FINANCIAL AND ORGANISED CRIME IN EUROPE: CONVERGING PARADIGMS OF CONTROL?

By Michael Levi and Mike Maguire


INTRODUCTION

Throughout his career, Cyrille Fijnaut has been a major contributor to research and debates about the control of organised crime in Europe, particularly around the topic of covert policing and new approaches to policing (Fijnaut and Jacobs, 1991; Fijnaut and Marx, 2005; Fijnaut and Paoli, 2004). In appreciation of this contribution, we offer for his Festschrift a few broad comments about developments in this area, combined with some thoughts about the relationship between particular types of ‘organised crime’ (or, indeed, of ‘organised criminal’) and particular approaches to control. More specifically, we consider responses to, on the one hand, large-scale (‘white collar’) financial crime and, on the other, the kinds of criminal activity (such as drug importation, extortion or vehicle theft) usually associated with organised criminal ‘gangs’. Traditionally, these have been treated as distinctly different kinds of criminal activity, undertaken by different kinds of offender, and have tended to attract somewhat different responses. However, it is increasingly recognised not only that the distinction between them is less clear than often portrayed, but that more systematic use of preventive and regulatory approaches (currently much more common in the control of financial crime) could enhance the effectiveness of responses to organised crime as a whole and, *vice versa*, that some of the covert policing methods now established as standard weapons against organised criminal gangs might be used more often against financial crime. In exploring these issues, we draw upon some research we undertook a few years ago for the EC-funded Falcone project, aimed at gathering concrete examples of preventive strategies used to tackle organised crime (Levi and Maguire, 2004), as well as on some more recent work undertaken by one of us to update earlier work on the use of covert methods to combat high-level fraud and other financial crime (Levi, 1995).

Clearly, organised crime has grown significantly in importance as a political issue for the EU over recent years and is now recognised by all European governments and police forces as a transnational issue requiring close cross-border cooperation. Under the umbrella of ‘Third Pillar’ activities, the late 1990s saw a series of collaborative measures and agreements, including the implementation of a High-Level Joint Action Plan and the constitutional establishment of Europol, and efforts have since continued apace to harmonise or, in EU diplomatic terminology, ‘approximate’ the fight against organised crime. These culminated in the dissolution of ‘organised crime’ into the current broader Europol mandate to deal with ‘serious crime’ (Dorn, 2009; Dorn and Levi, 2009). In the wider international arena, too, both the Financial Action Task Force and the UN have actively promoted cross-border collaboration in anti-laundering and organised crime prevention.

This surge of attention to organised crime, and the associated injection of resources into its control, have led to some important developments in policy and practice, particularly in relation to cross-border co-operation. These span three main dimensions, those of legal and investigative powers, proactive policing methods, and crime prevention. First, in terms of
increased legal and investigative powers, we can identify:

1. a significant growth in substantive legislation, relating especially to money-laundering and proceeds of crime legislation;
2. new procedural laws involving mutual legal assistance, including the establishment of Eurojust and the creation of the European Arrest Warrant; and
3. major new investigative resources, including the expanding role of Europol and the formation (and cross-border collaboration) of specialist organisations such as the Serious Organised Crime Agency and equivalents in Europe and the US (Andreas and Nadelmann, 2007).

Second, many of the barriers to the international exchange of criminal intelligence and to the use of covert and proactive policing methods (surveillance, bugging, participating informants, and so on) have been removed or reduced, thereby transforming the potential for intelligence-led policing and disruption of organised crime activity across borders (Fijnaut and Paoli, 2005; Harfield, 2006). It should, however, be emphasised that different interpretations of Human Rights and data protection laws and conventions mean that such activity is considerably more regulated and restricted in some states than others. Moreover, some states are less prepared than others to devote significant resources to what are highly expensive forms of policing.

The third major plank of emerging activity – albeit often remaining at the level of aspiration rather than put into practice - is measures to prevent organised crime. This includes a growing recognition that prevention is not a matter for law enforcement agencies alone, but requires commitment and action from a range of organisations (Levi and Maguire, 2004). One of the more successful early examples was the strategy of fining truck drivers and impounding their vehicles for carrying illegal migrants across the Channel: this led large firms to introduce new technology for checking (by carbon dioxide levels) whether their trucks were stowaway-free. More generally, preventive strategies are being encouraged by the growing prominence in policing, as in many other fields, of perceptions and calculations of risk (Maguire, 2000; Maguire and John, 2006), a key element being the preparation of broadly-based ‘threat assessments’ (see, for example, Council of Europe, 2006; Europol, 2011. For heavy critiques of the analytical process and presentation of earlier versions, see van Duyne and van Dijk, 2007; van Duyne and Vander Beken, 2008).

