INTRODUCTION

This thesis was born with the aim of analyzing the tools prepared by the European Union with a view to an increasingly effective contrast to the rampant phenomenon of transnational crime and the most important implementation prospects, also on the basis of the most recent criminal policy choices adopted by the European Commission and the Council of the European Union following the spread of the COVID-19 pandemic[1].

Although the first important step of the international community is represented by the Palermo Convention, in which the European Union has actively collaborated, in addition to the discipline dictated at international level, the Union has produced its own autonomous instrument: Framework Decision 2008/841/JHA.

Over the years, many other instruments[2] have been set up both at European[3] and global[4] level, including the reinforcing of the investigations of the so-called "Falcone Resolution" [5], the implementation of seizures and confiscations, police cooperation, the establishment of information sharing systems through the SHERLOC platform, liaison magistrates, the activation of special investigative techniques, as well as, to conclude, the definitive activation of the European Public Prosecutor's Office and the confirmation of the ONNET project by the participating countries in the broader EMPACT project of the European Commission.

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[1]Riccardi M., *Organized crime infiltration of the COVID-19 economy: emerging scheme and possible prevention strategies*, Transcrime- Joint Research Centre on Transnational Crime, University Cattolica del Sacro Cuore, pag. 33 et seq.

[2]Beken V., *European organized crime scenarios for 2015*, Apeldoorn, 2006.

[3]Militello V., *Participation in the criminal organization and international standards of incrimination: the proposal of the European Joint Project to combat* organized crime, in AA. VV., *Transnational crime between European experiences and global criminal responses, Proceedings of the Conference organized by the F. Carrara Center*, Lucca 24-25 May 2002, Milan, 2005, pag. 186.

[4]Militello V., *Participation in the criminal organization and international standards of incrimination*, in AA. VV., *Transnational crime between European experiences and global criminal responses*, Proceedings of the Conference organized by the F. Carrara Center, Lucca 24-25 May 2002, 2003, pag. 184.

[5]Balsamo A., *The international contrast to the economic dimension of organized crime: from the commitment of Gaetano Costa to the "Falcone Resolution" of the United Nations*, Text intended for publication in the volume dedicated to Gaetano Costa on the 40th anniversary of his killing at the hands of the mafia, in Penal System, p. 3 et seq.

As the vast majority of experts recall in their scientific productions on the subject, it is important not to turn off the light on the danger that the organized criminal system represents for European States and beyond.

Organized crime is today one of the main threats to the economic and financial systems of all States, but not all governments have chosen to put at the center of their governmental project the fight against what is probably the criminal phenomenon most capable of putting at risk the fundamental principles of the civilized world[6]: the rule of law, the protection of human rights, national security, freedom of competition and the economic and financial integrity of the country system.

It is useful to reiterate that today's criminal organizations, especially the oldest and most dangerous, have changed their *modus operandi* in delinquency, preferring political influence at high levels with the subtle method of corruption, rather than intimidation that creates more scandal.

Criminal groups, in fact, for years now have been able to maximize the opportunities that arise in national[7] and international[8] markets and to make the most of the new conditions offered by the globalization process to minimize the risk of being identified, arrested, and convicted, as well as seeing the proceeds of their activities seized and confiscated[9].

The frequency with which this occurred especially in European countries in the last decades of the last century, has attracted the attention of the institutions, despite the fact that the EU's limitations in the military and security sector are known, especially in the historical period in which Italy was experiencing an authentic state war against Cosa Nostra.

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[6] Balsamo A., Mattarella A., *Organized crime: the new perspectives of European legislation*, Sistema Penale, Vol. III, 2021, pag. 46.

[7] Roberti F., *Transnational organized crime and the banking-financial fabric*, in AA VV. *Criminal and European Law,* p. 93.

[8] Savona E. U., *Le mafie, la mafia. A first reading of the relationship between organized forms of crime and contrast strategies*, in *La mafia. Le mafie* (edited by G. Fiandaca and S. Costantino), Rome, 1994.

[9] Schelling T., *Economics and the Criminal Enterprise*, in Public Interest, 1967, p. 61.

The level of "transnationality" achieved by criminal associations has led them to search for new markets across borders as well as to forge new alliances with foreign criminal associations.

This has greatly increased the risk of the so-called *forum* shopping or *jurisdictional shopping*, a phenomenon that indicates the desire to seek a country where it is less risky to continue one's criminal activity[10].

Criminal associations have already reached a transnational level that even investigators and prosecutors are in difficulty, sometimes unable to act due to problems of jurisdiction.

While the former, in fact, cross borders without documents, the latter must wait for the slow bureaucratic excursus to obtain an extradition or an international rogatory letter.

It is for this reason that this paper proposes a careful reasoning on the effectiveness and results of European *policymaking* regarding the fight against organized crime, offering an overview of the tools available and reporting on the most recent decisions on the strengthening of the power and autonomy of Europol, a political choice that has received many criticisms from the doctrine.

