https://www.um.edu.mt/library/oar/bitstrea>, accessed on 10 October 2020.

79. A. Ribaldo, *L'Onu vota la "Risoluzione Falcone". Il metodo del giudice ispirerà la lotta alle mafie del mondo*, cit.

Its method developed based on banking investigations that started in Sicily and reached the US, Canada and credit institutes having ‘bank secrecy’ at their disposal⁸⁰. From these investigations, quasi-centralized operations were born between Italian police, FBI and DEA⁸¹. Another point of Falcone’s vision was the need for international centralised cooperation against OC and the formation of common investigative corps resorting to advanced tools⁸². This and other issues, such as the need for universal legislation against EC and new forms of OC, are included in this new Resolution. The latter legitimates the reciprocal judicial assistance between states, promotes active cooperation between public forces and foresees several obligations for signatory states⁸³.

In particular, the Resolution aims at contrasting the OC economic dimension and enhances the return of assets to victims also via social use. Further, it plans new international cooperation methods and the use of special investigative techniques. Moreover, it pushes towards the use of the UN-TOC of 2000, opens for a way of collaboration between States and internet providers against cybercrime, and proposes the fight against OC not only as repression but primarily as a fight to assure rights and freedoms⁸⁴. The Palermo Convention created a device governing international cooperation between authorities for sharing evidence and pursuing criminal actors at the international level, together with a framework to modernise and revise national legislations to better investigate and prosecute in a common effort⁸⁵. However, the discrepancy between the political momentum of the end of 1990s with the actual results after 18 years from UNTOC’s entry into force in 2003 is contradictory.

80. AMDuemila, *Onu approva risoluzione Falcone. Antoci: Adesso via libera a cooperazione contro le mafie*, in «Antimafia», 2020, <https://www.antimafiaduemila.com/home/rassegn> accessed on 15 October 2020.

81. P. Grasso, *Il ‘Metodo Falcone’ era lui stesso, uomo e giudice*, in «La Repubblica», 2018, <https://mafie.blogautore.repubblica.it/2018>, accessed on 10 April 2021.

82. A. Ribauda, *L’Onu vota la “Risoluzione Falcone”. Il metodo del giudice ispirerà la lotta alle mafie del mondo*, cit.

83. AMDuemila, *Onu approva risoluzione Falcone. Antoci: Adesso via libera a cooperazione contro le mafie*, cit.

84. Redazione PRP, *Untoc adopts the “Falcone resolution” in Vienna on the fight against the mafia in PRP Channel*, 2020, <https://www.prpchannel.com/en/untoc-adopts-t> accessed on 10 April 2021.

85. I. Tennant, *Fulfilling the Promise of Palermo? A Political History of the UN Convention Against Transnational Organized Crime*, in «Journal of Illicit Economies and Development», Vol. 2 Issue 1, February 2021, pp. 53-71.

The UNTOC brought anti-drug and anti-crime efforts around the UN umbrella closer together, despite different backgrounds and personnel's cultures. Yet, the level of coordination among UN processes on drugs and crime still leave significant room for improvement, yet difficult to reach with the current state of affairs⁸⁶. Ugljesa Zvekic declared that: "The Convention is a quasi-legal framework yet lacks authority and sanctions. There is no way of knowing whether and how countries are implementing it. There is no international authority governing OC". At the beginning, the UNTOC did not have priority in Vienna. In the 2014 and 2016, the Conference of Parties (COP) summits were able to establish a review mechanism mainly due to the Italian Ambassador, Maria Sabbatini⁸⁷. Yet, this device was adopted without public awareness, it does not have many resources, its structure is complex, its scope is narrow compared to the potential engagement from civil society, and the transparency remains low. In reality, it is more an agreement reached to conclude the discussion and solve legal uncertainty, instead of creating an effective monitoring mechanism.

Gino Polimeni argued that: "The 3 Protocols were added straight away after the adoption of the Convention, showing how flexible the Convention is. To allow this dynamic approach, the COP needs to include more expertise and science"⁸⁸. Again, Zvekic claimed that: "The UNTOC COP risks becoming outdated. The demise of UNTOC is due to the expansion of transnational OC, both politically and geographically. There are new criminal markets, and the problem is becoming more articulated and serious. The COP is not adequate to deal with this expansion". Antonio Balsamo agreed with the necessity to include expert discussion: "The link between development and OC is a challenge for the future. In the current COP architecture, best practice is not shared in enough detail"⁸⁹. Tennant claims that there should be more talks at the national level in respect of the UNTOC implementation, to comprehend how to use it. Indeed, the COP is deemed not to have enough room for solid expert discussion. Moreover, it is not efficient in promoting the broad use of international cooperation mechanisms of UNTOC.

