

ORGANIZED CRIME, RICO, AND THE EUROPEAN UNION

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I. ORGANIZED CRIME AND EUROPEAN RESPONSE

One unintended byproduct of economic integration among the European Union (EU) nations is the creation of new opportunities for criminal enterprises to commit crimes across national borders. European policy makers have discussed this issue for decades, and for nearly a quarter century the European Community and EU nations have adopted piecemeal and partial measures to address the problem.

These efforts took on a new urgency with the adoption of the Treaty on European Union (TEU) in 1992.¹ Open borders had long been a goal of European integrationists. The 1957 Treaty Establishing the European Community (Hereinafter the "EC Treaty") declared the goal of creating a European market within "an area without internal frontiers in which the *free movement of goods, persons, services and capital is ensured* in accordance with the provisions of this treaty."² Implementation of the TEU has meant that this goal has increasingly become a reality.

European policy makers have not been blind to the fact that by opening borders they were creating opportunities for criminal organizations. The 1992 TEU itself explicitly provided that "Member States shall regard. . . as matters of common interest: combating fraud on an

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1. TREATY ON EUROPEAN UNION, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter TEU]. For obvious reasons, much of the discussion has focused upon smuggling, especially of drugs, weapons, and stolen goods. Crimes involving the transfer of capital deserve equal attention, particularly as the EU cements its commitment to the free flow of capital among nations. Art. 73b1, introduced by the Treaty on the European Union and effective as of January 1, 1994, provides: "Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited." TEU, art. 73b1. Not surprisingly, concern about financial crimes has increased in the years following enactment of this provision.

2. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Rome, Mar. 25, 1957, art. 7a, 37 I.L.M. 56 (as amended by subsequent treaties) [hereinafter EC Treaty] (emphasis not in original).

international scale; judicial cooperation in criminal matters; customs cooperation. . . ."³

Subsequent pronouncements have been even more dramatic. For example, a recent action by the Council of the European Union (Council) cited "the importance of a greater awareness of the dangers of organised crime to democracy and the rule of law, for freedom, human rights and self-determination, values which are the *raison d'être* of any fight against organised crime."⁴

Despite the dangers posed by criminal organization, the EU's member nations have been reluctant to forsake authority over criminal justice, in part because this authority is among the fundamental attributes of national sovereignty. Although the member nations have ceded portions of their national sovereignty to the EU,⁵ they have remained largely unwilling to create the institutions and legal rules that would characterize a truly "federal" response to international crime.

Such a "federal" response logically would include the creation of an EU penal code and a code of criminal procedure, EU trial and appellate courts with original jurisdiction over criminal cases involving citi-

3. TEU, Title VI, art. K.1.

4. The Council of the European Union, Council Resolution 98/C/408/01 on the Prevention of Organised Crime with Reference to the Establishment of a Comprehensive Strategy for Combating It, 1998 OJ (C 408) 1-4.

5. For example, art. 5 of the EC Treaty commands that "Member States shall take all appropriate measures . . . to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community." It also requires them to "abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." EC Treaty, art. 5. Opinions by the European Court may be the best-known examples of how creation of the EC has resulted in the loss of sovereignty by member states. *See, e.g.*, Case 6/64, *Flaminio Costa v. ENEL*, E.C.R. 585, 593 (1964) (Member States had limited their sovereign rights and transferred real powers, within specific fields, and had created a body of law binding both their nationals and themselves, by creating a Community with unlimited duration, with its own institutions and personality, legal capacity, and capacity of representation on an international plane); Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, E.C.R. 1(1969) (national courts must refrain from applying provisions of national law conflicting with provisions of Community law sufficiently precise to permit direct application).

See also Case 26/62, *NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* E.C.R. 1(1963) (Community law applicable to private persons within the Member States, and not merely the States); Case 2/74, *Jean Reyners v. Belgian State*, E.C.R. 631 (1974) (where a Treaty provision is sufficiently clear and precise and also establishes an unconditional obligation, that provision must be applied by the national courts, and the implementation of the obligation does not depend upon measures being taken subsequently by the Member States or by Community institutions); Case C-106/89, *Marleasing v. La Comercial Internacional de Alimentacion SA*, E.C.R. I-4135 (1990) (when an EC directive applies to a dispute, national courts must, to the extent possible, interpret national legislation in light of the directive's wording); Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy*, E.C.R. I-5357 (1992) (a Member State's violation of Community law, including the failure to implement directives, may make it liable to pay damages to private persons harmed as a result).

zens of all member states, EU prosecutors, an EU police force with Union-wide investigation and arrest powers, and EU prisons where punishment could be imposed. Creation of such an EU system of criminal justice to co-exist with the domestic justice systems of the member nations would produce a situation not unlike that found in the United States, where the fifty states and the national government each maintain largely independent criminal justice systems, with interests that frequently overlap.⁶

This has not yet happened in Europe. Despite the many powers ceded to the EU by its member nations, these states have generally preserved their authority to define crimes; to determine who conducts criminal investigations and prosecutions; to specify the procedural rules that regulate these investigations and prosecutions; to create and operate their own courts; and to define and impose penalties.⁷ Efforts to create European-wide law enforcement institutions and mechanisms have faltered, often because of the seemingly irreconcilable differences among the substantive laws, procedural rules, and institutions of justice maintained by the member nations.⁸

The lack of a European system of criminal justice has forced policy makers to search for mechanisms consistent with national control. Before and after adoption of the TEU, most of the measures enacted to combat international crime have relied upon cooperation and information sharing by the member nations' law enforcement and judicial institutions. However, the TEU has made it possible for the EU institutions to attempt to impose some Union-wide mechanisms for fighting crime.⁹ In recent years, the Council has issued "joint actions" directing the

6. This independence is not complete. For example, the states cannot operate their systems in ways that violate rights guaranteed by the national constitution. In appropriate circumstances, citizens asserting that their federal rights have been violated by state government action can raise their claims in federal courts.

7. The limited authority of the EU institutions is apparent from the following example. The TEU authorizes the Council to "adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States." TEU, art. 34(2)(b) (ex Art. K.6). The goals announced in these framework decisions are binding upon the Member States, but the Treaty leaves "to the national authorities the choice of form and methods." These framework decisions "shall not entail a direct effect." *Id.* The European Court of Justice has jurisdiction to issue preliminary rulings on the validity and interpretation of these framework decisions. *Id.*, art. 35(1) (ex Art. K.7). Conversely, the "Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member states with regard to the maintenance of law and order and the safeguarding of internal security." *Id.*, art. 35(5).

8. See, e.g., Gert Vermeulen, *A Judicial Counterpart for Europol: Should the European Union Establish a Network of Prosecuting and Investigating Officials*, 2 UCLA J. INT'L & FOREIGN AFF. 225 (1997-98).

