European Union’s measures to combat fraud and corruption in order to break the link between European Union’s funding and organized crime

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Academic year 2010-2011
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LIST OF ABBREVIATIONS

EC: European Community
ECJ: European Court of Justice
EPP: European Public Prosecutor
ERDF: European Regional Development Fund
EU: European Union
GRECO: Groupe d'Etats Contre La Corruption
IRCP: International Institute of Research on Criminal Policy
NSRF: National Strategic Reference Framework
OCTA: Organized Crime Threat Assessment
OECD: Organisation for Economic Co-operation and Development
OLAF: European Anti-Fraud Office
PCN: Political Criminal Nexus
TFEU: Treaty On The Functioning Of The European Union
UN: United Nations
VAT: Values added tax
INTRODUCTION

A recent Motion for a European Parliament Resolution on Organized Crime in European Union (EU) highlights in its explanatory statement that organized crime has a considerable social cost and underlines that the European Institutions need to take concrete political steps in order to counter this dangerous phenomenon whose effects ‘have a strong impact on the European union commitments towards its citizens’. According to the same document, organized crime misappropriates and dissipates resources (financial, labor, resources, etc.), distorts the free common market, pollutes business and the legal economy, promotes corruption, contaminates and destroys the environment, infringes human rights and suppresses the rules of democracy.

Before the Lisbon Treaty, cooperation in criminal matters had its legal basis in the third pillar, therefore, it had a pure intergovernmental nature that limited the area of action. However, the need to complete the internal market and to protect it from criminal elements gave new impetus to the European Union policy against serious criminal offences such as organized crime, corruption and fraud because it was clear that free movement could not be ‘restricted’ just to legitimate persons, capitals, goods or services.

Apart from protecting the internal market the European Union’s measures in the criminal sphere are aimed to avoid gaps and differences between the criminal justice systems of the Member States. Their scope is to confer coherence to the fight against criminal activities with a European dimension in order to avoid that criminals take advantage of incongruities between the national legal systems.

In order to constitute an area of freedom security and justice, the Lisbon Treaty creates new opportunities and provides new instruments at European level, for example, the establishment of a European Public Prosecutor (EPP) and the idea to reinforce Eurojust.

The article 83 of the Treaty on the Functioning of the European Union (TFEU) states that the European Union is required to establish minimum common rules ‘concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis’. The second paragraph of the same article includes organized crime and corruption in the areas of particularly ‘serious crime with cross border dimension’ and therefore, provides a legal basis to the action of the European Union aimed at combating those offences. The TFEU also provides a legal basis for the fight against fraud with the article 325.

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2 Ibid 11
3 Ibid
This paper will go through an overview of the relevant measures and instruments adopted by the European Union in order to counter fraud and corruption and to avoid the exploitation of public funding by organized crime.

The first chapter will analyze the concept of fraud, it will consider the measures adopted to counter it and will take in consideration the issues arising from the implementation of public funding through the shared management system. It will also describe the activity of OLAF and Eurojust, taking in consideration the cooperation between these two bodies and the future European Public Prosecutor to be established from Eurojust.

The second chapter will describe the concept of corruption and will go through an overview of all the European, Regional and International measures adopted to fight it especially in the field of public funding.

The third chapter will outline the concept of organized crime, it will give an overview of the measures adopted to combat this phenomenon and it will take in consideration the preoccupying aspects of the link between organized crime and public funding.
The European Union policy against fraud aims to protect the European Union’s financial interests. Fraud is defined as acts or omissions which have as effect the misapplication, wrongful detention or illegal diminution of EU funds. Fraud against the Union’s interests includes tax evasion, VAT fraud and fraud in relation to agricultural and other subsidies. The Union’s policy against fraud is also aimed at limiting the operation of organized groups, which according to the evidence so far gathered, carry out fraud in relation to European Union subsidies and VAT fraud, therefore limiting the scope for this kind of fraud will consequentially affect the prosperity of these groups.2

The Treaty on the Functioning of the European Union (TFEU)3 with the Article 325 provides a legal basis to ‘counter fraud and any other illegal activities affecting the financial interests of the Union’4. According to the second paragraph of the same article ‘Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests’ which, means that Member States shall under their national law criminalize fraud affecting the Union’s budget as they criminalize frauds affecting their national budget5. Anti-fraud activities are a joint responsibility of the Commission and of the EU Member States. Effective cooperation is a key factor in the investigation and prosecution of related offences6. This important aspect is underlined in the third paragraph of the above mentioned article 325.

This article incorporates a requirement7 stated by the European Court of Justice’s judgment on the Greek maize case:

(...)the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community Law8. (...) For that purpose (...) they must ensure (...) that infringements of Community law are penalized under conditions (...) which are analogous to those applicable to infringements of national laws of similar nature and importance and which in any event make the penalty effective, proportionate, and dissuasive.9 (...) Moreover, the national authorities must proceed (...) with the same

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1 Part of this chapter is in M. Verbari.: Critical assessment of the potential added value of European Public Prosecutor’s office in combating offences against the EU’s financial interests, written in the context of the Course European Criminal Policy taught by Prof. Gert Vermeulen at Ghent University October-December 2010 and published on <http://minerva.ugent.be/main/student_publication/index.php?cidReq=B0011400_2010> the 28th November 2010
4 Ibid
8 ECJ, Judgment 21.9.89-C 68/88 (Commission/ Hellenic Republic) para. 23
9 Ibid para.24
diligence as that which they bring to bear in implementing corresponding national laws.\textsuperscript{10}

Given that the Member state could use a certain discretion to fulfill these requirements, the result is that several different criminal laws can be found within the European Union. All these differences do not help to ensure consistency in the fight against frauds. This inconsistency becomes even more dangerous if one things that the crimes in question are mainly committed by highly intelligent offenders.\textsuperscript{11} Usually they belong to organized crime, and they have big assets at their disposal. Furthermore the perpetrators operate transnationally, in many cases recurring to straw man and fictitious companies and the European integration has opened national borders, making it easier to move from one country to another without any border controls.\textsuperscript{12}

Although the above mentioned link between frauds and organized crime, frauds on the European budget does not always receive the necessary level of protection in all Member States and this is why several steps have been taken at European level\textsuperscript{13}

An important European instrument is the Convention on the protection of the European Communities’ financial interests, adopted in 1995\textsuperscript{14}, followed in 1996\textsuperscript{15} and 1997\textsuperscript{16} by two protocols. This convention and its protocols have the aim to create a common legal basis for the criminal-law protection of the European Communities' financial interests. As underlined by the Commission in its reports on 2004\textsuperscript{17} and 2008\textsuperscript{18}, the ratification process of these instruments was not easy in fact the convention, its first protocol and the protocol on its interpretation by the Court of Justice entered into force on 17 October 2002. The second protocol entered into force on 19 May 2009\textsuperscript{19}

Under this convention fraud affecting the expenditure, namely any act or deliberate omission involving the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, non-disclosure of

\begin{thebibliography}{9}
\bibitem{10} Ibid para 25
\bibitem{12} Ibid
\bibitem{13} Speech given by Barry Donoghue, Deputy Director of Public Prosecutions, at the Law Society Annual Conference, Budapest: 28 March 2008, p 3
\bibitem{19} http://europa.eu/legislation_summaries/fight_against_fraud/protecting_european_communities_financial_interests/l33019_en.htm accessed 07 April 2011
\end{thebibliography}
information in violation of a specific obligation, with the same effect; the misapplication of such funds for purposes other than those for which they were originally granted, and revenue

and fraud affecting the revenue, that is any act or deliberate omission involving the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, non-disclosure of information in violation of a specific obligation, with the same effect; misapplication of a legally obtained benefit, with the same effect.

must be punishable by effective, proportionate and dissuasive criminal penalties in every EU country.\(^\text{20}\)

According to this convention, the EU countries have to take the necessary measures to ensure that the conduct described above, as well as participating in, instigating, or attempting such conduct, are punishable by effective, proportionate and dissuasive criminal penalties. Moreover the member States should foresee measures that allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable, in cases of fraud affecting the European Communities’ financial interests.\(^\text{21}\)

That said, it is clear that protecting the financial interests of the European Union is a priority for the European Institutions. The EU combats fraud with a series of legislative acts concerning currency counterfeiting, violations of intellectual property rights and corruption at European as well as at international level. In addition to these acts, and in order to render the fight against fraud more effective, the European Union also created a specialized anti-fraud office (OLAF) which has the task to conduct anti-fraud investigations.\(^\text{22}\)

\(\text{1.1 Olaf}\)

OLAF was created in 1999 as an administrative independent body whose aim is to protect the financial interests of the Union, fighting fraud, corruption, professional misconducts and irregularities including the ones carried out within the European Institution.\(^\text{23}\) According to Articles 3 and 4 of the Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) N. 1074/1999\(^\text{24}\), its main task is to conduct, in full independence, transparent internal and external investigations. In addition to these activities it supports Member States with technical knowhow contributing to plan the strategy of European Union against fraud and to reinforce the legislation is this field\(^\text{25}\).

\(^{21}\) ibidem
\(^{25}\) Ibidem
OLAF has a special status, in fact as part of the Commission, it is responsible for developing and monitoring the implementation of the EU’s anti-fraud policies, but it has a measure of budgetary and administrative autonomy, which guarantees the total independence with which OLAF conducts investigations.  

Each year this Office investigates hundreds of cases where the European Union’s funds have been misused. Fraud against the EU’s Structural Funds, which finance farming, social policy projects and regional development, are spent on the base of a system of shared responsibility between the European Commission and the Member State and is the biggest single category of fraud that OLAF has to fight (see figure in annex I).

According to article 53b.1 of the Financial Regulation these funds are managed by both the commission and the member states.

When the Commission implements the budget on a shared basis, the implementation tasks are delegated to the Member States, in fact under article 53b.2 it is stated:

Without prejudice to complementary provisions included in relevant sector-specific Regulations, and in order to ensure in shared management that the funds are used in accordance with the applicable rules and principles, the Member States shall take all the legislative, regulatory and administrative or other measures necessary for protecting the Communities’ financial interests. To this effect they shall in particular:

(a) satisfy themselves that actions financed from the budget are actually carried out and to ensure that they are implemented correctly;
(b) prevent and deal with irregularities and fraud;
(c) recover funds wrongly paid or incorrectly used or funds lost as a result of irregularities or errors;
(d) ensure, by means of relevant sector-specific Regulations and in conformity with Article 30(3), adequate annual ex post publication of beneficiaries of funds deriving from the budget.

To that effect, the Member States shall conduct checks and shall put in place an effective and efficient internal control system, according to the provisions laid down in Article 28a. They shall bring legal proceedings as necessary and appropriate.

The role of the Commission is described then by paragraph four of the same article:

In order to ensure that the funds are used in accordance with the applicable rules, the Commission shall apply clearance-of-accounts procedures or financial correction mechanisms which enable it to assume final responsibility for the implementation of the budget.


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Social Fund and the Cohesion Fund\textsuperscript{30} foresees at the article 27.1 that the Member State shall present a National Strategic Reference Framework (NSRF) which ensures the consistency of the assistance from the Funds with the Community strategic guidelines on cohesion, and ‘which identifies the link between Community priorities, on the one hand, and its national reform program, on the other’.\textsuperscript{31}

Then the article 32.1 states that ‘the activities of the Funds in the Member States shall take the form of operational program within the national strategic reference framework.’ The same article at the second paragraph states that ‘The Commission shall appraise the proposed operational program to determine whether it contributes to the goals and priorities of the national strategic reference framework and the Community strategic guidelines on cohesion’\textsuperscript{32}

The Member States implement the programs. In fact the Article 70.1 foresees that Member States shall be responsible for the management and control of operational programs, and shall notify irregularities, recovering amounts unduly paid and interests of late payments to the Commission, keeping it informed also of the progress of administrative and legal proceedings.\textsuperscript{33}

Then the article 72 lays down the responsibilities of the Commission that should monitor that ‘the Member States have set up management and control systems (...) and, on the basis of the annual control reports and annual opinion of the audit authority and its own audits, that the systems function effectively during the periods of implementation of operational programs’, moreover the Commission should pay out the expenditure according to the rules laid down by the same regulation.\textsuperscript{34}

The concern about the implementation of this considerable portion of European Union budget was also underlined by Transparency International, that stressed how the fact that, being these funds monitored and controlled according to member states parameters, while still under the European Union financial responsibility, does not ensure consistency in the protection of the European Financial interests.\textsuperscript{35}

According to the last OLAF annual report over the period 2007-2013 the European union budget destined to cohesion policy and aimed to cover a great number of programs and projects in the twenty seven member states, amounts to 347 billion Euros. Such amount of money is often the subject of attack by fraud and irregularities. These attacks may take the form of: a) the subversion of tendering processes through false or exaggerated bids, cartel bids, illegal or irregular sub-contract; b) false or exaggerated, cost claims for services. c) fraud and irregularities resulting from situations of conflict of interest. This creates significant problems for the legal and effective use of Structural Funds in all Member States.\textsuperscript{36}

According to OLAF investigations, cases of fraud with Structural Funds can be found in all the Member States but OLAF’s experience is that the majority of cases arise in Italy, Greece and Spain and in Bulgaria and Slovakia.\textsuperscript{37}

\textsuperscript{31}Ibid
\textsuperscript{32}Ibid
\textsuperscript{33}Ibid
\textsuperscript{34}Ibid
\textsuperscript{37}Ibid
In the mentioned report it is cited a case concerning the misuse of European structural funding:

The European Regional Development Fund (ERDF) provided aid for a factory which was supposed to provide more than a hundred jobs in a socially deprived area. OLAF found that factory equipment, bought at inflated prices in Austria and sourced from Luxembourg, was delivered by means of a complex chain of financial transactions designed to create the impression that the promoters of the factory had put up investment financing when, in fact, they had invested nothing. Only a few of the jobs promised ever materialized and the Austrian trader concerned promptly went into liquidation. Also, a large part of the financing has disappeared into an off-shore account. OLAF recommended that the €2 million of ERDF funding should be recovered and judicial proceedings have started in Italy and Austria.  

