



European Union Action to  
**Fight Environmental Crime**

# Organised Crime and Environmental Crime: Analysis of EU Legal Instruments

Work package 2 on “Instruments, actors, and institutions”



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## ABSTRACT

Organised environmental crime is a serious crime committed by organized crime groups that often has a transnational dimension that requires the cooperation of the EU institutions and their Member States with Third countries and international organisations.. This organised environmental crime challenges the traditional definition of organised crime since it is now responding to a new market order. Organised crime criminals act as brokers providing highly specialized services to customers throughout the world, communicating through new technologies of information and escaping the traditional forms of crime prevention and repression. At the same time, these criminals are easily replaceable and not their structures that are challenging criminal and administrative approaches to dismantle their networks.

Even though the EU has not yet adopted concrete measures to combat organised environmental crime, the new Article 83 of the Treaty on the Functioning of the European Union allows the EU to adopt directives in areas of particularly serious crime with a cross-border dimension. In the future, the Council may unanimously decide to add serious environmental crimes to the list of organised crimes. Until then, as the former Commissioner for the Environment has put it: the main responsibility for fighting organised environmental crime is with the Member States.

The adoption of a legal instrument addressing organised environmental crime is not on the EU legislative agenda even though the European Parliament has made some proposals. A package of non-binding instruments on organised crimes adopted by EU institutions is establishing the basic concepts for organised environmental crime. Moreover, it could be the basis for a future EU criminal policy on organised environmental crime, especially for those iconic crimes such as illegal trafficking of endangered species that have been the object of resolutions of the European Parliament and also of international institutions. Despite the fact that the principal EU instruments dedicated to fighting organised crime do not address directly the specific organised environmental crime, they have left some room for an extensive interpretation of the goals to be achieved and have detailed in annexes the “other serious crimes” that could be addressed when required.

In the case of organised crime, the EU institutions are dealing with legal problems at the domestic and international levels that have hampered the enforcement of the legal instruments fighting against this type of criminality. There is a problem of conceptualization of organised crime that also affects the way the EU approaches environmental crime and organised environmental crime. The proximity between them leads the instruments and institutions to refer to both with the same terminology, the most general environmental crime prevailing over the specific forms of organised crimes, such as the illegal waste trafficking.

The European institutions are also considering adopting an administrative approach to prevent and combat organised crime complementary to the criminal system to overcome the new challenges that the flexible structures of organised crime poses to traditional proceedings.

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## LIST OF ABBREVIATIONS

COSI	Standing Committee on Operational Co-operation on Internal Security (COSI)
EIO	European Investigation Order
ENPE	European Network of Prosecutors for the Environment
EU	European Union
EUROJUST	European Union's Judicial Cooperation Unit
EUROPOL	European Union's law enforcement agency
IMPEL	EU Network for the Implementation and Enforcement of Environmental Law
JIT	Joint Investigation Team
OC	Organised Crime
OCG	Organised Crime Groups
OCTA	Organised Crime Threat Assessment
OJ	Official Journal of the European Union
TFUE	Treaty on the Functioning of the European Union
UN	United Nations
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNODC	United Nations Office on Drugs and Corruption
WEEE	Waste of Electric and Electronic Equipment
WP	Work Package

## Executive summary

Organised environmental crime is a serious crime committed by organized crime groups that often has a transnational dimension that requires the cooperation of the EU institutions and their Member States with Third countries and international organisations. This organised environmental crime challenges the traditional definition of organised crime since it is now responding to a new market order. Organised crime criminals act as brokers providing highly specialized services to customers throughout world, communicating through new technologies of information and escaping the traditional forms of crime prevention and repression. At the same time, these criminals are easily replaceable and not their structures that are challenging criminal and administrative approaches to dismantle their networks.

Even though the EU has not yet adopted concrete measures to combat organised environmental crime, the new Article 83 of the Treaty on the Functioning of the European Union allows the EU to adopt directives in areas of particularly serious crime with a cross-border dimension. In the future, the Council may unanimously decide to add serious environmental crimes to the list of organised crimes. Until then, as the former Commissioner for the Environment has put it: the main responsibility for fighting organised environmental crime is with the Member States.

The adoption of a legal instrument addressing organised environmental crime is not on the EU legislative agenda even though the European Parliament has made some proposals. A package of non-binding instruments on organised crimes adopted by EU institutions is establishing the basic concepts for organised environmental crime. Moreover, it could be the basis for a future EU criminal policy on organised environmental crime, especially for those iconic crimes such as illegal trafficking of endangered species that have been the object of resolutions of the European Parliament and also of international institutions. Despite the fact that the principal EU instruments dedicated to fighting organised crime do not address directly the specific organised environmental crime, they have left some room for an extensive interpretation of the goals to be achieved and have detailed in annexes the “other serious crimes” that could be addressed when required.

In the case of organised crime, the EU institutions are dealing with legal problems at the domestic and international levels that have hampered the enforcement of the legal instruments fighting against this type of criminality. There is a problem of conceptualization of organised crime that also affects the way the EU approaches environmental crime and organised environmental crime. The proximity between them leads the instruments and institutions to refer to both with the same terminology, the most general environmental crime prevailing over the specific forms of organised crimes, such as the illegal waste trafficking.

Directive 2008/99/EC on the protection of the environment through criminal law does not contain any reference to either organised crime or organised environmental crime. All the references to organised crime or criminal organisations and regarding a minimal harmonisation of sanctions that appeared in the proposal Directive were suppressed in the final text. However, after the Lisbon Treaty reform, this approximation may take place, since Article 83 confers on the Union the competence to adopt “minimum rules with regard to the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis” with the ordinary legislative procedure. Among the areas envisaged is organised crime. Organised environmental crime would require unanimity since it is not included in the list but could be added by Member States.

The European institutions are also considering adopting an administrative approach to prevent and combat organised crime complementary to the criminal system to overcome the new challenges that the flexible structures of organised crime poses to traditional proceedings.

# 1. Introduction

As Krämer points out “no concrete measures have yet been taken by the European Union to combat organised environmental crime. Article 83 TFEU allows the EU to adopt directives in areas of particularly serious crime with a cross-border dimension, and enumerates the areas to which this provision applies. The environment does not figure in this list, though the Council may unanimously decide to add other areas to the list”.<sup>1</sup> Thus the EU competence to adopt an instrument on organised crime is envisaged in the treaties, but it must be born out of consensus. In the particular case of organised environmental crime, this future legislative proposal has to overcome a tendency to deal only generally with environmental crime, which in itself is still too new a category of criminal offence to be incorporated in the EU Member States domestic criminal systems after the adoption of Directive 2008/99/EC on the protection of the environment through criminal law. This Directive does not contain any reference to either organised crime or organised environmental crime. This is why the former Commissioner for Environment, Dr. Janez Potočnik, when asked about organised environmental crime, answered:

“The main responsibility for fighting organised crime is with the Member States, although the European Union has agreed to support them through a number of instruments, such as financial investigations to dismantle networks, and confiscation of assets”<sup>2</sup>.

The adoption of a legal instrument addressing organised environmental crime is not on the EU legislative agenda even though the European Parliament has made some proposals. In 2012, it made an express call “on the Commission to develop innovative instruments for the prosecution of those who commit environmental offences in which organised crime plays a role”.<sup>3</sup> In 2013, the European Parliament recommended again that “joint action be taken to prevent and combat illegal environment-related activities connected to or resulting from organised crime and mafia-type criminal activities, including by strengthening European bodies such as Europol and Eurojust, and international ones such as Interpol and the United Nations Interregional Crime and Justice Research Institute (UNICRI), as well as by sharing working methods and information held by the Member States that have been the most involved in combating this form of crime, with a view to developing a common action plan”.<sup>4</sup>

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<sup>1</sup> Krämer, Ludwig, *EU Environmental Law*, Sweet and Maxwell, 2012, Seventh Edition, p. 413.

<sup>2</sup> *EUROJUST News*, Issue No. 10, December 2013, p. 6.

<sup>3</sup> European Parliament Resolution of 25 October 2011 on organised crime in the European Union, (2010/2309(INI)), *OJ C 131E*, 8.5.2013, p. 66–79. *This resolution has been very well received, thus it has been said that “In light of the Lisbon Treaty, the resolution takes on an important political significance and sets out a clear plan of action for the fight against organised crime and mafia organisations at a European level. For the first time in the institutional history of Europe, reference has been made to mafia-type criminal systems in an official text, evidence of an acquired political awareness of the need for adequate forms of countering this crime. The innovative scope of the resolution consists of a series of proposed measures, including: confiscation and re-use of criminal assets for social purposes, recognition of mafia-related criminal activities across the 27 Member States, laws on the control and transparency of public funds, countering money laundering, ineligibility of people convicted of serious crimes and the establishment of an anti-mafia parliamentary commission”, Roberto Forte (ed.), *Organised Crime and the Fight Against Crime in the Western Balkans: a Comparison with the Italian Models and Practices. General overview and perspectives for the future*, SAPUCCA Sharing Alternative Practices for the Utilization of Confiscated Criminal Assets Paper, 23 September 2013, p. 5, available at <http://www.sapucca.net/?p=838> and [http://www.flarenetwork.org/report/analyses/article/policy\\_paper\\_organised\\_crime\\_and\\_the\\_fight\\_against\\_crime\\_in\\_the\\_western\\_balkans.htm](http://www.flarenetwork.org/report/analyses/article/policy_paper_organised_crime_and_the_fight_against_crime_in_the_western_balkans.htm).*

<sup>4</sup> European Parliament Resolution of 23 October 2013 on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report) (2013/2107(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0444&language=EN&ring=A7-2013-0307>



Despite the fact that the principal EU instruments dedicated to fighting organised crime do not address directly the specific organised environmental crime, they have left some room for an extensive interpretation of the goals to be achieved and have detailed in annexes the “other serious crimes” that could be addressed when required.

In the case of organised crime, the EU institutions are dealing with legal problems at the domestic and international levels that have hampered the enforcement of the legal instruments fighting against this type of criminality as can be seen in the contributions made by EU and its Member States to the United Nations Office on Drugs and Corruption (UNODC hereinafter) Digest of Organised Crime Cases<sup>5</sup>. In practice, the existing legal framework to fight against organised crime in Europe, given by the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime has raised serious doubts about its capacity to solve the problems it was created to fight against. The domestic problems have a magnifying effect since the inability of individual Member States to cope with organised crime hinders the process to approximate this criminal offence regionally. The disparities in the implementation of both the environmental law and the Organised Crime Framework Decision have triggered problems of enforcement that have led organised crime to grow in those Member states with low sanctions and with the lowest level of human and economic resources dedicated to fight this profitable criminal phenomenon. Organised crime groups profit from forum shopping among those regimes that are softest on organised crime and least able to prosecute it.<sup>6</sup> However, there has been some outstanding individual experience in the Member States that could be considered as an example to follow, for instance, the case of Italy’s positive experience with the offence of "organised illegal waste trafficking", since 2011 classed as an offence with a major social impact and dealt with by the District Anti-mafia Bureau.

The international dimension of organised crime raises two types of problems, first, those regarding the implementation of the UN Convention on Transnational Organised Crime (Organised Crime Convention hereinafter) and, second, those related with bilateral and multilateral agreements concluded by the EU and its Member States with third countries dealing with organised environmental crime as an ancillary aspect of a greater criminality.

Other problems to enhance cooperation among states to fight against organised environmental crime are related with differences in the way they legally characterise environmental crime and the minimal requirements that have to be met in order to enable judicial cooperation according to the UN Organised Crime Convention.

The European institutions are also considering adopting an administrative approach to prevent and combat organised crime, because the criminal system has been ineffective so far.

This report will examine these legal instruments to fight organised crime and organised environmental crime as well as the main actors involved in their enforcement and the networks dedicated to enhancing cooperation among EU Member States as well with international organizations.

## 2. Organised Environmental Crime in the EU Legal System

As set out in our previous report on organised environmental crime at the international level, there is a problem of conceptualization of this particular type of organised crime that also affects the way the EU approaches environmental crime and organised environmental crime. The proximity between environmental crime and organised environmental crime leads the instruments and institutions to refer to both of them with the same

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<sup>5</sup> UNODC, *Digest of Organised Crime Cases. A compilation of cases with commentaries and lessons learned*, prepared in cooperation with the governments of Colombia and Italy and INTERPOL, 2012, hereinafter quoted Digest of Organised Crime.