86. *Ibidem*.

87. *Ibidem*.

88. *Ibidem*.

89. *Ibidem*.

The phenomenon of transnational OC is not properly fought by the COP, as the use of the Palermo Convention itself is too low⁹⁰. The diffusion of expertise is necessary as well as the reduction of the weight given to politics' considerations. This entails the need to find new unitary ways to counter the strength of transnational OC and increase the UNTOC implementation. On issues related to economic development and technical aid, collection and examination of information on OC, and proper exchanges of views, consistent renovations should be done⁹¹. All these gaps, structural lacunas and implementation problems derive from the abstractness that an international convention initiative has in respect of an ever-growing phenomenon such as OC. The latter is concrete, daily operative and able to change forms and methods faster than states. The more it is underestimated, the more it becomes dangerous and difficult to defeat⁹². It is time to surpass Palermo while avoiding the inescapable interference of 190 different national views.

More effective responses must be regional, and the EU is an area having judicial culture and resources to reach this result⁹³. Within the Union, there would also be a stronger interest compared to the COP, as mafias are stealing billions from the Union's budget every year. The establishment of a regional forum would be much faster as the political will is (technically) easier to be unified among MS. The African Union (AU), for example, is attempting to establish a similar device⁹⁴. In 2014, the Malabo Protocols introduced criminal jurisdiction through an International Criminal Law Section to the African Court of Justice and Human Rights' mandate. These protocols expanded the courts' jurisdiction to include several international and transnational crimes (amongst others, money laundering, organised crime, environmental crime). While not yet in force, this new device arose debates on its legal relationship with the ICC⁹⁵. Particularly, the fact

90. *Ibidem*.

91. R. Bindi, *Commissione parlamentare di inchiesta sul fenomeno delle mafie e sulle altre associazioni criminali anche straniere*, 2014, <http://documenti.camera.it/leg17/resoconti/c>, accessed on 10 April 2022.

92. M. Ludovico, *C'è mancanza di allarme sociale: così la Mafia cresce al nord*, in «Il Sole 24 Ore», 2019, <https://www.ilsole24ore.com/art/c-e-mancanza-allar> accessed on 10 April 2021.

93. H. Van der Wilt, *On Regional Criminal Courts as Representatives of Political Communities: The Special Case of the African Criminal Court*, in *The Oxford Handbook of International Criminal Law*, Oxford University Press, Oxford 2020, p. 230.

94. *Ibidem*.

95. P. Martini, *The International Criminal Court versus The African Criminal Court*, in «Journal of International Criminal Justice», Vol. 18 Issue 5, November 2021, pp. 1185-1205.

that the AU also has jurisdiction over international crimes is seen as problematic, a critique that may also be made if the EU would take a similar path.

Yet, the aim of this proposal is to offer an international court having jurisdiction on transnational serious crimes made within the EU. An EAC would vertically adjudicate cases that are centrally prosecuted by EPPO, ruling over cases that would otherwise be centrally adjudicated by MS courts. A regional forum prosecuting transnational OC crimes may be beneficial and create an added value for success, instead of resulting in an unanswerable problem of attribution of jurisdiction and human rights abuses. Indeed, other than incorporating an EU notion of OC, a regional EU court may cover all main serious crimes, including corporate criminal liability⁹⁶. Among others, a gap that an EAC could fill would be to ensure that justice is done in the prosecution of corporate actors: White collars playing a vital role for keeping OC apparatuses alive. Moreover, this ideal court would address the causal effects of OC at the EU level, so as to diffuse awareness among MS of its 'vital organs' (more violent crimes in Italy, more economic crimes in Malta, for example) and collectively counter it more effectively.