This case is a good example of how OLAF can work effectively to defend the EU budget, by conducting a series of coordinated checks in different Member States on persons involved in a transnational organised fraud. In fact OLAF has found evidence that in many cases the frauds in the Structural Funds are organised and planned. Hence given the huge funding that is available under the Structural Funds, it is important for Member States and the European Institutions to work together in dealing with this phenomenon.

Therefore, in order to render the fight against fraud more effective OLAF officials’ power of investigation has been broadened and they can now carry out on-the-spot checks in EU Members State. In addition OLAF has close links with Europol and Eurojust, the agencies set up to improve coordination of the fight against serious crime, especially when it is organized. Besides working with Eurojust and Europol, OLAF works in close collaboration with the national authorities:

In the area of shared management, a regional risk assessment was developed in close cooperation with the Guardia di Finanza, the Italian economic and financial police. This regional risk assessment and a situation report on Bulgaria allowed OLAF to identify specific fraud risk indicators based on measurable weaknesses in management and control systems, within identified geographic areas and economic sectors.

At the moment, OLAF cannot bring cases to court but it can refer them to the national authorities. In future, there could be a European Public Prosecutor’s Office, which would be competent for prosecuting cases directly in any member state where a case involved the EU’s financial interests.

OLAF’s investigations are aimed to collect the evidence needed to identify the facts, in order to verify whether an irregularity, fraud, corruption, or serious misconduct detrimental to the EU’s financial interests has occurred.

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38 Ibid. 10,
39 Ibid.
42 Ibid.
The final OLAF’s report on its investigations is sent to the competent authorities in the Member States and it contains only recommendations because, whether a criminal investigation should be initiate remains a decision that has to be taken by the national authorities.44

Although some aspects of defense rights that have been contested because considered uneven45, the reports of OLAF may constitute admissible evidence in administrative or judicial proceedings of an EU-Member State in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. The main precondition is that the procedural requirements laid down in the Member State’s national law have been respected. In the course of a subsequent national judicial investigation, OLAF may then further assist the national prosecuting authorities in their work.46

However the main problem is that, to date, the analysis of OLAF’s reports depends on a variety of legal and juridical interpretation originated in the different EU countries, and this situation may lead to different solution for similar cases and this does not respect the principle of equality of treatment within the European Union.47 Whether such a problem could be solved with the creation of a Public Prosecutor’s Office is not sure because if it is true that one purpose of establishing the European Public Prosecutor to protect the Community’s financial interests would be to remedy (…) the absence of a legal guarantee as regards OLAF’s investigation measures (and) such a guarantee can only exist if the investigation is carried out under the control of a judicial authority.48

On the other hand the debates on the feasibility of such a project are still ongoing while OLAF work cannot stop. Thus it is OLAF’s duty to remedy its weakness49 and ‘for this purpose, day-to-day work in liaison with national judicial authorities is essential’50

1.2 Eurojust and Europol

As already said OLAF has also established an important collaboration with Eurojust and Europol in order to render more effective the fight against transnational fraud or corruption. In fact although a large-scale fraud could be committed within the border of just one Member State, the necessity (especially for organized crime) to transfer funds abroad introduces an international element.51

Legislative proposal and initiatives, aimed at improving the protection of the financial interests of the Union were mostly taken following an intergovernmental procedure, which

44 Ibid. p. 91
48 Ibid.
49 Ibid.
50 Ibid.
was also used to establish Eurojust and Europol. As third pillar bodies the aim of Eurojust and Europol is to facilitate traditional judicial and police cooperation. While Europol has been processing Member States' data on crimes, including crimes against the EU budget, like fraud or corruption, Eurojust has been coordinating Members States' judicial authorities in the investigation and prosecution of similar crimes. The work of both bodies and their cooperation is also aimed to reinforce the fight against serious cross-border crime, particularly when such crime is organized.

Eurojust was established in 2002 by a Council decision, following a Recommendation of the European Council of Tampere about the creation of a body composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State (…) with the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organized crime cases.

Given that the European Union Member States have different criminal legal systems the recommendation of Tampere was aimed at improving judicial cooperation in criminal matters and to avoid as much as possible the traditional reluctance to collaborate. In other words Eurojust’s specific task is to speed-up and simplify cooperation between Member State’s authorities.

The Art 85 of the TFEU reinforced Eurojust conferring upon it more operational capacities to resolve conflicts of jurisdiction. According to this article Eurojust become a central player in the European judicial area, in fact acting on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

Eurojust shall have the competence to initiate criminal investigations as well as to propose the initiation of prosecutions, conducted by competent national authorities, particularly those regarding offences against the financial interests of the European Union, as well as the right to coordinate those investigations.

Eurojust’s work has an impact on Member States by bringing them closer without changing their criminal laws. This aspect is quite important because respect the

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53 Ibid.
57 Ibid.
58 Ibid 295
intergovernmental nature\textsuperscript{63} of such body while on the contrary the possibility to directly initiate criminal investigations with the establishment of a European Public Prosecutor from Eurojust would provide to it a supranational role\textsuperscript{64}, with all a series of problems also related to fragmentation of the different legal systems.

The 2009 Decision on Eurojust creates new possibilities, but the manner of their use remains with the EU Member States that have the powers to implement them according to their own legal regimes. In this context, the role of the Commission is also important to improve efforts to get these new rules in place. The Commission should supervise the implementation of the new rules in certain Member States. The important thing is to make sure that criminal investigators can do their job. Further new rules giving Eurojust new powers to directly initiate investigations as well as new rules to regulate its internal structure shall be considered.\textsuperscript{65}

Although Eurojust requests are not binding it has political instruments to identify not cooperative authorities and encourage them to collaborate. This can be done by bringing the matter to the Council’s attention or writing such lack of collaboration in the Eurojust annual report\textsuperscript{66}.

As already said, the Lisbon Treaty gave to Eurojust a more active role which includes especially the prosecution on a common base of serious crimes, this could mean giving, for example, Eurojust a more specific role in relation to European Union fraud, even if committed just in one member state\textsuperscript{67}.

\subsection{1.3 The European Public Prosecutor}

To respond to the need of effectiveness in protecting the European Budget, the Treaty of Lisbon, following the proposal made by a group of experts in the Corpus Juris of 1997\textsuperscript{68}, a "document that did not emanate from any of the institutions of the European Communities but was the product of research and analysis carried out by a group of academics and practitioners"\textsuperscript{69} and following the Green Paper of the Commission of December 2001\textsuperscript{70},

\begin{thebibliography}{99}
\bibitem{13} A. Serzisko, ‘European Criminal Justice under the Lisbon Treaty’, (2010), \textit{EUCRIM the European Criminal Law Association Forum}, n. 2 p. 73
\bibitem{16} <http://ec.europa.eu/anti_fraud/green_paper/corpus/it.pdf>
\bibitem{18} European Commission, ‘Criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor’ (Green Paper) (2001) COM 715 final, 31 December 2001
\end{thebibliography}
introduced a novelty with the Article 86 TFEU which states that ‘in order to combat crimes affecting the financial interests of the Union, the Council (...) may establish a European Public Prosecutor’s Office from Eurojust’.

The European Public Prosecutor’s Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union’s financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.\(^{71}\)

The idea to establish a EPP clearly reflects the typical approach of the EU policy-making which considers institution-making as the best problem-resolution mechanism. Once a problem is identified, an institution is created. Such institutions do not always have well defined tasks or sufficient powers or adequate coordination mechanisms with other related institutions and this can lead to an overlap of competences.\(^{72}\)

In the case of EPP it is not clear, for example, if the fact that the European Public Prosecutor’s Office should be established from Eurojust means that ‘we could have an old institution under a new name (and) Eurojust could disappear’\(^{73}\) or that the ‘European Public Prosecutor’s Office could be created on the basis of Eurojust (meaning) that we could have two separate institutions – Eurojust and the European Public prosecutor’s Office.’\(^{74}\) The latter solution could be understandable in the case that the Council does not agree unanimously on the creation of the European Public Prosecutor’ Office and, following what prescribed in the Art 86.1, a group of at list 9 Member States decides to establish it on the basis of enhanced cooperation.\(^{75}\) Then ‘in this context, the question is how they could share the competences to fight against criminals?’\(^{76}\) It has to be pointed out that probably ‘the involvement of a limited number of States will affect the effectiveness of the European Public Prosecutor’s Office.’\(^{77}\)

Of course the provision of the Lisbon Treaty is important and it has a very strong symbolic value but, to date, it does not have any great practical significance.\(^{78}\) In fact, in the Article 86 of the TFEU, the functions of the EPP are described only in general terms and the details will be left to secondary legislation that will deal with issues like\(^{79}\).

\(^{71}\) Ibid.
\(^{74}\) Ibid
\(^{78}\) Ibid.
‘the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures’, which will probably require long and difficult negotiations.

With regard to the collaboration between the EPP and OLAF, the latter could provide to the former assistance and documentation through its administrative investigations and reports which would finally be used directly in a national proceeding. Of course, ‘in order to reach this goal, appropriate communication and cooperation mechanisms between OLAF and the Prosecutor’s Office should be implemented; otherwise OLAF’s participation and expertise could irretrievably be wasted.’

Furthermore the relation between the EPP and Eurojust should be carefully considered. In fact given the different reactions of a number of Member States to the proposal. It is difficult to imagine that, at the European Council level, the unanimity, about establishing the EPP, will be reached soon. Thus the creation of such a body through enhanced cooperation of at least 9 Member States is more likely to happen. This would mean that the EPP could play its role only in the territory of the states which cooperated and he ‘would have to work alongside Eurojust which would continue to operate on an Union-wide basis.’ Probably once the EPP will be established he will replace the national authorities in a number of specific competences and activities. So while Eurojust will have just to provide assistance, the EPP will be directly involved in national jurisdictions.

However, the different competences of the two bodies in combating crimes effecting the financial interests of the European Union are not outlined yet, and it is not clear how such cooperation would improve the fight to frauds against the European Union.

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82 Ibid. 68
83 Ibid.
2 CORRUPTION

Although at European level a definition of corruption had already been given in 1995 by the European Parliament in its Resolution on Combating Corruption in Europe\(^1\), where at the point 1 it is stated that corruption is ‘the behavior of persons with public or private responsibilities who fail to fulfill their duties because of financial or other advantage that has been granted or directly or indirectly offered to them’, the European Commission in its ‘Communication on a comprehensive EU Policy Against Corruption’\(^2\) of 2003, highlighting the fact that ‘there is no single uniform definition of all the constituent elements of corruption’\(^3\), referred to a broader definition given by the UN Global Programme against Corruption\(^4\) where it is defined as ‘abuse of power for private gain’\(^5\).

Corruption is far from being a new phenomenon, it has always existed since ancient times but the way to approach it has varied according to different periods and cultures. As the Corruption Perception Index 2010 of Transparency International\(^6\) shows in the table in annex n. I, corruption is still a threat for various European Member States\(^7\). In the last twenty years this phenomenon has been given more attention and this factor increased ‘the need to tackle this insidious problem’\(^8\), requiring specific measures at national and international level. In the mentioned Resolution of the European Parliament, it is stated that corruption, particularly in conjunction with organized crime, poses a threat to the functioning of the democratic system and thus destroys public confidence in the integrity of the democratic constitutional State.\(^9\)

Moreover corruption is inherent to the nature of organized crime which needs protection of officials to avoid prosecution and have access to the market in order, to allocate its illicit goods and services\(^10\) and to reinvest its illicit proceeds\(^11\).

Beside the dangerous link with organized crime, corruption has a bad effect on the functioning of the society\(^12\) because in addition to harming the interests (and not just the

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3 Ibid.
4 UN Global Programme against Corruption, CICP-16, UN ODCCP, Vienna, June 2011.
6 <http://www.transparency.org/policy_research/surveys_indices/cpi/2010>
financial ones) of the Union, it negatively ‘mines the solid basis of the decision making process, distorts competition, and threatens the fundamental principles of a free and open market’. In fact corruption contrasts with the basic idea of internal market based on free competition and non discrimination, therefore

The elimination of corruption facilitates competition by ensuring that corrupt practice do not hinder by interfering with the transparent and open conduct of international trade. In a free market, corruption might have cross-border implications possibly leading to the ‘contagion’ of corruption, where Member States which would normally condone corruption, do so, in order to compete for international business with countries that ignore such practices. Corruption also increases the costs of economic activity thereby reducing the optimal use of resources.

Corruption as such also ‘poses a threat to the functioning of the democratic system and thus destroys public confidence in the integrity of the democratic constitutional State’ pulling down ‘citizen’s trust in (...) institutions (...) as well as the morality and ethics necessary for the well functioning of democracy’.

