

SOME COMMENTS ON THE OFFENCE OF SETTING UP AN ORGANIZED CRIMINAL GROUP IN ROMANIAN LEGISLATION

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Abstract: *The study performs an analysis of the offence of setting up an organized criminal group, provided by the Article 367 of the Romanian Criminal Code. When performing the analysis of the offence of setting up an organized criminal group, it was taken into account the text in force of the offence of setting up an organized criminal group provided by the Article 367 of the Romanian Criminal Code, the provisions of the Article 2 from the European Union Council Framework Decision 2008/841/JHA on the fight against organized crime and the provisions of the Article 5 from the United Nations Convention against Transnational Organized Crime.*

Key words: *organized criminal group, organized criminality, offence of setting up an organized criminal group, organized crime.*

1. Introduction

Organized crime can in essence be defined as "that criminal segment to which illegal activities are reported to seriously affect certain sectors of economic, social and political life, carried out by various methods and means, consistently planned and conspired by associations of individuals with a well-defined internal hierarchy with specialized structures and mechanisms of self-defence in order to obtain illicit profits at particularly high quotas" (Moise, Stancu, 2017, p. 171). This definition highlights two main features of the concept of organized crime (Britz, 2013, p. 167-172): the degree of social danger of illegal activities carried out by this criminal segment can seriously affect certain sectors of society; the constant, organized, planned and well-conspicuous deployment of these criminal activities.

The United Nations Convention against Transnational Organized Crime has introduced an expression of an *organized criminal group*. Thus, according to the provisions of Article 2 letter (a) of the United Nations Convention against Transnational Organized Crime, an organized criminal group is defined as: „a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in

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order to obtain, directly or indirectly, a financial or other material benefit". The United Nations Convention against Transnational Organized Crime and its Protocols, adopted by the United Nations General Assembly Resolution 55/25 of 15 November 2000 and opened for signature on 12-15 December 2000 in the city of Palermo, came into force on 29 September 2003, includes a number of offences, such as criminalization of participation in an organized criminal group, criminalization of the laundering of proceeds of crime, criminalization of corruption and obstruction of justice.

At European Union level, the concept of criminal organization as defined by the Council of the European Union - Justice and Home Affairs is used through Joint Action 98/733/JHA of 21 December 1998 adopted on the basis of Article K.3 of the Treaty of the European Union on the criminalization of participation in a criminal organization in the Member States of the European Union.

Thus, according to the provisions of Article 1, the criminal organization is "a structured association of more than two persons, established in time, acting in concert to commit crimes punishable by deprivation of liberty or the deprivation of freedom of up to four years or a more severe punishment, whether these offenses are an end in itself or a means of obtaining material advantages and, as the case may be, of illegally influencing the functioning of public authorities".

Later, the Council of the European Union, through the European Union Council Framework Decision 2008/841/JHA on the fight against organised crime that repealed Joint Action 98/733/JHA, redefined the notion of *criminal organisation*. Thus, according to the provisions of Article 1 point 1 of the Council Framework Decision 2008/841/JHA, the 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”.

Also, according to the provisions of Article 1 point 2 of the Framework Decision 2008/841/JHA, a 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”.

In Romania, the notion of *organized criminal group* is provided by Article 367 paragraph 6 of the Romanian Criminal Code and refers to the "structured group consisting of three or more persons, constituted for a certain period of time and to act in a coordinated way for the purpose of committing one or more offences".

Considering the three definitions of the organized criminal group concept presented above, we provide the following explanations. For the existence of an organized criminal group it is necessary to fulfill the following conditions: the unlawful association of a number of people, the stability over time of the criminal group and the adoption of a criminal program (Dobrinoiu, Pascu, Hotca, Chiş, Gorunescu, Neagu, Dobrinoiu, Sinescu, 2014, p. 859).

Regarding the first condition of existence of the organized criminal group, the international criminal doctrine established that the minimum number necessary to constitute a criminal group is at least 3 persons (Britz, 2013, p. 170-171).

The second condition for the constitution of the organized criminal group refers to the stability of the criminal group in the sense that it must operate for a long or indefinite period of time. The manner of setting up organized criminal groups and of establishing roles between their members allows criminal groups to have some continuity over time, regardless of whether some members die or are convicted, or withdraw from the criminal group by choosing the silence law (Britz, 2013, p. 170).

A third condition to be met for the existence of an organized criminal group lies in the elaboration by the criminal group of a criminal plan aimed at committing offences (Britz, 2013, p. 172).

Thus, the organized crime group is characterized by the following: is composed of three or more people; is a structured group with a form of organization and an internal code of rules; is set up for a long time; has the immediate purpose of committing serious crimes; has the ultimate objective of obtaining unlawful material benefits (Roth, 2010, p. 14-15).

To indicate the same phenomenon, different authors, or international documents, use different expressions such as (Roth, 2010, p. 11-15): organized criminality, organized crime, criminal organization, transnational crime or transnational organized crime.