In the following section, our focus is on this third dimension of organised crime control. We shall argue that, despite widespread lip-service being given to the value of preventive approaches, in practice these are often neglected and there is a strong tendency to favour the ‘quick win’ of criminal justice interventions, often based around intelligence-led operations of limited duration and scope. The one major exception, however, is organised financial crime, where preventive and regulatory measures tend to dominate, and covert policing operations are rare. In the second half of the paper, we shall briefly explore the apparent reasons for this and the potential for increasing their use. In doing so, we shall raise questions about effectiveness, legality and regulation.

**PREVENTIVE STRATEGIES AND ORGANISED CRIME**

Based mainly on previous literature, both theoretical and empirical, Levi and Maguire (2004) identified three main ‘non-traditional’ approaches to the prevention of organised crime (see Table 1). Most of these have in common the involvement of statutory or private agencies outside the law enforcement and criminal justice sector, or indeed of local communities or
the general public. They are based around a variety of techniques and principles, including routine surveillance, information-sharing, or the use of regulatory powers to disrupt criminal groups’ operations. One aim of the Falcone project was to explore the extent to which interventions of these or similar kinds were used across Europe. To this end, a survey was conducted of a range of European law enforcement agencies and other organisations involved in the control of organised crime, asking them to describe concrete examples of successful or unsuccessful preventive interventions. However, analysis of the responses by Levi and Maguire (2004) showed (a) that very few examples had been produced of genuinely ‘preventive’ initiatives (as normally understood: we recognise that the term is difficult to define, and is sometimes used very broadly) and (b) very little evidence was produced of the impact of any of the initiatives described, beyond statements of, for example, numbers of people arrested or value of drugs or other items seized. Most examples given referred to short-term operations, usually based on surveillance and sometimes involving participating informants or undercover police officers, in which at an opportune moment the police moved in and effected arrests and seizures: in short, most would be more accurately described as proactive policing operations, albeit often entailing liaison with other agencies such as customs or shipping companies, and hence as ‘repressive’ as much as ‘preventive’.

<table>
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<th>Table 1  Non-traditional approaches to organised crime prevention</th>
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<tr>
<td><strong>Community approaches</strong></td>
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<td>1. Community crime prevention</td>
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<td>2. Passive citizen participation: giving information about harms and risks, hotlines</td>
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<td>3. Active citizen participation: civic action groups</td>
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<td><strong>Regulatory, disruption and non-justice system approaches</strong></td>
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<td>4. Regulatory policies, programmes and agencies (domestic and foreign, including non-governmental organisations and IGOs such as the IMF, OECD/FATF and World Bank)</td>
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<td>5. Routine and suspicious activity reporting by financial institutions and other bodies</td>
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<td>6. Tax policy and programmes</td>
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<td>7. Civil injunctions and other sanctions</td>
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<td>8. Military interventions</td>
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<td>9. Security and secret intelligence services</td>
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<td>10. Foreign policy and aid programmes (US ‘certification’ of countries as adequate/inadequate in their anti-drugs measures)</td>
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<td><strong>Private sector involvement</strong></td>
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<td>11. Individual companies</td>
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<td>12. Professional and industry associations</td>
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<td>13. Special private sector committees</td>
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<td>14. Anti-fraud and money laundering software</td>
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<td>15. Private policing and forensic accounting</td>
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The reasons for this are not entirely clear. One obstacle to a serious shift towards preventive approaches may lie in the conservative attitudes and traditions of many law enforcement agencies, especially the police. In the UK, for example, despite some direct resource increase to SOCA (itself soon to be replaced by a new body with expanded reach,
the National Crime Agency – Home Office, 2011), within mainstream police organisations there has been little support for radical redirection of staff or resources towards preventive activities such as financial investigation, away from media-supported areas of crime and disorder. Indeed, police bureaucracies can become entrenched in ‘law and order solutions’ which obstruct alternative problem-solving approaches to complex social issues. While there is some evidence from the USA that such attitudes can be shifted when the rewards are strong enough,¹ this is not common elsewhere, including most European countries. This is probably partly because post-conviction reversal of the burden of proof typically yields modest results and crime proceeds income is not redirected fully towards the police (van Duyne and Levi, 2005; Kilchling, 2002; Levi and Reuter, 2006).