At European level increasing attention has been paid to this phenomenon, and has resulted in a series of measures addressed to fight corruption. In creating an area of Freedom, Security and Justice, the Treaty of the European Union (Amsterdam Treaty) foresaw the need for the prevention and fight against corruption in article 29. This commitment was confirmed by the Treaty of Lisbon where under Article 83 it is stated

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

2. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms

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13 Court of Auditors, ‘the Commission’s services specifically involved in the fight against fraud, notably the ‘unité de coordination de la lutte anti-fraude’ (UCLAF) together with the Commission’s replies’, (Special Report) 98/C 230/01, 22 July 1998.
15 Ibid. 6
trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

(…)

2.1 Measures Against Corruption

In the Action Plan to Combat Organized Crime adopted by the Council in 1997\(^{20}\), it was already evident the necessity to combat corruption in order to break one of the most used tools of organized crime. In fact the European Council underlined ‘the importance of enhancing transparency in public administration and in business and preventing the use by organized crime of corrupt practices’.\(^{21}\) In the same text, the development of a comprehensive policy against corruption is foreseen and it is recommended that the policy itself is in accordance with the steps already taken in the same field at international level. The efforts should be addressed also to prevent corruption, set strict and transparent rules on financial management, on participation in public procurement and on appointments to positions of public responsibility.\(^{22}\) One month later the Commission, in its communication to the parliament and the council for a policy against corruption delineated its approach ‘to identify and squeeze out opportunities for corruption by taking measures in areas such as tax deductibility of bribes, public procurement, accounting and auditing standard, blacklisting and external aid assistance’\(^{23}\).

In 1998 the Council Vienna Action Plan ‘indentified corruption as one of those criminal behaviors in the fields of organized crime where prioritized action was deemed necessary’\(^{24}\). Some day after the Council Resolution of 21 December 1998, emphasizes the need of transparency in connection with the award of public contract in order to prevent corruption and its link with organized crime. The same is required also in the sector of public affairs ‘including lawful and transparent funding of political parties and organizations’\(^{25}\).

In 1999 the Tampere European Council\(^{26}\) stressed how corruption was relevant in the field of financial crime and how it needed specific common actions. Following the line traced by the Action plan of 1998 and the Tampere Conclusions, the Strategy of 27 March 2000 for the Beginning Of The New Millennium, On the Prevention and Control of Organized Crime (Organized Crime Millennium Strategy)\(^{27}\), giving new input to the subject, underlined again the need for developing a European Union general policy against corruption that would take into account the measures already taken at international level. It stressed at the same time the

\(^{21}\) Ibid.
\(^{22}\) Ibid.
need for further approximation of anti-corruption national legislation and exhorted Member States to ratify the anti-corruption instruments already existing at the level of the European Union and of the Council of Europe.  

The European Instruments that according to the Organized Crime Millennium strategy needed to be ratified as soon as possible where the Convention on the Protection of the European Communities’ Financial Interests of 1995 and its first and second protocol, namely the Protocol of 1996 to the Convention on the Protection of Community Financial Interests and the Second Protocol to the Convention on the Protection of the European Communities’ Financial Interests of 1997 object of the latter is the liability of legal persons when involved in corruption or organized crime, as well as the ‘cooperation between the Member States and the Commission for the purpose of protecting the European Communities' financial interests. The first protocol is particularly important because it foresees the criminalization, not just of active or passive corruption of national or European officials, but also of the participation and instigation of corruption. However it has to be noted that its application is limited to the cases of corruption that effect the financial interest of the Union. According to this instrument, the Member States have to ‘ensure that offences become punishable by effective, proportionate and dissuasive criminal sanctions.’

Another fundamental instrument that is part of the anti-corruption acquis is the Convention of 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union. This Convention finds its roots in the First Protocol cited above and it is a further development of the same concept of criminalization of active and passive corruption of officials, that now encompasses also those cases where the damage to the Union’s financial interests is not involved. This convention represents an important step taken in the direction of the criminalization of corruption as a socially dangerous and degrading behavior and worth to be criminalized as such and not just when it is likely to affect Union’s financial interest.

36 Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (1997) OJ C 195
Beside implementing one of the guideline of the Action Plan Against Organized Crime of 1997, the Convention has also the important effect of harmonizing European law in this sector, helping then the well functioning of the internal market.\textsuperscript{40}

The Conventions and their Protocols, as such need to be ratified by the national Parliaments, but the ratification process has taken more than expected. In fact although the Convention on the protection of the European Communities’ financial interests and its first Protocol entered into force on 17 October 2002\textsuperscript{41}, and the same happened on 28 September 2005 to the Convention on the fight against corruption involving officials of the European Communities or officials of the EU Member States\textsuperscript{42}, on the contrary the second Protocol has not yet, entered into force.

Growing privatization rendered the distinction between corruption in public and private sector more narrow\textsuperscript{43}. This produced a fundamental need in the European Union to protect the market from unfair competition, and it was one (probably the most important) reason for the adoption in December 1998 of a Joint Action on Corruption in the Private Sector\textsuperscript{44}. But a Joint Action, as such, was nothing more than a political commitment of national governments, and it resulted in a lack of implementation by the national parliaments\textsuperscript{45}. This is why, on initiative of the Kingdom of Denmark, a Framework Decision On Combating Corruption in the Private Sector\textsuperscript{46} was adopted in 2003. The initiative obliges member states to criminalize active and passive corruption in the private sector and to hold legal persons liable for such offences\textsuperscript{47}.

For what concerns anti-corruption instruments adopted by other international bodies, the commission has always underlined the necessity, in order to avoid duplications, to accede to those instruments that are already existing at international level.\textsuperscript{48}

The bodies that have produced legislation in this fields are first, the OECD with the Convention on Bribery of Foreign Public Officials in International Business Transactions of 1997\textsuperscript{49}, which has been ratifies by all EU Member State; second, the Council of Europe with the Criminal Law Convention on Corruption\textsuperscript{50} and the Civil Law Convention on Corruption\textsuperscript{51}.

\begin{itemize}
\item \textsuperscript{39} Y. Gallego-Casilda Grau, The European Union’s initiative in the fight against corruption, in A. Alvazzi del Frate, G. Pasqua, Responding to the challenges of corruption, (UNICRI Publications 63, UNICRI, Rome, 1999), p. 189
\item \textsuperscript{40} M. Groz, Legal instruments of the European Union to combat corruption, in C. Fijnaut L. Huberts, Corruption integrity and Law Enforcement,(Kluwer Law International, The hague, 2002) p. 383
\item \textsuperscript{41} <http://europa.eu/legislation_summaries/fight_against_fraud/protecting_european_communitys_financial_interests/l33019_en.htm>
\item \textsuperscript{42} <http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33027_en.htm>
\item \textsuperscript{43} M. Groz, Legal instruments of the European Union to combat corruption, in C. Fijnaut L. Huberts, Corruption integrity and Law Enforcement,(Kluwer Law International, The hague, 2002) p. 385
\item \textsuperscript{44} Joint Action 98/742/JHA of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector (1998) OJ L 358
\item \textsuperscript{45} European Commission, ‘Communication from the Commission to the Council, the European Parliament and the European Economic And Social Committee on a Comprehensive Eu Policy against Corruption’(Communication) COM(2003) 317 final, 18 May 2003
\item \textsuperscript{47} < http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33308_en.htm > accessed on 05 March 2011
\item \textsuperscript{48} < http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33301_en.htm > accessed 03 March 2011
\item \textsuperscript{49} <http://www.oecd.org/dataoecd/4/18/38028044.pdf> Accessed 06 March 2011
\item \textsuperscript{50} Council of Europe, Criminal Law Convention on Corruption, CETS No.: 173, 27 January 1999
\item \textsuperscript{51} Council of Europe, Civil Law Convention on Corruption CETS No.: 174, 04 November 1999
\end{itemize}
that have not been ratified by all Member states. In consequence of such lack of ratification the Commission in its Communication of 2003 called

upon those Member States which have not yet ratified the Criminal and/or the Civil Law Convention on Corruption of the Council of Europe or which have not joined the Group of States against Corruption (GRECO), to do so without any further delay.\(^\text{52}\)

Another important international instrument against corruption that sees the involvement of the European union is the United Nations Convention against Corruption.\(^\text{53}\)

‘The Convention provides for a high standard of preventive and technical assistance measures in matters within the Community’s powers, in particular with regard to the internal market. This includes measures to prevent and to combat money laundering, as well as standards on accounting in the private sector and on transparency and equal access of all candidates for public works supply and service contracts. As the Member States stated that they would sign the Convention as soon as it was opened for signing in Merida, Mexico (…) the Commission asserts that the European Community should also do so. To that end, the Commission proposed that the Presidency of the Council designate the persons empowered to sign the Convention on behalf of the European Community. The Council adopted the Commission proposal without debate’.\(^\text{54}\)

As already said it is important to avoid duplication but it is also important to monitor the correct implementation of such large number of instruments. Of course the Commission holds a monitoring power for what concerns the application of EU legislation while at international level it is GRECO (Group of States Against Corruption) to play an important role involving in its activities Member States (a larger number than just the ones member of the Council of Europe), UN bodies and OECD bodies. Therefore:

GRECO’s objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption(…)The functioning of GRECO is governed by its Statute and Rules of Procedure. Each member State appoints up to two representatives who participate in GRECO plenary meetings with a right to vote; each member also provides GRECO with a list of experts available for taking part in GRECO’s evaluations(…)GRECO has granted observer status to the Organisation for Economic Cooperation and Development (OECD) and the United Nations)\(^\text{55}\)

\(^{54}\) <http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33300_en.htm>
\(^{55}\) <http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp>


2.2 Corruption and Public Funding

Combating corruption is important for several policy areas of the European Union. The necessity to create, in coordination with international bodies, a comprehensive action applicable to the different areas has been recently stressed again in the Stockholm Program. In this Program the Commission is invited once again to develop indicators, on the basis of existing systems and common criteria, to measure efforts in the fight against corruption, in particular in the areas of the *acquis* (public procurement, financial control, etc) and to develop a comprehensive anti-corruption policy, in close cooperation with the Council of Europe Group of States against Corruption (GRECO).

This necessity was already underlined by the Commission in 2003, when it acknowledged that the fight against corruption was important in order to guarantee sound decision making, fair competition, effective functioning of the internal market and of course the protection of the financial interests of the Union. However in the same document the Commission admits that fighting corruption means first of all preventing corruption ‘reducing opportunities for corrupt behavior by avoiding conflicts of interest and introducing systematic checks and controls’.

Public procurement and more in general public funding is certainly one of the sensitive sectors more likely to be affected by corruption and to cause damage to the market and distortion of competition. Therefore it is one of the key sector where the EU action has to be stronger.

The importance of a strong and transparent European public procurement policy was highlighted by the Stockholm Program, which mentioned public procurement as an area of special attention in the context of the fight against corruption. This same idea has been recently underlined by the Commission in its Green Paper on The Modernization of EU Public Procurement Policy towards a more Efficient European Procurement Market of 27 January 2011, which aims at understanding how the current EU provisions should be renewed and improved in order to reach the goals settled in the ‘Europe 2020 (Europe 2020) strategy for smart sustainable and inclusive growth’. According to Europe 2020 ‘public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open EU wide.’

Two relevant instruments in the field of corruption control in public procurement procedure are the Directive 2004/17/EC of the European Parliament and of the Council of 31

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58 Ibid
61 Ibidem

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March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors\(^{64}\) and the Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Public Procurement Directive)\(^{65}\) that consolidated the three already existing directives ruling the public sector\(^{66}\).

Compared to the past, the new Directives introduced an important novelty which is in line with the anti-corruption strategy adopted by the European Union, namely, the fact that it is now obligatory for Member States to exclude corrupt companies (as the ones that have been convicted of fraud, organized crime and money laundering) from public contracts whereas, on the contrary, in the past, Member States could use a certain discretion in deciding to exclude firms convicted of such offences.\(^{68}\) However, according to the mentioned Green Paper on Public Procurement

The current directives do not include more specific rules to prevent and sanction conflicts of interest, and they have few specific rules for penalizing favoritism and corruption in public procurement. These issues are more particularly addressed in national legislation, but the level of specific safeguards offered by national legislation varies greatly between Member States\(^{69}\)

What renders public contracts appetizing for unscrupulous contractors is the amount of resources and money on the table and this makes important for firms to obtain (through bribery) the award of the contract at the expenses of their competitors.\(^{70}\) It sounds as a paradox but:

The major reason for bribery in public contract assignment (…) is probably because everyone believes that everyone else is involved in such kind of business. Losing a contract because a competitor bribed the officials must be very frustrating. This problem of hidden information is reflected in the way that all the companies involved pay a bribe even if they would be better off with no corruption. Hence the companies

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\(^{67}\) S. Williams, *The mandatory exclusion for corruption in the EC procurement directive* p. 3 <http://www.nottingham.ac.uk/shared/sharedProcurement/publications/Sope_Exclusions_in_proc.pdf> accessed 08 March 2011

\(^{68}\) Ibidem 4


that bribe public officials seems to forget the negative externality they impose on the other firms, as well as the worsening of their economic environment.\textsuperscript{71}

In such system, who is the best in corrupting will be awarded the contract, and the best price or the best quality of goods or services provided will be considered ‘marginal details’ not worth to be taken in consideration in the awarding procedure, moreover the price will not be the best because the firm will add to the contract costs the further cost it suffered for the bribe.\textsuperscript{72}

‘Systematic corruption can induce inefficiencies that reduce competitiveness. It may limit the number of bidders, favor those with inside connections rather than the most efficient candidates, limit the information available to participants and introduce added transaction costs’. These distortions of market forces obstruct the ordinary benefits induced by competition(…). Usually a public tender effected by corruption represent an inefficient investment of public assets. One reason is inflated prices, another is that a corrupt official who discriminates in favor of some bidders, frequently selects an inefficient contractor.\textsuperscript{73}

Therefore, the result is a constant decrease of competition, or better to say, a substantial absence of real competition in public procurement, which, on the contrary, becomes a breeding ground for ‘competitive corruption’. This cannot be accepted in Europe where one of the funding principle of the Union itself is the well functioning of the internal market.\textsuperscript{74}

There are important reasons why European Union chose public procurement as one of the fields where to concentrate its anti-corruption policy. First, the creation of an open public procurement area creates more opportunities for cross border fraud and corruption which would irreparably effect the market; then, given that the European Union finances several projects, through the system of shared management, it has all the interests to protect its investment from criminal behaviors; finally, corruption and organized crime are strictly connected and a comprehensive policy is necessary in order to fight efficiently both phenomena\textsuperscript{75} and especially to avoid that public funds are used by criminal groups for their illicit activities. In certain regions, if criminal groups are able to infiltrate licit economy and are able get public funds, this would enrich them conferring them an influential power over the population of that region.

