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TRANSNATIONAL CRIME AND EU LAW: TOWARDS GLOBAL ACTION AGAINST CROSS-BORDERS THREATS TO COMMON SECURITY, RULE OF LAW AND HUMAN RIGHTS

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Abstract: *Moving from the analysis of transnational criminal law as the legal framework to counter cross-border crimes, this article focuses on "the new dimension" of EU criminal competence, that is no longer restricted to Member States' legislative harmonization and judicial cooperation within the Union, leading to serious rule of law and human rights deficits.*

Key words: *EU criminal competence, EU security, human rights-based approach, rule of law, transnational crime.*

1. Introduction

Transnational crime knows no borders, emblematic of the link between internal and external security (Com(2021) 170 Final, p. 2; COM(2020) 605 final). These crimes pose a significant threat to European citizens, businesses, state institutions, and the economy as a whole. Indeed, perpetrators of terrorism and other organized crime use their vast illegal profits to infiltrate the licit economy and public institutions, including via corruption, eroding the rule of law and fundamental rights, undermining people's prerogative to safety and their trust in public authorities.

Additionally, global emergencies, such as armed conflicts, health needs, and natural catastrophes, amplify the threat that cross-borders offences pose to EU values and to internal and external security. The recent Russian-Ukrainian crisis, the Covid-19 pandemic, and environmental disasters due to climate change have in fact created opportunities for transnational crime to flourish, increasing cyber-attacks, illicit arms trafficking, fraud in medical device counterfeiting, and human smuggling.

To face these evolving challenges, the EU recently adopted a new Common strategy to tackle transnational crime (COM/2021/170 final) as part of the EU Security Strategy (COM/2020/605 final) intended to ensure that the EU can act "as a united, more influential global actor stepping up international cooperation".

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Moving from the analysis of transnational criminal law as the legal framework to counter cross-border crimes (Section 2), this article focuses on "the new dimension" of EU criminal competence, that is no longer restricted to Member States' legislative harmonization and judicial cooperation within the Union (Section 3), but broadened to actions against cross-border threats (Section 4) implying: 1) tighter institutional links between EU external action and the internal area of freedom, security and justice, 2) the EU's active role in exporting its *acquis* on transnational crime in the context of enlargement and accession, 3) the development of the European Neighbourhood Policy, and 4) full participation in international fora in the fight against transnational offences.

In a critical perspective, the analysis aims to underline the inadequate emphasis on individual guarantees that seem to characterize EU action to counteract transnational crimes, namely leading to serious rule of law deficits, and presents some concluding remarks on the role of the (EU) judge in drawing up a uniform framework of definitions, redresses, and remedies concerning violations of individual guarantees linked to combating transnational offences (Section 5).

2. **Transnational Criminal Law as the Legal Framework to Counter Cross-Border Crimes**

Transnational crimes are criminal phenomena (including organized, corporate, professional, and political crimes) transcending international borders, transgressing the laws of several states or having an impact on another country.

Commonly, the legal framework to counter transnational crimes is enforced through criminal justice frameworks, i.e., criminalizing certain individual conduct in domestic legislation, and prosecuting and punishing perpetrators. This 'criminal justice approach' in essence establishes a mainly 'repressive' mechanism enacted 'after' the transnational crime has been committed, and by itself does not appear to satisfactorily eradicate cross-border violations.

Scholars and practitioners have therefore advanced several arguments in favor of adopting a complementary and 'preventive' approach to transnational crimes, the human rights-based approach (HRBA) (Hemsley 2015; Merkle, 2018; Peters, 2018). centered on the role of individuals as 'rights-holders' empowered to claim and exercise their rights, and the role of States as 'duty-bearers' having 'international' obligations to respect, protect, and fulfil human rights (Peters, 2018).

As for the criminal justice approach, this is reflected in the main international instruments countering serious transnational crimes, such as the 2000 United Nations Convention against Transnational Organized Crime (UNTOC or Palermo Convention)

UNTOC deliberately does not contain a closed definition of transnational crimes nor lists them, preferring to focus on the multinational nature of these violations to allow for a broader applicability of the provisions to new types of offences that constantly emerge as global, regional, and local conditions change over time. Hence, under Art. 3 (2) of UNTOC, a crime is transnational in nature if: (a) it is committed in more than one State; (b) it is committed in one State but a substantial part of its preparation, planning, direction, or control takes place in another State; (c) it is committed in one State but

involves an organized criminal group that engages in criminal activities in more than one State; (d) it is committed in one State but has substantial effects in another State.