Precisely because the Treaty on the Functioning of the European Union (TFEU) includes legislative approximation among its objectives, even if only where it is necessary to facilitate the implementation of the principle of mutual recognition of judgments and judicial decisions, it nevertheless represents a legal basis of considerable specific weight considered the source of reference.

An attempt will then be made to show how despite the progress made and the important efforts of almost all the states involved, the relevant European agencies and a multiplicity of NGOs operating nationally (especially in Italy) and internationally, the results often encounter an almost insurmountable blockade constituted by domestic disciplines and excessive bureaucracy at the jurisdictional level that prevent them from "running" at the same speed at which organized groups manage to change their criminal activities.

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[10]Ponti C., *Transnational crimes and international law*, Milan, 2010, pag. 75.

LITERATURE REVIEW

Given the important similarities between the measures of the European Union and those of the Palermo Convention, EU action in this field has received particular support and has been strengthened, making Framework Decision 2008/841/JHA and the Palermo Convention the main *corpus* of international law that seeks to harmonize and approximate national legislation on the fight against organized crime.

Legal writers agree that European commitments have crystallized with precise and typical formalities which have strongly pushed the Member States to follow the path towards harmonizing[11] criminal justice systems and broadening the rules at international level.[12]

Part of the doctrine, however, believes that international cooperation, if not treated in a certain way, risks turning into technical assistance, a form of solidarity that rich countries pay to poor countries, regardless of whether common problems are actually resolved.[13]

Despite the encouraging premises, the international instruments mentioned have been the subject of a series of criticisms concerning their excessive generality and the effective applicability of the provisions adopted.

The Convention has also not been exempted from these criticisms, which will be seen more in the next chapter.

On the contrary, since it is the third international instrument in this field, the first literature stated that experience could be gained during the negotiations from the mistakes and criticisms of the past, in order to overcome the most critical points.

This has not happened, and the Framework Decision has prioritized consistency with previous international instruments over promoting more penetrating and effective solutions.

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[11]Joutsen M., *The European Union and Cooperation in Criminal Matters: The Search for Balance*, Vol. 25, HEUNI Papers.

[12]Fijnaut C., Paoli L., Organised Crime in *Europe: concepts, patterns and control policies in the European Union and beyond*, Vol. 4., Studies of Organized Crime, Dordrecht, 2004.

[13]Savona E.U., Lasco F., Di Nicola A., Zoffi P., *Processes of globalization and transnational organized crime*, in Transcrime, pag. 24.

Despite these issues, academic research, somewhat surprisingly, has not produced any broad comparative analysis of national legislations related to organized crime, although there are some valuable exceptions.

However, most studies have compared the national organized crime legislations of a limited number of countries and/or without directly addressing the issue of compliance with international legal standards.

In general, most careful scholars have noted that EU policies to approximate criminal laws have run into several problems.

The first of these had to do with the political desirability of strong EU influence on national criminal laws.

For years the European Community's competence in criminal matters had been excluded from the treaties or very limited by European jurisprudence.

Even with the creation of the third pillar, the influence of the European Union was limited to the concept of approximation of criminal law, narrowly understood.

This demonstrated the close link between criminal legislation and national sovereignty, as Member States had difficulty in delegating their powers in the area of criminal legislation.

In this sense, cooperation between the EU and the UN has been of great help during the drafting of the UNTOC Convention, signed to date by 190 States, also thanks to the Common Position of March 1999, in which the Union confirmed the full willingness of the Union to participate actively in the project, thus avoiding that the negotiations were followed independently by the individual States.

For years, in fact, a more incisive regulatory path had begun in Europe.

In this sense, under the Treaty of Amsterdam, the European Union has introduced new instruments more effective than Joint Action, including the Framework Decision, which constitutes, according to legal literature, "the appropriate instrument for approximating criminal laws within the Union in this field", including through judicial cooperation and between police authorities.

Judicial cooperation, which developed on a "horizontal" basis also at the international level, was intensified with the enactment of numerous legislative interventions, to the point of leading a part of the doctrine to speak of a new "third

phase", following the phase of Framework Decisions under the Maastricht Treaty and Joint Actions with the Treaty of Amsterdam.

This third phase “involves the harmonization of substantive criminal law (including the areas of terrorism, organized crime, racism and xenophobia), mutual recognition of judicial documents, the work of EU criminal justice bodies such as Europol and Eurojust, the approval of the European Public Prosecutor’s Office and the development of rules to regulate the proliferation of the third pillar collection mechanism, the analysis and exchange of personal data”.

The EU returned to the definition of “organized crime”[14] only in 2008, after ten years of important changes and especially after adhering to the UNTOC (United Nations Convention against Organized Crime), signed in Palermo in December 2000.

