

ORGANIZED CRIME GROUP. ASPECTS OF COMPARATIVE LAW

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Abstract: *As we can clearly notice nowadays, one of the main objectives of the United Nations and of the international intergovernmental organizations such as the UN is that of creating a space of freedom, security and justice without frontiers, a space in which crime is prevented and fought, a space which provides a high degree of security by preventing and fighting crime through measures of coordination and cooperation between the police and other competent authorities, as well as by mutually acknowledging the criminal sanctions and by aligning the criminal laws.*

Key words: *organized crime, cooperation, group, imprisonment.*

1. Introduction

Thus, we can see that the most important law in regard to fighting crime is the United Nations Convention against Transnational Organized Crime, a document whose object is „promoting cooperation in order to prevent and efficiently fight transnational organized crime”(Article 1, Convention against Transnational Organized Crime)[5].

The reasons for passing this convention are quite numerous: some of those were the basis of the motivation of the European Parliament’s resolution [10] whereby it urges the Commission to elaborate a proposal of a directive by which any association with the mafia and other organized crime group becomes a crime in all member states and the crime organizations which profit just by their simple existence, by intimidating and threatening with the purpose of committing a crime or influencing the economy or

public offices or the electoral system are subsequently sanctioned.

The economically developed states have basically acted on the impulse on limiting the damage caused to their budgets by the phenomenon of organized crime as a result of these actions.

At the same level, it was also noticed that organized crime generates substantial costs, violating human rights and undermining the democratic regulations, by embezzling and wasting financial, human and other types of resources, by distorting the free market, the legal economical activities, by favoring corruption, by polluting and destroying the environment. Seeing that there are sufficient judicial and inquiry evidence which prove that, in some member states, organized crime is infiltrated and consolidated in the political environment, in the public administration and legal economy, the possibility of such infiltration in the rest of the UN was

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acknowledged, which consolidated the position of organized crime.

The Parliaments of the member states of the European Council have begun a vast activity to legislate which resulted in elaborating laws, changing the criminal codes and adding new regulations in the areas which are constantly under attack from organized crime groups.

2. Organized crime group

As globalization led to the expansion of international commerce, the activities of crime organizations throughout the country have widened and diversified.

The traditional hierarchy of the groups which acted based on geographical criteria have diminished as they were replaced with free networks which work together in order to exploit new opportunities on the free market.

Thus, it became necessary to have a definition of the „organized crime group” on an international level.

Given all these, although they all signed the United Nations Convention against Transnational Organized Crime, not all states share the same legal definition of the organized crime group and not all countries benefit from a special law against organized crime.

3. United Nations Convention against Transnational Organized Crime versus the Regulatory Decision 2008/841/JAI

On an international level the definition of organized crime is provided by the second article of the United Nations Convention against Transnational Organized Crime, which stated that the „organized crime group is a structure” [5] formed of three or more people, a group which exists for some time and acts based on mutual understanding with the purpose of

committing several serious crimes or any other crime regulated in the present convention in order to obtain, directly or indirectly, a financial or material advantage” [5]. A structured group is „a group which was not randomly formed to commit a crime and it does not have a certain role of continuity or elaborate structure for its members” article 2, letter c) of the United Nations Convention against Transnational Organized Crime.

In Europe, it was also thought that it was necessary to improve the capacities of the member states but also that of the European Union in fighting organized crime, thus, on December 24th, 2008 the UN Council passed the Regulatory Decision 2008/841/JAI regarding the fight against organized crime. Unlike the international regulation, this decision does not mention the notion of „organized crime group”. However article 1 provides the definition of „crime organization” and „structural association”.

The crime organization is defined as a „structured association, established in time, by more than two people which act together in order to commit crimes which are punished by imprisonment of at least 4 years or a more severe punishment in order to directly or indirectly obtain a financial or material benefit” (Article 1, point 1, the Regulatory Decision 2008/841/JAI).

Meanwhile the international and the European definition present certain differences. First there is the notion describing the group which is a crime group in the Convention and a crime organization in the decision.

Those are the fact that there is a structure and in order for it to be thusly considered it has to have some continuity in time. However, we must notice that „the European lawmaker” was very explicit in this matter by explaining the notion of „structured association”. Thus, the essential traits of the crime organization

are quite clearly pointed out by stating that „a structured association” is „an association which is not randomly formed in order to commit a crime and has no predefined roles for its members or its activities” (Article 1, point 2, the Regulatory Decision 2008/841/JAI). In regard to the benefits of these specific activities, the organized crime group and the crime organization both wish to obtain financial or material benefits.