This definition covers a whole series of cross-border violations of worldwide interest, requiring a 'global response' through State cooperation similarly to 'international' or 'core' crimes (such as war crimes, crimes against humanity, genocide, and crimes against peace), even if the latter may or may not involve multiple countries.

The 'multinational' nature of these offences is consequently the evident feature of transnational crimes, such as the provision of illicit goods (drug trafficking, trafficking in stolen property, weapons trafficking, and counterfeiting), illicit services (commercial sex, and human trafficking), and infiltration of business and government (fraud, racketeering, money laundering, and corruption) that have 'actual or potential trans-boundary effects of national and international concern' (Boister, 2003, p. 954).

On the transnational 'nature' of the crime, in accordance with Art. 3 of the Palermo Convention, some eminent scholars attempted to identify a (new) transnational criminal law (TCL) as a 'system regulated by both international and national law' (Mitsilegas, 2017, pp. 47–49) with different profiles with respect to the notions of international criminal law and national criminal law (Bassiouni, 1999), and not fitting into the traditional divisions' (Boister (2003), p. 955).

As clarified, 'TCL is a system dominated by sovereignty, effective law enforcement and the objectification of individuals as criminals' (Boister, 2002, p. 199). More precisely, the suppression conventions provide minimal express protection of human rights, relying in the first instance on the domestic protection of such rights, and thereafter on general international human rights law. The issue at stake is that the conventions are adopted at the international level but applied at the national level, and if human rights come into play at all at the national level, then they do so reactively and not proactively.

3. The EU (Transnational) Criminal Competence

Similarly to the conventional suppression system, the inadequate emphasis on individual guarantees would also seem to characterize EU action to counteract transnational crimes.

The EU has enacted measures in the criminal law domain for more than a decade to fight crimes that are increasingly transnational and sophisticated, with some correspondence in the definitions and sanctions for some very serious offences, such as terrorism, human and drug trafficking, and fraud impinging on EU financial interests (Oriolo, 2023, p. 219). Due to the absence of an explicit legal basis prior to the 2007 Lisbon Treaty, only a very limited number of measures concerned the enforcement of EU policies.

Nevertheless, according to the European Court of Justice's landmark judgment, while neither criminal law nor the rules of criminal procedure fall under the Community's competence, European legislature can oblige Member States to enact criminal law measures to ensure the effectiveness of the rules laid down in certain policy areas (ECJ C–176/03 (2005), paras 47, 48).

Moreover, the Treaty of Lisbon expressly recognizes Arts. 82 and 83 the EU's competence in procedural and substantive criminal law to ensure a high level of (common) security through the approximation of national criminal legislations, if necessary. It also introduced Art. 86 TFEU allowing the Council, by means of regulations, to establish a European Public Prosecutor's Office to combat serious crimes affecting the financial interests of the Union.

As the next sections will show, even if EU law provides minimum guarantees to protect individuals in the fight against cross-border offences, some rule of law deficits may arise from the large margins of maneuver left to Member States in their enforcement, i.e., lack of uniformity in the application of European standards, to the detriment of a uniform and effective system of redresses and remedies.

In the construction of the area of freedom, security and justice, for example, Art. 67 TFEU expressly demands respect for both fundamental rights and 'the legal systems and traditions of the Member States'.

3.1. The EU *Indirect* criminal competence

As for procedural competence, Art. 82 (TFEU) enables the European Parliament and Council to establish 'minimum' rules to facilitate the mutual recognition of judgments and judicial decisions, as well as police and judicial cooperation in criminal matters having a cross-border dimension.

In particular, paragraph 2 of Art. 82 TFEU allows the Union to establish minimum rules on rights of individuals in criminal proceedings in order to ensure that the rights of defense and the fairness of proceedings are respected. Those minimum rules have been gradually set out by the Union legislator in Directives on specific rights, such as the right to interpretation and translation, the right to information in criminal proceedings, the right of access to a lawyer, the right to be present at the trial etc. (Oriolo, 2023, p. 212), which leaves to the national authorities of Member States 'the choice of form and methods' to achieve the common result. This situation created a 'systemic flaw' (Costa Ramos *et al.*, 2020, pp. 230–248), as EU States are not prevented from planning their procedures in different ways.