9. See *infra* Part III. C.

member states not only to cooperate with each other, but also to adopt uniform legislation imposing penal sanctions on criminal organizations and those who participate in them.¹⁰ Key elements of these joint actions appear to be modeled upon the central innovation of the United States Racketeer Influenced and Corrupt Organization (RICO) statute.¹¹ That innovation is the RICO statute's focus upon the criminal enterprise.

Traditional legal theory has emphasized catching and punishing individual criminals. Even theories of group criminality, including traditional concepts of accomplice and conspiracy liability, have focused upon the acts and mens rea of each individual actor. The RICO statute, while still requiring proof of conduct and culpability, makes a fundamental analytical leap. It makes the criminal enterprise the focus of analysis. The law enforcement goal is not merely to catch and punish individual wrongdoers. The ultimate goal is to dismantle entire criminal organizations.

This focus upon the criminal enterprise may prove to be the statute's most enduring contribution to legal theory and practice, and is the element of the RICO statute that appears to have had the most influence upon EU planners. The role played by concepts of enterprise criminality in recent EU actions, and their relationship to the RICO statute, are the subject of this article. It opens with a discussion of the limited nature of most efforts by EU policy makers to combat organized crime. The article then examines the similarities between the RICO statute and the Council's recent joint actions directed at criminal enterprises. The ultimate conclusion drawn from this analysis is that RICO's innovative focus on the criminal enterprise is an essential concept for any contemporary attempt to control criminal organizations that operate across jurisdictional borders.

II. COOPERATION AND INFORMATION SHARING IN EUROPEAN LAW ENFORCEMENT

A. *Early Attempts by the European Community*

In the decades following the adoption of the EC Treaty, European policy makers adopted a number of devices intended to assist in the fight against international criminal organizations. In general, these efforts involved little more than attempts to facilitate cooperation and information sharing among the law enforcement and judicial agencies of the Euro-

10. See *infra* Part III. D.

11. 18 U.S.C. §1961 et seq.

pean nations. A brief summary of several of these anti-crime initiatives demonstrates their modest scope.¹²

One of the early undertakings was the common working group dealing with Terrorism, Radicalism and International Violence (the TREVI Group) set up by all 12 European Community (EC) states in 1976. Operating under the TREVI umbrella, the EC justice and interior ministers met twice a year to discuss questions dealing with terrorism, police cooperation, cross border crime, and drug trafficking. The TREVI group subsequently was replaced by working groups set up by the Council under the TEU.¹³

Another group, the European Committee to Combat Drugs (CE-LAD), came into being in 1989. Its function was to define a strategy and a plan of action to fight drug trafficking, to adopt legal instruments falling within the Community's powers, and to employ intergovernmental cooperation in matters over which the Community had no power.¹⁴

Most of the Union's member nations also entered into the two Schengen Agreements. After many starts and stops, after many complaints that some countries were not cooperating properly, and despite problems in data processing, the Schengen Agreements were applied irreversibly in 1995 by the contracting nations.¹⁵ The first of these agreements contained one of the most dramatic innovations found in any of the recent European initiatives. Schengen I allowed police forces of the participating nations to pursue criminals onto the territory of another member state. The effect of this provision was constrained to some extent, however, by bilateral agreements (between France and Spain and France and Italy) restricting this authority to pursue to a ten kilometer zone on each side of the border.¹⁶ Schengen II provided for the

12. For a brief discussion of these and other cooperative efforts undertaken by European Community nations, see LUCIEN DE MOOR, MAASTRICHT: THE THIRD PILLAR—CO-OPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS IN THE EUROPEAN UNION, in COMMISSION OF THE EUROPEAN COMMUNITIES, *THE LEGAL PROTECTION OF THE FINANCIAL INTERESTS OF THE COMMUNITY: PROGRESS AND PROSPECTS SINCE THE BRUSSELS SEMINAR OF 1989*, 257, 258-262 (1994).

13. *Id.*

14. *Id.*

15. The Schengen Treaty of 1985 was supplemented by Schengen II in 1990. The contracting parties were France, Germany, The Netherlands, Belgium, Luxembourg, Italy, Spain, Portugal, and Greece.

16. *France: Senate Commission Lists Schengen Objections*, REUTER TEXTLINE, AGENCE EUROPE, June 30, 1993; Report by French Senate Fact-Finding Mission on Schengen Convention, *The Implementation of the Convention Applying the Schengen Agreement*, Commission of the European Union, EU, REUTER TEXTLINE, AGENCE EUROPE, Feb. 2, 1994. The technical difficulties raised by the Schengen Agreements were overcome in 1994. See *The Implementation of the Convention Applying the Schengen Agreement*, Commission of the European Communities, Mar. 24, 1995.

Schengen Information System, which allowed the border control agencies and the local police to quickly exchange data in customs and crime related searches. The impact of these agreements was limited by the fact that not all EU countries are members of the Schengen group.¹⁷

Europol offers an interesting example of how the EU has confronted the problem of catching, prosecuting, and punishing criminals who operate across national boundaries. Years of meetings, discussions, proposals, and conferences about the need for an EU police force led to the creation of Europol in 1991. Europol's very title suggests that it is a true European police force. Yet nearly a decade after its creation, Europol remains little more than a vehicle for exchanging information among the domestic law enforcement agencies of the individual member states.

The 1992 TEU recognized that Europol would serve mainly as a vehicle for the exchange of information among the member nations. Europol's agents were not authorized to investigate crimes or make arrests. Instead, each member nation was called upon to designate a representative to pass along police investigative data—as long as this would not violate the country's privacy laws.¹⁸

The Treaty of Amsterdam, which modified the TEU, has increased Europol's functions. For example, Europol was granted authority to commence "the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal-data."¹⁹ In addition, the Council was directed to act within five years to "promote cooperation through Europol," by acting to:

- (a) enable Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity;
- (b) adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime;

17. Ireland and UK opted out of Schengen group. See Vermeulen, *supra* note 8.

18. *Id.* at 13-14, nn. 57-63.

19. TEU, art. 30 (1)(b) (ex Art. K.2).

(c) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol;²⁰

Although intended to expand Europol's functions, these recent amendments to the TEU still fail to create a traditional law enforcement entity. One only need compare Europol's limited functions with the powers to investigate and arrest granted the FBI and other federal law enforcement agencies in the United States to recognize how constricted Europol's grant of authority remains. Europol's primary tasks are still to support, coordinate, request, and promote cooperation by the law enforcers who matter—the agencies of the individual member states. The EU continues to emphasize cooperation and information sharing among the agencies of the individual member nations.²¹ Effective sharing of information among agencies undoubtedly is an important law enforcement tool, but Europol's limited grant of authority leaves it as but a shadow of a police agency possessing investigative and arrest powers. The obvious explanation for this comparatively paltry response to the problem of international crime is that the member nations have been unwilling to cede power over crime and punishment to the Union.