The EAC would result in giving the EU greater ownership of the process of justice in a democratic and fair procedural context. It will not replace the ICC as it will have jurisdiction over transnational serious crimes, but not over international crimes. To have any long-lasting effect, MS must leave the competence of prosecuting OC to the EU, so that the latter can be able to individuate and reach, from its privileged position, "those pulling the strings from abroad". Weaknesses and inefficiencies of the current system of transnational prosecution are continuing to offer OC the opportunity to act through favoured positions of power, concealing themselves more efficiently⁹⁷. Between opportunity, desire and targeting of victims/illegal activities, the former is the 'pillar' more easily addressable to reduce the likelihood of crimes, thus, the EU must unitarily impede the systematic exploitation of decentralised opportunities offered by the EU market.

96. K. Roberts, *Corporate Liability and Complicity in International Crimes*, Cambridge University Press, Cambridge 2013, p. 190.

97. R. Bindi, *Commissione parlamentare di inchiesta sul fenomeno delle mafie e sulle altre associazioni criminali anche straniere*, cit.

4.5. A European Anti-Mafia Court Initiative

The EU remains the crucial market for OC. In parallel, the ‘Falcone’ and ‘pool’ methods were effective. Consequently, he and others got killed. Yet, if these tactics were working in Palermo, they could be replicated on an EU scale. A serious EU investment for centralised judicial cooperation could represent the instrument to reach a higher level of counteraction against OC. This has been demanded by Europol recommendations for years. The latter requests to receive a stronger and more centralised ‘police function’, instead of simple coordinating tasks in international cooperation⁹⁸. MS must be required to commit resources and comply with centralised orders to tackle targets posing the highest threats at the EU level⁹⁹. In respect of an EU harmonisation of this type, 100 years of Italian experience of OC investigation, prosecution and sentencing must not be wasted. Moreover, an EU harmonisation of OC criminal law and procedures resulting in more lenient instruments or practises would be counterproductive¹⁰⁰.

The EAC should prosecute and adjudicate the members of the most powerful OC, frequently protected by webs of judicial and political complicity at the national level. Moreover, it should also recover the goods illegally obtained and manage their (re)distribution to victims¹⁰¹. The EAC should be competent to adjudicate serious OC as soon as EPPO finalises indictments¹⁰². This new framework could consist of features similar to those of the ICC, with EPPO already corresponding to the former’s office of the prosecutor, however, adding a pre-trial chamber (three judges), trial chamber (three judges) and appeal chamber (five judges) to the EAC¹⁰³. The latter could be classified under the

98. Europol, *Italian Organized Crime*, Threat Assessment 2013, <https://www.europol.europa.eu/publications-docume>, accessed on 10 August 2022.

99. *Ibidem*.

100. G. Ruccia, *Ue, Gratteri vs Frassoni (Verdi): “Omologazione legislazione giudiziaria? Ho paura, cancelleremo un secolo di antimafia”*, in «Il Fatto Quotidiano», 2018, <https://www.ilfattoquotidiano.it/2018/10/3>, accessed on 10 September 2022.

101. COPLA, *Verso un tribunale latino-americano contro il crimine organizzato*, in «L’Unità Europea», January 2020, <http://www.mfe.it/unitaeuropea/fileMfe/archivio>, accessed on 15 August 2022.

102. L. Kuhl, *The European Public Prosecutor’s Office – More Effective, Equivalent and Independent Criminal Prosecution against Fraud?*, in «Eu crim», Vol. 13 Issue 3, March 2017, pp. 135-143.

103. Aba-ICC, *Structure of the ICC*, 2020, <https://www.aba-icc.org/about-the-icc>, accessed on 17 October 2022.

framework of the Court of Justice of the EU (CJEU) or under a new European judicial structure. Judges may be appointed in the same way as CJEU's judges, holding 6-year renewable terms¹⁰⁴. Candidates should be selected among national criminal judges dealing with serious crimes.

EPPO's competencies can be enlarged to increase mandate, investigatory powers and number of Delegated Prosecutors. Furthermore, EPPO's structures should reflect the Italian Anti-mafia pools albeit with prosecutors belonging to two or more states. Specifically, in cases of serious OC investigations, teams of EU prosecutors and judges among MS should be able to operate under the EAC and the EPPO judicial structures, being then able to enforce confiscation, freezing and orders in the whole EU territory without the need for further authorization. The direction of each EPPO pool shall be determined on the basis of the MS giving the greenlight for the EPPO investigation. Regarding Europol and Eurojust, their competencies and powers in coordinating EU operations should also be refined¹⁰⁵. Indeed, instead of simply synchronising the operations of individual police forces, they should be able to direct a unique effort consisting of several police and judicial forces acting as one¹⁰⁶. This could be obtained by increasing the number of liaison officers and operatives.