With regard to European substantive criminal law, it can be harmonized by means of a): Art. 83(1) TFEU (regulating Euro-crimes); b) Art. 83(2) TFEU (implementing EU policies), and also c) Art. 325(4) TFEU (protecting the EU's financial interests).

Under Art. 83 (1) TFEU, EU competences in the substantive-criminal field concern the adoption of minimum rules in the definition of crimes and sanctions in specific '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'.

This is an *autonomous* but *indirect* criminal competence exercised via directives, i.e., acts that, as mentioned, are not self-executing in nature, *binding Members States to certain objectives to be achieved, leaving them free to* choose the proper means *to achieve the result.* This indirect competence concerns, in particular, an 'exhaustive' list of ten specific offences (so-called Euro-crimes): terrorism, human trafficking, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money

laundering, corruption, counterfeiting of means of payment, computer crime, and organized crime. Additional crimes can only be defined by the Council acting unanimously and with the consent of the European Parliament.

According to TFEU, these are crimes that by definition merit EU consideration due to their very serious nature and cross-border dimension.

Second, codifying the *ancillary* or *annex* competence developed by Court of Justice jurisprudence in the area of environmental crime and ship-source pollution, Article 83(2) TFEU allows the European Parliament and the Council, on proposal from the Commission, to establish 'minimum rules with regard to the definition of criminal offences and sanctions if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to a harmonisation measure'.

Without listing specific crimes, the fulfillment of certain legal criteria is a precondition of adopting criminal law measures at the EU level, notably in respect of Art. 83(2) TFEU where EU criminal policy is especially warranted, and where the communication aims to provide specific guidance.

This provision presents greater complexity, given that EU competences are not identified for specific sectors but must be exercised in those areas already subject to harmonization measures, a condition that does not appear to adequately fulfill a delimiting function of EU criminal intervention. On this point, the 'essentiality' requirement is crucial, as it subordinates the evaluation of the need for EU criminal law measures to the 'effective implementation of a Union policy', which might be interpreted in various ways (Manacorda, 2014, section 3.2).

Mitsilegas correctly stressed that with the introduction of Art. 83 TFEU, 'criminal law is thus used as a tool to achieve the effectiveness of Union law' (Kaiafa, 2011). Specifically, Art. 83(2) TFEU confirms a functionalist view of criminal law, which instead of an autonomous policy is perceived as expediting the effective implementation of other Union policies (Mitsilegas, 2007, p. 71). Art. 83(2) thus adds to EU competence the power to legislate beyond the domain of global security threats, for example, protecting the cornerstones of the EU architecture, such as the EU budget and internal market.

In spite of this, significant rule of law deficits in terms of judicial guarantees could also arise in the context of Art. 83 TFEU given that, also with regard to EU procedural competence, the principle of mutual trust (Di Stasi, Festa, 2022) and the choice of directives as legal instruments to regulate EU criminal competence entail the fragmentation of legal protection in national legal systems directly affecting individual rights and the uniformity of EU law (Montaldo, 2016).

This concern is particularly amplified by the consideration that, under TFEU, when legislating on substantive criminal law or criminal procedure, Member States can pull the so-called 'emergency brake' if they consider that the proposed EU legislation under Art. 82 (3) and Art. 83 (2) touches upon fundamental aspects of their national criminal justice system, in which case the proposal should be referred to the European Council.

3.2. The *Direct* Criminal Competence of the European Public Prosecutor's Office

Art. 325 (4) TFEU enables the European Parliament and the Council, acting in accordance with ordinary legislative procedure, to enact specific measures with regard to preventing and combating fraud affecting the Union's financial interests, an area where some pre-Lisbon legislation already exists.

Thus, the Council of the European Union, acting under Art. 86 TFEU, adopted Regulation 2017/1939 establishing that the European Public Prosecutor's Office (EPPO) (Oriolo, 2018) is mandated to investigate and prosecute the perpetrators of fraud and other offences affecting 'the Union's financial interests' (*EPPO Regulation*, Art. 22). Such interests include the management of budget appropriations, as well as all cases affecting its assets and those of Member States, such as fraudulent activities in relation to EU funds.