B. Crime and Sovereignty.

If criminal organizations engaged in international crime pose the threats to Europe's economic and political institutions that have been suggested by European policymakers, lawmakers, and scholars,²² an observer must ask why the European nations traditionally have done little more than adopt modest efforts at cooperation and encouragement. Perhaps the most important answer is national sovereignty. In any modern nation state, control over the processes of criminal justice has been an essential element of sovereignty. Although EU institutions recently have taken some steps toward exercising more power over the processes

20. *Id.*, art. 30(2) (a)-(c).

21. For example, art. 30 of the TEU opens by addressing the issue of cooperation:

"Common action in the field of police cooperation shall include: (a) operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences; . . . (c) cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research; (d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime."

Id., art. 30 (1)(a), (c)-(d). It later describes a plan to "establish a research, documentation and statistical network on cross-border crime." *Id.*, at para. 2(d).

22. See, e.g., *supra* notes 3-4 and accompanying text.

of criminal justice,²³ it appears unlikely that the EU nations will relinquish ultimate control over these fundamental indicia of national sovereignty in the near future.²⁴ They are unlikely, in other words, to create a European Penal Code enforceable within all member nations; or a comprehensive system of European trial and appellate courts with original and complete jurisdiction over these EU crimes; or a EU system of criminal procedure; or a comprehensive system of EU prosecutors, police officers and prisons with EU-wide jurisdiction to enforce a EU penal code.²⁵ Even the TEU acknowledges this political reality. While granting power to the EU to address problems common to the various Member States, Title VI of the Treaty specifically provides that "[t]his Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."²⁶

European economic and political conditions have produced profound problems for law makers and law enforcers. European economic integration permits criminal organizations to move goods, capital and people freely across national borders. Political realities, however, have preserved legal traditions that require that the investigation and prosecution of these groups remains largely within the jurisdiction of the individual EU nations.

C. *The RICO Enterprise and Legal Policy within the EU*

Since adoption of the TEU, the European countries have continued to study the related problems of organized and international crime.²⁷ They have sponsored numerous conferences and study groups, issued various reports and proposals for action. One subject discussed at these

23. See *infra* Part III. D. and accompanying text.

24. For an interesting example of how Eurocrats grappled with this political reality, see Council of Europe, Legal Affairs, Extraterritorial Criminal Jurisdiction, Report of the Select Committee of Experts on Extraterritorial Jurisdiction (Strasbourg 1990) (set up by the European Committee on Crime Problems in 1984; the Committee of Ministers authorised its publication in 1988). See also SVEN THOMAS, DIE ANWENDUNG EUROPÄISCHEN MATERIELLEN RECHTS IM STRAFVERFAHREN, *Neue Juristische Wochenschrift* 223 (1991); KLAUS TIEDEMANN, EUROPÄISCHES GEMEINSCHAFTSRECHT UND STRAFRECHT, *NEUE JURISTISCHE WOCHENSCHRIFT* 23-24 (1993).

25. See, e.g., Vermeulen, *supra* note 8.

26. TEU, art. 33 (ex Art. K.5).

27. See, e.g., European Committee on Crime Problems, Draft Report on the Volume and Structure of Changes in Crime in Europe, April 11, 1994, at 4 (referring to economic criminal offenses committed by public or private companies or by individuals acting in industrial, commercial or financial settings, and concluding that "A marked tendency towards international expansion and more complex organisational structure has been observed, aiming at the maximisation of profits, making use of illegal means."); *Id* at 6 ("most forms of delinquency [in Europe] are more and more often committed by a plurality of persons organized to some extent.")

sessions has been the Racketeer Influenced and Corrupt Organization (RICO) statute adopted by Congress in 1970.²⁸ Just how familiar European policy makers have become with RICO was brought home to me by the following incident.

While teaching at a German law school in the mid-1990s, I met with a German prosecutor who had recently taken a new job. One of her new duties was to attend meetings at which representatives of the European Union nations gathered to discuss the problem of fighting international crime, particularly as carried out by organized criminal groups. In her previous job, she had prosecuted people who had committed crimes on behalf of the old East German regime. Rather than prosecute criminals, she now attended meetings where bureaucrats and academics talked about prosecuting criminals. In the spirit of her new job, she and I then did the same. We spent the day discussing how the new Europe created countless opportunities for criminal organizations and endless problems for lawmakers and law enforcers.

Eventually, I began to outline some of the methods developed in the United States to fight organized crime, including a few of the most important elements of the RICO statute. She listened quietly as I described racketeering acts, the enterprise, and asset forfeiture, but as soon as I mentioned the name of the statute—RICO—she interrupted:

“RICO, RICO, RICO,” she exclaimed. “All we hear about is this RICO. At every meeting, somebody says ‘RICO this and RICO that,’ and tells us that RICO is the way to solve all our organized crime problems.”

We need not review in detail the statute’s controversial history to recognize that this rather euphoric description of RICO would not be embraced by all, perhaps not even most, American lawyers familiar with the statute. This group of RICO skeptics is not limited to criminal defense lawyers and others who regularly represent clients prosecuted under the statute.

For example, even Supreme Court Justices who have written or joined in opinions interpreting the RICO statute as broadly as logic could allow (and perhaps well beyond the limits of logic), have voiced their frustration with this law. Chief Justice Rehnquist began his opinion for the Court in *National Organization for Women v. Scheidler*, with the rather melancholy lament: “We are required once again to interpret the provisions of the Racketeer Influence and Corrupt Organizations [statute].”²⁹

28. 18 U.S.C. §§ 1961-1968 (1999).

29. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994).

The Justices' complaints about RICO have not always been so understated. In a concurring opinion (that received four votes), Justice Scalia chastised the majority for its attempt to interpret the meaning of the word "conduct" in one section of the statute,³⁰ but also commiserated with the majority's dilemma. Justice Scalia cited an earlier opinion, and in doing so emphasized that the statute's critics have included both liberal and conservative Justices. Justice Scalia wrote:

It is, however, unfair to be so critical of the Court's effort, because I would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application . . .

The situation is bad enough with respect to any statute, but it is intolerable with respect to RICO. For it is not only true, as Justice Marshall commented. . . that our interpretation of RICO has 'quite simply revolutionize[d] private litigation' and 'validate[d] the federalization of broad areas of state common law of frauds,' so that clarity and predictability in RICO's civil applications are particularly important; but it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws. No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.³¹

The list of complaints leveled against the RICO statute in this country has been so lengthy³² that an American observer might be surprised to learn that it has been exported to Europe, and that even longstanding critics of some applications of the statute, including the author of this article,³³ would recommend it to European policy makers. RICO's most

30. 18 U.S.C. § 1962(c) (1999) makes it unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity"

31. *H.J. Inc. v. Northwestern Bell Telephone*, 492 U.S. 229, 255-56 (1989) (Scalia, J., concurring) (citations omitted) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 501 (1985) (Marshall, J. dissenting)).