\textsuperscript{71} T. Soreide, \textit{Corruption in Public Procurement: Causes, Consequences and Cures} p. 4
\texttt{<http://bora.cmi.no/dspace/bitstream/10202/185/1/R%202002-1.pdf> }accessed 8 March 2011
\textsuperscript{72} T. Medina Arnáiz, ‘Grounds for exclusion in public procurement: measures in the fight against corruption in European Union’, (international public procurement conference proceedings 21-23 september 2006), pag. 333
\textsuperscript{73} T. Soreide, \textit{Corruption in Public Procurement: Causes, Consequences and Cures} p. 8
\texttt{<http://bora.cmi.no/dspace/bitstream/10202/185/1/R%202002-1.pdf> }accessed 8 March 2011
\textsuperscript{74} S. Williams, \textit{The mandatory exclusion for corruption in the EC procurement directive} p.6
\texttt{<http://www.nottingham.ac.uk/shared/shared_procurement/publications/Sope_Exclusions_in_proc.pdf> }accessed 08 March 2011
\textsuperscript{75} Ibidem 7
2.3 The protection of Public Funding

According to the Communication from the Commission to the Council and the European Parliament on the disqualifications arising from criminal convictions in the European Union of 21 February 2006,

A disqualification can be defined as a measure which restricts, for a limited or unlimited period, a natural or legal person from exercising certain rights, occupying certain functions, engaging in certain activities(…).

The Communication cites the Public Procurement Directive among the instruments adopted by the European Union aiming at the approximation of the national legislation. This document underlines how, through the provision on mandatory exclusion (which, as such, is a form of disqualification), the Directive makes the public procurement process more transparent in order to help the fight against corruption, organized crime and fraud, punishing also such offences as money laundering. The Directive foresees the application of mandatory exclusion to natural and legal persons.

In fact at the article 45.1 (recalled by art 53.3 of the Directive 2004/17/EC) it is stated:

Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

(a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA;
(b) corruption, as defined in Article 3(1) of the Council Act of 26 May 1997 and Article 3 of Council Joint Action 98/742/JHA respectively;
(c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities;

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

These grounds for mandatory exclusion were introduced for the first time (in national public procurement process) by this Directive, in order to respond to the alarm over the relevant influence of organized crime and terrorism on public procurement. Such influence does not only affect the normal competitive process, damaging the market, but it can also creates a circuit of money laundering. Moreover these grounds of exclusion find their rational in the

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77 Ibidem . 2.
78 Ibidem p. 5
concern that funds for the European financed projects are not misapplied. In fact the Directives also apply when the EU finances a project but the implementation process is conducted by a Member States. This means that safeguarding public contracts from the mentioned criminal offences will also safeguard the EU’s financial interests.81

Exclusion can have different meanings. Firstly it can be used in order to prevent the contracting authorities from concluding contracts with unreliable contractor protecting at the same time the public funding and the general interest of the community.82 Secondly exclusion could act as a deterrent against violation of anti-corruption legislation, stressing the firm line followed by the government in not accepting (or ignoring) corruption.83 Thirdly it can be a disincentive from engaging in dishonest economic activities in the future.84 Finally it can be punitive because the exclusion may damage the reputation of the firm, that might find difficult, in the future, to obtain a contract in that or other sectors.85

Provisions about exclusion also appear in in the Financial regulation applicable to the general budget of the European Communities of 200286 which, as such, has a relevant role to play for what concerns the sound management of the EU’s budget.87 In fact under art. 93.1 it is stated that:

Candidates or tenderers shall be excluded from participation in procurement procedures if:

(…)  
b) they have been convicted of an offence concerning their professional conduct by a judgment which has the force of res judicata  
(…)  
e) they have been the subject of a judgment which has the force of res judicata for fraud, corruption, involvement in a criminal organization or any other illegal activity detrimental to the Communities' financial interests.

According to the Financial Regulation, exclusion apply to public procurement and grants, in fact the article 114.3 states that ‘grants may not be awarded to applicants who are, at the time of a grant award procedure, in one of the situations referred to in Articles 93(1) (…)’

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The close relation between the Public Procurement Directive and the Financial Regulation can be explained as follows: the European Union financial regulation applies to the general budget of the Union and its objective is to regulate only EU funds and to protect the EU financial interests. On the other hand, the Directive sets more specific guidelines for Member States in order to regulate their national procurement, with their own funds or with the European funds implemented through shared management system. Therefore the Public Procurement Directive also protects, although indirectly, the financial interests of the EU.\(^88\)

As usually, a Directive sets minimum rules common to all Member States but still, a broad margin of discretion is left to the member states that have to implement it in accordance to their national laws. This means that the privation of the rights, arising from the exclusion, may take place for various reasons in accordance with the 27 national legal systems.\(^89\)

In fact:

providing for member states to introduce additional exclusion grounds in their national legislation might enable them to tackle specific problems of unsound business behaviors linked to the national context more effectively. On the other hand, specific national exclusion grounds always entail a risk of discrimination against foreign bidders and could jeopardize the principle of a European level playing field.\(^90\)

Therefore, according to the Green paper on Public Procurement Policy a clarification of the scope of the exclusion grounds in implementing national legislation is probably needed.\(^91\)

However, article 45.1, of the Directive, states that if the contracting authority is aware of the fact that a candidate or tenderer has been subject of a conviction by final judgment for one of the reasons listed in the same article, it shall exclude the candidate or tenderer from participating in a public contract. The exclusion is mandatory but it seems it will only apply when the contracting authority is aware of the conviction or at least has reasons to doubt about the candidate personal situation.\(^92\) This idea is reinforced by the last sub-paragraph of article 45.1

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned.\(^93\)

Here, the words *where appropriate* ‘mean that it is unclear how far member states must investigate’\(^94\) and appear to confer a relative value, more than an absolute one, to the request


\(^90\) Ibid

\(^91\) Ibid


of the relevant information. In fact, it seems that the contracting authorities do not need to ask relevant information to all tenderers but just to the suspicious ones. From the wording of the Directive it is not clear, first, how a contracting authority can find out if a bidder has been convicted. Second, it needs to be clarified if the contracting authority also has to investigate on convictions of someone closely related to the bidder.

The directive does not specify if the exclusion must apply to firms related to the convicted firm, such as parent, subsidiaries or sisters companies, or if the contracting authority is required to exclude a firm because its director or those persons that, within the company have the power to take decisions, have received a relevant conviction. Therefore it is not clear if a company should be excluded from participation in a public contract, because its director has committed a relevant offence, even when there is no connection with him anymore or he has been removed and it is not evident if the dismissal of the director is sufficient to clean the company. However, to understand the range of contractors subject to exclusions is important in order to render the mandatory exclusion effective and avoid the risk of convicted firms tendering through related persons or other firms belonging to the same group.

This matter becomes even more significant when the conviction is the ‘participation in criminal organizations’, because, thank to the efficient organization of the criminal groups, it is not too difficult to find related companies or persons behind whom to hide in order to be awarded the public contracts. Therefore, when the aim is to exclude persons convicted of participation in criminal organization, the effect of the exclusion cannot be limited to the convicted firms, because very often such firms and those who are involved with them, are part of a network of organizations created with the scope of evading penalties placed on individuals or organizations.

Another issue to address is the possibility to exclude a firm because it proposed subcontractors that committed a relevant offence. The award of subcontract is not regulated by the Procurement Directive. The Directive foresees only that the contracting authorities are allowed to request to the contractors any share of the contract which will be subcontracted to third parties. Although the matter is not further regulated, this is a sensitive subject, since subcontracting can be a way of avoiding controls by companies that have committed criminal offences. This is the reason why contracting authorities should, in any moment, be entitled to exercise a veto on the proposed sub-contractors.

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97 Ibid. 492
99 E. Piselli, ‘The scope for excluding providers who have committed criminal offences under the E.U. procurement directive’ Public Procurement Law Review, v. 6, p. 267-286
Such right to exercise a veto can be an important instrument in the fight against corruption and against organized crime in public procurement. An interesting solution comes from Italy, country where, the intention to subcontract a share of the works to be carried out and the names of the proposed subcontractors have to be indicated to the contracting authorities at the time of the presentation of the offer. Then the contracting authorities can decide to refuse a subcontractor if they have received a conviction for Mafia-related criminal offences.\textsuperscript{103}

That said, If the public procurement, which is based on non discrimination, has to be kept open to all the contracting authorities and contractors in Europe, the cost of investigation in order to assess the trustworthy or the absence of convictions of a contractor or candidate and related persons or firms might be too heavy for procuring authorities and overweigh the benefits that could derive from the contract\textsuperscript{104} But on the other hand, the provisions would be weakened if investigations are not carried out in a proper and effective way.\textsuperscript{105} Probably, the creation of a central register of convicted firms, to which Member States are allowed to have access, would help to solve the problem, because it would relieve Member States of the burden to investigate the suspicious companies every time a contract has to be concluded.\textsuperscript{106}

In order to be effective, such register should be created and managed following the most transparent criteria, setting up mechanisms that facilitates exchange of information, first among the various Institutions of the European Union (when the European union budget funds are centrally managed); second, between the Member States and the European Institutions (in cases of shared management funds); third, among the various Member States either in the case of public procurement with their own funds\textsuperscript{107}, or when (in the case of shared management), projects are financed by the European Union but the procurement process is conducted by the Member States.\textsuperscript{108}

The obstacle in creating a central register may be, besides the lack of harmonization in exclusion criteria, processes and applications\textsuperscript{109}, the difference in data protection among Member States. In fact for some Member State is not so obvious to share information about conviction and it is even less obvious to share information about suspicion (concept that does not have a Europe-wide recognized criminal relevance).\textsuperscript{110}

\textsuperscript{103} Ibid
\textsuperscript{105} S. Williams, The mandatory exclusion for corruption in the EC procurement directive p. 28 <http://www.nottingham.ac.uk/shared/shared_procurement/publications/Sope_Exclusions_in_proc.pdf> accessed 08 March 2011
\textsuperscript{107} Transparency international’s recommendations for the development and implementation of an effective debarment system in EU, < www. http://www.transparency.org/> accessed 08 March 2011
\textsuperscript{108} S. Williams, The mandatory exclusion for corruption in the EC procurement directive p. 36 <http://www.nottingham.ac.uk/shared/shared_procurement/publications/Sope_Exclusions_in_proc.pdf> accessed 08 March 2011
\textsuperscript{110} S. Williams, The mandatory exclusion for corruption in the EC procurement directive p. 28 <http://www.nottingham.ac.uk/shared/shared_procurement/publications/Sope_Exclusions_in_proc.pdf> accessed 08 March 2011
The main issue about transparency in managing European Union funds is represented by the important portion of European Union funds, mainly agricultural and structural (sectors where organized crime interests are more present), implemented jointly by Member States and Commission under the scheme of shared management. These funds are subject to monitoring parameter adopted by Member States but under European Union financial responsibility.\(^\text{111}\)

In this specific case, according to Transparency International and its Recommendation for the Development and Implementation of an Effective Debarment System in EU of 28 March 2006\(^\text{112}\), the Member States should firstly, consult, the information (kept in a register like the one mentioned above) on excluded (therefore convicted of a relevant offence) persons and companies before contracting. Secondly, they should exclude economic operators who have already been excluded at European level. Thirdly, signal to the European Union the cases where there is evidence that, according to the Union’s regulations would call for exclusion and submit to the competent authorities the relevant information. Lastly provide explanation for decisions to contract with an excluded company or individual. On the other hand the Commission should create mechanism to exclude operators who have been excluded at national level and should monitor the cases that member states have defined as suspicious.\(^\text{113}\)

This idea of cooperation between Member States and Commission reflected the recommendation n. 2 of the Organized Crime Millennium Strategy where, in line with the recommendation n. 7 of the ‘Action plan to combat organized crime’ of 1997, it is stated that Member States and the European Commission should ensure that the applicable legislation provides for the possibility that an applicant in a public tender procedure who has committed offences connected with organised crime can be excluded from the participation in tender procedures conducted by Member States and the Community. (…)Similarly the Member States and the Commission should ensure that the applicable legislation provides for the possibility of rejecting, on the basis of the same criteria, applications for subsidies or governmental licenses. Appropriate Community instruments and instruments of the European Union, enabling inter alia exchange of information among Member States and between Member States and the Commission, and containing specific provisions relating to the role of the Commission both in administrative co–operation and the setting up of black–lists, should be drawn up to ensure that these commitments can be carried out, while ensuring conformity with the relevant rules relating to data protection. In the long term, a single database on persons who have committed offences connected with organised crime should be established at EU level, while taking full account of data protection requirements. This database should be accessible by the Member States, the Commission and Europol in accordance with rules to be drawn up in consultation with the European Parliament.\(^\text{114}\)

While from several parts the creation of a Black-list or of a register of convicted firms is envisioned, according to a study conducted by IALS in London\(^\text{115}\) there are three reasons why an EU Black-list should not become the main approach and, on the contrary, a White-list

\(^{111}\) < www.transparency.org >

\(^{112}\) Ibid


approach should be preferred. Firstly, to be included in a black-list is a strong penalty and it could rise question of proportionality; secondly, the measure may not be effective because criminals belonging to well-structured organizations often hide behind people who have good records and do not appear in a Black-list; thirdly, the extension of a Black-list is unlikely to apply to all member states. 116

On the contrary a White-list approach would result in a list of information that the tenderers volunteer to provide. In doing so they agree on the fact that the national authorities of the Member States, where they are established, can carry out extensive and constant checks and they also agree that an European Union coordinating body would keep their details. Participation in the White-list would be on a voluntary basis on the part of tenderers and it may be taken into account by either public authorities of the Member State that carried out the checks either by public authorities of other Member States. Moreover, another significant element in favor of the White-list is that not being on a white list does not lead to the automatic exclusion of the tenderer. 117

116 Ibid 33
117 Ibid
3 ORGANIZED CRIME

The European Union’s fight against organized crime has its current legal basis in the art 83 of the Treaty of Lisbon that states:

1. The European Parliament and the Council may (...) establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis
2. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime

In specific for what concerns the sector of public procurement, the Public Procurement Directive and the Financial Regulation of 2002 foresee the exclusion from public procurement of firms that have been convicted of participation in criminal organization.