The EPPO's establishment brings about substantial changes to the protection of EU law and interests. In particular, the EPPO is the first EU judicial body exercising 'direct powers' *vis-à-vis* individuals responsible for financial cross-border offences (Mitsilegas and Giuffrida, 2017).

As for human rights (judicial) protection, the rights of defense provided for in the relevant Union law should apply to the activities of the EPPO. More precisely, any suspect or accused person in respect of whom the EPPO initiates an investigation should benefit from these rights, as well as from the rights foreseen in national law to request that experts be appointed, that witnesses be heard, or that evidence on behalf of the defense is otherwise produced by the EPPO (*EPPO Regulation*, Recital 85).

However, this new body is a 'model of hybrid prosecution' leading to serious rule of law deficits in terms of detail and legal certainty (Mitsilegas, 2021).

More precisely, as for the applicable law issues, while the EPPO aims to protect European interests, it does not operate in a single European legal area centered on common European standards, but in the distinct national jurisdictions of participating Member States mainly based on national law.

Second, the extraordinary coercive powers bestowed to an EU agency are not counterbalanced by an adequate level of judicial protection at the EU or even national level. In cases where the EPPO can act in multiple jurisdictions, for example, it has considerable discretion to choose (and change) the *forum* on investigations and prosecutions (*EPPO Regulation*, Art. 26(4)), 'switching' between different legal orders, and creating substantial rule of law restrictions in terms of legal certainty, foreseeability, and the protection of fundamental rights of defense, i.e., access to a lawful judge (Mitsilegas, 2021, p. 248).

In addition, EPPO Regulation limits judicial review of the vast majority of EPPO acts, undermining 'effective judicial protection and the role of the defence, by leaving key EPPO decisions without a sufficient level of judicial scrutiny and accountability' (Mitsilegas, 2021, p. 262).

In particular, the rule of law deficit arises from reliance on both national law and domestic courts for the judicial review of EPPO procedural acts intended to produce legal effects *vis-à-vis* third parties, and consequently, the very limited role of the ECJ in

both its preliminary ruling jurisdiction under Art. 267 TFEU and annulment of EPPO acts under Art. 263 TFEU (*EPPO Regulation*, Art. 42(1)) due to 'the specific nature of the tasks and structure of the EPPO, which is different from that of all other bodies and agencies of the Union and requires special rules regarding judicial review' (*EPPO Regulation*, Recital 86).

4. The EU's Global Actorness in the Management of Cross-Border Security

The EU approach to external security is intended to step up international cooperation, including through the activities of the relevant justice and home affairs agencies, security taking an active role in exporting its *acquis* on transnational crime in the context of enlargement and accession, the development of the European Neighbourhood Policy (ENP) (Mitsilegas, 2017, p. 72) and full participation in international fora and in the most relevant treaties on the fight against transnational crimes.

As anticipated, these global rules on transnational crimes create obligations for States and have a direct impact on individuals, posing significant challenges for the global rule of law and requiring equivalence in human rights (judicial) protection. As Mitsilegas remarked: 'In the emergence if a complex, multi-level system of governance of transnational crime, it is increasingly the judiciary at the national and the European level which brings the challenges of rule of law and human rights protection to the fore' (Mitsilegas, 2017, p. 80).

Similar concerns in terms of individual protections are put forward by the EU sanctions regime, transposing or reinforcing UN restrictive measures or those autonomously imposed by the EU, targeting governments of third countries (such as economic and financial measures or arms embargoes), or non-State entities and natural persons (freezing assets and travel bans).

The EU Council Decision and Regulation framework adopted on 7 December 2020 implements a new 'global' sanctions regime allowing the EU to take restrictive measures against legal and natural persons involved in serious human rights violations (i.e., *inter alia* human trafficking, migrant smuggling) regardless of where in the world these offences occurred (Council Regulation (EU) 2020/1998; Council Decision (CFSP) 2020/1999)

In terms of exporting EU *acquis* on transnational crimes in the context of its enlargement, and while the enforcement of EU sanctions is primarily the responsibility of EU Member States, the most effective sanctions are those that have extensive reach, comprising EU candidate countries, European Free Trade Association countries, and European Economic Area countries which are systematically invited to align themselves to the EU's restrictive measures.

As such, support for the EU sanctions regime against most Euro-crimes is also a determining element of the accession process and the ENP.