The offence of setting up an organized criminal group is provided by the Article 367 from, Title VII, Chapter I, entitled *Offences against order and public peace* from the Romanian Criminal Code. The legal text states:

“(1) The initiation or formation of an organized criminal group, the adherence or support in any form of such a group shall be punishable by imprisonment from one to five years and the prohibition of the exercise of certain rights.

(2) When the offence committed for the purpose of the organized crime group is punishable by law with life imprisonment or imprisonment for more than 10 years, the punishment is imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights.

(3) If the facts provided in paragraph (1) and paragraph (2) were followed by committing a crime, the rules on the offence contest apply.

(4) The persons who have committed the deeds referred to in paragraph (1) and paragraph (2), if he/she denounces the organized crime group to the authorities before it has been discovered and any of the offences falling within the group's purpose has been committed.

(5) If the person who has committed one of the deeds referred to in paragraph (1) - (3) facilitates, in the course of criminal prosecution, the finding of the truth and the criminal liability of one or more members of an organized criminal group, the special penalty limits are reduced by half.

(6) Organized crime group means a structured group consisting of three or more people established for a certain period of time and acting in a coordinated manner for the purpose of committing one or more offences”.

The offence of setting up an organized criminal group, provided by the Article 367 of the Romanian Criminal Code is regulated in a type variant (paragraph 1), an aggravated variant (paragraph 2), a variant which stipulates the existence of the crime contest (paragraph 3), a cause of non-punishment (paragraph 4) and a cause of reduction of

punishment (paragraph 5). With respect to the cause of non-punishment, this is only possible if three conditions are met cumulatively: the criminal group has not been discovered by the authorities; the organized criminal group did not commit the offences covered by the criminal plan; persons must report to the authorities the act of setting up the organized criminal group.

According to the provisions of the Law no.39/2003 on preventing and combating organized crime, organized crime has two important characters: the serious character and the transnational character.

Thus, according to Article 2 (b) of the Law no.39/2003, the serious offence represents "the offence for which the law provides the punishment of life imprisonment or punishment of imprisonment whose special maximum is at least 4 years, as well as nine offences".

Article 5 of the United Nations Convention against Transnational Organized Crime incriminates the act of participating in an organized criminal group. The text of Article 5 includes: "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group".

Article 2 of the Council Framework Decision 2008/841/JHA on the fight against organized crime stipulates the offenses relating to participation in a criminal organization. Thus, Article 2 criminalizes the following behaviours: "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; 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".

2. The pre-existing conditions

2.1. The object of the crime

The special legal object of the offence of setting up an organized criminal group is represented by the social relationships relating to social cohabitation, order and public silence that are seriously affected by the creation of the organized criminal groups. The offence of setting up an organized criminal group has a *special secondary legal object*, which refers to the serious offences that come within the scope of the organized criminal group, consisting of the social relations that are jeopardized by the crimes proposed to be committed by the members of the group (Căşuneanu, 2013, p. 88).

The offence of setting up an organized criminal group does not have a *material object*, because the action that constitutes the material element is not directed to a material object.

2.2. The subjects of the crime

The active subject of the offence of setting up an organized criminal group is undetermined (Dobrinioiu, Pascu, Hotca, Chiş, Gorunescu, Neagu, Dobrinioiu, Sinescu, 2014, p. 862). In the normative version of the *initiation* of an organized criminal group, the subjects of the offence will have only the quality of co-authors (constituted plurality), because the instigation or complicity refers to actions within the sphere of initiation. Thus, in the normative version of the *formation*, it is not possible to instigate, since it refers to the variant of initiation, the first modality of the offence. At the same time, we consider that complicity is not possible, because it consists in supporting in any form the organized criminal group.

In the other variants, namely, the formation, adherence and support in any form of an organized criminal group, the active subject can be a single person.

Other forms of criminal participation, instigation and complicity may fall under the following normative rules. Thus, in the case of *formation*, the form of criminal participation is complicity. In the case of *adherence*, the form of participation is both instigation and complicity, and in the normative version of *support in any form*, the criminal participation can only exist in the form of instigation. On the other hand, in the case of committing offences falling within the scope of the organized crime group, criminal participation is possible in all its forms: co-author, instigation and complicity.

The passive subject of the offence of setting up an organized criminal group is the state as the holder of the values protected by the criminal law.

3. The constitutive content

3.1. The objective side

The material element of the offence of setting up an organized criminal group is accomplished by the following normative modalities: initiation, formation, adherence or support in any form of an organized criminal group.

The normative modality of *initiating*, can be understood as the putting into operation of the criminal plan of the criminal group. The activity of initiating an organized criminal group refers to planning the illegal action and attracting people who are to be convinced of the benefits of the criminal actions of the criminal group. Practically, the activity of initiating an organized criminal group consists of taking an initiative by one or more persons to carry out the criminal group, through preparatory activities for setting up the organized criminal group (Vy Le, 2012, p. 123-125).

We believe that the initiator of an organized criminal group will only be criminally liable, if their activities lead to the formation of the organized criminal group. We note that the United Nations Convention against Transnational Organized Crime defines initiation as an agreement between one or more persons for the purpose of committing a serious crime with a direct or indirect purpose to obtain a financial advantage or any other material advantage.

