This article argues that the definition of organised crime by the European Union Framework Decision on the Fight against Organised Crime (henceforth FD) is uncertain and vague, and that this makes the FD a poor instrument with little added value for the approximation of criminal legislation against organised crime. This criticism of the FD is based on both legal and criminological arguments, since the FD appears to be flawed from both perspectives.

In order to support the article’s main thesis, the first section provides brief background information on organised crime, harmonisation and approximation of criminal law in the EU. The second section then analyses the definition of “criminal organisation” as provided by the FD and the model offences criminalizing participation in a criminal organisation. Subsequently, the third section summarises the FD’s problems relative to its added value in the approximation of criminal legislation against organised crime and suggests some possible improvements. The last section concludes.

1. Organised Crime, Harmonisation and Approximation of National Criminal Legislations

The concept of organised crime is debated both in criminal law and criminology. This is because the phenomenon is in itself complex and overlaps with economic crime, terrorism and even the legal economy, but also because state action to combat organised crime has frequently been uncertain and mostly symbolic, using the concept as a “picklock for criminal law and justice reforms” in order to increase police powers.1 After 11 September 2001 the main focus of

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the international crime and security agenda shifted from organised crime to terrorism, but the approach remained the same. The links between organised crime and terrorism suddenly became apparent and measures against organised crime were turned against terrorism.2

These difficulties long mirrored the lack of international consensus on a legal definition of organised crime. In the last decade this shortcoming was remedied by the 1998 Joint Action making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (henceforth the JA3) and the United Nations Convention against Transnational Organized Crime of 2000 (henceforth Palermo Convention4). Whilst the problem of the legislative loophole has been solved, however, the quest for a definition which balances effective repression with the safeguarding of civil rights and liberties still continues, as the analysis of the FD will show.

In the context of the EU, the concern with organised crime touches on another sensitive issue: the harmonisation of criminal law. As in the case of “organised crime”, “harmonisation” is another complex and blurred concept. In the scientific literature it is variously treated as an objective, a method or a process. This imprecision has given rise to different approaches and opinions on the harmonisation of criminal law, with animated debates between harmonisation enthusiasts and sceptics. Indeed, Article 31 of the Treaty on European Union enables approximation of criminal law through the adoption of “minimum rules concerning the constituent elements of criminal acts and penalties in the field of organised crime, terrorism and illicit drug trafficking”. The Treaty on European Union and the EU instruments adopted under the III pillar use the concept of approximation. Whilst apparently similar, harmonisation and approximation are two different processes. From a more considered perspective, “harmonisation...