Another partial explanation may lie in the fact that the sorts of core activities commonly engaged in by organized crime groups – the supply and distribution of goods and services that are in popular demand – are not seen as preventable in the same way as other crimes which have self-acknowledged victims who wish to reduce the harm that they suffer. For example, Customs or naval interception of a large cargo of narcotics clearly has some opportunity reductive effects, but its longer-term effects on the availability of drugs in local markets are highly questionable. Indeed, if demand for drugs is inelastic (i.e. largely unaffected by price), a rise in their price might do little more than increase the number and/or seriousness of the crimes committed to pay for them. The politics of supply-side approaches to ‘market offences’ are well enough known not to need rehearsal here.

More generally, in a world in which demonstrating ‘effectiveness’ is often critical to agencies’ capacity to attract and maintain funding, the difficulties involved in measuring the impact of preventive initiatives in any clear or convincing way constitute a major obstacle to their further development: a headline referring to x euros worth of drugs being seized, or to combined sentences of y years for a group of offenders involved in organized crime (even if only minor players in the enterprise) is likely to be both easier to achieve and more influential than an attempt to demonstrate a more subtle, complex and longer-term impact. The challenge is to define and measure convincingly (and to express as simply as possible) indirect crime reduction outcomes and activities that relate less to specific falls in crime and more to reducing the operational and innovative capacities of criminal organizations, or reducing the number of niches available for organized crime to exploit. These might fruitfully be labeled organized crime indicators rather than ‘measures’, which can give a spuriously objective aura to what may often be an approximation judgment process, though one that must be defensible publicly to enhance legitimacy and avoid the impression that organizations are creating their own performance evaluations.

To expand on this theme a little, it is worth emphasising that the organisation of crimes results from the interaction of crime opportunities, offender and prospective offender skills and networks, and formal control efforts (whether through the criminal law, administrative law or disruption). It is thus a dynamic process that evolves as offenders adapt (or fail to adapt) to their changing environment, including facilities offered by the legal commercial environment, such as container trucks and ships, car repair firms (Tremblay et al., 2001), payment card issuers and merchants (Levi, 2007), and financial institutions. There are many cases where crime networks adapt to police preventive tactics even in the course of one

¹ For example, Blumensen and Nilsen (1998) report considerable willingness even within state and local enforcement agencies to target forfeitable assets rather than just serious offenders, largely as a result of available income from drugs-related Federal ‘equitable sharing’ and ‘adoptive forfeiture’. In the UK, proceeds of crime confiscation has become much more popular because it is seen as an income stream for hard-pressed police forces.
series of frauds; and the losses of drugs or excise-evaded shipments constitute mainly opportunity costs from which higher members of crime groups develop counter-intelligence strategies or just accept risks and losses of (often female) ‘mules’. If criminals fail to develop their technical skills or find people they need to add to their networks to commit crimes effectively, then evolution in crime prevention – stimulated by private and public sector cost-saving – and in technology may force them to desist from crime or to resort to those crimes such as street robberies and thefts which cannot be eliminated by the spread of surveillance technology (though the technology may enable them to be identified more easily and reliably subsequently). In other words, there may be crime type displacement rather than geographical displacement of the same criminal activity.

While such impacts remain extremely difficult to evidence, they are at least plausible consequences of preventive initiatives aimed at reducing criminal capacity and opportunities for recruitment. Major offenders do not advertise their services in the media, and apart from common holidays in Spain, marinas, and casinos, such contacts may often be tentative, hedged around with the problem of negotiating trust in an ambience in which betrayal (perhaps by an undercover agent, especially an American or British one) can have very serious consequence not just for freedom but for retention of proceeds of crime. (See Gambetta, 2010, for a developed discussion of such trust issues.) Equally, the role of fences, criminal professionals (accountants, lawyers), money-launderers and transportation firms may be important in facilitating networks, though they themselves may have to be ‘brokered’ (Morselli, 2009, 2010). Initiatives aimed at increasing the risks for ‘upperworld’ members or associates of organised criminal groups may therefore bear fruit: vice versa, if such people and their activities are not part of the police and intelligence surveillance set, they and their activities are likely to remain relatively safe from intervention (see Gill, 2000; Vander Beken and van Daele, 2008).