<sup>6</sup> See “Eurojust and ENPE host environmental crime meeting“, 28.11.2013, available at <http://eurojust.europa.eu/press/News/>

terminology, the most general environmental crime prevailing over the specific forms of organised crimes, such as the illegal waste trafficking.<sup>7</sup>

The analysis of agendas and working documents of the Council and the Commission show that environmental crime has always been considered one of the issues to be addressed when considering the regulation of organised crime in Europe. We can trace it back to the Tampere European Council Meeting of October 1999 on the creation of an Area of Freedom, Security and Justice in the European Union. Then, whilst recognising the threat of all crime types, the European Council in the Tampere Meeting concluded that, “with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, Euro counterfeiting), drugs trafficking, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, high tech crime and *environmental crime*”<sup>8</sup>. Moreover, on the Agenda of the K4 Committee of 1999, many delegations considered that the assessment of environmental crime should be focused on organised crime<sup>9</sup>. However, ever since organised crime has just been considered as a possible dimension of environmental crime or an aggravating circumstance in the non-binding documents adopted by the EU institutions, EUROPOL and EUROJUST as will be examined.

There are also some turning points in the way environmental crime and organised environmental crimes were considered in the reports and staff working papers of the Commission, EUROJUST and EUROPOL. For instance, in the EUROPOL 2005 *EU Organised Crime Report* says that “the concept of ‘*crimes against the natural environment*’ covers a wide range of criminal offences” and that “elements of organised crime can be seen in cases of illegal waste disposal, especially hazardous waste and illegal trade in protected and threatened species”<sup>10</sup>.

On the other hand, in the EU Council of Ministers there is a certain reluctance to incorporate organised environmental crime as one of the serious crimes to be envisaged by long-term strategies. For instance in its new Policy Cycle, when setting the EU’s priorities for the fight against serious and organised crime between 2014 and 2017, the Council did not consider incorporating a reference for the environmental crime but just to add a mere reference to the fact that “all actors involved must retain a margin of flexibility to address unexpected or emerging threats to EU internal security, in particular regarding environmental crime and energy fraud”<sup>11</sup>.

The Member States of the EU are obliged to approximate their domestic legislation regarding organised crime as envisaged by the Treaty on the Functioning of the EU in its Articles 83.1 and 87.2. These provisions of the TFEU codify those previously established in the Joint Action of the Council 1999 in relation to the penalization of participation in a criminal organisation in the Member States<sup>12</sup> (the Joint Action hereinafter) as well as the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime. These legal instruments were focused on introducing a specific offence of participation in a criminal organisation, while

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<sup>7</sup> EUROPOL considers organised and serious crime just as a dimension of illicit waste trafficking. See EUROPOL Threat Assessment 2013 Environmental Crime in the EU, November 2013, p. 3.

<sup>8</sup> Tampere European Council 15 and 16 October 1999, Presidency Conclusions, paragraph. 48, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/00200-r1.en9.htm](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm)

<sup>9</sup> See the Agenda of the K4 Committee, 23-24 February 1999, Doc. 6596/99, partially disclosed document. When many delegations welcomed the Danish proposal concerning a Joint Action on combating serious environmental crime and some delegations suggested to start the discussion by defining the scope of Union action, which should preferably be focused on organised crime. Environmental crime - decision on procedural aspects doc. 5579/99, CK4 10 CRIMORG 13 JUSTPEN 5 ENFOPOL 8.

<sup>10</sup> EUROPOL 2005 *EU Organised Crime Report*, Doc.13788/1/05 p. 24.

<sup>11</sup> See Council conclusions on setting the EU’s priorities for the fight against serious and organised crime between 2014 and 2017, Doc. 137401, 6-7 June 2013, p. 3, available at and the Draft Council conclusions on setting the EU’s priorities for the fight against serious and organised crime between 2014 and 2017, 25.05.2013, Doc. 9849/13.

<sup>12</sup> This instrument will not be addressed in this report since its main contributions are set out Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime.

offering a wide definition of organised crime that could evolve and be adapted to the different national legal systems. However, both open definitions, criminal organisation and organised crime, have been much criticised and their reform has been considered by the European Parliament and academia as a precondition of further legal development on this subject. Some of these criticisms should be considered when attempting to propose a particular offence of organised environmental crime.<sup>13</sup> This is why we will examine them.

## 2.1 The Directive 2008/99/EC on the protection of the environment through criminal law

As mentioned above, the Directive 2008/99/EC on the protection of the environment through criminal law does not contain any reference to either organised crime or organised environmental crime. All the references to organised crime or criminal organisations and regarding a minimal harmonisation of sanctions that appeared in the proposal Directive were suppressed in the final text:

- The recitals 11 and 12:
  - o (11) Furthermore, the significant differences in the level of sanctions in the Member States make it necessary to foresee, under certain circumstances, an approximation of those levels corresponding to the seriousness of the offence.
  - o (12) Such an approximation is particularly important where the offences have serious results or the offences are committed in the framework of criminal organizations which play a significant role in environmental crime.
- The reference to the approximation of sanctions that envisaged that “For offences committed under certain aggravating circumstances, such as having caused a particularly serious result or the involvement of a criminal organization, the minimum level of maximum sanctions for natural and legal persons is subject to approximation, too”.<sup>14</sup>
- The point d) of Article 5.3 on Sanctions that foresaw that “Member States shall ensure that the commission of the following offences is punishable by a maximum of at least between two and five years imprisonment: d) the offences referred to in Article 3, where the offence is committed in the framework of a criminal organisation within the meaning of Framework.
- The sanctions for legal persons foreseen in Article 7 that envisaged that “The fines provided for in paragraph 1 shall be: (b) of a maximum of at least between EUR 500 000 and EUR 750 000 in cases where: (iii) an offence referred to in Article 3 is committed intentionally in the framework of a criminal organisation within the meaning of Framework Decision [... on the fight against organised crime]”.<sup>15</sup>

The suppression of these provisions and references is a step backwards motivated by the Ship source pollution case regarding the scope of the Community’s criminal competence that led the Commission to abandon the purpose of approximating the sanctions. The Court, in this case, had narrowed the scope of the European

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<sup>13</sup> See Valsamis Mitsilegas, “Defining organised crime in the European Union: the limits of European Criminal Law in an area of ‘freedom, security and justice’”, *European Law Review*, Vol. 26, p. 565 and of the same author: *The Council Framework Decision on the Fight against Organised Crime: What Can Be Done to Strengthen EU Legislation in the Field?*, European Parliament, Note, 2011, European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), EP 453.195.

<sup>14</sup> Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, *SEC(2007) 160*, *SEC(2007) 161*, *COM/2007/0051 final - COD 2007/0022*.

<sup>15</sup> *Ibidem*, p. 15.

competence regarding criminal penalties since “the determination of the type and level of the criminal penalties does not fall within the Community’s sphere of competence”.<sup>16</sup>

After the Lisbon Treaty reform, this approximation may take place, since Article 83 confers on the Union the competence to adopt “minimum rules with regard to the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis” with the ordinary legislative procedure. Among the areas envisaged is organised crime. Organised environmental crime would require unanimity since it is not included in the list but could be added by Member States.

## **2.2 The Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime**

The Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime was the result of a complex process of negotiating on sovereignty over criminal law that suffers from the price of having to conciliate two legal traditions -the Anglo-Saxon and the continental- and of concealing the differences between them that require more than approximation of the domestic legislations. Even though the Member States and the European institutions may have preferred a gradual process of approximation, the practice reveals that organised environmental crime structures adapt better and quicker to the current trade scenarios than the legal efforts of the European Union to control them.

### **2.2.1. Definitions**

The Framework Decision offers in its Article 1 definitions of criminal organisation and structured association that follows closely those of the UN Organised Crime Convention and of the previous Joint Action of 21 December 1998 by making it a criminal offence to participate in a criminal organisation in the Member States of the European Union. Like these instruments, it does not provide a definition of organised crime and has some shortcomings regarding substantive aspects of these concepts.

1. ‘criminal organisation’ means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit;
2. ‘structured association’ means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.

As the UNODC has pointed out, this definition of the term “criminal organization” is very much in line with that of “organized criminal group” in the UN Organised Crime Convention and the term is subsequently used in Article 2 as a basic component of the description of the offence of “participation in a criminal organization”, which determines the scope of application of the special measures prescribed in the following provisions of the Framework Decision.<sup>17</sup>

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<sup>16</sup> Judgment of the Court (Grand Chamber) of 23 October 2007, Case C-440/05, Commission of the European Communities v Council of the European Union, at paragraph 70, available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-440/05>

<sup>17</sup> See the UNODC Digest of Organised Crime Cases 2012, p. 20.

## 2.2.2. Offences relating to participation in a criminal organisation

Once again, the Framework Decision follows the UN Organised Crime Convention when it foresees in its Article 2 that “each Member State shall take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences:

(a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation’s criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation’s criminal activities;

(b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity”.

These two types of conduct of which Member States must recognise at least one as an offence, reflect both the Anglo-Saxon and the continental legal traditions. For the continental the active participation in an organisation's criminal activities is required, with the knowledge of its aim or of its intention to commit crimes. For the Anglo-Saxon an agreement on the perpetration of crimes without necessarily taking part in committing them is required.

The UNODC Digest of Organised Crime Cases that examines some of the EU Member States cases assesses in particular two cases representing the continental system: France and Italy. In these countries, a list of offences is the keystone of French and Italian legislation on organized crime. In French law, the list is exclusive; it includes the offence of *association de malfaiteurs* (i.e., any group formed for the preparation of one or more offences punishable by a minimum of five years of imprisonment) only for cases in which the purpose of the association is the commission of another offence included in the list. By contrast, in the Italian system, the offence of “mafia-type criminal association” is included regardless of the offences committed by the association. Thus the limited nature of the list is partially balanced by prosecuting the crime of association: whenever a person is investigated for or charged with participation in a mafia-type association involved in non-listed offences, most or some of the special procedures and measures designed for the listed offences still apply. Moreover, the Italian list encompasses any offence committed for the benefit of, or using the means offered by, a mafia-type association. This legal mechanism allows the special norms to apply to undefined categories of offences when there is no charge of participation in a mafia group but there is proven involvement by this kind of criminal association<sup>18</sup>. So the Italian regime brings together the two legal regimes.

As UNODC explains “the frequent adoption of the ‘list system’ has many possible explanations, but first and foremost is the fact that the criminological characterization of the listed offences enables measures to be tailored to the precise nature of organized crime in a certain country at a certain time, and provides additional justifications for the introduction of new rules. However, the ‘list system’ suffers the serious disadvantage of rigidity, requiring time-consuming and complex legal, and sometimes also institutional, adjustments when organized groups get involved in non-listed crimes or when new crimes arise that are either by their nature or de facto committed by criminal groups. This rigidity can also pose difficulties in dealing with transnational crimes since a restricted scope of application may impede international legal assistance.”<sup>19</sup>

As UNODC states these difficulties are not necessarily connected to the double criminality rule. It may happen that the offence is also criminalized in the legal system of the country whose assistance is requested, but because the offence falls outside the scope of application of the special measures against organized crime, the requested measure (e.g., controlled delivery) cannot be executed.<sup>20</sup> These problems have also arisen in the European

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<sup>18</sup> Digest, p. 26.

<sup>19</sup> Ibidem.

<sup>20</sup> Digest, p. 13, footnote 28.

practice. It is the double criminality principle especially problematic in the area of organised crime because some aspects of the international norms can lead to different conclusions. The first issue concerns the undefined scope of application of the UN Convention, a figure shared by the EU Framework Decision. The Convention and the Framework Decision apply, inter alia, to the open-ended class of serious crime, which includes offences that the Parties/Member States are free to criminalize or not. Therefore, the Convention does not assure double criminality for this class of offences. The EU on the other hand has overcome this problem thanks to the solution offered by Article 5 of the Framework Decision, which has been further strengthened by the European Court of Justice case law on extradition. In its decision in the Mantello case interpreting Article 2(1) and (2) of the Framework Decision on European arrest warrant, the Court accepted the possibility of granting the warrant on offences without verification of the double criminality rule of the crime. Under Article 2(2), that rule does not apply in respect of 32 categories of crimes, provided that the issuing Member State punishes those offences by a prison sentence of a maximum of at least three years. Among those offences are included the participation in a criminal organization and environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties.<sup>21</sup> The referring judge argued that this provision of the Framework Decision could contravene the principle of legality. Even though the list of paragraph 2 of Article 2 of the Decision has been much criticized for not containing offences which, as the Spanish Government observes in its notable statement in intervention (paragraph 121), have a serious effect on legal interests in need of special protection in Europe, and there is a requirement that the Member State issuing the arrest warrant must punish those offences by sentences with a particular degree of severity. They are offences where the verification of double criminality is regarded as superfluous because the acts concerned are punished in all Member States.<sup>22</sup>

UNODC has said that “exploiting the flexibility of States on the dual criminality requirement could be a solution for mutual assistance, but not for extradition. For both—and by necessity for extradition—universal

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<sup>21</sup> Article 2(1) and (2) of the Framework Decision state: 1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant: participation in a criminal organisation, terrorism, trafficking in human beings, exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, *environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties*, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.