Also, Europol should be competent to ensure the protection of transnational crimes' key witnesses¹⁰⁷. Furthermore, an entity should be established for the organisation and redistribution of assets confiscated to victims. As stated by Gratteri, the EU does not only need a centralised approach to conquer OC, but more importantly, a centralised understanding of its dangerousness in order for such an approach to be practical¹⁰⁸. Indeed, once a common understanding is achieved, the centralization of OC prosecution would be more efficient as it eliminates the handling of investigations and the passing of information to several entities, thereby diminishing the risks of corruption and

104. European Parliament, *The Court of Justice of the European Union*, Fact Sheets 2020, <https://www.europarl.europa.eu/ftu/pdf/en/>, accessed on 17 October 2022.

105. Europol, *Italian Organized Crime*, Threat Assessment 2013, <https://www.europol.europa.eu/publications-docume>, accessed on 10 August 2022.

106. European Commission, *Operational Cooperation*, Policies 2020, <https://ec.europa.eu/home-affairs/what-we-do/>, accessed on 17 October 2022.

107. COPLA, *Verso un tribunale latino-americano contro il crimine organizzato*, cit.

108. G. Tizian, *Così la mafia è diventata europea*, in «L'Espresso», 2014, <https://espresso.repubblica.it/plus/articoli/2014>, accessed on 13 October 2022.

loopholes within the EU system (particularly in Eastern EU)¹⁰⁹. The issue of secrecy regarding anti-OC operations is not only problematic on a national level, but evermore problematic at the European level¹¹⁰.

The exercise of jurisdiction requires several authorizations. Further, different procedures among MS not only lead to inefficient investigations but also to the risk of enlarging the circle of information due to the various layers of authorities to be notified¹¹¹. Thus, the existing joint investigation scheme is too slow and facilitates its own penetration by OC due to its decentralised nature and poor coordination. The EAC would create a unique judicial space where requests for judicial assistance and mutual recognition decisions are not necessary¹¹². The sharing of sensible information will still be present, however only between EPPO prosecutors, EAC judges and Europol/Eurojust officers. Besides, the EAC should function based on the primacy principle, rather than the complementarity principle. Primacy ensures that states do not take the backseat through what is called the “bystander effect”¹¹³.

First, states prefer not to be involved in sensitive matters concerning other state sovereignty (especially criminal matters) as it may hinder international relations. Second, the complementarity principle is counterproductive as it would endorse a *laissez-faire* attitude by MS in respect of OC crimes in their territories not envisaging violence but only high economic returns¹¹⁴. Theoretically, MS having an interest in opposing the prosecution of the EAC on the basis of complementarity could refuse its jurisdiction and carry out investigations themselves. However, having an economic interest in OC organisations within its territory may prevent a MS from conducting impartial investigations¹¹⁵. For example, in the event that the EAC would start a complementary

109. V. Musacchio, *Le mafie italiane regnano in Europa*, in «Antimafia», 2019, <https://www.antimafia-duemila.com/home/di-la-tua/>, accessed on 16 October 2022.

110. Europol Public Information, *Europol Programming Document*, 2019, <https://www.google.com/url?sa=t&rct=j&q=>, accessed on 16 October 2022.

111. A. Truzzolillo, *L'Europa è disarmata contro la 'Ndrangheta*, in «Corriere della Calabria», 2017, <https://www.corrieredellacalabria.it/cronaca>, accessed on 16 October 2022.

112. Europol, *Italian Organized Crime, Threat Assessment 2013*, cit.

113. A. Klip, *European Criminal Law*, Intersentia, Cambridge 2016, p. 521.

114. M. Portanova, *United Mafias of Europe*, in «Il Fatto Quotidiano», 2020, <https://www.ilfattoquotidiano.it/longform/mafia-and-o>, accessed on 17 October 2022.

115. G. Parada, *Malta Nostra: How Italian Mafia is using the island to launder money*, in «L'Espresso», 2017, <https://espresso.repubblica.it/inchieste/2017>, accessed on 16 October 2022.

investigation regarding crimes occurred in a MS where powerful institutional or economic links are established with an OC organisation, this situation may lead to three outcomes: Absence of collaboration in investigations, a reduced probability of a successful prosecution and, eventually, an increase of diplomatic distrust among MS¹¹⁶.