To conclude this section, it is increasingly being understood that ‘organised crime’ (however defined) can be fruitfully conceived as a business process, requiring funding, technical skills, distribution mechanisms, and money-handling facilities. The larger the criminal business, the more likely all these elements will be required, with the special business problem that what they are doing is illegal and, if caught and convicted, they – and their bankers or lawyers - could all go to jail for very long times as ‘organised criminals’. The practical and policy implications of this – that control strategies should be based to a much greater degree around preventive strategies, including interventions aimed at making it more difficult to set up and sustain such business-type organisations – have as yet failed to materialise in a large-scale or systematic manner, although there are pockets of promising activity. The Netherlands and the UK have been probably the highest profile countries to move towards the developments of such an approach, but long-term rolling out and sustaining of prevention strategies is about quality of implementation rather than just the presence or absence of a formal process. Such efforts also require periodic evaluation, and whether the broader approach takes off and ‘works’ needs considerably more empirical research than has been undertaken to date. (For examples, see van de Bunt and van der Schoot, 2003; van der Schoot, 2006; and, for a sceptical evaluation, Huisman and Nelen, 2007).

COVERT POLICING AND FINANCIAL CRIME

While the control of ‘organised crime’ as most commonly perceived remains primarily built around a combination of intelligence-led policing operations and criminal justice interventions, the situation with regard to ‘economic’ or ‘financial’ crime is rather different. Here the use of regulatory mechanisms, and the involvement of agencies other than the
'normal' policing agencies like police and customs, are commonplace. In other words, preventive strategies are the norm. At the same time, their potential effectiveness is handicapped by the fact that terms like 'economic' or 'financial' crime – like the concept of 'white collar crime', with which they are often associated – attract much less attention from politicians, police, journalists and academics than the emotive phenomenon of 'organised crime', and hence – even after the banking crisis - do not command anything like the immense political and bureaucratic power of the latter to attract publicity, powers and resources, nor indeed to generate a sense of urgency or commitment in the 'fight' against it.

In fact, as many writers have pointed out, the separate labels are misleading, and in reality there are many overlaps between both the activities and the personnel involved in both 'organised' and 'financial' crime. Indeed, although often seen as occurring in a different arena, investigation of financial crime is not restricted to fraud: it arises increasingly in the context of anti-laundering and proceeds of crime investigations, whether as part of the financial asset-stripping process or as part of the crime investigation link-making process. A study in the UK by Gannon and Doig (2009) notes that there has been a concealed shift in England and Wales from officers investigating fraud within Fraud Squads to officers and civilians investigating recoverable proceeds of all crimes within 'serious and organised crime' units.

Moreover, covert policing itself is a far from self-evident category. Much intelligence collation is covert, in the sense that it is collected without the knowledge of the suspect(s) or by misleading them. In the UK, the authorities have the opportunity to collect information from banks and other financial institutions by Production Orders issued by judges, without the knowledge of the suspect or account-holder. In the case of the Serious Fraud Office, the information can be required without a judicial order on the authority of the Director alone. Or, under the Money-Laundering Regulations, financial institutions may pass on information about clients where they suspect that they are laundering the proceeds of serious crime (including any offences, not just drugs): van Duyne and Levi (2005, 2009) have demonstrated that hitherto, most of those reports that trigger criminal investigations and prosecutions relate to fraud and other property crimes rather than drugs. (Though this does not mean that those 'enterprise criminals' are not also involved in drugs trafficking.) In all cases, unless there is a leak - which itself is a criminal offence - the suspect will be unaware of the police or customs officers' interest in them. Such data may be kept for years on Financial Intelligence Unit records without leading to the apprehension of any offender.