Of course, as one of the EU's tools to safeguard its fundamental interests, security, and values, such as the rule of law, all sanctions adopted should be fully compliant with obligations under international law, including respect of human rights and fundamental

freedoms, due process, and the right to effective remedy (European Parliament Resolution 2021/2563(RSP), para. 7).

5. Conclusions: Balancing Security and Rights in Countering Transnational Crime

In the construction of internal and cross-border security against transnational crimes, EU law demands respect for Member States' legal systems and traditions to the detriment of the uniform enforcement of EU values and principles, such as human rights, and consequently (substantial) rule of law. National disagreements on the appropriate level of protection of individual rights include which rights are to be protected as fundamental rights, how they are interpreted, and how they are balanced against other interests (De Boer, 2013).

The question as to whether the EU standard of fundamental rights in the area of criminal law provides adequate protection for individuals changed with the Lisbon Treaty and the elevation of the Charter of Fundamental Rights to primary EU law reflecting EU-wide attention to individual guarantees and the rule of law. Since then, the ECJ's awareness of fundamental rights has grown considerably.

Of course, the EU has a number of tools at its disposal to monitor and enforce the rule of law in all Member States, such as the 'Annual Rule of Law Report' launched by the Commission in September 2020 that collects data on the state of the rule of law focusing on four pillars (the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances) (Com/2020/580 Final), and the so-called 'rule of law conditionality requirement', i.e., rules establishing a mechanism that would allow stopping payments from the EU budget to Member States that do not respect the rule of law, adopted by the European Parliament and the Council on December 2020 to protect the EU budget and values (Regulation (EU, Euratom) 2020/2092). In addition, the European institutions' rule of law toolbox includes infringement proceedings triggered by the Commission under Art. 258 TFEU against a Member State that fails to implement EU values and law, as well as potential financial sanctions determined by the ECJ. A further procedure under Art. 7 TUE aims to ensure that all EU countries respect the common values of the EU, including the rule of law, and allows the Council to make recommendations or decide by unanimity on sanctions against a Member State, including the suspension of membership rights.

Nerveless, as highlighted above, in certain circumstances, the rule of law principle is enforced by a decentralized system of counter-crime measures and prosecutions that may themselves violate the 'good laws' requirement, i.e., threaten the fair trial rights of those accused of cross-borders violations.

In our view, the role of the EU judiciary in enhancing the rule of law is crucial where the EU counter-crime regime impacts human rights guarantees.

In particular, without replacing national criminal codes, EU competence in criminal matters could standardize domestic criminal systems in compliance with the human rights-based approach through the ECJ ensuring the uniform interpretation of applicable EU law in all Member States.

Similarly, reliance on national law and judicial review deficits, as stipulated in Regulation 2017/1939, could raise harmonization concerns and rule of law challenges, but the risk of compromising the effectiveness of the EPPO as an EU counter-crime mechanism could be prevented by overcoming the limits to ECJ jurisdiction by extending it to fully comply with rule of law standards (Mitsilegas, 2021).

Again, the parties targeted by counter-crime measures (i.e., within the sanctions regime framework) could *directly* seek legal redress by introducing an annulment action before the EU Court under Art. 263 FTEU, or *indirectly* via legal action against a national measure of enforcement of the EU counter-crime regime, leaving the domestic court to submit a reference to the ECJ for a preliminary ruling under Art. 267 TFEU (Hirsbrunner and Tsakanakis, 2021; C-399/11, para. 60).

Finally, in balancing counter-crime measures with rule of law standards, the ECJ could benefit from ECtHR jurisprudence. In fact, in light of the equivalence clause enshrined in Art. 53 (2) of the Charter of Fundamental Rights of the European Union, the ECJ could import the ECtHR approach to national counter-crime measures (e.g., anti-corruption tools) to assess whether they are lawful, serve a legitimate public interest, and are proportionate (Oriolo, 2021).

The ECJ case-law in this field would give the Court the opportunity to contribute to a uniform framework of definitions, redresses, and remedies concerning violations of individual guarantees linked to combating transnational offences, not only identifying and applying uniform human rights protection criteria to measures countering cross-border crimes, but also developing new standards for extending HRBA to the EU counter-crime regime and fostering a more comprehensive and aligned adoption of EU criminal rules with the requirement of 'good' laws in criminal matters.

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