<sup>22</sup> See the Opinion of Advocate General Damaso Ruiz-Jarabo Colomer, delivered on 12 September 2006, Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*. He argued that in fact, it is not the double criminality requirement which is set aside but rather the requirement of verification, because the nature of the acts listed – such as murder, grievous bodily injury, kidnapping, illegal restraint, hostage-taking, organised or armed robbery, and rape – is such that they are classed as offences in all the Member States. Another difficulty, which I will deal with below, concerns the definition of the offences by the legal systems of each Member State (point 96 et seq.). In any case, the list in Article 2(2) of the Framework Decision contains some acts for which there is, or is soon to be, a harmonised definition of the offence, and other acts which are certainly punished in all the Member States, footnote 86.



criminalization of specific conduct via an ad hoc international criminal law treaty remains the chief way out (a cumbersome one, however)".<sup>23</sup>

This problem has been discussed by the ECJ in the Mantello Case. Another interesting aspect of the Mantello case is its application of Article 2(1) and (2) of the Framework Decision that envisages the possibility of granting the warrant on offences without verification of the double criminality rule of the act. Under Article 2(2) this rule does not apply in respect of 32 categories of offence, provided that the issuing Member State punishes those offences by a prison sentence of a maximum of at least three years. Among those offences are included the participation in a criminal organization and environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties.<sup>24</sup>

As remarked in the Opinion of Advocate General Damaso Ruiz-Jarabo Colomer,<sup>25</sup> it is not the double criminality requirement which is set aside but rather the requirement of verification, because the nature of the acts listed is such that they are classed as offences in all the Member States.

### 2.2.3. Penalties

Penalties are foreseen in Article 3 establishing that

Each Member State shall take the necessary measures to ensure that:

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

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

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<sup>23</sup> Digest, p. 13

<sup>24</sup> Article 2(1) and (2) of the Framework Decision state: 1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months. 2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

- participation in a criminal organisation, - terrorism, - trafficking in human beings, - exploitation of children and child pornography, - illicit trafficking in narcotic drugs and psychotropic substances, - trafficking in weapons, munitions and explosives, - corruption, - fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995,
- laundering of the proceeds of crime, - counterfeiting currency, including of the euro, - computer-related crime, - environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, - facilitation of unauthorised entry and residence, - murder, grievous bodily injury, - illicit trade in human organs and tissue, - kidnapping, illegal restraint and hostage-taking, - racism and xenophobia, - organised or armed robbery, - illicit trafficking in cultural goods, including antiques and works of art, - swindling, - racketeering and extortion, - counterfeiting and piracy of products, - forgery of administrative documents and trafficking therein, - forgery of means of payment, - illicit trafficking in hormonal substances and other growth promoters, - illicit trafficking in nuclear or radioactive materials, - trafficking in stolen vehicles, - rape, - arson, - crimes within the jurisdiction of the International Criminal Court, - unlawful seizure of aircraft/ships, - sabotage.

<sup>25</sup> Opinion of 12 September 2006, Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*.

Paragraph 2 of this article stipulates, “Each Member State shall take the necessary measures to ensure that the fact that offences referred to in Article 2, as determined by this Member State, have been committed within the framework of a criminal organisation, may be regarded as an aggravating circumstance”.

The Member States may reduce, or allow for an exemption from, these penalties if the offender relinquishes criminal activity and assists the authorities by providing them with otherwise unobtainable information on the offence and the other offenders.

#### 2.2.4. Legal Persons

The Member States must also hold any legal person accountable for the above offences that have been committed on its behalf by a person who has a central role in the legal person in question, even if that person has acted in an individual capacity. An offence committed, as a result of lack of supervision, by a person under the authority of the former may also be held against the legal person.

The legal persons held accountable for offences must be punished by effective, proportionate and dissuasive penalties. These should include both criminal and non-criminal fines. The penalties may also include the following:

- ending the right to public aid;
- temporarily or permanently prohibiting commercial activities;
- placing under judicial supervision;
- judicial winding-up;
- temporarily or permanently closing the establishments used for the offences.

The UNDOC Digest of Organised Crime Cases underscores that “France provides a good example of how the liability of legal persons can be established within civil law systems. Since 1994, liability of legal persons exists in the French criminal code as a general rule for any offence committed “on their account by their organs or representatives”. The effectiveness of this measure has been assessed by academics, but also by the Ministry of Justice in a 2008 statistical report on the convictions of legal persons in France between 1994 and 2005. The report confirms that the number of convictions against legal persons grew at an impressive rate between 1994 and 2005, and that between 2002 and 2005, a total of 2,340 legal persons were convicted of crimes. These figures, however, are not limited or related to organized crime”<sup>26</sup>. There are no figures about environmental crimes.

#### 2.2.5. Jurisdiction

A Member State’s jurisdiction must cover the offences if they are committed on its territory, in whole or in part, by its nationals or on behalf of a legal person set up on its territory. If the offence is committed outside a Member State’s territory, it may choose whether or not to apply the last two rules. If the offence falls within the jurisdiction of several Member States, they must collaborate, for example via EUROJUST, in order to decide on the prosecuting country and thus to centralise the proceedings. However, in doing so, the Member States must give due consideration to where the offence was carried out, the nationality or place of residence of the offender, the country of origin of the victim and the territory where the offender was found.

If a Member State does not extradite or surrender its nationals, it must revamp its jurisdiction and take steps to prosecute its nationals when they commit an offence outside its territory. Simultaneously, the Member State may continue to apply its jurisdiction to criminal matters as stipulated in its national law.

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<sup>26</sup> UNODC Digest, p. 27.



For offences that have been committed on the territory of a Member State, the investigations and prosecutions by that Member State must be carried out without requiring a report or an accusation from a victim.

### 2.2.6. Cooperation and Assistance

The UNODC Digest of Organised Crime Cases has considered as a model to follow the cooperation systems of EUROPOL and EUROJUST, in particular the establishment of joint teams that create full coordination and expand and speed up the investigation. The French practice shows one of the most beneficial aspects of joint teams acting under the EU norms: the simplification of activities that would otherwise be governed by the more cumbersome rules of mutual assistance. Article 13, paragraph 7 of the EU Convention on mutual assistance confers on the officer of State A, who is a member of a team operating in State B, the right to ask his/her own national authorities to authorize or perform a certain measure needed for the investigation of the team in State B, without a rogatory letter or formal request for mutual assistance. The French practice also shows that the members of a joint team can be law enforcement officers as well as prosecutors or members of the judiciary (e.g., prosecutors where they have the status of judicial officials, or investigative judges).<sup>27</sup> However as will be analysed below, these joint teams have brought up some important legal doubts regarding their consistency with essential criminal procedural rules and human rights guarantees.

## 2.3 Lost Opportunities: Directive on the freezing and confiscation of proceeds of crime in the European Union

The legal framework on confiscation and asset recovery was composed of five EU legal instruments which do not refer to environmental crime or to organised environmental crime. Now they have been repealed by the Directive on the freezing and confiscation of proceeds of crime in the European Union<sup>28</sup> adopted in December 2013, to regulate the area in accordance with the strategic priorities of the EU's fight against organised crime. Unfortunately, it does not address environmental crime and in particular, organised environmental crime and does not refer to the Environmental Crime Directive when describing the term “criminal offence” it uses. It follows the Strategic priorities of the EU's fight against organised crime in which the Council discarded environmental crime because it continues to underrate it in comparison with the other serious organised crimes.

However the UNODC has assessed positively some of the measures foreseen in this Directive such as Non-conviction-based confiscation which is not necessarily of a civil nature; it can occur in criminal proceedings under special circumstances. One example is this directive that extends the powers of confiscation of EU Member States and introduces a specific form of non-conviction-based confiscation in addition to conviction-based confiscation and extended confiscation.<sup>29</sup> Article 5 of that Directive (Non-conviction based confiscation)

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<sup>27</sup> In his conclusions, the French expert stressed that the “J.I.T. is a more flexible process in a criminal case, than international rogatory proceedings. The two Justice representatives need to communicate in real time, exactly like caseworkers.”, UNODC Digest, p. 75.

<sup>28</sup> COM(2012) 85 final of 12 March 2012.

<sup>29</sup> The European Union Council Framework decision on Confiscation of Crime-related Proceeds, Instrumentalities and Property, 2005/212/HA (24 February 2005), already obliges Member States to introduce in their systems the conviction-based extended confiscation. The European Union initially regulated extended confiscation by allowing States to choose among various graduated options (Council Framework decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, 2005/21/JHA [24 February 2005]). It subsequently dictated very detailed rules for cooperation among Member States on confiscation (Council Framework Decision on the Application of the Principle of Mutual Recognition to Confiscation Orders, 2006/783/JHA [6 October 2006]). Under article 8 of the latter decision, recognition and execution may be refused if the confiscation order of the requesting State falls outside the option adopted for extended confiscation by the requested State.

prescribes that “Each Member State shall take the necessary measures to enable it to confiscate proceeds and instrumentalities without a criminal conviction, following proceedings which could, if the suspected or accused person had been able to stand trial, have led to a criminal conviction, where: (a) the death or permanent illness of the suspected or accused person prevents any further prosecution; or (b) the illness or flight from prosecution or sentencing of the suspected or accused person prevents effective prosecution within a reasonable time, and poses the serious risk that it could be barred by statutory limitations.”<sup>30</sup>

### 3. Non-Binding Instruments on Organised Crime

The EU legal framework to fight organised crime is also supported on non-binding instruments such as:

- Council Conclusions,
- Communications of the Commission,
- Programmes such as:
  - the Stockholm Programme establishing the European Union’s priorities for developing an area of justice, freedom and security during the period 2010-14. Despite the fact that there is no specific reference to environmental crime or to environmental organized crime, there are measures that indirectly refer to them, such as in its fourth part where it is reaffirmed that “focus should not only be placed on combating terrorism and organised crime but also cross-border wide-spread crime that have a significant impact on the daily life of the citizens of the Union.” This statement allows crimes that are not expressively mentioned in the programme such as environmental crime to be covered.<sup>31</sup> This Programme is also important because it stated that administrative measures should be used as part of the overall response to combat organised crime.
  - or the new Seventh Environment Action Programme,<sup>32</sup> which does not refer to organised crime or environmental crime expressly.
- Reports, such as the EUROPOL EU Organised Crime Reports.
- Joint Strategies of the EU institutions,<sup>33</sup>
- EUROPOL Organised Crime Threat Assessment and more recently renamed as Serious Organised Crime Threat Assessment (OCTA and SOCTA).<sup>34</sup>

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<sup>30</sup> Article 5 of the *Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union* (12 March 2012), *Doc. COM (2012) 85 final*.

<sup>31</sup> The Stockholm Programme adopted in 2009 establishes the European Union’s priorities for developing an area of justice, freedom and security during the period 2010-14 that were developed through an Action Plan Implementing the Stockholm Programme. This action plan aims to deliver those priorities as well as to prepare for future challenges both at European and global level.

<sup>32</sup> Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 ‘Living well, within the limits of our planet’, *OJ L 354*, 28.12.2013, p. 171.

<sup>33</sup> Strategy Towards a European strategy to prevent organised crime Commission, Staff Working Paper, Joint report from Commission services and EUROPOL, *SEC (2001) 433*, Annex, p. 42.

<sup>34</sup> The EUROPOL OCTA is a core element of the European Criminal Intelligence Model (ECIM), which is based upon the intelligence-led law enforcement concept. This means that the OCTA focus is primarily placed on the OC groups. Criminal activities are mainly analysed through the criminal hubs concept. In this way, the focus remains on complex situations that have widespread effects reaching beyond national borders and shaping criminal markets in large parts of the EU. Such complex situations are based on considerations which appreciate criminal activities in terms of geographical flows and facilitating factors, and OCGs in terms of intentions and capabilities. The SOCTA is based on data from law enforcement agencies and open sources. Law enforcement

- The Handbooks on “Complementary approaches and actions to prevent and combat organised crime - A collection of good practice examples from EU Member States” adopted during the Hungarian and Lithuanian Presidencies.

These non-binding instruments have shaped the *working definitions* of organised crime, criminal organisation and criminal groups as well as the priorities for the fight against serious organised crime.