The difference between the two definitions is noticed in regard to the condition needed for it to achieve the purpose of the group; mainly, these have the same purpose, but there are differences when it comes to the way in which the organized crime group and the crime organization achieves it.

Thus, the organized crime group „acts based on mutual understanding with the purpose of committing one or several serious crimes or any other crime regulated in the presented convention” whereas the crime organization „acts as a whole in order to commit crimes which are punished by imprisonment of at least 4 years or a more severe punishment”.

One might also claim that, considering the fact that a serious crime is defined by the Convention as an act „which is a crime punished by imprisonment of at least 4 years or a more severe punishment” (Article 2. letter b) of the United Nations Convention against Transnational Organized Crime [5]) the differences are noticeable only in regard to using different terms.

We must also consider the fact the Regulatory Decision is more comprehensive given that it does not only refer to the crimes punished by imprisonment of at least 4 years or more, but also to the situation of applying a punishment of 4 years at most.

Also, given the limits for the punishment clearly stated within the two documents, there is the question of how these two will

be transposed in the internal laws of the states which signed the Convention. Article 5 of the Convention states that every state will pass the necessary laws in order to qualify as a crime the fact of creating an understanding with one or more people in order to commit a crime, if it was committed with intention and in order to obtain a financial or other material advantage or when internal law requires it.

The Regulatory Decision of the U.N. is in this case much more specific, as it expressly mentions in article 3 that „every member state must take all necessary measures in order to ensure that the crime mentioned in article 2 letter” (a) is punished by a 2 to 5 years imprisonment”. This article states that „any person’s behaviour which knowingly and intentionally takes part in criminal activities of the organisation, including by providing information and material means, recruiting new members, financing the group, knowing that this activity would contribute to achieving the criminal purposes of the organization”.

Given these two regulations and the way the organized crime group and the crime organization is described, it is interesting to observe the way in which member states follow the Convention and the Regulatory Decision and the way in which they chose to define this notion in their internal laws.

4. Italian Law

It is thought that Italian organized crime groups are the most complex and the most powerful ones, with a rich and agitated past and a present „anchored in the shocking events which happened in the contemporary times” [1].

Italian criminal law is considered an important European model in fighting organized crime. Given all these, the Italian law does not provide a definition of the organized crime group or the crime

organization. However, Italian law is the only law which clearly regulates mafia-like associations.

Defining the concept of organized crime group can be deduced from the regulation of association in order to commit crimes (Article 416, Italian Criminal Code - *Associazione per delinquere* [8]) as mentioned in the Italian Criminal Code, that is „when three or more people come together in order to commit crimes; those who promote or hire the association will be punished only for this deed with imprisonment from 3 to 7 years; the mere act of belonging to an association will be punished with imprisonment from 1 to 5 years. The leaders will be punished with the same punishment as the people who organized the group”.

From the present regulation, we can observe some features of the organized crime group, that it is a structured group and in order for it to be considered an organized crime group it has to have at least three members.

Given all these, the Italian lawmaker makes no mention of the group's continuity in time.

We must also mention that, in regard to the members of the group, in case there are 10 members or more, the punishment is more severe. However, it is not mentioned how severe.

„The superior form” [2] of organized crime is called a Mafia and is distinctly regulated in the following article (Article 416 bis, Italian Criminal Code - *Associazione di tipo mafioso* [8]).

Except for the more severe punishments regulated for this type of association, the features are listed, thus meaning that „the association will be considered a mafia-like association when its members use force or intimidation, constraint or the silence code in order to commit crimes or achieve direct or indirect control of economical activities by exercising leadership, offering

authorization, contracts or public services, achieving profit or preventing the freedom of expression, preventing the right to vote of buying votes for themselves or others during elections.”

Considering these traits, it is legitimate that we ask whether a mafia-like association exceeds the comprehensive definition of the organized crime group stated in the Convention or that of the Regulatory Decision.

We feel that this notion does not exceed state regulations as the purpose is the same as the one expressed in international law, the only difference being that these crime groups have a different *modus operandi*.

4. German Law

Germany has one of the most advanced, comprehensive and strict law as opposed to the other member states. However, in fighting organized crime, Germany did not pass any special laws, but adjusted the present Criminal Code regulation.

Thus, after the Convention against Transnational Organized Crime had been passed, Germany readjusted article 129 of its Criminal Code [7]. Much like the Italian law, a definition of the organized crime group is not provided, as it can be defined based on the specifics mentioned in the previous article.

The German lawmaker stated that „whoever creates an organization with the purpose of committing crimes or whoever participates in such activities as a member, recruits members or supporters or supports the organization in any way will be punished with imprisonment of up to 5 years or a fine”.