32. For example (and this is a very partial list), critics have asserted that the RICO statute has distorted garden variety commercial litigation, including securities fraud litigation, by giving plaintiffs too much leverage; that it has been misused in civil litigation by allowing legitimate institutions to be labeled as "racketeers;" that it defines conspiracies so broadly that traditional notions of individual culpability are obliterated; that it gives the government improper incentives to seek the forfeiture of assets, including some held by allegedly innocent third parties; that it can be manipulated to prevent people accused of crimes from using privately held assets to retain defense counsel for so many years; that it improperly extends the statute of limitations; that it violates concepts federalism by using state law to define federal crimes.

33. See, e.g., Morgan Cloud, *Forfeiting Defense Attorneys Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, WIS. L. REV. 1-66 (1987); Morgan Cloud,

controversial and difficult components—including its use of language so expansive as to make even legitimate enterprises potential racketeers; its creation of private civil claims holding out the carrot of treble damages and attorneys fees for successful litigants; its adoption of criminal forfeiture provisions unprecedented in scope; its application to enterprises not operated for purposes of financial gain, like anti-abortion protestors—continue to be troubling. One can only hope that EU policymakers will use care in deciding whether to embrace these provisions of the statute.

Nonetheless, these recurring criticisms of the RICO statute should not prevent us from recognizing that it has been a brilliantly successful tool when deployed against organized criminal enterprises. In part, this has resulted from some of its most controversial elements, including its broad language and draconian sanctions.

But much of the statute's success as a law enforcement tool derives from its creative use of the concept of the enterprise as an organizing principle. The recent attempts by the Council to impose enterprise liability concepts throughout the European Union suggest that this innovation in the RICO statute is more than just a valuable law enforcement tool. It is an essential and inevitable part of any contemporary effort to combat international crime.

III. THE ENTERPRISE

A. *The RICO Enterprise*

The most striking conceptual innovation in the RICO statute is its focus upon the enterprise as the fundamental organizing principle. Many of the statute's most important provisions—including those designed to reach groups whose activities extend beyond the geographical boundaries of any federal District or of any individual State—employ devices that are not unique to the RICO statute.³⁴ But RICO does not stop with these relatively common devices.

Government Intrusions into the Attorney-Client Relationship: The Impact of Fee Forfeitures on the Balance of Power in the Adversary System of Criminal Justice, 36 EMORY L. J. 817 (1987). Both articles were cited in: *United States v. Monsanto*, 105 L.Ed. 2d 512 (1989) (Blackmun, J., dissenting), and *Caplin & Drysdale v. United States*, 105 L.Ed. 2d 528 (1989) (Blackmun, J., dissenting).

34. It permits all members of a RICO conspiracy to be prosecuted in any federal District in which any act in furtherance of the conspiracy or enterprise was carried out. This makes it possible to prosecute an entire organization in one trial, regardless where its individual members reside or committed their crimes. This concept of jurisdiction is not unique to the RICO statute. Other federal statutes, including the traditional conspiracy statute (18 U.S.C. §371) cede the same power to prosecutors. And like many federal statutes, RICO relies upon the concept of interstate commerce to grant jurisdiction to the federal government. RICO establishes a set of prohibited activities, which can loosely be classified as consisting of employing a "pattern of racketeering"

One of the statute's fundamental innovations was to expand the analytical focus of the criminal law. RICO permits, indeed encourages, law enforcers not to focus only upon the acts committed by individual criminals, but instead to place those acts within a broader context: the criminal enterprise. It was the danger posed by relatively permanent, relatively well-organized criminal groups that RICO addressed, and the goal of the statute's creators was not merely to catch and punish individuals for their individual crimes. The lawmakers' goal was to provide the means for dismantling these organizations.

Congress described the threat posed by organized criminal enterprises in language that would be echoed by the European Council³⁵ more than two decades later: "organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens."³⁶

These dramatic conclusions were supported by a number of findings specifying dangers posed by organized crime. Congress then declared that its purpose was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."³⁷

activities or income derived from them to acquiring an interest in an enterprise, or to conduct an enterprise's affairs, if the enterprise is "engaged in," or its activities affect "interstate or foreign commerce." See 18 U.S.C. § 1962(a)-(c). RICO is not unique in authorizing nationwide service of witness subpoenas in criminal cases. See 18 U.S.C. § 1965(c).

35. See *supra* note 4 and accompanying text.

36. *United States v. Turkette*, 452 U.S. 576, 588 (1981), quoting the preface to the Organized Crime Control Act of 1970, Title IX, Pub. L. No. 91-452, 84 Stat. 922. RICO arose out of concerns about the nature and scope of the activities engaged in by criminal organizations. These included the use of both criminal acts and the wealth produced by these crimes to infiltrate legitimate businesses. This was troubling because it not only corrupted formerly legitimate businesses and industries, but also allowed organized crime groups to "launder" the proceeds of their criminal activities. Traditional law enforcement efforts against these organizations were hampered by the fact that these groups frequently operated in more than one state. This created problems for law enforcers. For example, if a group committed crimes in several states, prosecuting all crimes and all criminals might require separate prosecutions in each state. This would be costly in terms of human and financial resources and might make it practically impossible to pursue all charges. And even a successful prosecution of group members in one state might leave the organization alive and well in other states, free to carry on their group activities even if some members of the group were being punished for the crimes they had committed in a single jurisdiction. See, e.g., *Turkette*, 452 U.S. at 581-93.

37. *Turkette*, 452 U.S. at 589 (1981) (citing 84 Stat. at 923).

Experience demonstrated that to arrest and convict a few individuals often would have little impact upon the continuing success of the organizations to which they had belonged. In addition, so long as criminals could retain the financial benefits of their acts, even the threat of severe punishments might not deter them. Therefore, Congress focused upon the criminal enterprise, and the profits derived from it. The legislative history of the statute stressed, for example:

"What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts."³⁸

To achieve these related goals of dismantling the criminal organizations and attacking their economic bases, RICO employs an expansive definition of the organizations to which it can be applied. A RICO enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."³⁹

RICO defines a long list "racketeering acts" that are a predicate for liability under the statute. Racketeering acts include crimes defined by both state and federal law.⁴⁰ Merely committing the racketeering acts that are a predicate for RICO violations, however, does not create liability under this statute. The criminal acts must be related to the enterprise. RICO prohibits conduct which can be classified loosely as consisting of employing a "pattern" of these racketeering activities, or income derived from them, to acquire an interest in an enterprise, or to conduct an enterprise's affairs, if the enterprise is "engaged in," or its activities affect "interstate or foreign commerce."⁴¹

RICO also prohibits conspiracies, but once again these are not merely conspiracies to commit racketeering acts. A RICO conspiracy occurs only when the object of the conspiracy is to employ a pattern of racketeering acts, or income derived from them, to acquire an interest in

38. S.REP. NO. 91-617, 79 (1969), *quoted in* *United States v. Turkette*, 452 U.S. at 592. One Senator declared that "the combination of criminal and civil penalties in this title offers an extraordinary potential for striking a mortal blow against the property interests of organized crime." *Id.* (quoting 116 CONG. REC. 602) (1970) (remarks of Senator Hruska).