Thus, the Joint Strategy of the Commission and Europol 2004, *Towards a European strategy to prevent organised crime* contains a working definition of organised crime that requires that at least six of the following characteristics to be present, four of which must be those numbered **1, 3, 5** and **11**:

**1. Collaboration of more than 2 people;**

2. Each with own appointed tasks;

**3. For a prolonged or indefinite period of time (refers to the stability and (potential) durability);**

4. Using some form of discipline and control;

**5. Suspected of the commission of serious criminal offences;**

6. Operating at an international level;

7. Using violence or other means suitable for intimidation;

8. Using commercial or business-like structures;

9. Engaged in money laundering;

10. Exerting influence on politics, the media, public administration, judicial authorities or the economy; assertion

**11. Determined by the pursuit of profit and/or power.**

The EUROPOL’ annual *EU Organised Crime Reports* have shown how criminal organisations and criminal groups have introduced in their modus operandi strategies to use the legal commercial structures for the following purposes:

- To launder illicit proceeds;
- To cover and facilitate their illegal activities;
- To obstruct criminal investigations;
- To gain profits in order to finance criminal activities;
- To conduct a legitimate business in an unlawful way (such as disregarding regulations about quality, safety, environment, workers pensions etc.)<sup>35</sup>

EUROPOL elaborated in its 2009 OCTA the typology of organised crime groups (OCGs). In concrete terms, OCGs in this OCTA typology are classified on the basis of the geographical location of their strategic centre of interest and their capability and intention:

- To use systematic violence or intimidation against local societies to ensure non-occasional compliance or avoid interferences (named **VI-SO** strategy).

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data includes data available within Europol, data obtained from MS via questionnaires, and data obtained from third organisations and countries. The open sources material used has been carefully evaluated for the reliability of the source and the validity of the information, SOCTA 2013, p. 45.

<sup>35</sup> 2005 EU Organised Crime Report, Doc. 13788/1/05 REV 1, 17 November 2005, p. 29.

- To interfere with law enforcement and judicial processes by means of corruptive influence (named **IN-LE** strategy) or violence/ intimidation (named **VI-LE** strategy).
- OCGs can also adopt strategies that consist of interfering significantly with law enforcement or judicial processes.
- To influence societies and economies (named **IN-SO** strategy).<sup>36</sup>

## 4. EUROPOL and the Organised Environmental Crime

### 4.1. EUROPOL and the Environmental Crime

The EUROPOL Convention has added an Annex with three groups of "other serious forms of international crime" which Europol could deal with, the third one being, *Illegal trading and harm to the environment, comprising:*

- (a) illicit trafficking in arms, ammunition and explosives;
- (b) illicit trafficking in endangered animal species;
- (c) illicit trafficking in endangered plant species and varieties;
- (d) environmental crime;
- (e) illicit trafficking in hormonal substances and other growth promoters.

On 12 November 2001, the European Parliament approved a Belgian and Swedish initiative for a framework decision extending Europol's mandate to the serious forms of international crimes annexed to the Europol Convention such as *environmental crime*, organised robbery, illicit trade in cultural goods and product piracy. The initiative took effect on 1 January 2002. The Parliament also called on the EU to set up joint police units to investigate everything from terrorism to drug and human trafficking and fighting organised crime<sup>37</sup>. The objective was to enhance the effectiveness of co-operation within the scope of the EUROPOL Convention by giving EUROPOL the means to carry out, in specified prioritized areas, its tasks in relation to all aspects of international organised crime<sup>38</sup>. With this limited competence, the EUROPOL has developed an ever-growing role in the fight against organised crime and to some extent organised environmental crime as a serious manifestation of environmental crime.

There has been a clear evolution in the way organised environmental crime has been dealt with by the EUROPOL. At first, there was a certain reluctance to deal with it motivated by the lack of intelligence about it that was then followed by a further commitment driven by the growing size of the problem that spills over individual Member States. The problem of the definition of organised crime and the use of a too restrictive definition has had throughout the years a negative effect on the quality of the information sent to EUROPOL by EU Member States.<sup>39</sup> After some years, EUROPOL changed its position and acknowledged that the information sent by Member States on environmental crime was conditioned and somehow distorted by questionnaires that did not take into account the increasing intervention of criminal groups and criminal organisations in

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<sup>36</sup> OCTA 2009, p. 18-19.

<sup>37</sup> Report 2001, p. 41.

<sup>38</sup> Report 2001, p. 42.

<sup>39</sup> See EUROPOL 2004 EU Organised Crime Report, *Doc. 15822/2004*, 8 December 2004, p.2.

environmental crimes. In the 2000 EU Organised Crime Situation Report, EUROPOL had concluded that the “environmental crime [was] a dormant problem in terms of organized crime involvement.”<sup>40</sup> It considered then that environmental crime seldom attracted the attention of organised crime groups (OC groups hereinafter). In some cases, OC groups were known to be involved in trafficking in endangered species and the dumping of hazardous waste. In the latter case, it seemed more appropriate to talk about ‘organisation crime’ where businesses were cutting corners to reduce costs.<sup>41</sup>

While EUROPOL recognized in 2004 that “not much [was] known about the involvement of OC groups in ‘non-traditional’ OC areas”, it introduced among the recommendations of its annual report that “situation reports in the areas of high-profit/low-risk crimes such as environmental crime, organ smuggling and trading in hormones with a focus on the involvement of OC groups should be initiated.”<sup>42</sup>

EUROPOL has adopted Annual Assessments on Organised Crime that use general references to environmental crime instead of referring to the typology of organized environmental crime. These reports have also reckoned the number of investigations in Member States and examined the nature of the environmental crimes and the modus operandi. The difficulties to apply to environmental crimes the categories linked to organised crime such as criminal organisation have led to narrowing them down. For instance, in its 2002 Report it was concluded “it is more correct to speak of ‘organisation crime’ instead of organised crime.”<sup>43</sup>

Finally, organised environmental crime has become an important issue in the last *Threat Assessments of EUROPOL* that have recognized it as one of the emerging threats in the EU, because of the increasing interest of organised crime in environmental crime which is perceived now as high profit and low risk and is growing exponentially because of its profitability. As EUROPOL has put it:

“Driven by perceptions of low risk and high profit, indications have emerged of this criminal activity attracting the greater interest of organised crime groups. Groups specialising in money laundering, financial crime, thefts and drug trafficking in Member States are now engaged in environmental crime as well. In general, however, substantial intelligence gaps preclude comprehensive assessment of organised crime activity in this area.”<sup>44</sup>

In November 2013, EUROPOL presented its first Threat Assessment on Environmental Crime in the EU and pointed out that “the most prominent environmental crimes featuring the involvement of organised crime in the EU are the trafficking in illicit waste and the trafficking in endangered species”<sup>45</sup>.

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<sup>40</sup> See EUROPOL 2000 EU Organised Crime Situation Report, Open Version, 13538/01, 7 November 2001.

<sup>41</sup> See EUROPOL 2001 Report, pp. 9-10.

<sup>42</sup> See EUROPOL, 2004 European Union Organised Crime Report, December 2004, Recommendation 19 on Intelligence requirements, p. 17.

<sup>43</sup> Environmental crime appeared in 10 criminal investigations, 8 of which concerned the illicit dumping of residual substances after the production of synthetic drugs. The other 2 investigations involved a form of organisation crime, i.e. bona fide companies that, in the course of their business activities, commit criminal offences by illegally processing substances or waste, or by smuggling chemical and hazardous substances. The non-classified version of the 2002 EU Organised Crime Report. EUROPOL, pp. 67 and 75.

<sup>44</sup> See EUROPOL, OCTA 2011 Organised Crime Threat Assessment, p. 40.

<sup>45</sup> EUROPOL Threat Assessment 2013 on Environmental Crime, 25 November 2013. This report will be further referred as EUROPOL Threat Assessment 2013 on Environmental Crime, p. 4, available at <https://www.europol.europa.eu/content/threat-assessment-2013-environmental-crime-eu>

## 4.2. The 2013 EUROPOL Threat Assessment on Environmental Crime

EUROPOL presented last November 2013 its Threat Assessment 2013 on Environmental Crime in the EU as a response to conclusions of the *2013-2017 EU Policy Cycle for organised and serious international crime*<sup>46</sup> and the EU Organised and Serious Crime Threat Assessment 2013<sup>47</sup> that identified environmental crime as one of the emerging threats requiring intensified monitoring.

With the information sent by Member States, EUROPOL has mapped the flows of organised environmental crime inside the EU and with neighbouring countries as well as with targeted countries mostly in Africa and Asia that are countries of origin, transit and destination of the proceeds of the different types of organised environmental crimes, classified taking into account the nature of the activities: illegal hazardous waste trafficking.

### 4.2.1. Trafficking in Endangered Species

EUROPOL has identified that trafficking in endangered species attracts organised crime groups highly specialized which serve a niche market.<sup>48</sup> The EU is one of the most important markets for endangered species and both a destination and a source of their illegal trafficking. The EU Organised Crime Threat Assessment 2011 estimated that the revenues generated by trade in endangered species amount from 18 to 26 billion euros per year, the EU being the foremost destination market in the world.<sup>49</sup> The trade is principally coordinated by well organised, loose networks based in the EU and in the source regions. While in the past the perpetrators travelled personally to collect animals, it is now more common for them to use couriers and air mail-orders. Animals from several destinations are concentrated in one place, from which it is possible to organise transit into the EU. In addition, the Internet is used with increasing sophistication to facilitate trade. Now EUROPOL considers that “internet has greatly facilitated organised crime groups in their ability to maintain contact with potential clients, advertise their services and receive orders”.<sup>50</sup>

Some of the most profitable assets are the ivory and rhino horns poached in Africa and sold and distributed from Europe to Asia, particularly China, where they are highly demanded.

The OC groups are characterized by a small size with a few members and exclusively focused on this activity, unlike what happens with the illegal trafficking on endangered species in other geographical areas such as South America, Africa or Asia where OC groups, insurgent groups and terrorists groups can combine it with drug trafficking.

The EUROPOL Threat Assessment on Environmental Crime 2013 has identified some of the *modi operandi* adopted by OC groups depending on the nature of the trafficked specimens. Thus larger live animals are typically trafficked using false papers, while smaller animals such as birds and inanimate specimens such as protected plants are more frequently trafficked in concealed spaces.<sup>51</sup> Individual couriers as well as the postal system are used extensively to transport valuable specimens, depending on whether the specimen is alive or not. Couriers transporting more exotic specimens from overseas tend to use air transport and hide the merchandise as part of their luggage. Other trafficking *modi operandi* are now mirroring those employed by drug traffickers. Trafficked

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<sup>46</sup> Doc. 15358/11

<sup>47</sup> Doc. 7368/13 + COR 1

<sup>48</sup> See p. 3 and 4.

<sup>49</sup> EU Organised Crime Threat Assessment 2011 (OCTA), *Doc. 8709/11*, 06.04.2011, p.18.

<sup>50</sup> EUROPOL Threat Assessment 2013 on Environmental Crime, p. 13.

<sup>51</sup> *Ibidem*.



specimens have been found concealed within sculptures or disguised as other goods. There have also been reports of supervisors accompanying some couriers trafficking protected specimens, similar to the use of drug mules<sup>52</sup>.

In addition to the trafficking of endangered species in concealed containers by couriers, endangered species are also frequently trafficked using fraudulent documents, such as entry or sales permits or certificates falsely declaring the endangered specimens a non-CITES covered species. Some OC groups have been found to falsely declare the intended purpose of the specimens.<sup>53</sup>

Within the EU, dedicated OC groups often exploit legitimate business structures to facilitate the importation and retail of specimens. Groups in North West Europe, for instance, cooperate with breeders in other Member States to launder 'wild caught' animals, using false documents to trade them as 'captive bred' on the legitimate market. Difficulties in ascertaining the authenticity of foreign certificates frustrate enforcement efforts. Of note, there is evidence that trade in endangered species is of increasing interest to poly-criminal groups. Groups involved in high-level drugs trafficking in Brazil, Colombia and Mexico have established a notable role in the illegal supply of endangered species to the EU and US markets. Within the EU also, OC groups involved in drug trafficking, the facilitation of illegal immigration, fraud and the distribution of counterfeit products are now active in trafficking endangered species such as birds of prey and products for traditional Chinese medicine along routes established for other types of illicit commodity.

EUROPOL has also identified some of the patterns of action of OC groups. They are innovative in obtaining their products, for instance, they steal rhino horn in exhibition halls, museums, during sight-seeing tours in castles or during auction sales<sup>54</sup>. Live specimens are also stolen from zoos, including parrots, monkeys and tortoises. In February 2014, there was a theft in Kew Garden, London, where the smallest water lily was stolen. This species has disappeared from the wild in Ruanda since 2004.