The article 45.1.a of the Directive refers to the definition of participation in criminal organization given by Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organization in the Member States of the European Union\(^1\) that under the article 2 states:

To assist the fight against criminal organisations, each Member State shall undertake, (...) to ensure that one or both of the types of conduct described below are punishable by effective, proportionate and dissuasive criminal penalties:
(a) conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in:
- the organisation's criminal activities falling within Article 1, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the Member State concerned, even where the offences concerned are not actually committed,
- the organisation's other activities in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities falling within Article 1;
(b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences falling within Article 1, even if that person does not take part in the actual execution of the activity.

It is important to break the link between European or national public funding and organized crime because through this channel, criminal organizations can influence in their favor government policy, law making and law enforcement. Throughout this mechanism

organized criminal groups are able to penetrate legitimate economy. Therefore combating the infiltration of organized crime in public funding is important to prevent the state from being an actor of the enrichment of criminal groups and to prevent criminal organizations from using public contracts to launder illicit money. Furthermore, security and moral issues should be addressed especially when local or even national governments become dependent from such groups because of the involvement of organized crime in political campaign financing and electoral manipulation.

Before going deeper in analyzing the link between organized crime and public funding, it may be useful to describe the concept of organized crime and analyze what have been the measures adopted by the European Union in order to tackle this phenomenon.

### 3.1 The Concept of Organized Crime

The term ‘organized crime’ may suggest the idea of a clear and coherent phenomenon, while on the contrary, it is not possible to observe and classify it as it is possible to do with other crimes. Although ‘the confusion surrounding the definition of organised crime can be observed in academic as well as in political and law enforcement discourse’.

A definition of organized crime, based on the consensus of the authors reads ‘organized crime is a continuing criminal enterprise that rationally works to profit from illicit activities that are often in great public demand. Its continuing existence is maintained through the use of force, threats, monopoly control and/or the corruption of officials’. The precise size of enterprise or groups is not important to the definition; two persons are the minimum required to engage in a criminal conspiracy, so any group of two or larger suffices.

This phenomenon can be considered from three different points of view: on the base of criminal activities, on the base of criminal organization and on the base of illicit power structures. According to the first view organized crime is seen as a kind of criminal activity which is specific because of its level of sophistication, continuity and rationality and it is not just a sporadic criminal behavior. The second view holds that it is not important what offenders do but how they are linked to each other, therefore the emphasis is on the fact that they are organized. According to the third view organized crime is a system characterized by

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the concentration of power either at the underworld level, either at the upper-world level as an alliance between criminal and political/ economic elites. However given that organized crime is a social construct that may vary depending on the point of view of each observer, according to other authors:

In Europe as in the United States, public, political and even scientific debates still oscillate between thinking of organized crime as meaning sets of criminalized activities, and as meaning sets of people engaged in crime. In other words, the concept of organized crime inconsistently incorporates the following two notions: a) the provision of illegal goods and services; b) a criminal organization understood as a large scale entity primarily engaged in illegal activities with well-defined collective identity and subdivision of work among its members.

The locution ‘organized crime’ was first used in an annual report of the New York Society for the Prevention of Crime, and it referred to ‘gambling and prostitution protected by public officials’. The term was not very used until the early 1950s when in the US, it became common to use it in order to identify the centralized criminal organization, formed mostly by Italian migrants, that was the parallel of the Sicilian Mafia organization and that dominated the illegal markets and lucrative rackets in various US cities. In 1963 the testimony of the former member of this organization, Joe Valachi explained the composition and internal activity of the organization itself and named it ‘La Cosa Nostra’. However this mafia-based view of organized crime was rejected by most American social scientists, because considered too ideological, serving political interests and lacking in accuracy and empirical evidence.

Therefore, since 1970 the attention of the social scientists focused on the non-controversial aspect of organized crime, namely, the supply of illegal products and services and in that period several authors began to use the expression ‘illegal enterprise’ instead of ‘organized crime’; notwithstanding the will of scientist to eradicate the ethnic stereotypes that saw the term ‘organized crime’ too connected to the Italian Mafia, the term ‘organized crime’ continued to be used but it was then identified with the provision of illegal goods and services and it became synonym for ‘illegal enterprise’.

Since the mid-1970s, the debate about organized crime interested scientists in Europe that tried to conceptualize and define it in order to understand if their countries were immune to the problem. In spite of the above mentioned efforts of scholars to disconnect the idea of organized crime with ethnic stereotypes, the identification of ‘organized crime’ with the pure

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8 Ibidem
14 Ibid. 310
illegal market activities has not been accepted in Italy where several scholars underlined the differences between Italian mafia groups, which have a specific cultural and political dimension, and other forms of organized crime that could be identified just with illegal business.

Furthermore, since the 80s the problem of mafia-type organizations and later also of Russian and other ethnic mafias, attracted the interest of media and politicians in all European countries, but until the beginning of 1990s it remained a problem discussed at national level and little attention was paid to its transnational nature.

In 1992, after the murder of the Italian judges Falcone and Borsellino, the situation changed, and suddenly the fear that something similar would happen in other States spread all around Europe and from then on organized crime and its being potentially transnational, became a central argument in the European policy making about serious crime, although it was not clear yet what it was or what it could be.

Since then, experts tried to asses in various way organized crime, focusing their studies on criminals, groups, activities and geographical presence. Delineating the activities that constitute organized crime is not easy because organized crime can be active in several fields and the nature of its activities has changed in the years. To give some examples there was a shift from heroin and cocaine trafficking to synthetic drug trafficking, from extortion of local businesses to extortion of corporations or from loans-harking to money laundering. The modern activities of organized crime are ‘simply newer versions of older kinds of criminal conduct that have changed due to opportunity, technology and likelihood of apprehension’, According to the last assessments the majority of criminal groups have a cellular structure, with no strong affiliation between them and no permanent chain of command. However, such organizations coexist with hierarchical groups occupying relevant positions in organized crime within the European Union.

The 2009 OCTA (Organized Crime Threat Assessment), reported the existence of five criminal hubs that influence the criminal markets. The North West hub, which is located on the Netherlands and Belgium and it is a function as distribution centre for heroin cocaine syntetic drugs and cannabis products. The South West criminal hub is located in Spain and is related to the markets of drugs, trafficking in human beings and illegal immigration. The North East hub can be localized around the Baltic countries and it is influenced by the Russian Belarus and Ukraine criminal organizations; the main activities in this geographic area are traffic of woman for sexual exploitation, illegal immigrants, synthetic drugs, counterfeit goods. The southern criminal hub is based in Italy and it is influential the markets of all type of drugs, illegal immigration, counterfeit goods and Euros. The last is the South


East criminal hub is located between Europe and Asia around the Black Sea and it is active in cocaine traffic. \(^{20}\)

OCTA 2009 also classified ‘criminal groups according to a typology based on the geographical location of their strategic center of interest and their capability and intention’. \(^{21}\) On the base of this classification it listed three threatening group type:

1) Groups using systematic violence or intimidation against local societies to ensure non occasional compliance or avoid interferences (VI-SO strategy); 2) Groups interfering with law enforcement and judicial process by means of corruptive influence (IN-LE strategy) or violence/intimidation (VI-LE) strategy; 3) Groups influencing societies and economies (IN-SO strategy). \(^{22}\)

Various attempts to assess organized crime have been made in order to set the right (present and future) policies. The variables often considered in order to assess the risk posed by organized crime are ‘the threat’ and ‘the harm’. The threat assessments ‘identify and evaluate potential future threats by making projection based on accumulated knowledge about them and anticipated change in the future.’. \(^{23}\) The harm ‘is the damage occurring should a threat be realized’. \(^{24}\) Once the probability of an event happening (threat) and its severity (harm) are known, \(^{25}\) a risk assessment, that is to say, ‘the chance of something happening that will have an impact upon objective’ can be delineated. \(^{26}\)

According to Smith, that in 1980 was the first to embrace a new approach in the assessment of organized crime, another variable that should be considered is the vulnerability \(^{27}\) which is ‘an aspect of the environment offering opportunities to the threat to cause harm’. \(^{28}\) The importance of analyzing the context in which criminal organizations operate was recognized in various studies and was underlined also by the fist OCTA that in

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\(^{20}\) T. Vander Beken, ‘The faces of organized crime in Europe’, p. 3

\(^{21}\) Ibid 4

\(^{22}\) Ibid.


2006 referred to the ‘key facilitating factors with regard to criminal markets’\(^{29}\). Besides vulnerability studies, environmental scans are conducted to get information about the external environment of organized crime. Environmental scanning is aimed at alerting decision makers ‘to potentially significant external changes before they crystallize so that decision makers have sufficient lead-time to react to the change’\(^{30}\).

Therefore for an effective assessment the ideal model would be to combine information about criminal activities (threat), about the crime opportunities of the environment (vulnerabilities) and about the impact (harm) of organized crime\(^{31}\).

### 3.2 Measures Against Organized Crime

Since the 80\(^{th}\) the discussion between member states focused on the idea that organized crime needed to be combated through criminal law also at European level. This can be deduced from the Convention implementing the Schengen agreement of 1990, where a particular attention was paid to drug traffic and arms traffic\(^{32}\). The fight against organized crime received a new input a few years later, in fact when the Italian judge Falcone and Borsellino were murdered in Sicily in 1992, an ad hoc committee was set up in order to produce working documents on the danger of organized crime for the European Union. Although at the end of his work the committee gave various recommendations, none of them resulted into a concrete program to combat organized crime in the European Union\(^{33}\).

Although, organized crime as such was not considered a major problem yet, an indirect reference was made in article K 1.9 of the treaty of Maastricht\(^{34}\) that proposes the creation of a European Police Office (Europol) aimed at improving police cooperation in criminal matters. An explicit reference to fight organized crime was made later, in 1995, when a Convention\(^{35}\) established Europol and stated at the art 2 that the Europol’s task is to improve the cooperation and the effectiveness of the competent authorities in preventing and combating serious forms of international crime where there are indications that an organized crime structure is involved\(^{36}\).

However, the real boost, in terms of policy making, arrived in 1996 after the murder of an Irish journalist Veronica Guarin who had repeatedly denounced the influence of organized crime in the city\(^{37}\). The fact was committed while Ireland held the presidency of the European Union and the shock of such death was probably the reason why Ireland together

\(^{29}\) T. Vander Beken, ‘The faces of organized crime in Europe’, p. 8

\(^{30}\) Ibid.


\(^{33}\) Ibid. 634


\(^{37}\) Ibid. 634
with the Nederlands established an High Level Group of Officials, which was given the task to delineate a coherent policy on organized crime.  

The report of this group was adopted by the Council and resulted in the ‘Action plan to combat organized crime of 1997’. This plan called for more cooperation in criminal matters between member states and stressed the need to prevent organized crime. This plan focused on the importance of improving socio-economic conditions in cities exposed to the influence of criminal organizations. The main objective were first, transparency in public administration, second, a deep screening of companies or individuals that participate in public procurement.  

The chapter II of the plan indicated the steps to be taken in order to prevent organized crime. It mentioned the importance to pay a special attention the implementation of structural funding, to cases of fraud affecting the financial interest of the Union in order to understand if they are committed in the framework of a criminal organization.

After this plan, the issue of organized crime appeared also in the Treaty. In fact, although the Treaty of Maastricht introduced criminal law as a new (intergovernmental) domain of the European Union, as said above, it did not explicitly recognized organized crime as an EU issue.

The novelty was introduced by the Amsterdam Treaty could be found in the article 29 that stated that the Union should create an ‘area of Freedom Security and Justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters (…)That objective shall be achieved by preventing and combating crime, organised or otherwise(…)’

With this article the fight against organized crime becomes a central problem of the Third Pillar and the central aim of judicial and police cooperation within the Union. This commitment was reinforced in 1999 at the European Council of Tampere where the idea of fighting serious crime was once again translated in ‘A union wide fight against organized crime’ program adopted by the European Council. Several measures were introduced like for example: first, the creation of European police chiefs Operational task Force, that had to work in cooperation with Europol in order to contribute to planning of operative actions against organized crime; second, the establishment of Eurojust, a European body which task is to help the coordination of national prosecuting and investigating bodies; thirdly, the formation of joint investigation teams; finally, the recognition of the fight against money laundering as one of the main objective in order to touch the core interest of organized crime.