39. 18 U.S.C. § 1961(4) (1999). The statute employs comparably expansive definitions of other key terms. For example, a "person" includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1999).

40. 18 U.S.C. § 1961(1) (1999).

41. *See* 18 U.S.C. § 1962(a)-(c) (1999).

an enterprise, or to conduct an enterprise's affairs.⁴² In short, only acts related to a covered enterprise trigger criminal liability and permit the imposition of sanctions intended to not only punish those acts, but also to end the existence of organized groups used to perform them.

It appears that EU policymakers have been influenced by RICO's focus upon the criminal organization and its financial underpinnings. This is the first RICO device that the European Council has tried to impose upon the member states.

B. Harmonization of European Law

The absence of "federal" institutions of criminal justice has left EU policymakers with limited tools to deploy against international criminal organizations. Most obviously, these tools include the traditional approaches: information sharing and cooperation among the individual states' law enforcement agencies. One possible and more ambitious approach would entail adoption of identical substantive and procedural rules by the Member States. This is a particularly difficult undertaking because of the structural relationships among the Member States, the European Communities, and the EU.

The European Union has not been organized politically as a federal system. It has no single written constitutional document allocating powers to the Member States and a central government. The respective Communities have been created by treaties, which have been the "basic documents" of European integration. Each was crafted as an independent document, although they have overlapped in important areas. For example, the Communities have shared the European Court of Justice and the European Parliament. As a result of the treaty-based organization of the Communities and the Union, each of the Member States has remained theoretically independent within its own sphere of legal power.⁴³ Therefore, attempts to achieve Union-wide uniformity in the substantive penal laws adopted by the Member States are constrained by these political and structural conditions. Despite these political difficulties, numerous attempts have been made to harmonize the domestic laws of the Member States.

Early attempts by the European Community to harmonize the laws of the Member States exemplify these problems. These efforts proved

42. See 18 U.S.C. § 1962 (d) (1999).

43. JAMES D. DINNAGE & JOHN F. MURPHY, *THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 83-84 (1996).

difficult for even the simplest of issues.⁴⁴ The tortuous process that plagued early attempts at harmonization is described in this commentary:

[At first] politicians sought to work out uniform legislation on the basis of the Community's legislative competence to harmonise national laws, but the negotiators exhausted themselves by considering the smallest details of the subject matter at issue. The output of that process was wholly unsatisfactory, both in quantitative and in qualitative terms: few national laws were harmonised and, worse, the staunchest obstacles remained because not all Member States were pleased by the necessary compromises.⁴⁵

It became apparent that a new approach to harmonization was needed.⁴⁶ In 1985, the European Commission issued a White Paper on the internal market proposing that "actual harmonisation should only concern the base-level requirements for goods and services to be marketable everywhere in the Community; beyond that level, Member States would be obliged to accept the differences among their national laws and to consider them as being equivalent, if not in their actual substance, at the very least in their actual outcome."⁴⁷ Thus only a year before the

44. The problem is not limited to the legislative setting. Similar problems exist for members of the European Court, who have been trained in "a variety of national legal-judicial traditions," and who must cope with this diversity as they carry out the Court's work. H. RASMUSSEN, *THE EUROPEAN CONSTITUTION* 11 (1989), *quoted in* SIMON BRONITT, FIONA BURNS, DAVID KINLEY, *PRINCIPLES OF EUROPEAN COMMUNITY LAW, COMMENTARY AND MATERIALS* 161 (1995).

45. K. Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians*, 93 U. CHI. L. FORUM 110 (1992), *quoted in* SIMON BRONITT, FIONA BURNS, DAVID KINLEY, *PRINCIPLES OF EUROPEAN COMMUNITY LAW, COMMENTARY AND MATERIALS* 177 (1995) (emphasis supplied).

46. More detailed commentary only emphasizes the problems plaguing attempts at detailed harmonization. *See, e.g.,* Lenaerts, *supra* note 47, at 110 (emphasis supplied):

Accordingly, the removal of barriers to trade used to be sought through the adoption of detailed harmonization measures. In every area where national legislation served an accepted interest and thereby restricted such trade, it was thought necessary for this interest to be protected in the same way in every Member State. In most cases this thinking meant that a directive, designed to specify the requirement which national law must satisfy, had to be agreed upon unanimously by the Council of Ministers under provisions such as Article 100 of the Treaty, which provides for harmonization of national law directly affecting the establishment or functioning of the common market. As a result, a directive might become so technically detailed that, as regards products, it completely determined the requisite characteristics of the product concerned. Similarly, in the case of services, the Commission envisaged detailed harmonization of national law, particularly that concerning insurance and the professions. However, because of the detail required such measures were often agreed, if at all, only after years of negotiation. Even where agreement was reached, the resulting measures might be criticized as not being geared to potential technological developments and as even being capable of obstructing them.

47. Lenaerts, *supra* note 47, at 110. The author concludes that the scope of "harmonisation of national laws changed dramatically as a consequence of this new approach. Member States

adoption of the Single European Act, which helped lay the foundation for the creation of a single market by the end of 1992, the European Commission recommended harmonization of the States' laws on only a few, market oriented issues. The concept that the Member States should address, acknowledge, and to some extent accept, each others' divergent domestic laws is an idea embodied in the various EC treaties, but it does little to end the diversity among the criminal justice systems of the various states.

The problems raised by the harmonization process mirror a classic dilemma long faced in the United States federal political system. In the United States, the conflict between forces favoring State autonomy and those pressing for greater power in the central government helped shape the political structure of the nation, energized the defining political conflicts in the nineteenth and twentieth centuries (the Civil War, the New Deal, the Civil Rights movement, and others), and has re-emerged as a defining issue in constitutional theory.⁴⁸

The EU parallels are striking. Efforts to preserve national autonomy have been countered by pressures for integration of power within the EU institutions. The European Court of Justice has played an influential role in this process. For example, the Court of Justice typically has concluded that within the harmonization process Community law takes primacy over the law of the individual Member States.⁴⁹ On the other hand, European opponents of integration often cite the principle of subsidiarity as a fundamental constraint on the exercise of power by the EU institutions. The principle of subsidiarity dictates that the EU should act only if the means of achieving the goal or objective of the action can

now see the political process of the Community as an opportunity to eliminate the most disturbing aspects of other Member States' laws, rather than to integrate the complete fine print of their own law into the new Community-wide legislation. The change in the Member States' attitude itself assured more successful political decision-making within the Council." *Id.*

48. See, e.g., Robert A. Shapiro, *Judicial Deference and Interpretive Coordinancy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 669-83 (2000) (discussing recent judicial decisions involving federalism issues).