In the case of illegal logging, it has been noticed that the modus operandi in these cases where bulk commodities are comprised, involves faked and forged documents and permits. Frequently, border guards or customs personnel lack the required expertise to distinguish protected tropical woods from unprotected woods. Sometimes protected woods are trafficked among unprotected woods or full shipments of protected woods are covered by unprotected woods, significantly complicating their discovery. Falsified certificates are used to change the type of wood on paper from protected to unprotected ones. Protected woods trafficked to the EU are offered by both online and offline retailers. These retailers often engage in otherwise legitimate business activities in addition to illegally selling protected woods.<sup>55</sup>

### 4.2.2. Illicit Waste Trafficking

EUROPOL has evaluated the environment in which the illicit waste trafficking has expanded exponentially during the economic crisis. It is a highly-profit and low-risk activity which goes under-reported and under-investigated. The investigations by the Member States with the help of EUROPOL have led to the identification of OC groups specialized in this particular area of crime.

EUROPOL has identified that these illicit activities run parallel to the legal ones with they are intrinsically linked. Even though it has been said that these activities benefit from a drive to reduce costs during the economic crisis, the illegal trade was on the agenda of the European institutions since the late nineties<sup>56</sup>.

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<sup>52</sup> Ibidem.

<sup>53</sup> Ibidem.

<sup>54</sup> SOCA 2013, p. 32.

<sup>55</sup> EUROPOL Threat Assessment 2013 on Environmental Crime, p. 13.

<sup>56</sup> For instance, in the reports last appears that

In the illicit waste trafficking are involved both organized criminal groups and legal companies. The OC groups profit from the loopholes in the European opened market regulations and the absence of standardized modes of control and the required enforcement mechanisms. “So it has pointed out that organised crime exploits the discrepancies between EU laws and national legislations in committing among others environmental crime and high technology crime, and, on the other hand, the gaps in EU procedures for example in VAT and other fraud.”<sup>57</sup> Environmental crime, especially illegal waste dumping, is exploiting a wide legislative vacuum and a lack of law enforcement. Much of it remains undetected.<sup>58</sup>

The use of fraudulent documentation and the lack of the required modes of control are considered by EUROPOL as key characteristics of their modus operandi. Trafficking in hazardous waste is mostly predominated by the so-called “storage technique”, which remains the most simple and profitable way of avoiding waste management costs. This is the case for tyre recycling but also in cases where a waste management or “reevaluation” fee is levied (e.g. electronic or domestic electrical waste). Recently, trafficking of breeding effluents through a well-structured channel has been observed. This channel resorts to different means such as documents forgery, false declaration, handwriting forgery, corruption, threats...<sup>59</sup>

In many countries a continuous growth of the economy is taking place and, subsequently, the amount of waste produced is also growing, whilst disposals systems are often unable to meet these growing demands. The UK reported about the increasing costs of dumping waste in a legal way (‘landfill costs’) as a main reason why crime in this area is growing. In addition, the lack of legitimate sites for disposing of hazardous waste in the UK may increase the instances of illegal dumping (‘fly tipping’), which takes place in rural and urban areas, and has an economic as well as environmental impact due to the costs of clear up and correct disposal. The consequences for a country’s environment and economy are obvious, although hard to estimate accurately. It will obviously be very expensive to clean up the sites where illegal waste has been dumped.<sup>60</sup>

The 10 Member States that joined the EU in May 2004 could be experiencing a growth in the number of cases of cross-border transport of waste and illegal trade in certain protected and threatened species.<sup>61</sup>

While mafia-type structures have sufficient resources to participate in large scale illegal waste management, there is evidence that lower level groups are engaged in the illicit harvesting of hazardous waste, such as used cell and car batteries. Illicit waste trafficking is often facilitated by cooperation with legitimate business, including those in the financial services, import/export, and metal recycling sectors, and with specialists engaged in document forgery for the acquisition of permits. Permits are also obtained by means of corruptive influence on issuing bodies. Lack of harmonisation concerning the distinction between ‘waste’ and second hand goods has resulted in e-waste (second hand electrical and electronic equipment) and deregistered vehicles in particular being shipped to non-OECD and other states.<sup>62</sup>

From the Southern hub toxic waste is trafficked to South East Europe and the Western Balkans, also to other Member States. Italy has also become a transit point for e-waste en route to Africa and Asia. There is evidence of corruption in the public and private sectors, especially in relation to the issuing of certificates by laboratory technicians. Intermediate storage sites are often used to disguise the ultimate destinations of waste and to frustrate law enforcement efforts to identify source companies. The North West hub plays an important role in the export of waste to third countries, especially in West Africa and Asia. Trafficking groups are usually small (between 5

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<sup>57</sup> 2005 EU Organised Crime Report, Doc. 13788/1/05 REV 1, 17 November 2005, p. 8.

<sup>58</sup> 2005 EU Organised Crime Report, Doc. 13788/1/05 REV 1, 17 November 2005, p. 32.

<sup>59</sup> See 2001 EU Organised Crime Report, p. 42.

<sup>60</sup> 2005 EU Organised Crime Report, Doc. 13788/1/05 REV 1, 17 November 2005, p. 32.

<sup>61</sup> Ibidem.

<sup>62</sup> EUROPOL EU Organised Crime Threat Assessment 2011 (OCTA), *Doc. 8709/11, 06-04-2011*, p.40.



and 10 people), with ethnic links to the destination countries. Toxic waste, e-waste and deregistered vehicles are transported to West Africa via the ports of North West Europe.<sup>63</sup>

### **The Italian case**

The statistics value the illegal waste market in Italy at over 7 billion euros per year.<sup>64</sup> Among the reasons for its steady growth are the failure of the State and the market to provide legal services and the opportunities for business that have multiplied throughout the last decades of continued development of the illegal sector, organised crime having become one of the factors of the waste disposal management “institutional composite setting.”<sup>65</sup> These activities genuinely fit the criteria of organized crime and organised crime groups waste management services to private and public sector. Despite evidence of the gravity of the problem, there are no conclusive empirical or legal studies on the impact of this particular type of organized environmental crime.<sup>66</sup> However, this particular case provoked a legal reaction in Italy that adopted a legislative action to create the offence of "organised illegal waste trafficking", since 2011 classed as an offence with a major social impact (and thus dealt with by the District Anti-mafia Bureau) that singularises the general type of organised crime foreseen in Article 416-bis of the Italian Penal Code.<sup>67</sup>

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<sup>63</sup> Ibidem.

<sup>64</sup> See Legambiente, *Rapporto Ecomafie*, 2010, Rome.

<sup>65</sup> See Alessio D’Amato, Massimiliano Mazzanti and Francesco Nicolli, “Waste Sustainability, Environmental Management and Mafia: Analysing Geographical and Economic Dimensions”, *Centre for Economic and International Studies Tor Vergata, Research Paper Series*, Vol. 9, Issue 11, No. 213, October 2011, available at [http://papers.ssrn.com/paper.taf?abstract\\_id=1947303](http://papers.ssrn.com/paper.taf?abstract_id=1947303) , p. 22.

<sup>66</sup> See Alessio D’Amato, Massimiliano Mazzanti and Francesco Nicolli, “Waste Sustainability...”, *loc. cit.*, p. 3.

<sup>67</sup> Italian Penal Code. Article 416-bis. "Mafia-type association:

1. Any person participating in a Mafia-type unlawful association including three or more persons shall be liable to imprisonment for 5 to 10 years.
2. Those persons promoting, directing or organizing the said association shall be liable, for this sole offence, to imprisonment for 7 to 12 years.
3. Mafia-type unlawful association is said to exist when the participants take advantage of the intimidating power of the association and of the resulting conditions of submission and silence to commit criminal offences, to manage or in any way control, either directly or indirectly, economic activities, concessions, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for any other persons, or with a view to prevent or limit the freedom to vote, or to get votes for themselves or for other persons on the occasion of an election.
4. Should the association be of the armed type, the punishment shall be imprisonment for 7 to 15 years pursuant to paragraph 1 and imprisonment for 10 to 24 years pursuant to paragraph 2.
5. An association is said to be of the armed type when the participants have firearms or explosives at their disposal, even if hidden or deposited elsewhere, to achieve the objectives of the said association.
6. If the economic activities whose control the participants in the said association aim at achieving or maintaining are funded, totally or partially, by the price, the products or the proceeds of criminal offences, the punishments referred in the above paragraphs shall be increased by one-third to one-half.
7. The offender shall always be liable to confiscation of the things that were used or meant to be used to commit the offence and of the things that represent the price, the product or the proceeds of such offence or the use thereof.
8. The provisions of this article shall also apply to the Camorra and to any other associations, whatever their local titles, seeking to achieve objectives that correspond to those of Mafia-type unlawful association by taking advantage of the intimidating power of the association.

## Legislative Decree No 152 of 3 April 2006 “Environmental standards”

### *Article 259 Illegal traffic of waste*

1. Any persons who make shipments of waste constituting illegal traffic pursuant to Article 26 of Regulation (EEC) No 259/93 of 1 February 1993, or make shipments of the waste listed in Annex II of this Regulation in breach of Article 1(3)(a), (b), (c) and (d) of the Regulation shall be punished by fine of between EUR 1 550 and EUR 26 000 and a prison sentence of up to two years. The fine shall be increased if hazardous waste is shipped.

2. Upon conviction, or the delivery of a judgment within the meaning of Article 444 of the Code of Criminal Procedure, for offences related to the illegal traffic referred to in paragraph 1 or the illegal transport referred to in Articles 256 and 258(4), the means of transport shall automatically be seized.

### *Article 260 Organised activity for the illegal traffic of waste*

1. Any persons who, in order to make an unjust profit, transfer, receive, transport, export, import or otherwise improperly manage large quantities of waste through several operations and through the provision of organised continuous means and activities, shall be liable to a term of imprisonment of one to six years.

2. In the case of highly radioactive waste, the term of imprisonment shall be between three and eight years.

3. The conviction shall give rise to the supplementary penalties referred to in Articles 28, 30, 32-bis and 32-ter of the Criminal Code, with the limitation referred to in Article 33 of the Code.

4. Upon conviction, or the delivery of a judgment within the meaning of Article 444 of the Code of Criminal Procedure, the Court shall order the restoration of the state of the environment, and may make suspension of the sentence subject to the elimination of environmental damage and the threat to the environment.

Mafia-type Italian organised crime is a clear and present threat to the European Union (EU).<sup>68</sup> Since the 90's, it has been reported by the international institutions and media, that the Italian Mafia dominates the waste disposal business, both legal and illegal, through front companies and legitimate businesses under its control, in Italy and also in parts of France, Switzerland<sup>69</sup> and also Germany.<sup>70</sup>

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<sup>68</sup> The EUROPOL's Threat Assessment on Italy 2013 points out that “The basis of the power of the Italian Mafias resides in their control and exploitation of the territory and of the community. The contextualised concepts of family, power, respect and territory are fundamental to understanding the dynamics of the Mafias. The Mafias are capable of manipulating elections and installing their men in administrative positions even far away from the territories they control. From that perspective, the threat they pose is unparalleled by any other European Organised Crime Group (OCG). Exploiting legislative loopholes and using the services of corrupt administrators and professionals, they launder money and manage it through front companies and straw men. The four Italian Mafia-type organisations – Sicilian Mafia, Calabrian ‘Ndrangheta, Napolitan Camorra and Apulian Organised Crime – present common traits but also specific individual characteristics that need to be appreciated. When operating outside their territory of origin, the Mafias modify their behaviours and *modi operandi*. Cosa Nostra is the oldest, most traditional and widespread manifestation of the Sicilian Mafia. Its international expansion has mainly been directed towards North America. In the EU its emissaries facilitate criminal operations and money laundering. Cosa Nostra's present strategy of keeping a low-profile is valid both within the territories it controls and outside them. Cosa Nostra is increasing its involvement in cocaine trafficking, often cooperating with other Mafias. Extremely skilled Cosa Nostra money launderers manage legitimate business structures and have infiltrated the economy of some target countries, including South Africa, Canada, USA, Venezuela and Spain”. EUROPOL, Threat Assessment Italy, July 2013, p. 3.

<sup>69</sup> See International Crime Threat Assessment 2000, *Trends in Organised Crime, Summer 2000*, p. 79.

<sup>70</sup> Der Spiegel, 8 March 2010.

Most cases of illegal trafficking involve waste not listed in Annex III which is intended to be handled in accordance with the procedure provided for in Article 18 of Regulation (EC) No 1013/2006 and the prior written procedure. On other occasions, waste which is generally green listed is imported or exported as non-waste. There are no specific data on such illegal shipments in either case, since they were uncovered during the normal criminal investigation activity of the Carabinieri Environmental Protection Unit, the Financial Police, the National Forestry Corps, Harbourmaster's Offices, etc. In most cases these are movements into or out of Italy of waste not listed in Annex III which the producer/holder or consignee considers to be included on the list and which are therefore shipped as provided for by Article 18 of Regulation (EC) No 1013/2006. The Italian authorities have claimed that they did not have specific data on such illegal shipments, since they were uncovered during the normal criminal investigation activity of the Carabinieri Environmental Protection Unit, the Financial Police, the National Forestry Corps, Harbourmaster's Offices, etc.