We note that the United Nations Convention does not criminalize the mere initiation, which may not be followed by the constitution of the organized criminal group, a provision that Romanian lawmakers should consider in the future, and will transpose it into the criminal legislation through an amendment and a completion of the provisions of Article 367 paragraph 1 of the Romanian Criminal Code.

The activity of *setting up* an organized criminal group refers to the association of at least three persons, who are to prepare the criminal group for the implementation of the criminal plan to commit more offences. An organized crime group is constituted only if it has a minimum of 3 members, has established a set of rules of operation, a hierarchy, has assigned the roles and tasks of each member of the group and has developed a criminal plan (Dobrinou, Pascu, Hotca, Chiş, Gorunescu, Neagu, Dobrinou, Sinescu, 2014, p. 863). We believe that the activity of setting up the criminal group refers to the accomplishment of the criminal group that has to function for a period of time.

The normative modality of *adherence* refers to a person's request to be part of an organized criminal group that is already established.

To find ourselves in the presence of this normative modality, we believe that this request must be approved by the leaders of the organized criminal group. Adherence to an organized criminal group refers to the actual entry of the person into the organized criminal group, and it is irrelevant whether or not that person participates in the illegal actions of the organized criminal group (Căşuneanu, 2013, p. 90).

The normative modality of *supporting in any form* the organized criminal group refers to the help given to the group by a person who is part of this criminal group. Our opinion is that this normative variant also refers to the help given by a person who is not part of this organized criminal group, in this case being an occasional plurality. The offence of setting up an organized criminal group is a form of plurality of criminals.

The immediate consequence consists of producing a state of danger for the state authority.

There must be a *causality link* between the activity of the offender and the consequence that results from the materiality of the crime.

3.2. The subjective side

The offence of setting up an organized criminal group is committed with direct and indirect intention. Thus, with regard to the normative forms of formation, initiation, adherence, the offenders act in a premeditated manner, committing the offence only with the form of guilt of direct intention. Regarding the normative variant of supporting in any form an organized criminal group, the perpetrators can commit the offence with both forms of guilt of intention, both direct and indirect. The purpose of committing the offence of setting up an organized criminal group is to obtain material illicit profits.

4. The forms of the offence

In the case of the offence of setting up an organized criminal group, *the preparatory acts* and *the attempt* are possible, although these are not incriminated by the Romanian legislator.

The consumption of the offence of setting up an organized criminal group takes place when any of the normative variants contained in Article 367 from the Romanian Criminal Code (initiation, formation, adherence or support in any form of an organized criminal group) was committed. Therefore, the offence of setting up an organized criminal group is consumed when the material element is carried out and the socially dangerous result is produced.

The exhaustion of the offence occurs at the time of committing the last act criminalised by the legislator, usually leading to the conviction of the members of the organized criminal group. In the specialty literature, it was considered that a moment when the offence of setting up an organized criminal group has been exhausted is also the decision of the members of the criminal group to cease its existence (Dobrinioiu, Pascu, Hotca, Chiş, Gorunescu, Neagu, Dobrinioiu, Sinescu, 2014, p. 863). The offence of setting up an organized criminal group can be committed in continuous form.

5. Modalities

The offence of setting up an organized criminal group presents the following normative modalities, according to the provisions of the Article 367 from the Romanian Criminal Code: the initiation or formation of an organized criminal group, the adherence or support in any form of such an organized criminal group. To these normative modalities may correspond various fact modalities.

6. Sanctions

The type variant (paragraph 1) of the offence of setting up an organized criminal group is sanctioned by applying a punishment of imprisonment from one to five years and prohibiting the exercise of certain rights, and the aggravated variant (paragraph 2) is sanctioned with imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights. Article 367 of the Romanian Criminal Code also provides a cause of non-punishment (paragraph 4) and a cause of reduction of punishment (paragraph 5).

7. Conclusions

Regarding the provisions of Article 367 paragraph 1 and paragraph 2 of the Romanian Criminal Code and the provisions of Article 2 (b) of the Law no. 39/2003 on preventing and combating organized crime, we have to make the following remarks. Since the provisions of Article 367 paragraph 1 and paragraph 2 criminalize the act of setting up an organized criminal group in two variants, the standard variant, in the case where the offence which comes under the purpose of the organized criminal group is punished by law with imprisonment of 10 years or less, and the aggravated variant, if the offence committed for the purpose of the organized criminal group is punishable by law with more than 10 years' imprisonment, we believe that the provisions of Article 2 (b) of the Law no. 39/2003, which refer to the concept of serious crime for which the law provides the punishment of life imprisonment or punishment of imprisonment, whose special maximum is at least 4 years, should be restated or even repealed by the legislator, these provisions being no longer useful. At the European Union level, the most important legal instrument in the field of preventing and combating organized crime is the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime, which largely transposes the provisions of the United Nations Convention against Transnational Organized Crime.

In conclusion, we noticed that both the provisions of Article 5 of the United Nations Convention against Transnational Organized Crime and the provisions of Article 2 of Council Framework Decision 2008/841/JHA on the fight against organized crime have been transposed almost entirely in the text of the Article 367 of the Romanian Criminal Code.

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