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The next policy plan was ‘The Prevention and Control of Organized Crime. A European Union Strategy for The Beginning of The New Millennium’ of May 2000. This plan did not introduce many novelties, it had provisions already foreseen by the action plan of 1997 on organized crime and the Tampere program, just more detailed. It stressed the necessity to have a better cooperation with countries that wanted to join the Union in order to render more effective the fight against organized crime, aspect however already present in the ‘pre-accession pact on organized crime’ of 1998 and recommended the introduction of a witness protection program.48

In 2004 the Council of European union and the Commission published the Hague Program that was the successor of the Tampere Program. Although the priority 8 of this program is the fight against organized crime, it did not introduce novelties, in fact, it just underlined the need to improve the knowledge of the phenomenon, to develop a new strategic concept, to devote more attention to the anti corruption policy and to strictly monitor the financial aspect of organized crime.50

In 2005 it was decided that Europol had to produce an annual OCTA, Organized Crime Threat Assessment, in order to support the development of a common intelligence model by Europol and member States.51

The most recent instrument adopted to fight organized crime is the Council Framework decision 2008/841/JHA of 24 October 2008 on the Fight against Organised Crime. This instruments is quite important because it aims to ‘harmonize Member States’ definitions of crimes related to a criminal organization and to lay down corresponding penalties for these offences’.

In March 2011 a Motion for an European Parliament Resolution on Organized Crime in Europe underlines how this instrument has had a limited impact and ‘has not made any significant improvement to national laws or to operational cooperation to counter organized crime’. However it is difficult to understand the nature of this criticism because, according to this framework decision, two conducts need to be recognized as offences. One is the active participation in the criminal activities of an organization, with the knowledge of its aim or of its intention to commit crimes. The other is the agreement on the perpetration of crimes
without necessarily taking part in committing them. The latter is of course aimed to get to the leaders of criminal groups that are usually not involved in the execution of criminal activities. Another important element to be mentioned is the introduction of the criminal liability of legal persons according to the article 5 that states:

Each Member State shall take the necessary measures to ensure that legal persons may be held liable for any of the offences referred to in Article 2 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person (…).

It is interesting to notice how after a period of constant activity in addressing all efforts to render effective the fight against organized crime, the Lisbon Treaty underlines in art 83 the necessity to ‘establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension’ moving the focus from organized crime to ‘serious crime with a cross-border dimension’ and mentioning, in the same article, organized crime just as one of the crime falling under this category.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

As if all the other types of crime mentioned in the same list were not part of organized crime.

This tendency was already underlined by the Europol Decision of 6 April 2009 establishing the European Police office (Europol) that replaces the provisions of the Convention of 1995. The Decision did not focus on organized crime but on serious crime, which is a different concept and as such influences the assessment of the fight to crime in Europe. In fact from this perspective not all forms of organized crime are serious crimes. In northern European countries, for example, there is not a mafia kind organization but, nevertheless, smaller and flexible groups are active in several fields; the question then is to understand if these kinds of small criminal organizations can be considered serious crime and deserve the same policy priority.

Another interesting novelty introduced by the Lisbon treaty is according to article 86 the possibility to establish a European Public Prosecutor from Eurojust that might be conferred by the European council competences for what concerns serious crime having cross border dimension, which as just said, in the wording of the Lisbon Treaty, includes also organized crime. However there are still doubts about the feasibility of this new body that


should share competences with two already existing bodies namely OLAF and with Eurojust.60

The successor of the Tampere and Hague Programs is the new policy plan: Stockholm Program - An open and secure Europe serving and protecting citizen61. The plan lists a series of suggestion made by the European Council in order to develop an area of freedom security and justice. At the point 4.4 of the program in the section concerning the protection of serious and organized crime are listed a number of fields where the action of the EU is advisable.

First it admits that the fight against organized crime continues to become globalized and therefore a high level of coordination among Member States authorities is needed in order to work effectively in cross border situations; then all a series of actions against trafficking in human beings, sexual exploitation of children and child pornography, cyber-crime and drugs are foreseen and finally the Council focused on the necessity to fight economic crime and corruption, reducing the number of opportunities that a globalized economy render available to organized crime to infiltrate licit economy.

In march 2011 a motion for a European Parliament Resolution on organized crime in the European Union, gave new input to the fight against organized crime as such, by making no distinction between serious and organized crime. The motion stressed how organized crime is a threat to the internal security of the European Union, and called for a specific horizontal European Union strategy. In order to set strict implementation timetable and allocation of funds, explicitly calls on the member states to clarify their political will to combat organized crime, strengthening their judicial and police authorities and assigning adequate human and financial resources for that purpose.62

Furthermore it underlines that:

Organized crime cannot proliferate without the aid , the complicity, or even the mere indifference of the political world, and expresses deep concern about the evidently increasing interpretation of organized crime and politics, involving the creation of a so called grey area which is seriously jeopardizing the credibility and true democratic nature of the institutions; expresses equal concern over the proven ability of organized crime to infiltrate the nerve centers of general government and the economic and financial fabric.63

The fight to organized crime has been an argument of discussion of bodies like the United Nations and the Council of Europe that adopted specific program to counter this phenomenon.

At the level of the Council of Europe there are initiatives specifically addressing organized crime as the PC-CO, Committee of Expert in Criminal Law and Criminological Aspects of Organized Crime set up in 1997 by the Committee of Ministers of the Council of Europe Member States. The PC-CO was replaced by the PC-S-CO Group of Expert on Criminological and Criminal Law Aspect of Organized Crime which, under the authority of the European Committee on Crime Problems, is required to find ways to increase the effectiveness of the fight against organized crime at national and international level, evaluating the organized crime control policies of the single member states.

63 Ibid. 6
In 2001 the Committee of Ministers in its Recommendation\(^{64}\) provided guiding principles on the fight against organized crime, concerning use of criminal justice system, mechanism of international police and judicial cooperation and measures to prevent organized crime. It is important to mention here also the relevant role of the European Court of Human Rights of Strasbourg, that with its judgments tried to create a good balance between the fight to organized crime and the respect of human rights like the case law concerning the use of undercover agents and anonymous witness, or the direct and indirect interception of communication.\(^{65}\)

The United Nations Convention against Transnational Organized Crime\(^{66}\), is the main international instrument in the fight against transnational organized crime. It was signed in Palermo in December 2000 and entered into force on 29 September 2003. The Convention was followed by three Protocols which focus on specific areas of action of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

With this Convention Member States recognized fight against transnational organized crime as a central issue and commit themselves to closer international cooperation in order to adequately face the problems arising from such phenomenon. Member States agreed on foreseeing in their legislations certain specific domestic criminal offences such as participation in an organized criminal group, money laundering, corruption and obstruction of justice. Moreover Member States agree on having new frameworks for extradition, mutual legal assistance and law enforcement cooperation.\(^{67}\)

### 3.3 Organized Crime and Public Funding

The Directive on Public Procurement of 2004 foresees what was already suggested in 1997 by the Action plan to combat organized crime, namely, the exclusion from participation in public contracts. The Financial Regulation of 2002, had already foreseen the exclusion from participation in public procurement and also grants, for persons that have been convicted, by final judgment, of participation in criminal organization.

These provisions have been reinforced by the Framework Decision of 2008 on the Fight Against Organized Crime that after having recognized the liability of legal persons, at the art 6.a states that legal persons held liable for one of the offences related to participation in criminal organization, should be excluded from entitlement to public benefits or aid.

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\(^{64}\) Recommendation Of The Committee Of Ministers To The Member States Concerning Guiding Principles Of The Fight Against Organized Crime <http://www.coe.int/t/dlapil/codexte/2_Adopted_Texts/CM%20Rec%20%282001%29%20E.pdf> accessed 28 March 2011


Similar measures, aimed to prevent organized crime from infiltrating the legal market and especially from participating in public procurement, are foreseen also at the level of the Council of Europe and the United Nations.\(^{68}\)

In fact the already mentioned Council of Europe Recommendation of September 2001, underlines the necessity that member states identify in their legislation ‘weak’ provisions that can be abused by organized crime for its purpose, and should enhance transparency and accountability in public administration, encouraging the adoption of codes of conduct in order to prevent illegal practice in the commercial and financial sector including public procurement.\(^{69}\)

For what concerns the United Nations Convention on transnational organized crime, at the article 31 it is stated that Member States shall take measures that focus on ‘the prevention of the misuse by organized criminal groups of tender procedures conducted by public authorities and of subsidies and licences granted by public authorities for commercial activities’.\(^{70}\)

From what said above it appears clear that the link between organized crime corruption and public procurement has always been a sensitive subject, matter of concern at the level of European Union, Council of Europe and United Nations.

An example is the Organized Crime-Best Practice Survey n. 9 ‘Preventive Legal Measure Against Organized Crime’ of the PC-S-CO of June 2003, that analyzing the experience and the best Practice of three Member States in order to give guidance for the elaboration of the preventive legal measure against organized crime, reports the experience of and legislation adopted in Sweden to prevent the infiltration of organized crime in public procurement process.\(^{71}\)

The issue of the aptitude of organized crime to infiltrate the lawful economy and to corrupt political institution began to be a concern for politics and media at the beginning of 1990.\(^{72}\)

Since then it has been clear that corruption and organized crime have been interlaced. In fact very often when an investigation on a case of corruption is carried out, the involvement of criminal groups is discovered.\(^{73}\)

This scenario is present in several Member States where, according to a study ‘Examining the links between organized crime and corruption’ conducted in 2010 by the Centre For the study of Democracy ‘certain regions and cities have traditionally being associated with high level of corruption and systematic links to organized crime. In some cases, corruption income and support for organized crime have become the norm’.\(^{74}\) The table in annex III gives an overview of regions with a high vulnerability to corruption.

\begin{footnotes}
\footnote{69 Recommendation Of The Committee Of Ministers To The Member States Concerning Guiding Principles Of The Fight Against Organized Crime <http://www.coe.int/t/dlapil/codexter/2_AdoApted_Texts/CM%20Rec%20%282001%29%20E.pdf> accessed 28 March 2011}
\footnote{73 V. Ruggiero, Who corrupts whom? A criminal ecosystem made in Italy, (2010), Crime, Law and socia change, vol. 54, n. 1, pag. 103}
\footnote{74 Centre for the study of democracy, ‘Examining the link between organized crime and corruption’, 2010 < http://www.csd.bg/artShow.php?id=15192 accessed 02 April 2011 p. 87}
\end{footnotes}
To understand how complex the phenomenon of organized crime can be, it may be useful to make a distinction between, on one side, organizations present at the level of the so-called underworld which focus their activity on conventional illicit business, in order to place on the market their illicit goods. On the other side, organizations (like the Italian Mafia) that do not limit their activity to the market of illicit goods but try to get to the upper-world of the official economic and political sphere. The latter type or organization establishes itself in both legitimate and illegitimate sector, exercising territorial control and constituting a real power system which goes beyond conventional criminality.\(^75\)(See figure in annex IV).

That said, a question arises spontaneously: how can organized criminal groups establish such intense political-criminal nexus?

The answer is particularly important especially if one considers that a NSIC study on Political-Criminal Nexus (PCN)\(^76\) revealed that the fusion between political and criminal power is a reality in several countries. This phenomenon is often present because

Organized crime groups develop collaborative relationships with state authorities to gain access to, and to exploit for their own purposes, the political, economic, and social apparatus of the state. To increase the security of their operations, they also try to develop arrangements with local and/or national political and legal authorities. For their part, state authorities seek cooperative relationships with criminal elements for various reasons such as personal benefits, securing votes, money, or to control enemies.\(^77\)

This criminal political nexus can be found all around Europe and especially in those countries in transition from authoritarian regimes like Lithuania, Czech Republic or Bulgaria, where there have been cases of involvement of former law-enforcement personnel in organized crime and cases of representatives of organized crime that assumed important position in the new legislature in order to influence in their favor the new legal framework of the country.\(^78\)

There are other countries where there is a public perception that corruption is normal and this perception helps organized crime to exercise a strong power on the territory. Such situation is common in the south of Italy, where due to the ‘environmental corruption’\(^79\) that can be explained as ‘the spread of corrupt practices throughout all sectors of the administration and public affairs’, the phenomenon of the ‘iron triangle’ is often present. ‘Iron triangle’ means a systematic exchanges between organized crime, entrepreneurs and politician, that forms a ‘cartel’ where each partner profits from votes, money, protection and public contracts.\(^80\)

One possible reason to explain the presence of this criminal-political nexus is to be found in the fact that political parties rely on external funding and this makes them sensitive

\(^75\) V. Ruggiero, Who corrupts whom? A criminal ecosystem made in Italy, (2010), *Crime, Law and social change*, vol. 54, n. 1, pag. 89
\(^76\) National Strategy Information Centre (NSIC), ‘Study On The Political Criminal Nexus (PCN), (1997)’ *Trends in Organized Crime*, vol 3, n. 1, p 4-7
\(^77\) National Strategy Information Centre (NSIC), ‘Study On The Political Criminal Nexus (PCN), (1997)’ *Trends in Organized Crime*, vol 3, n. 1, p 4-7
\(^78\) Centre for the study of democracy, ‘Examining the link between organized crime and corruption’, 2010 <http://www.csd.bg/artShow.php?id=15192 accessed 02 April 2011 p. 39
\(^80\) Centre for the study of democracy, ‘Examining the link between organized crime and corruption’, 2010 <http://www.csd.bg/artShow.php?id=15192 accessed 02 April 2011 p. 39
to corruption. This scene is pronounced in situations of political instability and change of government like in the countries of the former Soviet bloc. There, due to the lack of a well functioning system of financing political parties, older and newly created parties have often accepted the funds provided by companies belonging to ‘gray sectors’ and criminal business. This companies are motivated to make donations because they know that so doing they will be able to ask later for any kind of assistance. 