### 4.2.3. Traffic of Substances

The connection between counterfeit goods and environmental crime is clearly shown in the last Serious and Organised Crime Threat Assessment 2013. Counterfeit goods, particularly pesticides from China, also have a significant environmental impact, containing many untested active substances which may contaminate soil and surface water, causing serious damage to the environment and significant harm to the end consumer. This is a relatively low risk activity, involving minimal penalties whilst providing high profits, and will increasingly attract OCGs previously involved in other crime areas. Counterfeiters take advantage of the economic crisis to expand their business and diversify their product range. Counterfeited products will increasingly include daily consumer goods and counterfeit pharmaceuticals.<sup>71</sup>

## 4.3. Last Proposals of EUROPOL

In November 2014, at Europol's Annual meeting, Slovakia presented a proposal for an EU Action Plan, 'EnviCrime OFF', to combat environmental crime. The plan contains Work Packages such as creating a 'manual', as well as developing an effective IT application for citizens and police forces that can be used by all EU countries. Unfortunately, details of the proposal are not currently available.

## 5. EUROJUST and Organised Environmental Crime

In order to reinforce the fight against serious organised crime, the Tampere European Council of 15 and 16 October 1999, in particular in point 46 of its conclusions, decided on the setting up of a unit that will become Eurojust composed of prosecutors, magistrates or police officers of equivalent competence.<sup>72</sup> As established in Article 3 of the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, it has among its objectives:

1. In the context of investigations and prosecutions, concerning two or more Member States, of criminal behaviour referred to in Article 4 in relation to serious crime, particularly when it is organised, the objectives of Eurojust shall be:
  - (a) to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions in the Member States, taking into account any request emanating from

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<sup>71</sup> *SOCTA 2013*, p. 24.

<sup>72</sup> Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, *OJ L 63*, 6.3.2002, p. 1.

a competent authority of a Member State and any information provided by any body competent by virtue of provisions adopted within the framework of the Treaties;

(b) to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests;

(c) to support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective.

Regarding organised environmental crime, EUROJUST has adopted some important initiatives in 2013. In November 2013, Eurojust and the European Network of Prosecutors for the Environment (ENPE) co-hosted a meeting entitled “Towards an enhanced coordination of environmental crime prosecutions across the EU: The role of Eurojust in The Hague”. Its purpose was to find answers to the question of how to improve best practices and fight organised crime groups involved in environmental crime more effectively. Despite the fact that environmental crime is on the increase, it is not reflected in the level of prosecutions.<sup>73</sup> One of the issues that was explored is the link between environmental crime and organised crime.

In April 2013, the College of Eurojust approved a strategic project on environmental crime that was finished in November 2014. The goals of the project are:

- to assess the status of judicial cooperation;
- to assess the needs of practitioners;
- to identify obstacles and best practice;
- to suggest improvements in the use of existing legal instruments with special focus on penalties, illegal cross-border shipment of waste and trafficking in endangered species;
- to intensify efforts to prosecute environmental crimes at national level;
- and to raise awareness of the added value of Eurojust.

In November 2014, Eurojust adopted the final result of this project, the Strategic Project on Environmental Crime Report that defines environmental crime as “a serious crime, often committed by organised crime groups that affects society as a whole, as its impact is felt not only in the health of humans and animals but also in the quality of air, soil and water”.<sup>74</sup> Among other activities, the project drew up and passed a questionnaire<sup>75</sup> to Member States that has also targeted organised crime. The main issues that have been examined in the report are: illegal trafficking in endangered species, illegal trafficking in waste and surface water pollution. The aspects that have been analysed in these three areas are:

- The complexity of legislation relating to protection of endangered species ,
- The level of seriousness and penalties associated with trafficking in endangered species,

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<sup>73</sup> *EUROJUST News*, Issue No. 10, December 2013, p. 2.

<sup>74</sup> Eurojust (2014), Strategic Project on Environmental Crime Report, November 2014, p.5, available at [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Strategic%20project%20on%20environmental%20crime%20%28October%202014%29/environmental-crime-report\\_2014-11-21-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Strategic%20project%20on%20environmental%20crime%20%28October%202014%29/environmental-crime-report_2014-11-21-EN.pdf)

<sup>75</sup> The Questionnaire was divided into four chapters: “(1) Questions relating to Criminal Policy, including challenges, support which could be provided by Eurojust; (2) Best practices, obstacles and possible solutions, including questions on the links between environmental crime and OCGs, the legal instruments used to fight environmental crime, the possible need for common definitions and standardisation of penalties; (3) the organisation of law enforcement and prosecutorial units when dealing with environmental crime cases; and finally, (4) an open question on the topics that appeared most relevant to Member States to debate within the field of environmental crime”, Eurojust (2014), Strategic Project on Environmental Crime Report, November 2014, p.7.

- Insufficient coordination among competent authorities at national and international level.
- Burden of proof and evidence gathering.
- Links to organised crime.

The Report has presented as “possible solutions” that should be promoted by Eurojust:

1. Closer international cooperation and involvement of Eurojust.
2. Joint investigation teams and other cooperation tools.
3. Exchange of case law and best practice.
4. Multidisciplinary approach to fighting environmental crime.
5. Harmonisation of definitions standardisation of their interpretation and implementation of dissuasive penalties.
6. Confiscation of criminal proceeds.
7. Cooperation with partners.

Of these possible solutions, the administrative approach as part of the broader multidisciplinary approach is now analysed.

## 6. Administrative approach as an alternative to combat organised crime

In 2004, a Seminar was held in The Hague that was attended by representatives of several EU Member States and institutions and international experts. Its aim was to put the administrative approach to fight against organised crime on the EU agenda and to raise awareness of the importance and possibilities of an administrative approach. It was the starting point for a multidisciplinary approach that took into account the new characteristics of organised crime that so often escaped the legal instruments available in the criminal approach. It served to give notice of the fact that “In practice, many criminal organisations aim at the illegal control over legal markets.”<sup>76</sup>

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<sup>76</sup> It was pointed out that “The laundering of criminal profits through legal economic activities, the creation of legal covers such as catering businesses, arcades and phone houses, the acquisition of premises (for instance for establishing illegal casinos or as home base for human trafficking), corruption in obtaining procurement contracts, the transportation of illegal goods covered by official transport licences... these are but a few examples of criminal organisations deliberately using the legal infrastructure in order to develop and continue their activities. As a matter of fact, many criminal organisations need the legal infrastructure for their shady activities to be successful. This means that if the underworld is to penetrate legal markets, it often has to do so ‘via’ the (local) public administration, for example through licences or subsidies. This very aspect makes criminal organisations vulnerable to an administrative approach to organised crime, and it offers public administrations instruments to combat this type of crime. This also implies that an exclusively penal approach will generally prove inadequate, since it basically focuses on individual criminals and criminal organisations, not on the underlying infrastructure. The problem is that criminal organisations and individual criminals appear to be very easy to replace. A purely repressive approach through penal instruments therefore often amounts to a waste of time and energy. Indeed, criminals may come and go but the infrastructure remains intact. By attacking the underlying structures of organised crime, the administrative approach can therefore also play a complementary role, curtailing the development of criminal activities. The fact that organised crime often needs the public administration (the legal infrastructure) for its activities implies that the latter will need to be involved in the approach to crime. However, worldwide experience with organised crime shows that it is quite often deeply rooted in local and national cultural society: it often uses the same social and cultural values as law-abiding citizens in order to justify its criminal activities, and it is deeply embedded in civil society”, see Dutch Presidency Note for the Multidisciplinary Group on Organised Crime on “An alternative approach to combat organised crime. Seminar held in The Hague on 5 and 6 July 2004”, Doc. 12557/04, Limite, 21 September 2004, p. 2.

they can react to illegal activities of organised crime, for instance by imposing administrative sanctions, revoking licences and subsidies, and they can prevent organised crime from taking part in legal activities, for instance by screening applications for licences and subsidies or by excluding criminals from public procurement. The Dutch “Public Administration Probity in Decision-Making Act” (BIBOB) is an example of a concrete administrative instrument. This new act enables national, regional and local administrative bodies to refuse applications for licences and subsidies if it is suspected that they will be used for punishable offences. To make this possible, a national office has been set up that can carry out probity investigations by examining a large number of closed sources (police files, tax files etc.) and open sources.

The Seminar exposed clearly that:

“...., practice shows that members states are insufficiently aware of the fact that they already have several administrative instruments at their disposal. An administrative approach is possible, desirable as well as feasible, but many hurdles will need to be cleared before such an approach can be implemented Europe-wide, at both the national (within the member states) and the European level. Many practical and legal implementation problems persist when it comes to the concrete application of administrative instruments. Current bottlenecks are the absence of national legislation relating to the exchange of information between the judiciary, the police and the public administration, and the absence of a framework for the exchange of information among member states. Support from the member states for European-level information exchange is a precondition for a successful European administrative approach. More in general, the poor harmonisation of the legislative and regulatory frameworks and of the definitions (for instance with regard to organised crime) at the European level hampers administrative cooperation among member states in the Euregional fight against organised crime. Organised criminals can make good use of this absence of harmonisation for their criminal activities”.<sup>77</sup>

Since then, the administrative approach is considered as a part of multidisciplinary methodology, that was confirmed in strategic seminar held in Copenhagen on 11-13 March 2012 on "A Multidisciplinary Approach to Organised Crime: Administrative Measures, Judicial Follow-up, and the Role of Eurojust". There, the Council of the European Union made a very important reflection on it and its practical problems:

- (1) “the need to have a robust legal framework in place as a precondition for the exchange of information between judicial and law enforcement authorities and public bodies, private entities and NGOs;
- (2) the need to ensure a “two-way” exchange of information and “appropriate” feedback, always bearing in mind the secrecy of investigations and, although not emphasised during the discussions, the need to strike a balance between information exchange and data protection principles (in particular, the principle of purpose limitation);
- (3) the vital importance of mutual trust amongst the authorities involved at local, national and EU level, through, for instance, training, participation in seminars, national Joint Investigation Teams and exchange of information; and, finally,

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<sup>77</sup> Dutch Presidency Note for the Multidisciplinary Group on Organised Crime on “An alternative approach to combat organised crime. Seminar held in The Hague on 5 and 6 July 2004”, Doc. 12557/04, Limite, 21 September 2004, p. 4.



(4) awareness of the needs, motivation and expertise of all partners involved” .<sup>78</sup>

In this context, the Council’ s representative emphasized the important role that Eurojust, as the EU Judicial Cooperation Unit, can play through its coordination meetings and its support to Joint Investigation Teams.

This approach is receiving an important support by the Standing Committee on Operational Co-operation on Internal Security, (COSI)COSI Group even though most of results are still classified.<sup>79</sup>

## 6.1. The Handbook on Organised Crime

During the Hungarian Presidency in 2010, a handbook describing good practices from the Member States was drawn up. This document called “Complementary approaches and actions to prevent and combat organised crime - A collection of good practice examples from EU Member States” that was adopted on 30 May 2010<sup>80</sup>, of whose 107 pages only 10 have been declassified. In the case of its updated version of 2013, 9 of 128 pages have been declassified recently.<sup>81</sup>

The Hungarian Handbook did not mention environmental organised crime but refers to “The emergence of illicit commodities, including synthetic drugs and counterfeit medicine, and the exploitation of business sectors, such as emissions trading, require a proactive approach to identify criminal markets that are liable to criminal exploitation” .<sup>82</sup>

The Handbook II adopted during the Lithuanian Presidency in 2013 just updated practices and pointed out the importance of a multidisciplinary approach to fight organised crime due to the fact that:

“The sheer size and diversity of the serious and organised crime threat renders it impossible for individual countries or law enforcement systems to deal with it in isolation. Equally, legislation, regulation and traditional criminal justice remedies alone will not be effective in reducing the problem. A more holistic and multidisciplinary approach is required, targeting criminal networks, finances and supporting infrastructure to have the greatest impact. Increased multi-agency collaboration and partnership working involving, for example, law enforcement, judicial and prosecuting authorities,

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<sup>78</sup> Mr Hans G Nilsson, Head of Division, Fundamental Rights and Criminal Justice, General Secretariat of the Council of the European Union, summarised the conclusions of the three workshops and chaired the panel discussion and general debate. Mr Nilsson emphasized the issues addressed in the workshops, in the Document of Eurojust, “Multidisciplinary Approach to Organised Crime: Administrative Measures, Judicial Follow-up, and the Role of Eurojust,” Doc. 11298/12, 14 June 2012, p. 13.

