

ASPECTS ON ORGANIZED CRIMINAL GROUPS

*Gheorghe-Iulian IONIȚĂ**

Abstract

The author presents the concept of organized criminal group as defined in regional/international documents and in internal regulations, the incrimination of criminal groups in the Romanian legislation and some of the problems generated by the amendment to the criminal legislation and the entry into force of the new Criminal Code on the issue.

Keywords: organized criminal groups, concept, incrimination, new Criminal Code, more favorable criminal law

1. The concept of „organized criminal group”

1.1. In international/regional documents

In international/regional documents, the organized criminal group/criminal organization is defined in United Nations Convention against Transnational Organized Crime (adopted on 15 November 2000)¹, Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on fight against organised crime (adopted on 19 September 2001)² and Council Framework Decision 2008/841/JHA on fight against organised crime (of 24 November 2008)³.

A) In United Nations Convention against Transnational Organized Crime (adopted on 15 November 2000), „organized criminal group” has been defined [article 2 letter (a)] as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences (established in accordance with the Convention), in order to obtain, directly or indirectly, a financial or other material benefit.

It also provides [article 2 letter (c)] that „structured group” is a group that is not randomly formed for the immediate commission of an offence and that does not need to

* IONIȚĂ Gheorghe-Iulian is post-doctoral researcher at the „Alexandru Ioan Cuza” University of Iași, associate researcher at the „Acad. Andrei Rădulescu” Legal Research Institute of the Romanian Academy of Bucharest, lecturer at the Romanian-American University of Bucharest. E-mail: ionita.gheorghe.iulian@profesor.rau.ro

¹ United Nations (UN), United Nations Conventions against Transnational Organized Crime, available on <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCbook-e.pdf>.

² Council of Europe (CoE) Committee of Ministers, Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on fight against organised crime, available on http://www.coe.int/t/dlapil/codexter/Source/CM_Recommendation_2001_11_EN.pdf.

³ Council of European Union (CoEU), Council Framework Decision 2008/841/JHA of 24 October 2008 on fight against organised crime, available on <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0841&from=RO>.

have formally defined roles for its members, continuity of its membership or a developed structure.

B) In Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on fight against organised crime (adopted on 19 September 2001), „organized criminal group” has been defined (Appendix, point I) as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes, in order to obtain, directly or indirectly, a financial or other material benefit.

C) In Council Framework Decision 2008/841/JHA on fight against organised crime (of 24 November 2008), „criminal organisation” has been defined (article 1 pct. 1) as a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit.

It also provides (article 1 point 2) that „structured association” is an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.

1.2. In domestic regulations

In domestic regulations, the organized criminal group has been defined in Law no. 39/2003 on preventing and combating organized crime (of 21 January 2003)⁴, Law no 535/2004 on preventing and combating terrorism (of 25 November 2004)⁵ and Law no. 286/2009 on the Criminal Code (of 24 October 2012)⁶.

A) In Law no. 39/2003 on preventing and combating organized crime (of 21 January 2003), „organized criminal group” has been defined [article 2 letter a) thesis I, in the variant in force prior to 01 February 2014] a structured group, formed of three or more persons that exists for a period of time and acts in a coordinated manner to the purpose of committing one or more grave offenses, in order to obtain directly or indirectly a financial benefit or another material benefit.

It is also presented here [article 2 letter a) thesis I, in the variant in force prior to 01 February 2014] that an “organized criminal group” is not the group formed occasionally to the purpose of immediately committing one or more offenses and which has no continuity or definite structure or pre-established roles for its members inside the group.

B) In Law no 535/2004 on preventing and combating terrorism (of 25 November 2004), „terrorist group” has been/is defined (article 4 point 4) as a group that is not formed randomly for the immediate commission of a terrorist act, does not involve a

⁴ Law no. 39/2003 published in the Official Gazette of Romania, part I, no. 50 of January 29th, 2003.

⁵ Law no. 535/2004 published in the Official Gazette of Romania, part I, no. 1161 of December 8th, 2004.

⁶ Law no. 286/2009 published in the Official Gazette of Romania, part I, no. 510 of July 24th, 2009.

constant number of members and does not require the prior establishment of their role or of a hierarchical structure.

It is also presented here (article 4 point 3) that „structured group” is a group that is not formed randomly for the immediate commission of a terrorist act, does not involve a constant number of members and does not require the prior establishment of their role or of a hierarchical structure.

It is interesting to note that, in the same context, „terrorist organisation” has been defined (article 4 point 5) as a hierarchically created structure that has its own ideology of organisation and action, and which is represented both nationally, and internationally and that uses violent and/or destructive modalities to achieve its specific goals.

C) In Law no. 286/2009 on the Criminal Code (of 17 July 2009), the „organized criminal group” is defined [article 367 paragraph (6)] as a structured group, made of three or more persons, set up for a certain time interval in order to act in a coordinated manner for the purpose of committing one or several crimes.