Differences in legal regimes between countries are likely to have a much greater effect on fraud and money-laundering than on drugs cases, because there are far greater disparities in substantive legislation, and different government departments and reporting agencies may be entrusted with money-laundering and economic crime enforcement. Typically, the Treasury or Ministry of Finance is in charge of money-laundering compliance, and special FIUs to handle reports have to be established. However, the liaison between the FIU and enforcement groups can be quite tense, and in particular, unless the groups handling the reports are co-operative, there may be confusion as to which specialist agency - drugs, fraud, other organised crime - should investigate the case.

As to the future of covert policing in ‘white-collar’ cases in Europe, fashions in policing come and, sometimes, go. The history of responses to organised crime suggests a need to see an enemy, preferably an alien implant that has nothing to do with either domestic economic policy or the criminalisation of popular commodities. Policing of organised crime and the imagery of a highly structured hierarchy that has to be penetrated seems to be unnamable
to ordinary methods, and critical academic research on street and uniformed policing may have assisted in the momentum towards a proactive, offender-oriented style of policing that promises more. The risks of this - in terms of who chooses the individual targets and the sorts of crimes that will be proactively investigated, and how do we judge (or even find out about) the propriety of who gets 'disrupted' - are issues of great public importance. How one judges the value of 'intelligence' that has no outlet in a criminal prosecution remains frequently mysterious.

A key question, of course, is how close can and should the police get to private sector organisations (which commonly possess more intelligence on fraud than do the public authorities)? The UK has established a National Fraud Authority and a National Fraud Intelligence Bureau aimed at closer integration of public and private sectors (NFA, 2011), and is aiming at expansion of private funding of public policing. At the same time, there are tensions in coordination between public sector investigators, as well as with the private sector, and lines of accountability are obscure (Doig and Levi, 2008; Levi, 2010).

It should also be emphasised that there are inherent limits to the proactive policing of white-collar cases, inasmuch as (a) major corporate collapses and insolvency frauds are seldom predictable in advance, and (b) the gestation times of many white-collar crimes make surveillance more expensive and more difficult to get authorised than typically is found in most other areas of crime (though the latter is a hypothesis rather than a fact). However, this does not mean that covert methods cannot be used:

(i) to lure vulnerable individuals to warn them of the sort of methods that can be practised against them, e.g. 'get rich quick' or 'advance fee' type scams operated commonly by Nigerians.

(ii) to test employee integrity in fake money-laundering investigations

(iii) to test willingness of firms to sell liquor or tobacco to minors

(iv) to test willingness of firms to 'fudge' integrity of motor car roadworthiness and pollution tests which they are authorised to conduct, or to validate propriety of work they claim to have done on vehicles, or to dump toxic waste unlawfully

(v) to keep surveillance on high-frequency offenders, though the notion of 'high frequency' is different for white-collar offenders than for others, except perhaps in the case of 'plastic card', cheque and counterfeit money teams. For example, it may take months for a bankruptcy fraud to be planned, though 'serial offenders' may be perpetually engaged in them: this creates finance problems for police managers.

Covert methods may also be used more reactively, in, for example, public and/or private sector attempts to recover stolen art works such as 'The Scream', which was returned to Norway and the offenders tried by Norwegian judges in England: an excellent example of cross-border covert work by the Metropolitan Police. Given that many cross-border and domestic major criminals are - as far as we know - generalist 'enterprise criminals' who will turn their hand to anything within their spheres of competence, those committing white-collar crimes may be stumbled upon by investigators looking at drugs or other sorts of crime. Finally, there are social network analysis methodologies adopted by the private sector to connect previously unknown criminal networks in insurance claims and credit application frauds (Levi, 2010), but do not generally relate to elite frauds. (Though insider dealing
investigations in the US in 2010-11 have involved ‘supergrass’ deals with insiders to wear covert wires to provide proof against their collaborators: a process that works more easily in the US than in the UK.)

In conclusion, then, both in ‘organised crime’ and ‘white-collar crime’, there are many overlaps and convergences which are reflected in their policing, sometimes by accident and sometimes by design. But as Cyrille Fijnaut’s own interests show, it is important to look analytically at what forms of organised crime and white-collar crime are being targeted, by whom, and using what methodologies. So far, the convergence in methods reflects principally the drift by ‘the usual suspects’ into fraud and intellectual property crimes and their tracking by police using financial investigations and other recent techniques, rather than a radical shift towards re-prioritising frauds over ‘the usual crimes’.

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