<sup>79</sup> Fijnaut (2014) considers “Evidence that the administrative approach to organized crime has gained credence in the EU can be found in the fact that the relevant Council working group has also raised the subject at conferences (Ministerie van Binnenlandse Zaken 2008). This explains why this approach has been included in the table of contents of the reference book currently being compiled by a COSI project group entitled Complementary Approaches and Actions to Prevent and Combat Organised Crime –A Collection of Good Practice Examples from EU Member States. Unfortunately, the text of the reference book has so far remained classified”, see Fijnaut, C. (2014), “European Union Organized Crime Control Policies” in Paoli, L., *Oxford Handbook of Organized Crime*, OUP, 2014, p. 585.

<sup>80</sup> See EU Handbook compiling a collection of good practice examples from EU Member States on complementary approaches and actions to prevent and disrupt organised crime, Doc. 10899/11, 30 May 2010.

<sup>81</sup> EU Handbook Part II, Complementary Approaches and Actions to Prevent and Disrupt Organised Crime, Doc. 17600/13, 12 December 2013, Document Partially Accessible to the Public (21.02.2014)

<sup>82</sup> See EU Handbook I, p. 6.

public sector bodies, local authorities, the private and voluntary sectors, academia and the media can be more effective in disrupting and preventing organised crime from flourishing than purely unilateral or bilateral cooperation.”<sup>83</sup>

## **6.2. The Network of Contact Points on the administrative approach to prevent and fight organised crime**

Based on the EU Internal Security Strategy in Action,<sup>84</sup> an Informal network of contact points on the administrative approach was set up and held its first meeting on 28 September 2011 co-chaired by the former Polish Presidency and the Commission.

The main purpose of this network is promoting, strengthening and developing the role of the administrative authorities as well strengthening and enhancing the role of governments to achieve a comprehensive approach to the phenomenon of organised crime at the EU level. The basic idea is to include within the circle of partners not only local law enforcement and judicial authorities, but also other central and regional authorities.<sup>85</sup> After the first meeting, the Commission<sup>86</sup> was committed to provide financial support to the Network.

As presented in the Handbook II, all EU Member States have been invited to participate in the Informal Network, along with other EU institutions. It meets twice a year under the rotating EU Presidency in Brussels to consider progress made within a Work Programme agreed by COSI. One of its key tasks is the updating of this Handbook.

## **6.3. The Example of the Netherlands**

The Dutch experience with regard to a multidisciplinary approach to organised crime has been a reference for the EU Member States and institutions and took the lead in some of the most interesting initiatives. In 2009, the Netherlands<sup>87</sup> carried out a survey on administrative/non-penal instruments in various Member States that showed

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<sup>83</sup> See EU Handbook II, p. 5.

<sup>84</sup> In its Communication on the EU Internal Security Strategy in Action, the Commission specified that “[policies] to engage governmental and regulatory bodies responsible for granting licences, authorisations, procurement contracts or subsidies should be developed (the ‘administrative approach’) to protect the economy against infiltration by criminal networks. The Commission will give practical support to Member States by establishing in 2011 a network of national contact points to develop best practices, and by sponsoring pilot projects on practical issues”, COM(2010) 673. See also the Council Conclusions on the fight against crimes committed by mobile (itinerant) criminal groups Doc. 15875/10 GENVAL ENFOPOL 314. In the Communication from the Commission to the European Parliament and the Council, The final implementation report of the EU Internal Security Strategy 2010-2014, it is said that “The Commission will inter alia continue to work on the following actions, in cooperation with all relevant actors: Further its assessment on the scope of environmental crime and energy fraud and consider measures to address them”, COM(2014) 365 final, 20 June 2014, p.14.

<sup>85</sup> See the Note prepared by the Lithuanian Presidency in 2013 on the Administrative Approach to Prevent and Fight Organized Crime Network, available at [It is also remarked that “EU institutions involved consider that the establishment of the network reflects the principles of functioning of the EU, namely diversity and modernity. Only the ability to combine traditional and non-traditional crime-fighting techniques will help to keep up with and neutralize the changing structure of the criminal world”.](#)

<sup>86</sup> Mr Mickaël Roudaut, DG Home Affairs, Fight Against Organised Crime, European Commission position as presented in the Document of Eurojust, “Multidisciplinary Approach to Organised Crime: Administrative Measures, Judicial Follow-up, and the Role of Eurojust,” Doc. 11298/12, 14 June 2012, p. 8.

<sup>87</sup> The Netherlands, under the influence of the United States’s experience on the subject, has adopted the



that many Member States already use a multidisciplinary approach in the fight against organised crime. At the same time, it was concluded that there is a clear need for more intensive national and international cooperation. Two other conclusions were that a platform should be set up where new proposals and initiatives with regard to the administrative approach could be addressed and that Member States best practices should be compiled. From this initiative, the Handbooks that have been referred to above were created.

The two most important outcomes of the Dutch administrative approach to fight against organised crime are:

1) the Public Administration (Probity Screening) Act 2002, which contains rules on the furtherance of probity screening by the public administration with regard to decisions on permits, subsidies and public contracts<sup>88</sup>; and

(2) Regional Centres of Information and Expertise (RIECs), created in 2008, and the Netherlands' National Centre of Information and Expertise (LIEC), created in 2011.<sup>89</sup>

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administrative approach and has prepared a “Manual for the Administrative Approach to Organised Crime.” As “the European nation most influenced by the New York administrative approach to organized crime control has been the Netherlands. Dutch policy makers, particularly those who attended the influential Dutch-American Conference on Organized Crime in The Hague in 1990, were concerned about organized crime activity within the legal economy and became convinced that a control effort based solely on a police repressive approach would be inadequate and needed to be supplemented by an approach involving various agencies in local governments”, in Beare, M. and Woodiwiss, M. (2014), “U.S. Organized Crime Control Policies Exported Abroad” in Paoli, L., *Oxford Handbook of Organized Crime*, OUP, 2014, p. 565

<sup>88</sup> In the Seminar of 2004, the Dutch authorities presented this Act, “The “Public Administration Probity in Decision-Making Act” (BIBOB) has been in force in the Netherlands since 2003. This Act aims to equip the administrative approach to crime with a complementary instrument (grounds for refusal) and to guarantee the probity of the public administration through the exchange of information (screening). The BIBOB Act came into being after administrative organs drew attention to the fact that criminal persons had penetrated economic life and made use of administrative facilities. The Dutch authorities appear to spend a lot of time and resources on tracing and prosecuting organised crime, but at the same time they facilitate it. Before the Act took effect, administrative organs suspecting that a licence or subsidy was going to be used for punishable offences had few if any means for refusing or cancelling the application. The BIBOB Act applies to high-risk sectors – i.e. low-threshold sectors in terms of levels of training etc. – such as the catering industry or the construction sector. The Act sets forth possible grounds for refusal and cancellation of applications and subsidies and offers complementary public procurement information. The Act should be considered as *ultimum remedium* and constitutes no mandatory instrument for administrative bodies. An administrative body can apply the Act autonomously and can also seek advice from the national ‘Bureau BIBOB’, which has been operational since June 2003. The task of this bureau is to carry out probity investigations and to support administrative bodies in implementing and applying the Act. For this purpose, the bureau can investigate a large number of closed sources (police files, tax files etc.) and open sources. The administrative body can found its decision on a BIBOB opinion, but this is not mandatory: it is at liberty to weigh the different interests at stake. Upon refusal or cancellation, the parties concerned (applicants and third parties) have the right of inspection of their files. Given the sensitive nature of the BIBOB process (privacy), a committee has been set up to monitor whether the Act is properly administered. Practical experience shows that there are many divergences among administrative bodies when it comes to implementing the Act. Although the Act has not been evaluated yet, good initial results have been obtained. Awareness and administrative courage appear to be preconditions to effective implementation. The BIBOB instrument makes it possible to give concrete shape to the idea that administrative bodies should do something about organised crime.” See the presentation of Eli Gabel, Public Prosecution Service Unit, Amsterdam, in the “Multidisciplinary Approach to Organised Crime: Administrative Measures, Judicial Follow-up, and the Role of Eurojust,” Doc. 11298/12, 14 June 2012, p. 5.

<sup>89</sup> *Ibidem*.

## 7. Policy Implications and Conclusions

Organised environmental crime is a serious environmental crime committed by organized crime groups that often has a transnational dimension that requires the cooperation of Member States with Third countries and international organisations. This organised environmental crime challenges the traditional definition of organised crime since it is now responding to a new market order. Organised crime criminals act as brokers providing highly specialized services to costumers of the whole world, communicating through new technologies of information and escaping the traditional forms of crime repression. They are motivated by high profit and low risks; this is why confiscation of assets and proceeds of environmental crimes is one of the most important measures that should be adopted to fight against it.

Even though the EU has not yet adopted concrete measures to combat organised environmental crime, the new Article 83 of the Treaty on the Functioning of the European Union allows the EU to adopt directives in areas of particularly serious crime with a cross-border dimension. In the future, the Council may unanimously decide to add serious environmental crimes to the list of organised crimes. Until then, as the former Commissioner for the Environment put it: the main responsibility for fighting organised environmental crime is with the Member States.

The adoption of a legal instrument addressing organised environmental crime is not on the EU legislative agenda even though the European Parliament has made some proposals. A package of non-binding instruments on organised crimes adopted by EU institutions is establishing the basic concepts for organised environmental crime. Despite the fact that the principal EU instruments dedicated to fighting organised crime do not address directly the specific organised environmental crime, they have left some room for an extensive interpretation of the goals to be achieved and have detailed in annexes the “other serious crimes” that could be addressed when required.

In the case of organised crime, the EU institutions are dealing with legal problems at the domestic and international levels that have hampered the enforcement of the legal instruments fighting against this type of criminality. There is a problem of conceptualization of organised crime that also affects the way the EU approaches environmental crime and organised environmental crime. The proximity between them leads the instruments and institutions to refer to both with the same terminology, the most general environmental crime prevailing over the specific forms of organised crimes, such as the illegal waste trafficking. Most problems related with prosecuting organised environmental crime are related with the choice of criminal provisions: Just to exemplify this, in Spain, illegal wildlife trade is prosecuted under special penal provisions of the Act on Smuggling<sup>90</sup> and the provisions of the Criminal Code on crimes against nature, that is invoked to fight against the infringement of the domestic and EU legislations transposing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention).<sup>91</sup> Operation Rapiña that started in 2009<sup>92</sup> unveiled a network involving experts and individuals, selling raptors inside the European Union to the highest bidder paying up to 7.000€. Other cases prosecuted as smuggling involved individuals working at conservation NGOs, members of the SEPRONA, police member supplying modified and faked rings and official documents,

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<sup>90</sup> Ley orgánica 12/1995 de 12 de diciembre de Represión del Contrabando, en la nueva redacción operada por la LO 6/2011 de 30 de junio.

<sup>91</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; 12 I.L.M. 1085 (1973). Available online: <http://www.cites.org/eng/disc/E-Text.pdf>. In legal doctrine see, among others, Sand, P. H. (2011), “Endangered Species, International Protection”, in Max Planck Encyclopedia of Public International Law, ed. Rüdiger Wolfrum, OUP; Bowman, M., Davies, P. and Redgwell, C. (2010) *Lyster’s International Wildlife Law*, Cambridge University Press.

<sup>92</sup> In Spain, one of the EU Member States that is both country of origin and destination of crimes on raptors, there are currently several ongoing operations regarding raptors: Rapiña involving 70 living raptors and 9 charged persons and Horus involving 101 living raptors and 13 charged individuals, among whom them experts, police members, see the Press note 13 May 2009, “La Fiscalía de Medio Ambiente ha coordinado una operación conjunta de la Guardia Civil y de la Policía en relación con el tráfico ilegal de especies amenazadas”, available at [www.fiscal.es](http://www.fiscal.es).

poachers who looted nests, and retailers and other authorities in conservation centres who used their posts to commit crimes. None of these cases was considered as organised crime and the legal provisions invoked by prosecutors were those generic on crimes against nature, faking documents, and the special act on smuggling.<sup>93</sup> On the other hand, the qualification of an illegal activity as an administrative or criminal infringement of smuggling<sup>93</sup> depend on the estimated value of the specimens, so it is very important in order to facilitate cooperation among EU Member states to approximate the thresholds of value of the assets and penalties. Considering these problems and shortcomings, some solutions should be:

## Approximation of penalties

Approximation of penalties is a prerequisite to facilitate cooperation among Member States but also at international level in the framework of the UN Convention on transnational organised crime. The minimal imprisonment penalty is a prerequisite that cannot often be fulfilled due to different level of penalties in Member States and Third Countries. As examined, after the Lisbon Treaty reform, this approximation should take place, since Article 83 confers on the Union the competence to adopt “minimum rules with regard to the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis” with the ordinary legislative procedure. Among the areas envisaged is organised crime. Organised environmental crime would require unanimity since it is not included in the list but could be added by Member States.