A second reason could be that for criminal organizations it is common to secure a number of votes in exchange of favors like the award of public contracts. The mechanism is quite easy: the criminal group, exercising its territorial power, tells to the (in many cases consistent) subdued part of population which party to vote for, and thousands of votes will flow in for that party. The system is based on interest and it is not moved by ideological motivation, this means that the criminal groups will sponsor any political party, no matter the ideology behind it, as long as it will favor their criminal activities and favor them in the public funding procedures.

This influence is particularly relevant at a local level, which is the breeding ground for political patronage and where, given the possibility for local administrators to manage resources and given also their geographic proximity to the criminal groups, they are more subject to the pressure of such groups. Therefore, local government employees may be able to award contracts to companies related to the local criminal organization or may, at least, easily ignore rules in order to ensure that the criminal group companies are awarded the public contracts.

This behavior finds its explanation, first in the said exchange of favors; second, in the just explained pressure exercised on local administrators and third, as several investigations have shown, in the likelihood that the council’s administrators or employees are, themselves, members of the criminal groups.

Example of this last phenomenon were found in South of Italy where in 2006 only 9 out of 92 Councils in the region were judged ‘clean’ from any kind of Mafia infiltration. This situation represents one of the extreme cases, where organized crime cannot be defined anymore as a criminal enterprise but it is integrated in the social, economic and political institutions of legitimate society to the point that there is a perfect mix between country’s political and criminal elites. Therefore, the relation between organized crime and politics can be considered as a system interaction. Example of this interaction is found in the fact that the former seven times prime minister Giulio Andreotti has been accused of collusion with Cosa Nostra. According to the investigations he protected the interest of the organization by intervening to fix the trial of some of the leaders and by allowing them to influence areas of public life. In exchange he has enjoyed the mafia’s electoral support.

The importance of public funding in the exchange system between politics, entrepreneur and organized crime has already been mentioned. This system does not involve just national public funds but it is extended also to the EU funds.

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81 Ibid. 40
82 Ibid. 39
84 Ibid
85 Centre for the study of democracy, ‘Examining the link between organized crime and corruption’, 2010 <http://www.csd.bg/artShow.php?id=15192 accessed 02 April 2011 p. 40
87 Centre for the study of democracy, ‘Examining the link between organized crime and corruption’, 2010 <http://www.csd.bg/artShow.php?id=15192 accessed 02 April 2011 p. 41
The European budget attracts criminal groups especially because of the lack of clear rules governing the relevant portion of the budget implemented through the shared management system. This uncertainty makes it even easier for such groups to request, for example, payment for fictitious work performed or incomplete services delivered.\textsuperscript{88} A recent example consists in the business of the construction of wind turbines financed by the European Union. This turbines are spread all around South of Italy but not even one fifth of these ecologic energy plants are properly functioning, most of them just stand there and are not connected to any machinery transforming the wind into energy\textsuperscript{89}

In recent years, also in Southern France the involvement of local criminal elites in ‘white collar’ crimes such as, European Union funding fraud, and manipulation of the public procurement process has shown their collusion with local politics.\textsuperscript{90} Furthermore public procurement attracts organized criminals because, especially in poor regions, it represents a relevant part of the available resource. This finds confirmation in the amount of money devoted by the EU to the structural funds\textsuperscript{91} that have the scope to grant financial assistance to resolve structural economic and social problems.\textsuperscript{92}

But why is the infiltration of organized crime in public funds process so harmful? The table in annex V summarizes the harm caused by organized crime to society, to individuals and to business. To give an example the higher price (due to the protection tax), paid for the construction of a road, will be suffered by the individual taxpayers. The harm caused by organized crime to the business will be suffered by the competing companies that cannot be awarded the contract because of the collusion between administrators and organized criminal groups. Referring to the example of wind turbines, the citizens of that area will not enjoy the green energy because the plants do not function properly although they have been fully financed.

The aspect that may rise more concern is the fact that criminal organization may use public funding (especially the ones aimed at the development of social and living conditions), in order to gain more prestige and power in the territories they control. Thank to the award of a contract for the construction of a bridge or thank to a project financed by the structural funds, companies related to these organization may become, the ‘licit’ employers for members of the general population\textsuperscript{93}. In regions where the unemployment rate is high, this may mean complete control of the criminal groups over their employees and the subsequent dependence of the latter (and their families) to the former. One of the consequences of such situation could be that the employees will ‘thank’ the employer, supporting at the (local or national election) a certain candidate (close to the criminal group) with his vote and the ones of his family’s members. This example explains how, in practice, organized crime is able to manipulate the electoral system in its favor. Furthermore, for the social pressure exercised by the criminal group and for the difficulties to find another job, it is unlikely that the employee will ever complain about his labor conditions, renouncing ‘de facto’ to the protection of his rights as a worker.\textsuperscript{94}

\textsuperscript{89} Ibid.
\textsuperscript{90} Centre for the study of democracy, ‘Examining the link between organized crime and corruption’, 2010 < http://www.csd.bg/artShow.php?id=15192 accessed 02 April 2011 p. 73
\textsuperscript{91} V. Ruggiero, Who corrupts whom? A criminal ecosystem made in Italy, (2010), \textit{Crime, Law and social change}, vol. 54, n. 1, pag. 101
\textsuperscript{92} http://ec.europa.eu/regional_policy/funds/prord/sf_en.htm , accessed 19 April 2011
\textsuperscript{93} V. Ruggiero, Who corrupts whom? A criminal ecosystem made in Italy, (2010), \textit{Crime, Law and social change}, vol. 54, n. 1, pag. 101
\textsuperscript{94} Antonio Nicaso, Interview with N. Gratteri, Italian Public Prosecutor, (Piola Libri, Bruxelles, 30 March 2011)
This last point is particularly relevant when one thinks that avoiding the exploitation of public funds by organized crime is fundamental in order to respect the real aim to which part of the European funds are devolved. In fact according to the recommendation 9 of the Action Plan to combat organized crime of 1997:

The possibilities offered by structural funds, notably the European Social Fund in the context of action to assist the labour market, and the Urban program, should be mobilized to prevent large cities in the Union from becoming breeding grounds for organized crime. Those funds can help those most at risk of exclusion from the labour market and thus alleviate the circumstances that could contribute to the development of organized crime.  

Through the infiltration in public funding, criminal organizations may get access to the business world establishing a network that may be useful for the future. In other words they may progress in their career combining involvement in licit and illicit market in order to answer to the need to launder the big amount of money they earned through their illicit activities. Moreover, even when criminal groups do not directly gain public funds, they can still act as mediators for other ‘clean’ companies, that would then be subject to the organized groups influence and control.

However it has to be pointed out that, although the mentioned study conducted more than ten years ago on the Political-Criminal Nexus highlighted how:

- Long term existence of criminal groups require some type of PCN
- Some politicians might collaborate with criminal group to embezzle public funds
- Specific political conditions facilitate the formation and evolution of a PCN
- Cultural factors also play a role in facilitating PCN 

according to the Centre for the Study of Democracy in Europe, there are few empirically based academic or policy studies (except for the case of Italy and Bulgaria) that examine how organized criminals are able to corrupt politicians and civil servants.

This situation is confirmed by C. Fijnaut and L. Paoli, who underline how the aptitude of criminal organizations to engage in illegal market activities has been investigated much more than their capacity to infiltrate the legitimate economy, civil society and politics, insomuch as ‘given the poor data available, in some context it is indeed impossible to go beyond guess-estimates and speculations.’

According to this idea, at the beginning of 90th organized crime attracted media and politics and this is why the threat of the infiltration of traditional organized group in legitimate economics and its ability to corrupt politicians and administrators was...
overestimated. Notwithstanding the fact that in several European countries criminal organizations invest their illicit proceeds in legitimate sectors such as finance, real estate, hotels, or night clubs, however, given the little information gathered in this sector, at least in western Europe, there was an exaggeration in the perception of such infiltration. The situation becomes even less clear when one also takes into consideration white collar crimes such as fraud or manipulation of public tenders.  

In the Netherlands in 2002 the final report of the Parliamentary enquiry on fraud in the Dutch construction industry was published. The Commission identified collusion as the key problem. Collusion is intended as ‘secret agreements for a fraudulent or deceitful purpose, especially to defeat the course of law’, and thus, it is considered less serious than corruption. According to the report the Netherlands was a country of collusion more than corruption, and its situation could not be compared to the German corruption scandals of the beginning of 1990, where there was a clear link between construction cartels and local corruption.

Therefore, despite some isolated cases of corrupted officials or of collusion, in Western Europe, there is no evidence of systematic corruption and infiltration of political or government institutions by criminal groups. The only exceptions in this region is represented by Italy (where the influence on politicians and administrators and the infiltration in licit activities is specific of Italian criminal organizations, and finds no equals even in Eastern Europe). However, the infiltration of criminal organizations in political and government institutions is a sensitive argument especially for what concerns public funds. This is confirmed by provisions at national and European level foreseeing the exclusion from public contracts or grants of persons convicted, beside of fraud and corruption also of participation in criminal organizations.

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100 Ibid. 615
102 Ibid. p. 147
103 Ibid. p. 141
In conclusion, the need to complete the internal market and to protect it from criminal elements gave new impetus at the EU policy against serious criminal offences. The reasons for the intervention of the European Union in the criminal law are, first, the protection of the internal market; second, the necessity to harmonize the criminal justice systems of the Member State in order to render impossible to criminals to take advantage of the incongruities that are present between the different systems; third, the need for coherence in tackling criminal activities with a European dimension.\(^1\)

As explained, in the last years the European Union has taken several steps to tackle the problems of fraud corruption and organized crime but probably some further effort or clarification is needed in order to render it more effective. For example, there is not sure and complete information about the functions and rules governing the European Public Prosecutor. In fact, the Treaty of Lisbon, foresees the establishment of such new body but it does not mention a European Criminal Court\(^2\) or a European system of criminal law. Therefore European Public Prosecutor will have to act on a national level which 'means that national authorities will have to be ready to accept the intervention of this extraneous body within the system.'\(^3\)

Probably, between the creation of an autonomous body of prosecutors, or the foundation of an office, which would direct and instruct national public prosecutors appointed by the Member States and acting in turn as the European Public Prosecutor’s deputies,\(^4\) this latter solution will be chosen. This way he will already be integrated in the legal system, and more important the cession of sovereignty will be more easily accepted if he/she is not seen as an extraneous body.\(^5\)

However, any aspect concerning the creation of the European Public Prosecutor and his cooperation with OLAF, Eurojust and Europol should be perfectly organized because ‘Any organizational deficits in this field could seriously affect the effectiveness of the prosecution of ‘eurocrimes’ (...) and the risk is that this Office may not even be established or, if established, could prove itself substantially ineffective and thus not constitute a sharp deviation from the model represented by existing bodies.’\(^6\)

Notwithstanding the efforts made in order to harmonize the different criminal systems, there is no uniform approach in the prevention and fight against fraud and corruption either when they are committed for an individual scope either when they are committed in the context of organized crime. Societies rely differently on the integrity of their public institutions and certain countries may need greater efforts to prevent and fight economic and organized crime and they may need more effective tools than the already existing ones.\(^7\)


\(^3\) Ibid p. 68

\(^4\) Ibid p. 67

\(^5\) Ibid p. 68

\(^6\) Ibid

For what concerns public funding, a common problem in Europe is the limited flaw of information. In fact, given that criminal registers are not available to contracting authorities, they cannot rely on those information when they try to uncover convictions. This increases the difficulties of investigating national and even more foreign firms limiting the impact that the mandatory exclusion, foreseen in both the Procurement Directives and in the Financial Regulation, should have. 8

The problem of the limited flow of information is known in Sweden, where although the National Public Procurement Act delineates a system that should prevent the infiltration of public procurement by organized crime, it does not function as such because, neither information on criminal records nor on suspicion of involvement in crime is available to tendering authorities. According to the Swedish National Board for Public Procurement it would be appropriate for Contracting authorities to request tenderers to provide excerpt from the criminal registers, but, since such document will reveal all offences and therefore also the ones that are not relevant for the public procurement but which could influence the procurement process, such system was not accepted because it would be contrary to the principle of proportionality and equal treatment. 9

To solve this problem the creation of a European White-list of companies has been suggested. However the White-list approach will still put the burden of seeking information on the contracting authorities. This is why another solution may be found in the creation of a EU certificate of non-conviction as it was proposed in the case of ‘vulnerable professions’ by the IRCP in its study ‘Blueprint for a EU criminal records database’. 10

Given that several reports had already stressed the importance of exchanging information in areas such as public procurement, money laundering, organized crime, child pornography or sex offences, the IRCP project assessed the feasibility of ‘setting up a comprehensive EU criminal records database and disqualification register, either as an intranet or as a genuine central EU database’. 11

The development of such European Union database makes it possible to have an European Union certificate of non-conviction related to this register. This certificate is needed because according to the study the access to the European Criminal register should be regulated in order to limit it just to member state’s authorities as well as European bodies involved with criminal investigations. OLAF, Eurojust and Europol should be able to check the register in order to fulfill their tasks, but their access should be limited to their specific competences. 12

However, the study does not foresee the possibility for tendering authorities to have access to the register. “Direct access cannot be granted to authorities which are not concerned with criminal investigations. These authorities can access the register through the authorities that have full access”. 13 Anyway, as said above, access to all the information kept in the European criminal record would raise issues of proportionality and equal treatment. A solution to this problem would be to ask a certificate of non-conviction, as the one that the study foresees for ‘vulnerable professions’.