The primacy principle also prevents the so-called “boomerang effect”, meaning that states with an active record of prosecution tend to deter suspects from their country¹¹⁷. In that sense, the better a state is at prosecuting OC, the more likely it is that offenders avoid their territory. Hence, all investigations must be in the hands of one EU court to ensure that this deterrence is effective over the whole EU territory¹¹⁸. MS would be obliged to provide full cooperation to the operations in light of their belonging to a united Europe. Consequently, primacy should become the default option not only because it is more practical, but more so, as a symbolic manifestation of the political will of all MS to fight OC once and for all. All these competencies must be attributed to each entity through the adoption of some form of binding decision or treaty. The latter should also provide an OC definition, together with common characterizations of each related felony, on the basis of which the mere membership and the external contribution to an OC association determine the EU crime¹¹⁹.

As stated above, this common definition should mirror the Italian one, the latter giving clear elements differentiating serious OC from other forms of organised criminality. Moreover, the mens rea applicable to OC felonies should be established as a mix between the international JCE and the Italian MM doctrines. Then, a standard set of procedural safeguards for OC suspected/accused individuals prosecuted by the EAC must be agreed upon through a common ‘EU Charter of Rights’¹²⁰. As for terrorists, the traditional guarantees should be revised considering democratic values and utilitarian considerations to render the operations against OC members more successful. The latter represent a

116. European Commission, *Examining the Links between Organized Crime and Corruption*, Directorate Report 2020, <https://ec.europa.eu/home-affairs/sites/hom>, accessed on 17 October 2022.

117. A. Klip, *European Criminal Law*, Intersentia, Cambridge 2016, p. 521.

118. *Ibidem*.

119. Europol, *Italian Organized Crime*, Threat Assessment 2013, cit.

120. T. Obokata, *Key EU Principles to Combat Transnational Organized Crime*, in «Common Market Law Review», Vol. 48, May 2012, pp. 801-828.

high social danger necessitating extraordinary efforts of public force and coercion. So, the new device should also envisage utilitarian measures, such as instruments similar to the Article 41-bis IPC and the capability to intercept telecommunications in an enhanced manner, so as to bypass the capability of mafias to maintain clans' structures alive and operational regardless of key arrests.

5. Critiques & Open Questions

This contribution aimed at convincing readers that the current decentralised system displays many deficiencies and cannot cope with the widespread and diversified operations of mafias. Still, apart from the persuasiveness of these claims, there remain flaws and questions that should be further addressed. Indeed, arguments may just underline the need for further laws' harmonisation and more effective cooperation. The contribution lacks a separate section addressing why a centralised adjudicative body is needed, apart from obstructing moles. EPPO just became operational and may not be the final solution, but one could argue that the EU should maintain decentralised adjudications¹²¹. Moreover, EPPO is depicted as insufficient without having yet demonstrated anything. The academia may address this critique in the future, when the effects produced, and the hurdles encountered by EPPO will be more recognizable. EPPO will certainly do its part against serious crimes, yet it would be naïve to deny that it will face many obstacles throughout investigations, being much dependent on MS cooperation¹²².

Other questions that remain open to debate are the following: As the EAC would still be dependent on MS cooperation, what progress is made? Does the proposal really claim that the EAC would enhance efficiency? In briefly trying to answer these criticisms, this whole exercise is based on the assumption that the EU would collect the will to establish this instrument. A unified direction of investigations, prosecutions and adjudication at the EU level is based a pri-

121. M. Wade, *A European public prosecutor: potential and pitfalls*, in «Crime Law and Social Change», Vol. 59, Issue 4, May 2013, pp. 506-609.

122. *Ibidem*.

ori on the supposition that all MS agree to this new authority and collaborate fully. In case the EAC would receive the legal capacity to reach all MS banking documentation and finance sectors to collect data without having to request permissions from national authorities, this would potentially be a progress in terms of investigation efficiency. The recognition of such an intrusive prerogative may be justified for preserving EU citizens' human rights and the Union's interests¹²³.