## Intelligence based cooperation and action

More and better intelligence based cooperation and action is needed. The growing concern about environmental crime is also due to the failure to identify it as a serious threat. The initial test and enquiries responded to by Member States for the SOCTAs showed the lack of intelligence based analysis as well as the lack of human resources destined to fight against it. In recent years, Member States such as the UK, the Netherlands and Italy have taken the right steps: better intelligence, mandate and executive institutions such as the UK Agency

## To clarify and reinforce Networks and tools

Currently, Eurojust and Europol, with the European Network of Prosecutors for the Environment (ENPE) are the most advanced schemes of legal networks in the EU regarding the activities of (1) ‘harmonization networks’; (2) ‘enforcement networks’; (3) ‘information networks’. These activities should be clarified and institutionalised more accurately in order to:

- 🔄 To lead the approximation//harmonization of legal frameworks, (Eurojust)
- 🔄 To enhance enforcement networks. This task should be assigned to Eurojust that could further promote coordination meetings and Joint Investigation Teams involving administrative authorities, such as customs and tax authorities<sup>94</sup>
- 🔄 To improve existing tools and propose new ones. In the case of the Joint Investigation Teams, the practice has shown some important problems regarding the principles of legality and accountability that

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<sup>93</sup> In the case of Spain, a case of administrative infringement of smuggling (infracción administrativa de contrabando) is referred to the Ministry of Economy when the value of the specimens do not exceed the threshold established for crimes of smuggling, see Judgment num. 636/2012 of 29 November 2014 (Audiencia Provincial de Madrid, Sección 3ª)

<sup>94</sup> See the position of Eurojust as expressed by Ms. Michèle Coninx, Vice-President of Eurojust and National Member for Belgium in the Document of Eurojust “Multidisciplinary Approach to Organised Crime: Administrative Measures, Judicial Follow-up, and the Role of Eurojust,” Doc. 11298/12, 14 June 2012, p. 14.

require further developments. Spanish Prosecutors<sup>95</sup> have pointed out some gaps and loopholes that require to be considered when proposing an enhanced role for JITs. The links between the JITs and the new Directive on the European Investigation Order should be better assessed.<sup>96</sup>

- 🌐 To enhance Information networks: more information is required as well as networks to share it, specially in those cases where the prosecution of environmental crime is difficult due to the lack of human resources, excessive cost or the new forms of crimes.
- 🌐 Most documents on the EU Member states' practice on organised crime are classified, thus academic analysis is hampered by the lack of data on practice.

## To adopt a Memorandum of Understanding on enhanced international cooperation

The international dimension of the fight against organised environmental crime has not been sufficiently addressed by the institutional reports of Europol and Eurojust. The EU should consider the opportunity of using Memoranda of understanding, (MoUs) following the models adopted by its Member States.<sup>97</sup> Many Member States have concluded them ) with Third countries and international institutions to fight against organised crime mostly focusing on drugs, human trafficking, cybercrime and money laundering. It is important to address the need to incorporate environmental crimes in Member States's MoUs. A compilation of their MoUs could be of great interest for the establishment of common principles of action.

EU institutions should also consider the opportunity to adopt MoUs for enhanced cooperation with Third countries targeted by organised crime groups acting in the EU, following the practice of its Member States.

It would be useful to negotiate a MoU with UNODC in order to enhance cooperation and complement the existing cooperation developed by Europol. Most Member States do have MoUs with UNODC to fight against drugs. A common action to propose a MoU would give visibility to the problem of Wildlife trade.

## An Enhanced Administrative Approach to prevent and combat organised crime.

An enhanced administrative approach to fight organised crime is required to fight those forms of environmental crimes that challenge the capacity of reaction of local administrations and customs services due to the high economic cost and human resources that they require.

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<sup>95</sup> See *Compilación de Conclusiones de las Jornadas de Fiscales Especialistas en Cooperación Internacional*, 31 October 2014, available at [www.fiscal.es](http://www.fiscal.es)

<sup>96</sup> Because as it is said in its Article 3 on the scope of the EIO: “The EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team as provided in Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (1) (‘the Convention’) and in Council Framework Decision 2002/465/JHA (2), other than for the purposes of applying, respectively, Article 13(8) of the Convention and Article 1(8) of the Framework Decision.” It is also envisaged in Recital 8 of the Preamble of the Directive where is said “The EIO should have a horizontal scope and therefore should apply to all investigative measures aimed at gathering evidence. However, the setting up of a joint investigation team and the gathering of evidence within such a team require specific rules which are better dealt with separately. Without prejudice to the application of this Directive, existing instruments should therefore continue to apply to this type of investigative measure. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ L* 130, 1.5.2014, p. 1–36.

<sup>97</sup> The EU should also study the opportunity to adopt MoUs to enhance cooperation both for criminal and administrative investigations. Administrative investigations are important to gather information and intelligence related with illegal activities that do not cross the line of administrative and civil jurisdictions, but that constitute a serious problem for legal sectors and companies such as those related with WEEE management.

However as Calderoni and Caneppele have pointed out, the administrative approach to combat organised crime has to face the cases of infiltration of the Administration by the Mafia or on a smaller scale the cases of malpractice and corruption of the institutions involved in the fight against infringements of administrative and criminal law.<sup>98</sup> Besides, as has been said in other Efface Reports,<sup>99</sup> there is a dependency of criminal law towards administrative law, thus if the administrative authorities do not acknowledge the infringements there is no possibility of prosecuting. In any case, the criminal law enforcement should be a last resort, to be used just in case the administrative measures are not effective to prevent and to sanction.

## Non-conviction-related seizures and confiscations

As examined in this report, the new Directive on the freezing and confiscation of proceeds of crime in the European Union<sup>100</sup> does not address environmental crime and in particular, organised environmental crime and does not refer to the Environmental Crime Directive when describing the term “criminal offence” it uses. However, the practice of some Member States such as the UK and Italy are proving the importance of this tool as well as the problems it may create.<sup>101</sup> Thus, according to the new Italian Anti-Mafia legislation, both a criminal trial and non-conviction-based confiscation proceedings can be carried out against the same person, as these two proceedings are independent of each other.<sup>102</sup>

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<sup>98</sup> Calderoni, F. and Caneppele, S., "Administrative Approach opposed to Criminal Approach in the Fight against Organized Crime: Does it Always Work?" *Paper presented at the annual meeting of the ASC Annual Meeting, San Francisco Marriott, San Francisco, California*, (Not Available), 26 November 2014, [http://citation.allacademic.com/meta/p431828\\_index.html](http://citation.allacademic.com/meta/p431828_index.html) . This unpublished paper argues that given the difficulties in tackling organized crime with the traditional approach of law enforcement and prosecution, there should be a shift on the focus from enforcement policies to prevention policies. After pointing out non-criminal or administrative approaches that have been introduced in different contexts such as New York or Amsterdam, the paper focuses on the Italian case to show how the administrative certification mechanism for participation in public procurement that were adopted at the beginning of the 1990s, is experiencing problems, twenty years after its establishment.

<sup>99</sup> See the Aggregation of the country reports and the Spanish Report.

<sup>100</sup> *COM(2012) 85 final* of 12 March 2012.

<sup>101</sup> The Italian authorities consider that two conditions must be met as proposed by 101: (1) a serious suspicion of participation in a criminal organisation; and (2) a lack of proportion between the assets owned by the individual and his/her income. In all these cases, the onus of proof is inverted, as the suspect must prove the licit nature of the assets. Furthermore, as a need to strike a balance between prevention and repression is present, these measures have been recognised by the European Court of Human Rights to be in compliance with the principles of the European Convention on Human Rights.

<sup>102</sup> However, the question of third-party rights, however, still remains open.

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Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States and subsequent amending act.

Council Framework Decision 2002/465/GAI of 13 June 2002 on joint investigation teams (and report from the Commission on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams (COM(2004)0858).

Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property.

Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

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## Annex I

### Lessons to be learned from the ECJ Case Law

In its judgment of 16 November 2010 in the Mantello case on a preliminary ruling presented by the Oberlandesgericht Stuttgart, the Court in Grand Chamber decided on central criminal issues such as the *Ne bis in idem principle*, the concept of the ‘same acts’ and the double criminality rule and their interpretation when the crime of participation in a criminal organisation is at stake. The Court ruled that some aspects of criminal law are now an autonomous concept of European Union law. From the factual point of view, this case exposes some of the disturbances and shortcoming of the inter-states cooperation that may arise in a case of transnational crime and in particular of organised crime.

Mr Mantello had participated in a criminal organisation as courier, middleman and supplier and has also been in illegal possession of drugs. He had been convicted in respect of the individual acts in relation to which the offence of illegal possession of drugs intended for resale was applied. The Oberlandesgericht Stuttgart posed the question whether this judgment should preclude subsequent prosecution of offences such as those referred to in the arrest warrant. The Italian authorities did not disclose nor shared the information on the criminal network, what constituted an element that the Judge considered to be of importance in order to allow the extradition.

#### *The Ne bis in Idem, the Concept of Same Acts and the Participation in a Criminal Organisation*

According to the referring court, under German law as interpreted by the Bundesgerichtshof (Federal Court of Justice), a crime relating to participation in a criminal organisation may in principle still be the subject of a subsequent prosecution if, first, the earlier charges and judicial investigation concerned only individual acts of a member of such an organisation and if, second, the accused did not have a legitimate expectation that the earlier proceedings encompassed all the acts committed in the framework of that organisation. However, in this case the referring court did not fully subscribe to the Bundesgerichtshof’s position. It suggested a third condition, namely that, at the time of the judicial decision on the individual act, the investigators must have been unaware of the existence of other individual offences and of an offence relating to participation in a criminal organisation, which was specifically not the case so far as the investigating authorities in Italy were concerned.<sup>103</sup>

In this case it was exposed how, in the interests of the investigation, in order to be able to break up that trafficking network and arrest the other persons involved, the investigators did not pass on the information and evidence in

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<sup>103</sup> See Judgment of 16 November 2010, C-261/09, Mantello, available at [http://curia.europa.eu/juris/document/document.jsf?pageIndex=1&docid=84420&dir=next&occ=first&part=1&text=crimen%2Borganizado&doclang=EN&mode=req&cid=829462#Footnote\\*](http://curia.europa.eu/juris/document/document.jsf?pageIndex=1&docid=84420&dir=next&occ=first&part=1&text=crimen%2Borganizado&doclang=EN&mode=req&cid=829462#Footnote*)

their possession to the investigating judge or at that time request the prosecution of those acts. So the offender was condemned by an individual act and subsequently he was going to be prosecuted for the participation in a criminal organisation.

The Court concluded that the concept of the ‘same acts’ in Article 3(2) of the European Arrest Warrant Framework Decision is an autonomous concept of European Union law, that, according to the referring court, if that concept were to be analysed only in the light of the law of the issuing Member State or of that of the executing Member State, it would then be bound to order Mr Mantello’s surrender.<sup>104</sup>

For the purposes of the issue and execution of a European arrest warrant, the concept of ‘same acts’ in Article 3(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States constitutes an autonomous concept of European Union law. Thus, a decision which, under the law of the Member State which instituted criminal proceedings against a person, does not definitively bar further prosecution at national level in respect of certain acts cannot, in principle, constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person in one of the Member States of the European Union in this case for organised crime.<sup>105</sup>

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<sup>104</sup> That would be the case because, first, under German law as interpreted by the Bundesgerichtshof, a crime relating to participation in a criminal organisation may as a general rule still be the subject of a subsequent prosecution if the earlier charges and judicial investigation concerned only individual acts of a member of such an organisation and if, second, the accused did not have a legitimate expectation that the earlier proceedings encompassed all the acts committed in the framework of that organisation. Second, taking into account the case-law of the Corte suprema di cassazione referred to in paragraph 14 of the present judgment and the information, mentioned in paragraph 26 of this judgment, which was provided to the referring court on 4 April 2009 by the investigating judge of the Tribunale di Catania, the judgment of 30 November 2005 by that court does not preclude, under Italian law, the institution of criminal proceedings in respect of offences such as those alleged in the arrest warrant.

<sup>105</sup> Paragraph 47 of the Mantello Case.