11 Ibid. 9
12 Ibid. 31
13 Ibid. 32
A EU certificate of non-conviction (for the relevant offences) could be made available through national authorities (indirect access) who can send the request to the maintaining authority. This certificate would, then, be valid in all EU Member States.\textsuperscript{14}

This way the disclosure of information would be regulated and, in full respect of the principle of functionality, the contracting authorities would not be able to know whether the tenderer committed offences which are not relevant for the procurement proceeding but which once known, could influence it. If it will be made compulsory for the contracting authorities of every Member State to require such certificate, the principle of equal treatment will be respected.\textsuperscript{15}

A similar system is already foreseen in Italy where, in order to participate in public procurement proceedings firms have to provide an Anti-mafia certificate issued by the competent authorities, attesting that the person is not involved in or has no connection to any mafia-type organizations. Of course this certificate will be issued once the controls carried out by the competent authorities will have a positive outcome.\textsuperscript{16}

For what concerns the infiltration of organized crime in the public funding and more in general in the licit economy in Europe, the debate focuses on two main ideas. The first idea, in line with the policies of the last years, considers organized crime a threatening phenomenon especially for the influence it can exercise on the licit markets. This vision has been recently highlighted by a Motion for a Resolution of the European Parliament on organized crime in European Union which indicated what are the sectors where a more incisive action of the Union is required. According to this document for example the commission should submit a proposal for a Directive that, replacing the Framework decision of 2008 on organized crime, gives a less generic definition of organized crime and better identify the key feature of the phenomenon.\textsuperscript{17}

The Parliament through this document calls on Member States to make an effort to approximate their legislation. It calls on the Commission to draw up a proposal for a Directive to make the offence of Mafia association a punishable crime in all Member States, in order to counter transnational organized crime and in order to ‘eradicate entrenched Mafia-style organized crime in the European Union’. Moreover it underlines the link between organized crime and corruption and how it is at the basis of other crimes such as money laundering, manipulation of public funds procedures and fraud.\textsuperscript{18}

While the Motion, above cited, refers to the threat that ‘entrenched Mafia-style organized crime’ exercises in Europe on licit and illicit sectors (political system included) on the contrary, from several parts this idea has been refused in favor of a less pessimistic vision that does not consider the Italian Mafia groups as controlling, beyond the Italian borders, a significant part of local illegal economies or having a strong systematic influence over the legal economy or the political system.\textsuperscript{19}

According to this second idea there is not any other criminal group in Western Europe that has shown any interest in imitating the structure of the Italian Mafia and is capable or interested in exercising the political power that is typical of the southern Italian Mafia organizations. The organized crime groups active in Western Europe are too small to be able

\textsuperscript{14} Ibid. 37
\textsuperscript{15} Ibid. 38
\textsuperscript{16} http://www.mi.camcom.it/show.jsp?page=150534, accessed 19 April 2011
\textsuperscript{18} Ibid 10
to exercise a political power, they are cellular in structure and they have loose affiliations and not strong chain of command.20

Therefore, if it is true that in several European countries criminal organizations invest their illicit proceeds in legitimate sectors, however, given the little information gathered in this sector, there is no evidence of systematic infiltration of legitimate sectors of the economy by criminal groups.21 This means that at least in Western Europe there was probably an exaggeration in the perception of such infiltration. The situation becomes more confused when one considers white collar crimes such as fraud or manipulation of public tenders.22 In fact white collar criminals ‘do not need to “infiltrate” into the legitimate economy as they are already an established part of it and the revenues of their “dirty” activities are barely distinguishable from the flows of “clean” and “hot” money that are traded incessantly around the world’ 23

It is difficult to assess whether various policies against fraud corruption or organized crime have actually been effective and if they have always received a proper translation in national legislation. From several parts critics arise about the necessity to focus on measures that can really make the difference in practice.24

For what concerns organized crime, one of the main problem is that the general public is not aware of the fact that, besides being a danger for the democratic order of a state, its illicit activities decrease the economic and social quality of ordinary daily life.25 Like for example in the case of the increased price of goods in shops that are obliged to pay (under the threat of personal violence or material damages) for the extortion practiced by criminal groups through the ‘protection tax’.26

This takes us to another consideration, that points out how, being organized crime a problem suffered especially at national and even more a local level, it is necessary, in deciding policies, to check what measures are actually needed at a more decentralized level, in order to make them as more effective as possible. Probably, to reach this aim it would be better to involve more directly local authorities in the decision making.27 If the fight to organized crime should follow a bottom up approach, a good idea would be to stimulate systematic consultation through a EU Security Fund that would finance projects aimed to the cooperation concerning criminal and administrative matters between authorities such as police, majors or public prosecutors of various Member States.28

20 Ibid
22 Ibid 615
23 Ibid
25 Ibid 254
## ANNEX II

<table>
<thead>
<tr>
<th>RANK</th>
<th>REGIONAL RANK</th>
<th>COUNTRY / TERRITORY</th>
<th>CPI 2010 SCORE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>Denmark</td>
<td>9.3</td>
</tr>
<tr>
<td>4</td>
<td>2</td>
<td>Finland</td>
<td>9.2</td>
</tr>
<tr>
<td>4</td>
<td>2</td>
<td>Sweden</td>
<td>9.2</td>
</tr>
<tr>
<td>7</td>
<td>4</td>
<td>Netherlands</td>
<td>8.8</td>
</tr>
<tr>
<td>8</td>
<td>5</td>
<td>Switzerland</td>
<td>8.7</td>
</tr>
<tr>
<td>10</td>
<td>6</td>
<td>Norway</td>
<td>8.6</td>
</tr>
<tr>
<td>11</td>
<td>7</td>
<td>Iceland</td>
<td>8.5</td>
</tr>
<tr>
<td>11</td>
<td>7</td>
<td>Luxembourg</td>
<td>8.5</td>
</tr>
<tr>
<td>14</td>
<td>9</td>
<td>Ireland</td>
<td>8.0</td>
</tr>
<tr>
<td>15</td>
<td>10</td>
<td>Austria</td>
<td>7.9</td>
</tr>
<tr>
<td>15</td>
<td>10</td>
<td>Germany</td>
<td>7.9</td>
</tr>
<tr>
<td>20</td>
<td>12</td>
<td>United Kingdom</td>
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</tr>
<tr>
<td>22</td>
<td>13</td>
<td>Belgium</td>
<td>7.1</td>
</tr>
<tr>
<td>25</td>
<td>14</td>
<td>France</td>
<td>6.8</td>
</tr>
<tr>
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<td>15</td>
<td>Estonia</td>
<td>6.5</td>
</tr>
<tr>
<td>27</td>
<td>16</td>
<td>Slovenia</td>
<td>6.4</td>
</tr>
<tr>
<td>28</td>
<td>17</td>
<td>Cyprus</td>
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<tr>
<td>30</td>
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<td>Spain</td>
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</tr>
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<td>19</td>
<td>Portugal</td>
<td>6.0</td>
</tr>
<tr>
<td>37</td>
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<td>Malta</td>
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<td>41</td>
<td>21</td>
<td>Poland</td>
<td>5.3</td>
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<tr>
<td>46</td>
<td>22</td>
<td>Lithuania</td>
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<td>50</td>
<td>23</td>
<td>Hungary</td>
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</tr>
<tr>
<td>53</td>
<td>24</td>
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<tr>
<td>59</td>
<td>25</td>
<td>Latvia</td>
<td>4.3</td>
</tr>
<tr>
<td>59</td>
<td>25</td>
<td>Slovakia</td>
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<tr>
<td>67</td>
<td>27</td>
<td>Italy</td>
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<td>73</td>
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<td>78</td>
<td>30</td>
<td>Greece</td>
<td>3.5</td>
</tr>
</tbody>
</table>

Source: [Transparency International](http://www.transparency.org/policy_research/surveys_indices/cpi/2010)
### ANNEX III

**Regions and towns with higher vulnerability to corruption**

<table>
<thead>
<tr>
<th>County</th>
<th>Regions of higher vulnerability to corruption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>Towns along the Turkish and Greek borders, Sofia and the town of Dupnitsa</td>
</tr>
<tr>
<td>Czech Rep</td>
<td>Prague and towns along the German and Austrian borders</td>
</tr>
<tr>
<td>France</td>
<td>Corsica</td>
</tr>
<tr>
<td>Greece</td>
<td>The island of Crete</td>
</tr>
<tr>
<td>Hungary</td>
<td>Budapest and towns along the Ukrainian border</td>
</tr>
<tr>
<td>Italy</td>
<td>Calabria and Sicily, and also parts of Campania</td>
</tr>
<tr>
<td>Latvia</td>
<td>Regions close to the Russian and Belorussian borders</td>
</tr>
<tr>
<td>Lithuania</td>
<td>The region close to the Belorussian border</td>
</tr>
<tr>
<td>Poland</td>
<td>Towns along the Ukrainian and Belarus border</td>
</tr>
<tr>
<td>Romania</td>
<td>Regions along the Moldovan/Ukrainian borders; the cities of Brasov and Cluj</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Towns along the Ukrainian border</td>
</tr>
<tr>
<td>Spain</td>
<td>The region of Costa del Sol</td>
</tr>
</tbody>
</table>

*Centre for the study of democracy, ‘Examining the link between organized crime and corruption’*
**ANNEX V**

<table>
<thead>
<tr>
<th>Societal harm</th>
<th>Harms to individuals</th>
<th>Business harms</th>
</tr>
</thead>
<tbody>
<tr>
<td>The impact of fear and distrust caused by organised crime</td>
<td>Losses to individuals from organised frauds</td>
<td>Losses to businesses through fraud and the costs of preventing it</td>
</tr>
<tr>
<td>Losses to taxpayers from smuggling and fraud</td>
<td>Victimisation by drug-related crimes, including gun crime</td>
<td>Victimisation by drug-related thefts</td>
</tr>
<tr>
<td>The costs of dealing with organized crime and its effects</td>
<td>Harm caused by drug abuse</td>
<td>Loss of revenue to legitimate businesses from counterfeiting or piracy</td>
</tr>
</tbody>
</table>

(Centre for the study of democracy, ‘Examining the link between organized crime and corruption’)


BIBLIOGRAPHY

Legislation and other Documents

United nations

The United Nations Global Program against Corruption, CICP-16, UN ODCCP, Vienna, June 2011.


Council of Europe

Recommendation Of The Committee Of Ministers To The Member States Concerning Guiding Principles Of The Fight Against Organized Crime

Council of Europe, Civil Law Convention on Corruption CETS No.: 174, 04 November 1999

Council of Europe, Criminal Law Convention on Corruption, CETS No.: 173, 27 January 1999


European Union


Commission decision 1999/352/EC, ECSC, EURATOM of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), OJ L136/20


Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ. C 83 of 30 March 2010


Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 063


Court of Auditors, ‘the Commission’s services specifically involved in the fight against fraud, notably the ‘unité de coordination de la lutte anti-fraude’ (UCLAF) together with the Commission’s replies’, (Special Report) 98/C 230/01, 22 July 1998


Protocol to the Convention on the Protection of European Communities’ Financial Interests (1996) OJ C 313,


The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final, 10 May 2005


Cases

Commission of the European Communities v Hellenic Republic ECJ, Judgment 21.9.89-C 68/88

Books

Cornelli R, Di Nicola A, The organization fo the fight against corruption on the national level, in T. Vander Beken, B. De Ruycer, N. Siron, The Organization Of The Fight Against Corruption In The Member States And Candidate Countries Of The EU (Maklu, Antwerpen-Aperldoorn, 2001)


**Articles**


National Strategy Information Centre (NSIC), ‘Study On The Political Criminal Nexus (PCN)’ *Trends in Organized Crime*, vol 3, n. 1, p 4-7


Piselli E, ‘The scope for excluding providers who have committed criminal offences under the E.U. procurement directive’ (2006) *Public Procurement Law Review*, v. 6

Quirke B, ‘OLAF’s role int he fight against fraud in the European Union: do too many cooks spoil the broth?’ (2010), *Crime, Law and Social Change*, vol. 53


**Internet Sources**


< http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp >

< http://www.eurojust.europa.eu/ >


<http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_organised_crime/jl0011_en.htm#KeyTerms>


<http://www.mi.camcom.it/show.jsp?page=150534>


<www.policing.oxfordjournals.org>

<http://www.csd.bg/artShow.php?id=15192>

<http://www.springerlink.com/content/c57rq11064614n12/>

<http://bora.cmi.no/dspace/bitstream/10202/185/1/R%202002-1.pdf>


Other Sources

Antonio Nicaso, Interview with N. Gratteri, Italian Public Prosecutor, (Piola Libri, Bruxelles, 30 March 2011)

Centre for the study of democracy, ‘Examining the link between organized crime and corruption’, 2010, commissioned by the Directorate General Justice, Freedom, and Security. It was written by Philip Gounev and Tihomir Bezlov of the Center for the Study of Democracy (Project 1 EOOD)
European Anti-fraud Office, Annual report 2010, Tenth Activity Report Of The European Anti-Fraud Office – 1 January to 31 December 2009


Recommendation Of The Committee Of Ministers To The Member States Concerning Guiding Principles Of The Fight Against Organized Crime <http://www.coe.int/t/dlapil/codexter/2_Adopted_Texts/CM%20Rec%20%282001%29%201%20E.pdf>

Speech given by Barry Donoghue, Deputy Director of Public Prosecutions, at the Law Society Annual Conference, Budapest- 28 March 2008


Vermulen G, Freedom, security and justice in the Reform Treaty, Institute for International Research in Criminal Policy, Ghent, 22 November 2010