49. The European Court has influenced the concept of harmonization. Most cases before the European Court of Justice raise:

the same fundamental concern; that is, the harmonization of Community law and the laws of the Member States both collectively and separately. Such harmony, of course, is in the view of the Court of Justice, to be attained on the Community's terms. Thus, the notion of the primacy of the Community law is the sine qua non of this fundamental objective. The process by which the court has pursued this goal has been by the way of what we referred to earlier in this Chapter as the constitutionalisation of the Community treaties, for it is in the treaties (especially the EC Treaty) that the tersely expressed tenets of the relationship between Community and member States' law are to be found.

SIMON BRONITT, FIONA BURNS, DAVID KINLEY, *PRINCIPLES OF EUROPEAN COMMUNITY LAW, COMMENTARY AND MATERIALS* 176 (1995).

not be best attained at the national level, and supranational action is required. In addition, the means employed in such supranational actions should be proportional to these goals or objectives.⁵⁰

Ironically, this principle favoring decentralized power can serve as a justification for standardization of the Member States laws. On its face, the principle preserves national sovereignty, but it is also a double-edged sword. Although it restricts the integrative power of the EU to issues best addressed by supranational means, the principle of subsidiarity also concedes power to the EU institutions to address such issues. To the extent that the EU institutions can identify issues that operate across national borders, they are empowered by the TEU to act.

Employing this approach, EU institutions have proclaimed that organized crime poses threats that require a supranational response by the Union. As a result, the EU, and particularly the Council, can assert authority granted by the TEU to direct the Member States to adopt uniform anti-crime legislation. Although this process still entails lengthy negotiations by representatives of the EU institutions and the Member States, it appears likely to produce uniform legislation more readily than did earlier attempts at harmonization.

C. *Joint Actions and Organized Crime Under the TEU*

The adoption of the TEU, as later amended by the Treaty of Amsterdam, has provided EU policy makers with a potent mechanisms for achieving penal laws that are consistent throughout Europe. The Treaty lays the foundation for Union-wide action by proclaiming that "the Union's objective shall be to provide citizens with a high level of safety within 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. . . ."⁵¹

This language is consistent with the original TEU, which established the essential conceptual framework for supranational action against international crime: "Member States shall regard. . . as matters of common interest: combating fraud on an international scale; judicial cooperation in criminal matters; customs cooperation;" and "police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with

50. See, e.g., University of Aberdeen Political Science Department, A Glossary of the European Communities and European Union, (visited Aug. 20, 2000) <<http://www.abdn.ac.uk/pir/sources/euroguide.htm>>.

51. TEU, art. 29 (ex Art. K.1).

the organization of a Union-wide system for exchanging information within a European Police Office (Europol)."⁵²

Although the TEU preserves the traditional emphasis upon cooperation in the effort against organized crime,⁵³ it also empowers the EU institutions, particularly the Council, to compel enactment of uniform penal laws about subjects of Union-wide significance. Consistent with the principle of subsidiarity, the TEU originally provided that "[t]he Council may. . . adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged. . . ."⁵⁴ As amended by the Treaty of Amsterdam, the TEU now commands: "The Council shall adopt joint actions. Joint actions shall address specific situations where operational action by the Union is deemed to be required."⁵⁵

Once the Council has acted, Member States must accept and implement the joint actions. The TEU dictates that "[j]oint actions shall commit the Member States in the positions they adopt and in the conduct of their activity."⁵⁶

The Treaty specifically incorporates law enforcement efforts within the Council's powers. It provides that law enforcement goals will be achieved not only by the traditional efforts at cooperation,⁵⁷ but also by "approximation, where necessary, of rules on criminal matters in the Member States, in accordance with Article 31(e)."⁵⁸ That Article states, in relevant part, that "[c]ommon action on judicial cooperation in criminal matters shall include. . . progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking."⁵⁹ By the end of 1998, the Council had used these

52. TEU, Title VI, art. K.1 (4) – (9).

53. *See, e.g.*, TEU, arts. 29-31 (ex arts. K.1-K.3).

54. TEU, art. K.3(2).

55. TEU, art. 14(1) (ex Article J.4). Joint actions must state "their objectives, scope . . . and the conditions of their implementation." *Id.*

56. TEU, art. 14(3) (ex Article J.4). Joint actions are created in Title V, which enacts Provisions on a Common Foreign and Security Policy, and not in Title VI, which addresses Provisions on Police and Judicial Cooperation in Judicial Matters. It is apparent, however, that joint actions are not limited to issues arising directly under Title V, and the Council has issued joint actions under the authority granted by Title VI. *See infra* Part III.D.

57. *See, e.g.*, TEU, arts. 29-30 (ex arts. K.1-K.2).

58. TEU, art. 29 (ex art. K.1).

59. TEU, art. 31 (ex Art. K.3). This is not, however, an unlimited power. Article 34(2)(b) authorizes the Council—if it acts unanimously—to adopt "framework decisions" designed for the "approximation of the laws and regulations of these Member States." These framework decisions "shall be binding upon the Member States as to the result to be achieved but shall leave to the

powers to issue a number of Joint Actions directed at the problem of organized crime.

D. Recent Joint Actions Attacking Organized Crime

The Council of the European Union has acted to exercise its power to issue joint actions on matters of criminal justice policy. In early 1998, for example it adopted the Falcone programme "to promote coordinated measures for those responsible for the fight against organised crime."⁶⁰ Consistent with earlier efforts to promote cooperation, this program promotes training, research, and cooperation among judges, public prosecutors, police and other people "responsible for the fight against organised crime" in their respective nations.⁶¹

But the Council has also employed the "joint action" mechanism more assertively.⁶² In particular, it has issued joint actions directing the member nations to adopt specific measures, including common provisions in their substantive penal laws, to help in the battle against transnational crime. The most important of these actions to date became

national authorities the choice of form and methods." These decisions cannot entail a "direct effect." *Id.*, art. 34(2)(b).

60. Joint Action of 19 March 1998 adopted by the Council, on the basis of Art. K.3 of the Treaty on European Union, Establishing a Programme of Exchanges, Training and Cooperation for Persons Responsible for Action to Combat Organised Crime (Falcone programme), 1998 O.J. (L 99) 8-12 (published Mar. 31, 1998). Among the reasons cited by the Council for undertaking the Falcone programme were that:

"the Member States regard the fight against organised crime in all its forms as a matter of common interest; . . . [and] the Member States are mindful of the need for a coordinated multidisciplinary approach to prevention and enforcement at both legislative and operational levels; . . . [and the programme] is likely to strengthen and facilitate the struggle against this phenomenon and to reduce such obstacles as may exist to increased cooperation between Member States in this area, particularly in the customs, police and judicial fields; . . . [and] these objectives may be more effectively pursued at European Union level rather than at the level of the individual Member States, in view of the synergy which develops from the exchange of specific experience available in the Member States and the anticipated economies of scale and cumulative effects of the intended measures. . . ."