Framework Decision 2008/841/JHA is considered differently than before, basing this intervention on compliance with the principle of subsidiarity enshrined in Article 5 TFEU in order to achieve the stated objective of “improving the common capabilities of the Union and its Member States in order to combat transnational organized crime”.[15]

The outcome of the negotiations, however, as will be analyzed better in the following chapter, led to the obtaining of a document less ambitious than had been set: a document that left intact the dualism between participation in criminal organization and so-called “*conspiracy*” in a criminal organization, frequently used in the traditions of *common law*.

Much of the scholarly doctrine[16], as mentioned above, has carried out a systematic analysis of the impact of the Framework Decision in order to assess the actual contribution[17] of the measures taken by the European institutions and

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[14] Finckenauer, James O., *Problems of Definition: What Is Organized Crime?, Trends in Organized Crime* 8, no. 3, 2005, pp. 63-83.

[15] Literally, Recital (1) to Framework Decision 2008/841/JHA. https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32008F0841&from=IT.

[16] Fijnaut C., *Controlling organized crime and terrorism in the European Union*, in *European cooperation in penal matters: Issues and perspectives*, edited by M. Bassiouni C., Militello V., and Satzger H., pp. 243- 263, Padova, 2008, Cedam.

[17] Calderoni F., *Organized crime legislation in the European Union*, Heidelberg, 2010, Springer.

subsequently encourage the debate regarding the future development of EU policies in the area of approximation[18] of criminal legislation in the field of organized crime.

[18] Flyghed J., "Sweden" in *Organised crime: A catalyst in the "Europeanisation" of National Police and Prosecution Agencies?*, edited by Monica Den Boer, 2002, pp. 159-177, Maastricht, European Institute of Public Administration.

CHAPTER 1

The legal base of the fight against TOC: the Framework Decision 2008/841/JHA.

1.1. The discipline of the Framework Decision and its limits.

While acknowledging the harmonization effort attempted during the drafting of Framework Decision 2008/841/JHA and with the previous instruments, it is good [19] to present from the outset the opinion of most legal writers[20] according to which a formulation of a different tenor could and perhaps should have focused more on the duration of the group and on the suitability to continue its criminal activities for a significant or indefinite period.[21]

The definition *of the modus operandi* chosen for the Framework Decision leaves out of the framework some of the main elements of recognition of criminal organizations, including the threat and intimidation with the use of violence.

The doctrine already cited, consistently, considers that the definition risks violating the principles of legality, clarity, and proportionality of the criminal law.[22]

Specifically, Article 1 in paragraph 1 defines the criminal organization as follows: "*a structured association of more than two persons, established for a long time, acting in concert with the aim of committing crimes punishable by a custodial sentence or a detention order of not less than four years or a more serious one to obtain it, directly or indirectly, a financial or other material advantage".*

Next, paragraph 2 of the same article identifies the structured association with a negative formula: *"an association that has been formed fortuitously for the impromptu commission of a crime and that does not necessarily have to provide*

[19]Mitsilegas V., *Defining Organized Crime in the European Union: The Limits or The European Criminal Law in an Area of Freedom, Security and Justice*, in European Law Review, 2001, p. 565 ss.

[20] Joutsen M., *The European Union and cooperation in criminal matters, the search for balance*, HEUNI Papers, vol. 25, 2006.

[21]Balsamo A., Mattarella A., *Organized crime: the new perspectives of European legislation*, in Sistema Penale, Vol. 3/2021, pag. 41.

[22]Laudati A., *Transnational crimes. New models of incrimination and procedure within the European Union*, Procedural Criminal Law, 2006.

formally defined roles for its members, continuity in composition or an articulated structure".

Broad doctrine has easily found a technical-legal limit in the rule just presented, such that it clearly identifies what a criminal organization is not but does not specify the identifying factors that must instead positively exist in order to be recognized.

The main gap then concerned the choice to confirm a selection only "quantitative" of the criminal activities of organized groups, specifically indicated in par. 1 of art. 1 of the Framework Decision for which the application of the rule is limited to crimes that provide for a penalty of not less than four years of imprisonment.

On closer inspection, this choice resulted in a worrying and serious uncertainty of the empirical scope of the concept of criminal organization, linked exclusively to the criminal policy choices of each member state.

The latter choices in fact could legitimately lead states to increase penalties for some crimes with the aim of including them among the purpose crimes and to reduce others for or exact opposite purpose.

Already during the drafting of the UN Palermo Convention, discerning scholars were raising their concerns about the inherent mutability of criminal organizations and turning their attention to the problem that new organized forms of crime might render ineffective any categorization into a taxing framework of crimes.

In fact, at the time of the UNTOC negotiations, the European Union had pursued a research project that suggested as an alternative, to the later adopted formula of the quantitative threshold, that of providing a list of typical crimes of criminal organizations.