This development is a matter of pure attribution of competence: If the EU is given this mandate, it only depends on the political will to reach this result among MS¹²⁴. This contribution tried to depict, in as much detail as possible, crude criminal practices to stress the problem's scope and the urgency to find an adequate solution. It does not intend to sustain that the EU developments against OC do not work at all. Moreover, it recognizes a general positive trend of EU initiatives in this respect, leaving to EPPO the credit of potentially being a strong improvement against serious crimes. Still, this thesis strongly sustains that an EU central prosecution and adjudication of OC is the key condition necessary at the EU level for obstructing, to the maximum possible extent, OC opportunities to operate, as opposed to the current split and decentralised cooperation.

6. Conclusion

Mafias' ability to subjugate cardinal sources of power are at the basis of their dominance. Mafias' prosperity transcends EU borders, benefitting from loopholes, concessions and differences in political, legal, fiscal and social views among states. The EU is regarded by clans as 'hunting ground'. Free movements of goods, people and capital rendered MS easy targets for OC. Authorities encounter many difficulties in detecting the transport of illicit goods/services and the laundering/concealment of criminal proceeds. Mafias must be fought using supranational countermeasures capable of harmonising MS national legislations

123. V. Scalia, *Protection of Fundamental Rights and Criminal Law*, in «Eucrium», Issue 3, 2015, pp. 100-111.

124. H. Van der Wilt, *On Regional Criminal Courts as Representatives of Political Communities: The Special Case of the African Criminal Court*, in *The Oxford Handbook of International Criminal Law*, Oxford University Press, Oxford 2020, p. 230.

into a single framework. While clans have no difficulties in connecting with other OC groups and laundering money abroad, MS authorities display inefficiency in coordinating measures between them. The EU should agree on a centralised instrument to adjudicate these organisations when committing their crimes in the EU territory. The proposal of an EAC is based on six postulations.

Firstly, structural differences among MS affect their capacity to intercept illegal fluxes and avoid, *inter alia*, illegal appropriations by clans. Secondly, without a concerted action, the legitimization and proportion of this phenomenon is destined to grow among MS. It is not a static process: OC may expand 'protection' and violent activities throughout the Union, if left free to act. Clans prosper from chaotic procedures and absence of consistent frameworks leading to 'normative paradises'. The most advanced OC associations perpetrate crimes in one country, while their economic power remains safely hidden abroad. Without common understanding, such conditions are destined to increment without MS even realising it. There is also a grave lack of European data, which is why Italian data are extremely important. Effective investigations must revise as many documents as possible, so as to depict a realistic picture of clans and their transnational activities. Yet, this remains quasi-impossible without a centralised intervention.

Thirdly, the existing framework is insufficient. Problems derive from too different national interpretation rules regarding the territoriality principle, or the definitions of 'suspect' and 'accused'. These divergences, *inter alia*, create confusion and hinder an efficient intervention. Also, the current EPPO legal frame has several problems that may lead to fragmented results. The EPPO Regulation only applies to agreeing MS, its material competence is inconsistent because it depends on national transpositions, its competences are derivative as they depend entirely on each MS's jurisdiction, and the rules on the exercise and reallocation of competence are unclear and thus, potentially detrimental for defendants. Fourthly, the EU FD 2008/841 definition of OC is uncertain and vague, fostering problems for the legality principle, impacting criminal law's certainty, clarity and precision. Moreover, the FD definition covers a broad range of phenomena without addressing typical OC features. A meaningful EU initiative should adopt an OC definition mirroring the Italian MA offence, the latter recognizing the distinctive elements differentiating serious OC from 'crimes that are organised'.

Fifthly, OC must be considered more dangerous than terrorists, necessitating for equally extraordinary and special security measures. Countermeasures must be taken at the EU level to yield better results in terms of, *inter alia*, states' speediness, effectiveness and coordinated interventions. The rationale at the basis of a centralised action is that, while mafias are moving within the Union with a unitary and top-down method, the EU counter-reaction cannot be fragmented. Sixthly, the EAC could be modelled on the current EU judicial structure. The EU must agree on a Regulation establishing an EU crime of 'OC Association' and related crimes. This should be construed with the Italian jurisprudence as a starting point, considering OC peculiarities and approach towards institutional, administrative and entrepreneurial figures. Substantively, there are also similarities between the JCE doctrine used by international criminal courts and tribunals and the Italian MM doctrine establishing the mens rea of the MA offence. So, these two doctrines should be combined to establish an EU doctrine for the attribution of OC liability.

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