As we can see, this regulation is quite general, given the fact that German law must only create the legal frame in which the criminal laws of each *Land* can coexist. As a novelty, we notice the alternative punishment of a fine.

The minimum number of members in order to be considered an organized crime group is not clearly stated, as is not the time continuity element.

However, this apparent deficiency was completed on a national level by Decision 23,239 of the German Federal Court, the Crime Section, which „in order to create a legal frame which requires the laws to be reinforced in the same way in all treaties signed by Germany”[4] has stated that „a criminal organization is that group of people with a well built structure, formed of at least three members acting together in order to commit crimes which will provide some benefit and each member must obey their will”[7]. There is however an element of novelty. That is the fact that each member must obey the will of the group.

The German doctrine noticed that „individual will is amenable to the will or the crime organization, but this must not be achieved by force, as it must be determined by the wish of every individual to take part in the organization”[4].

In defining the concept of organized crime group as well as criminal organization, we must mention that there have been *de lege ferenda* suggestions in this regard. Until now, these suggestions have not been transformed into law.

The German criminal system has passed a series of special laws which regulate crimes that if committed by an organization are considered to be more severe and in order to point that out, it also sanctions the „professional” way in which they were committed”[3].

5. Swiss law

Unlike the German lawmaker, the Swiss lawmaker thought it was necessary to readjust its Criminal Code after having ratified the Convention against

Transnational Organized Crime. A specific to Swiss law is the notion of „crime organization” as defined by common law (Swiss Criminal Code).

As Switzerland has a rich jurisprudence in fighting organized crime, a special law was not considered necessary.

The notion of „crime organization” is defined in article 260³ of the Criminal Code as „an organization formed of at least three people which keeps its structure and number of members a secret with the purpose of committing violent acts or collecting income through violent acts”.

However, the Swiss lawmaker allowed greater liberty to the courts in determining the sanctions according to the severity of each deed as long as the maximum time does not exceed 5 years imprisonment. Thus, the Swiss Prosecutor’s Office published some statements regarding the correct interpretation of the structure and characteristic of the organization.

The term „secret” is thought to be a continuous activity of concealment; organizations, in order to meet the requirements of the present law must be formed of at least three people, it must have a solid structure and a permanent existence; the simple participation is considered a crime as it is not necessary to commit a crime; „achieving profit” implies a classic interpretation suggesting both legal and illegal activities.

An interesting regulation concerning the crime organization is presented in the second alignment of the same article where it is stated that „the judge can reduce the sentence of whoever tries to prevent illegal activities of the organization”.

This regulation aims at encouraging the prevention of illegal activities by crime organizations.

Also „whoever commits crimes outside the state is also punished if the organization to which he is a member commits crimes in Switzerland”.

6. Romanian Law

As a result of ratifying the Convention against Transnational Organized Crime, Romania, passed in 2003, Law no 39 regarding the prevention and fight against organized crime. This law distinctively mentions the notion of organized crime group as defined by the convention.

According to article 2, letter a) of Law no 39/2003 “the organized crime group is the structured group, formed of three or more people, a group which exists for some time and acts with the purpose of committing one or more serious crimes, in order to directly or indirectly obtain a financial or material benefit; it is not considered to be an organized crime group, the group which is formed with the purpose of committing an immediate crime or more crimes, a group which has no continuity or a determined structure with preset roles for its members”.

As we can easily notice, the above mentioned regulation comprises the notion of “organized crime group” as well as the distinctly regulated one of “structured group”.

An “organized crime group” must meet the following two conditions at the same time: the group must be formed of three or more people and it must function for a specific period of time in a coordinated way [2]; the second condition is that this group must not be occasional, it must be built based on a previous “study” considering certain qualities of its members. In regard to the coordinated functioning of the group, a hierarchy is needed and the role of each member must be established.

De facto, the group must have an established structure, certain components with complementary tasks in achieving the criminal goal, a hierarchy with specific roles and rules of conduct specific to a structured unit.

Article 7 of the same law states that “the forming of an organized crime group or the participation or support of such a group is punished by imprisonment from 5 to 20 years and by the restriction of some rights”.

Thus, initiating an organized crime group is the *in abstracto* forming of the group, the building of the group implies “an association or agreement between several people in order to create a group which will exist in time, to prepare and organize crimes stated by law” [2].

Becoming part of a group requires the express consent of a person, while supporting the group implies assistance, help, and advice in order to commit crimes. Given all these, as the lawmaker uses the term “support in any form”, we should mention the specific activities discussed here, in order to protect one’s right to a fair trial.