As is known, in both agreements the choice will fall on the quantitative solution.[23]

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[23]Militello V., *Participation in an Organized Criminal Group as International Offence*, in AA.VV.,*The Containment of Transnational Organized Crime: Comments on the UN Convention of December 2000*, edited by Albrecht H.J., Fijnaut C., Iuscrim, Freiburg, 2002, p. 97-112.

It is easy to understand that this choice has led to profound uncertainty in the definition of a common core of crimes punishable by common European legislation.[24]

To this it must be added that the rule is characterized by the presence of very elusive elements and non-univocal interpretation.

This is the case of the necessary continuity of the organization, such that the structured association of more than two people must be "*established for some time",* strongly criticized for its genericity.

Although the formula offers, at the judicial level, a less rigid evidentiary target than more stringent requirements such as continuity over time, permanence and stability, the most sensitive doctrine considers that, as adopted in its final form[25], the requirement to be "*established for a long time"* focuses on the actual duration of the group leaving aside its potential duration, as well as the potential ability to continue his criminal project in a significant but indeterminate time.

As mentioned, the definition clashed with the general principles of legality, clarity and proportionality of the criminal law[26], especially with regard to the risk already feared that, due to such a generic definition, any criminal activity that presents a certain type of organization in the preparation and execution of crimes can be traced back to the *status* of criminal organization pursuant to Article 1 of the Framework Decision, albeit rudimentary.[27]

No less important are the remarks on Article 2 of the Decision, a provision which obliges Member States to criminalize the following two practices in alternative or cumulative ways:

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[24]Vlassis D., The global situation of transnational organized crime, the decision of the international *community to develop an international Convention and the negotiation process*, in *Current situation of and countermeasures against transnational organized crime*, Unafei, Tokyo, 2002, p. 81.

[25]By the way, see Aprile E., Spiezia F., *Criminal judicial cooperation in the European Union before and after the Treaty of Lisbon*, Ipsoa, Milan, 2009, p. 14.

[26]Calderoni F., The framework decision of the European Union on the fight against organized crime and *its impact on the legislation of the Member States*, in AA.VV., *For a European fight against organized crime and mafias. The Resolution of the European Parliament and the commitment of the European Union*, Franco Angeli, Milan, 2012, p. 16 ss.

[27]Fiandaca G., *Organized crime and criminal control,* in *Ind. Pen.*, 1991, p. 5.

1. The conduct of a person who, intentionally and knowing the purpose and general activity of the criminal organization or its intention to commit the crimes-purpose, actively participates in the criminal activities of the organization (including through the provision of information or material means, the recruitment of new members as well as any form of financing of its activities), being also aware that his participation contribute to the criminal activities of such an organization;

2. The conduct of a person, consisting of an agreement with one or more persons to carry out an activity which, if implemented, would involve the commission of purpose-crimes, even if the person in question does not participate in the material execution of the activity.

In the formulation of the two conducts, the reference to the two traditional models of associative crime is clear: in particular, to the criminal association, typical of *civil* law systems, and to the form of *conspiracy,* typical of *common law systems.*[28]

Although the rationale was to favor the speed of adaptation to the Framework Decision by both civil law and common law countries, the final[29] result, the result of a political compromise, is by necessity less ambitious[30] than expected.

It could easily be observed in the doctrine that the model offense formulated in 2008 in Brussels was the logical price to be paid as part of a dialogue among the 28 member countries of the time, which had to come to a unanimous approval.

At the same time, while understanding the reasons of those countries, such as Ireland and the United Kingdom, which would have faced significant evidentiary difficulties in the preparation of an effective prosecution regarding the demonstration of the existence of the criminal organization, the same doctrine could not help but recognize that the preparation of the dual figure of crime did not promote the best

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[28] Militello V., *Participation in an Organized Criminal Group as International Offence*, in AA.VV.,*The Containment of Transnational Organized Crime: Comments on the UN Convention of December 2000*, a cura di Albrecht H. J., Fijnaut C., Iuscrim, Freiburg, 2002, p. 97-112.

[29] Manacorda S., *La "parabole" de l'harmonisation pénale : à propos des dynamiques d'intégration normative relatives a l'organisation criminelle*, in Aa.Vv., *Les chemins de l'harmonisation penale/ Harmonising criminal law*, a cura di Delmas- Marty M., Pieth M., Sieber U., *Société de Législation comparée*, Paris, 2008, p. 281.

[30] Vermeulen G., *Where do we currently stand with harmonisation in Europe?,* in AA.VV., *Harmonisation and harmonising measures in criminal law*, a cura di Klip A.H., Van Der Wilt H.G., Royal Netherlands Academy of Science, Amsterdam, 2002, pp. 71-74;

https://www.brocardi.it/tesi-di-laurea/against-transnational-organized-crime-role-framework-decision-2008/827.html