2. The incrimination of criminal groups in the Romanian legislation

2.1. Prior to the entry into force of the new Criminal Code

Prior to the entry into force of the new Criminal Code, crime groups were mainly incriminated⁷ in Law no. 15/1968 Criminal Code (of 21 June 1968)⁸, Law no. 51/1991 on national security of Romania (of 29 July 1991)⁹, Law no. 39/2003 on preventing and combating organized crime (of 21 January 2003) and Law no 535/2004 on preventing and combating terrorism (of 25 November 2004).

A) The plots, has been incriminated in the 1969 Criminal Code (article 167) with the following content: the initiation or creation of an association or group in order to commit any of the offences in Article 155-163, 165 and 166¹, or adhesion to or any kind of support of such an association or a group. The punishment stipulated for this crime was life imprisonment or imprisonment from 15 to 25 years and the prohibition of certain rights, which could not exceed the sanction provided in the law for the most serious of the offences intended by the association or group.

B) The association in order to commit offences, has been incriminated in the 1969 Criminal Code (article 323) with the following content: the act of becoming associated or of initiating the creation of an association in order to commit one or more offences, others than those in Article 167, or of adhering to or of supporting in any manner such an association. The punishment stipulated for this crime was imprisonment from 3 to 15 years, while not exceeding the penalty provided in the law for the offence that was the purpose of the association.

⁷ But there were also other provisions contained in the special laws which incriminated the organization of specific crimes, such as: article 9 of Law no. 78/2000, article 10 thessis I of Law no. 143/2000, article 15 paragraph (2) of Law no. 678/2001.

⁸ Law no. 15/1968 republished in the Official Gazette of Romania, part I, no. 65 of April 16th, 1997.

⁹ Law no. 51/1991 published in the Official Gazette of Romania, part I, no. 163 of August 7th, 1991.

C) The agreement in order to commit the genocide has been incriminated in the 1969 Criminal Code [article 357 paragraph (3)] with the following content: agreement in order to commit the offence of genocide. The punishment stipulated for this crime was imprisonment from 5 to 20 years and the prohibition of certain rights.

D) The formation of informative structures which may damage national security, has been incriminated in Law no. 51/1991 (article 19), with the following content: the initiation, organization or the constitution on the territory of Romania of some informative structures that can cause damage to the national security, their supporting in any way or adhering to them, the holding, manufacturing or unlawful utilization of specific means for the intercepting of the communications, as well as the collecting and transfer of information of a secret or confidential nature, by any means, outside of the legal framework. The punishment stipulated for this crime was imprisonment from 2 to 7 years, if the deed is not considered a more serious offence.

E) The creation of an organized crime group, has been incriminated in Law no. 39/2003 (article 7), with the following content: the initiation or constitution of an organized criminal group, or joining or supporting in any way such a group. The punishment stipulated for this crime was imprisonment from 5 to 20 years and the interdiction of certain rights, which could not exceed the sanction stipulated by the law for the most serious crime aimed at by the organized crime group.

It also provides (article 8) that the initiating or constituting or joining or supporting in any way a group, to the purpose of committing offenses, which is not, according to the present law, an organized criminal group, shall be punished, as the case requires, according to article 167 or article 323 from the Criminal Law.

F) The association for the purpose of committing terrorist actions has been incriminated in Law no. 535/2004 (article 35), with the following content: the act of becoming associated with or of initiating the creation of an association in view of committing terrorist acts or of joining or in any form supporting such an association. The punishment stipulated for this crime was imprisonment from 10 to 15 years, while not exceeding the maximum of the penalty provided in the law for the offence that was the purpose of the association.

2.2. After the entry into force of the new Criminal Code

Law no. 187/2012 for the enforcement of Law no. 286/2009 on the Criminal Code (of 24.10.2012)¹⁰ abrogated/amended the other provisions (above) which incriminated the criminal groups, as follows:

- article 250 of Law no. 187/2012 abrogated Law no. 15/1968 on the Criminal Code.
- article 37 point 1 of Law no. 187/2012 abrogated article 19 of Law no. 51/1991;
- article 126 point 2 of Law no. 187/2012 abrogated article 7 and 8 of Law no. 39/2003;
- article 159 point 6 of Law no. 187/2012 amended article 35 of Law no. 535/2004.

Currently, crime groups are only incriminated in the Criminal Code [article 367, 409 and 438 paragraph (3)] and in Law no. 535/2004 (article 35).

¹⁰ Law no. 187/2012 published in the Official Gazette of Romania, part I, no. 757 of November 12th, 2012.

A) The creation of an organized crime group is incriminated in the Criminal Code (article 367) with the following content: initiating the setup of an organized crime group, adhering to or supporting such a group under any form. The punishment stipulated for this crime is imprisonment between 1 and 5 years, the interdiction of certain rights, and imprisonment between 3 and 10 years, respectively, the interdiction of rights when the crime aimed at by the organized crime group is sanctioned by the law with life imprisonment or imprisonment exceeding 10 years.