Id.

61. These people include those "involved in customs departments, civil servants, public tax authorities, authorities responsible for the supervision of financial establishments and public procurement, including the fight against fraud and corruption, and representatives of professional circles who may be involved in the implementation of some of the recommendations in the action plan, as well as the academic and scientific world." *Id.*, Art. 1.2.

62. In recent years the Council has issued various Resolutions and Joint Actions directed at least in part at organized criminal activities. *See, e.g.*, Joint Action of 22 December 1998 adopted by the Council on the basis of Art. K.3 of the Treaty on European Union, On Corruption In the Private Sector, 1998 O.J. (L 358) (published Dec. 31, 1998); Council Resolution of 20 December 1996 On Individuals Who Cooperate With the Judicial Process in the Fight Against International Organized Crime, 1997 O.J. (C 10) 1-2 (published Jan. 11, 1997). Council Act of 27 September 1996 Drawing up a Protocol to the Convention on the Protection of the European Communities' Financial Interests, 1996 O.J. (C 313) 1.

effective in December, 1998. Relying upon the authority granted it under Article K.3 of the TEU, the Council directed the EU Member States to outlaw criminal organisations and to penalize both these organizations and their members.⁶³

This Joint Action rests upon a definition of criminal organizations that echoes the RICO concept of an enterprise:

Within the meaning of this joint action, a criminal organisation shall mean 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. . . an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.⁶⁴

Elements of the RICO conception of the enterprise are apparent. The organization cannot be some ad hoc, momentary grouping of people. It must have a structure and exist over a period of time, but it is not limited to any particular form of business organization. Indeed, as long as a structure can be identified, it would appear that this definition is as broad as a RICO enterprise, which "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."⁶⁵

The Council's requirement that the organization exist over time appear to track the judicially crafted "continuity and relatedness" elements of the "pattern" of racketeering acts that are a prerequisite for RICO liability.⁶⁶ Similarly, the Joint Action's focus upon the organization's purpose—two or more people acting together for material gain or to work some public corruption—is akin to RICO's concern for the dangers posed by criminal enterprises.⁶⁷

63. Council of Europe, Joint Action 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 Organisation in the Member States of the European Union 1998 O.J. (L 351) 1-3 [hereinafter Joint Action of December 21, 1998].

64. Joint Action of December 21, 1998, Art. 1. Like the RICO statute, which focuses upon serious crimes, this Joint Action applies to crimes "punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty. . . ." *Id.* "Nothing in this joint action shall prevent a Member State from making punishable conduct in relation to a criminal organization which is of broader scope than that defined in Art. 2(1)." TEU, art. 5(2).

65. 18 U.S.C. § 1961(4). The statute employs comparably expansive definitions of other key terms. For example, a "person" includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § (3).

66. The RICO statute defines a pattern as including at least two racketeering acts within a ten year period. 18 U.S.C. § 1961(5). The Supreme Court has imposed the additional requirements of relatedness and continuity. *See H.J. Inc. v. Northwestern Bell Telephone*, 492 U.S. 229, 251 (1989).

67. *See supra* notes 36-39 and accompanying text.

Once again echoing RICO's focus on the criminal enterprise, the Joint Action also imposes penalties upon the organization itself: "Each Member State shall ensure that legal persons may be held criminally or, failing that, otherwise liable for offences. . . which are committed by that legal person, in accordance with procedures to be laid down in national law."⁶⁸

In other words, the Council directed the EU nations to impose penalties on the organization. It required the Member States to "ensure, in particular, that legal persons may be penalized in an effective, proportionate and dissuasive manner and that material and economic sanctions may be imposed on them."⁶⁹

Legislation adopted by the Member States to conform to this Joint Action would, perforce, focus upon the nature of the criminal organization, and impose penalties upon the organization itself.⁷⁰ As in the

68. Joint Action of December 21, 1998, Art. 3.

69. *Id.* RICO prescribes penalties in more detail, although their impact upon enterprises is phrased less directly than the language of this Joint Action. The RICO statute imposes criminal penalties upon persons. See 18 U.S.C. § 1963. Of course, the statutory definition of a "person" encompasses enterprises. A "person" is "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). Violators "shall be fined under this title or imprisoned not more than 20 years . . . or both, and shall forfeit to the United States" specified assets. Among the covered assets are "property or contractual right of any kind affording a source of influence over, any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." 18 U.S.C. § 1963 (1)(b).

The statute also creates civil remedies. United States District Courts can order both legal and equitable remedies. They can, for example, issue orders restraining violations of the statute; "order any person to divest himself of any interest, direct or indirect, in any enterprise"; impose "reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in"; or order the "*dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.*" 18 U.S.C. § 1964(a) (emphasis not in original).

70. As this article was written, the ultimate impact of the Joint Action of December 21, 1998 on the domestic laws of the EU nations remained unclear. The effectiveness of this Joint Action depends on each of the Member States. Unless and until they act to comply with the Council's commands, the Joint Action remains only as a directive telling the States to act. Recognizing this political reality, the Council took steps to ensure compliance by potentially recalcitrant Members. The Council declared that during 1999 it would assess the "Member States' compliance with their obligations under this joint action," and would prepare a report describing the nations' progress in implementing this joint action, outlining the national measures applied under this joint action, and, in particular, consider practices used in prosecuting the offences covered by it, considering "any measure needed to achieve more effective judicial cooperation on the offences covered by this joint action," paying particular attention to specific conditions contained in national legislation that hampers judicial cooperation between Member States, and finally, explaining "where appropriate, why implementation of this joint action has been delayed." Joint Action of December 21, 1998.

Even on the face of the Joint Action, several Member States indicated their compliance would have limits. Article 3 of the Joint Action directed the Member States to impose sanctions on criminal organizations. Austria indicated its intent to defer compliance with this part of the joint action for up to five years. Denmark was even more defiant, declaring "that it does not

RICO statute, the enterprise is the center of analytical attention in this Joint Action. For example, criminal liability for individuals derives from their relationship with and participation in the activities of the organization. The Joint Action decrees that the decision to impose penal liability upon the organization "shall be without prejudice to the criminal liability of the natural persons who were the perpetrators of the offences or their accomplices."⁷¹ Citing the need for a common approach to combating organized crime, the Council directed all of the Member States to punish individuals for committing one or both of the following types of conduct relating to criminal organizations:

(a) conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organization or the intention of the organization 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 organization'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.⁷²

This Joint Action thus directs the Member States to adopt rules in their domestic penal codes imposing penalties upon individuals who participate in the conduct of the affairs of a criminal organization, or who enter into a conspiracy to commit crimes on behalf of or by means of the organization. RICO's influence is apparent in these provisions.