Considering the previously presented laws, we must also mention that the previous Criminal Code regulated the forming of an organized crime group, under the form of the crime known as “association in order to commit crimes”, an article which was not modified after the convention had been ratified.

This was stated in the 1864 Criminal Code as “the association between perpetrators in order to commit crimes against a person or against property”. It is obvious that Romanian law was quite similar to the French one based on the qualification of this deed. Thus, the old Criminal Code, stated, in article 323 first alignment that the deed of “creating an association in order to commit one or more crimes, other than the ones stated in article 167 or participating in or supporting a crime group in any way, is punished by imprisonment from 3 to 15 years without exceeding the maximum punishment for the deed committed while in the association”.

Article 167 of the previous Criminal Code[11] regulated the crime of plotting by initiating or forming an association with the purpose of committing treason, helping the enemy, betrayal by selling secrets, wrongful actions against the state, espionage, attempt at national security, undermining the state, diversion, undermining the economy, actions against the constitutional order. As we can easily notice, there was no number of members stated, neither was the condition of the organized structure.

However, the current regulation states this crime as “the forming of an organized crime group”. It is defined by the sixth alignment of article 367 as the “structured group formed of three or more people, for a certain amount of time in order to act in an organized manner for committing one or more crimes”.

If the previous regulation presented some doubt in regard to the similarities between the organized crime group and the association with the purpose of committing crimes, the current regulation eliminates these doubts.

So as not to be any confusion, we must mention that the first alignment of article 367 of the Criminal Code provisions that “the initiation or formation of an organized crime group, participating or supporting such a group is punished by imprisonment from 5 to 20 years and the prohibition of some rights”. As we can easily notice, the new Criminal Code absorbs those stated in article 7 first alignment of Law no 39/2003.

The new regulation is also inspired by French laws but it also respects the provisions of the Regulatory Decision 2008/841/JAI.

To point out the similarities with French laws, we quote the provisions of article 367 fourth alignment postulating that “people who have committed the crimes stated in the previous two alignments who

decide to denounce these deeds to the authorities will not be punished if they denounce the deeds before the organized crime group was discovered and any crime was committed” (article 450-2, French Criminal Code [6]). This regulation is similar to that stated by article 450-2 of the French Criminal Code.

Back to the current common law regulation, we must also state that the association of several people is not considered to have an antisocial significance, as the idea of forming a group for a certain activity is not considered to be illegal.

But when the group has the antisocial goal of committing crimes, that certain group is dangerous just by its existence, regardless of whether the deeds for which the group had been formed were committed.

The social danger of this deed resides in its purpose, that of “committing one or more serious crimes in order to directly or indirectly obtain a financial or material benefit”.

Although it is an agreement between several people in order to commit crimes by planning the execution of these crimes, the forming of an organized crime group threatens the rightful order of law, the social security and public order.

7. Conclusions

Organized crime is thought to be one of the major threats to man’s security as it prevents the development of society from a social, economical, political and cultural point of view.

It is a phenomenon with multiple sides manifested in multiple forms; the most common and dangerous being drug trading, human trading, illegal weapon trading, to name only a few. The forms of organized crime have new meanings in the context of the geopolitical, economical and

social changes that occurred in the international community as the area of activity for these organizations is widely spread in all countries, either developed or in the course of development.

As we have stated, the states which signed the Convention against Transnational Organized Crime did not rush to integrate the international regulations in their internal laws. This is an essential condition in order for the fight against organized crime to have a solid basis.

There is no unique model of a transnational crime organization as it has different forms, conducts, experience, areas, tactics or mechanisms.

Thus, the fight against organized crime is quite complex and requires international cooperation, crime organizations are flexible, sophisticated, easily adjustable and are in permanent expansion of their alliances and agreements in order to obtain boarder access to „know-how”, new technologies of ensuring better protection from state’s authorities, reducing risks and opening new channels of illegal activities.

Given the current situation and in order to cover all areas in which crime groups could operate, the European Parliament supports member states in their actions against organized crime and encourages them to consolidate their judicial authorities and police forces based on the best available expertise and by comparing laws and resources meant to sustain their activity and provide the necessary financial and human resources in order to achieve this goal.

The premise for cooperation and mutual support thus created in order to fight crime provides the states with the need to develop a proactive investigation approach, to elaborate plans to fight crime and to coordinate their actions through adequate structures.

We must not forget that all the measures taken to fight crime must fully respect fundamental rights and must be adjusted to the objectives that they achieve in a democratic society.

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