B) The setup of illegal informative structures is incriminated in the Criminal Code (article 409) with the following content: initiating, organizing or creating on Romania's territory any informative structures aimed to collect secret state information or conducting activities to collect or process such information outside the legal framework. The punishment stipulated for this crime is imprisonment between 3 and 10 years and the interdiction of certain rights.

C) Any agreement to commit genocidal acts is incriminated in the Criminal Code 1969 [article 438 paragraph (3)] with the following content: an agreement to commit genocidal crimes. The punishment stipulated for this crime is imprisonment between 5 and 10 years and the interdiction of certain rights.

D) Association for the purpose of committing terrorist acts is incriminated in Law no. 535/2004 (article 35) with the following content: the act of associating or initiating the setup of an association aimed at carrying out terrorist acts or adhering to or supporting such association under any form. The punishment stipulated for this crime is imprisonment between 5 and 12 years and the interdiction of certain rights, but without exceeding the maximum punishment stipulated by the law for the crime which fits the purpose of the association.

3. Problems generated by the amendment of the criminal legislation and the entry into force of the new Criminal Code on the formulation of norms for the incrimination of crime groups and the enforcement of the more favorable criminal law on the issue

The amendment of the criminal legislation and the entry into force of the new Criminal Code, with all the measures enforced, has generated and will continue to generate vast debates on the formulation of norms for the incrimination of crime groups and the enforcement of the more favorable criminal law.

On the issue of organized crime groups, debates and contradicting solutions have been generated in practice, in the meaning that association acts aimed at committing crimes (as stipulated at article 323 of the 1969 Criminal Code), namely the act of setting up a group (for the purpose of committing criminal acts), which was not (according to the law) an organized crime group [as stipulated at article 8 of Law no. 39/2003 (in the regulation in force prior to the amendments operated through Law no. 187/2012)] would be de-incriminated, but also in the meaning that such acts would not be de-incriminated since the content thereof could be found in the content of article 376 of the Criminal Code.

The High Court of Cassation and Justice was notified to issue a prior decision to solve this problem, namely whether the crimes stipulated at article 323 of the 1969 Criminal Code and article 8 of Law no. 39/2003 (in the regulation prior to the amendments operated through Law no. 187/2012 and Law no. 255/2013) have a correspondent in article 367 paragraph (1) of the Criminal Code or if, on the contrary, they are de-incriminated, since the lawgiver understood to incriminate in the provisions of article 367 paragraph (1) of the Criminal Code, only the crime stipulated at article 7 of Law no. 39/2003 (in the regulation prior to the amendments operated through Law no. 187/2012 and Law no. 255/2013).

Through Decision no. 12/2014¹¹, the High Court of Cassation and Justice – the Court for the settlement of criminal issues, in file no. 13/1/2014/HP/P:

- accepted the notification formulated by the Court of Appeal Braşov – Section for criminal acts and files on children under age, in File no. 790/62/2014, for the issuance of a prior decision to solve the problem under discussion, in the meaning of whether the crimes stipulated at article 323 of the 1969 Criminal Code and article 8 of Law no. 39/2003 (in the regulation prior to the amendments operated through Law no. 187/2012 and Law no. 255/2013) have a correspondent in article 367 paragraph (1) of the Criminal Code or, on the contrary, they are de-incriminated since the lawgiver understood to incriminate in the provisions of article 367 paragraph (1) of the Criminal Code, only the crime stipulated at article 7 of Law no. 39/2003 (in the regulation prior to the amendments operated through Law no. 187/2012 and Law no. 255/2013);

- established that the acts stipulated at article 323 of the 1969 Criminal Code and article 8 of Law no. 39/2003 (in the regulation prior to the amendments operated through Law no. 187/2012 for the enforcement of Law no. 286/2009 on the Criminal Code), are to be found in the incrimination provided for at article 367 of the Criminal Code, without being de-incriminated.

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5. Conclusions

In our opinion, the Romanian lawgiver, in an attempt to set up a framework incrimination, namely the creation of an organized crime group and to abandon the parallelism between texts which incriminated similar acts (for instance: the organized crime group, association aimed at committing crimes, complot, terrorist groups), as stated in the Rationale¹² to the Draft Law on the Criminal Code, ignored not only the

¹¹ The High Court of Cassation and Justice, Decision no. 12/2014 of 02.06.2014, available on http://www.scj.ro/Decizii%20Completo%20DCD%20Penal%202014/Decizie%20nr.%2012%20din%202014_HP.html.

¹² Chamber of Deputies of Romania, Rationale to the Draft Law on the Criminal Code, available on <http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf>.

meaning of some terms as indicated in previous domestic and regional/international regulations, but also the defining features of such groups.

Thus, since most groups of any nature consist of three or more persons acting together and whose existence lasts for a certain time interval, the true defining features of such organized crime groups are as follows¹³:

- they are oriented towards making profits, which defines the very nature of such groups;

- the seriousness of crimes committed by such groups.

On the other hand, decision no. 12/2014 of the High Court of Cassation and Justice – the court for the settlement of criminal issues, in file no. 13/1/2014/HP/P, is also prone to criticism, which we will enlarge upon in another paper.

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