As in United States law, individuals can incur both group and inchoate liability. Group liability exists because an individual can be punished for crimes actually committed by other members of the criminal organization, so long as that individual exhibits both the proper mental state—that is, he intends to participate in the organization's criminal affairs—and conduct—he actually participated in the organization's ac-

intend to extend the applicable Danish rules on criminal liability in the case of legal persons in order to implement Art. 3.

71. *Id.*, Art. 3.

72. Joint Action of December 21, 1998, Art. 2(1). "Nothing in this joint action shall prevent a Member State from making punishable conduct in relation to a criminal organization which is of broader scope than that defined in Art. 2(1)." *Id.*, Art. 5(2).

tivities, regardless of whether he personally committed the relevant crimes. Inchoate liability exists because a participant in the enterprise, or a member of a conspiracy related to the enterprise, can be punished although the crimes planned or agreed to are not actually committed. These measures parallel the RICO statute's expansive, but not unlimited, imposition of liability upon the participants within criminal organizations for crimes committed in furtherance of the organization's affairs and for conspiracies to commit RICO crimes.⁷³

It is apparent that the substantive provisions of both the RICO statute and this Joint Action are conceptually linked. But profound differences between the federal political structures of the United States and the treaty-based European Union also are evident. The differences appear most obviously in the need for the Council to rely upon actions by the individual member states, who control the institutions of criminal justice, to implement the prescribed rules governing organized criminal groups. The Council has to rely upon the individual countries to not only adopt substantive penal rules, but also to undertake procedural reforms.

The Joint Action commands the Member States to enact procedural rules that address some of the special enforcement problems facing European law enforcers. Some are applications of conventional EU approaches to the problem of international crimes. The member states must "afford one another the most comprehensive assistance possible in respect of the offences covered by this Article" as well as those offences covered by a portion of the 1996 Convention relating to extradition between the Member States of the European Union.⁷⁴

But the Council went beyond merely directing the Member States to adopt rules intended to assist in the investigation and prosecution of international criminal organizations. It commanded them to adopt uniform jurisdictional rules that would ensure that organizational crime could be punished anywhere in the EU. The Council directed each Member State to ensure that the crimes committed on behalf of criminal organizations or criminal conspiracies for these organizations "which take place in its territory are subject to prosecution wherever in the territory of the Member States the organisation is based or pursues its criminal activities, or wherever the activity covered by the agreement . . .

73. *Salinas v. United States*, 522 U.S. 52 (1997) (individual RICO conspirator need not agree personally to commit two predicate acts to incur liability under the statute; liability arises from an agreement that some co-conspirator would commit racketeering acts). See also 18 U.S.C. §1962(d) (RICO conspiracy defined).

74. Joint Action of December 21, 1998, Art. 2.

takes place.”⁷⁵ And where the acts of the enterprise’s members vest jurisdiction in several nations, the relevant Member States “shall consult one another with a view to coordinating their action in order to prosecute effectively, taking account, in particular, of the location of the organisation’s different components in the territory of the Member States concerned.”⁷⁶

On one level, these measures address problems not faced by law enforcers in our federal system.⁷⁷ RICO automatically applies in all fifty states. In the United States the individual states need take no additional action to subject the enterprise and its members to federal criminal liability for acts committed in different states that violate the federal statute’s penal provisions. The federal legislation permits prosecution in federal courts without any additional actions by the several states. The federal structure of our political and legal systems makes it much easier to construct mechanisms for law enforcement across state borders than it is in Europe, where sovereign nations have agreed to relinquish some powers by treaty.

IV. CONCLUSION

The “legislative history” cited by the Council makes it difficult, if not impossible, to determine the precise sources of the December 21, 1998 Joint Action’s language addressing the problem of criminal organizations. Consistent with EU practice, the document cites a large number of action plans, resolutions, conferences, forums, and seminars that influenced the Council in crafting this Joint Action.⁷⁸ This citation of au-

75. *Id.*, Art. 4.

76. *Id.*, Art. 4. Extradition poses special problems for European law enforcers. The Joint Action directs that it “shall not affect in any manner whatsoever the obligations” of the Member States “relating to extradition between” them under the Convention drawn up by the Council on September 27, 1996.

77. On the operational level, however, this Joint Action addresses logistical issues that face law enforcers in the United States and Europe. Like their European counterparts, law enforcers in different federal agencies, and in federal and state agencies, must coordinate their actions.

78. Among the sources considered by the Council were: The Action Plan to Combat Organized Crime of 28 April 1997; European Parliament Resolution of 20 November 1997, “which calls for closer consideration of the prevention aspect”; The Seminar on Police and Urban Criminality (Zaragoza, February 1996); The European Union Conference on Crime Prevention (Stockholm, May 1996); The Seminar on European Union Measures to Combat the Drug Problem (Dublin, November 1996); The Conclusions of the European Union Conference on Crime Prevention (Noordwijk, May 1997) and the seminar ‘Partnerships in reducing crime (London, June 1998); the conclusions of the Conference on Achieving a Corruption Free Commercial Environment (Brussels, April 1998); the work of other international organizations and forums, in particular the Council of Europe recommendations R(81)12 on Economic Crime and R (87) 19 on the Organization of Crime Prevention, Resolution R(97)24 on 20, Guiding Principles for the Fight Against Corruption, the Work Under the United Nations Programme on Crime Prevention and Criminal Justice, as

thority for the Joint Action identifies no substantive materials derived from any of these sources. Nonetheless, experience strongly suggests that the RICO statute was actively discussed at many of these conferences, seminars, forums, and meetings, and influenced the contents of these new European organized crime rules. If this is true, then RICO's influence extends far beyond United States domestic law; it has extended its reach into international legal theory—and this frequently criticized statute will have confounded its critics again.

It is, of course, possible (however unlikely), that these ideas have purely European origins. This possibility carries its own provocative implications for United States policymakers. It is unremarkable that potent legislation adopted in one country would influence lawmakers in other countries who are confronted with similar problems. It is, on the other hand, noteworthy if policy makers in different legal systems, in different countries, on different continents arrive at similar solutions to the same problems.

In either event, RICO's stature is enhanced. If law makers in Europe are copying the statute, one can only conclude that the influence of this innovative statute is spreading. If, on the other hand, European and American policy makers independently have reached the same conclusions about the nature of the devices needed to combat criminal enterprises operating across jurisdictional boundaries, RICO's conceptual stature is enhanced in a different way. One could reasonably conclude from such a confluence of legal theories that the RICO statute, long considered radical by its critics, is grounded on a concept—the criminal enterprise—that is so fundamental that this element of the statutory scheme is not only a proper exercise of government power, it is an essential element of any rational effort to combat criminal organizations.

well as the results of the United Nations General Assembly on Drugs (New York, June 1998), and in Particular the Declaration on Demand Reduction Guidelines; the Council Resolutions of 23 November 1995 (2) and 20 December 1996 (3); and the fundamental rights as described in the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 22, E.T.S. No. 5 (entered into force Sept. 3, 1953).

