

# AN APPRAISAL OF THE EUROPEAN UNION LEGAL FRAMEWORK ON ILLICIT FIREARMS TRAFFICKING AFTER DIRECTIVE 2017/853/EU

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## Abstract

This article examines European Union legislation on civilian firearms currently in place. This is with the aim of assessing its effectiveness in preventing and suppressing illicit firearms trafficking, which, in recent years, has considerably contributed to the growing threats of terrorism and transnational organized crime in Europe. The author contends that, notwithstanding undeniable progress, especially after the entry into force of Directive 2017/853/EU, the European Union regulatory framework still requires some steps forward in order to comprehensively tackle illicit firearms trafficking.

**Keywords:** illicit trafficking, firearms, Directive 2017/853/EU, transnational organized crime, terrorism

Questo contributo prende in esame la legislazione dell'Unione europea sulle armi da fuoco civili. In particolare, al fine di valutare la sua adeguatezza nella prevenzione e repressione del traffico illecito di armi da fuoco il quale, nel corso degli ultimi anni, ha contribuito alla crescita esponenziale della minaccia terroristica e del crimine organizzato transnazionale in Europa. La tesi qui sostenuta è che, nonostante i numerosi progressi, in particolare a seguito dell'entrata in vigore della direttiva UE 2017/853, il quadro normativo dell'Unione europea richieda ulteriori miglioramenti al fine di contrastare più efficacemente il traffico illecito di armi da fuoco.

**Parole chiave:** traffico illecito, armi da fuoco, Direttiva UE 2017/853, crimine organizzato transnazionale, terrorismo

## 1. Introductory remarks: the growing threat of illicit firearms trafficking in the European Union

According to the most prominent official sources<sup>1</sup> Europe faces a serious *illicit firearms trafficking* (IFT) threat. Broadly speaking, IFT refers to ‘weapons that are produced transferred, held, or used in violation of national or international law’<sup>2</sup>. IFT is an important factor contributing to terrorist attacks that have taken place in Europe in recent years, threatening the security of European Union (EU) Member States and their citizens<sup>3</sup>. IFT is also heavily fueling other transnational organized criminal activities, such as drugs smuggling and human trafficking<sup>4</sup>. There are several ways in which firearms can enter the illicit market (including illicit manufacturing, thefts, diversion, conversion, etc.)<sup>5</sup>. The true scale of IFT in the EU is quite difficult to quantify as a consequence of the hidden nature of this market<sup>6</sup>. Available information suggests that the great majority of illicit firearms actually circulating in the EU derive from cross-border trafficking activities. Since the early 1990s this has been especially from the following main routes: firearms smuggled from the former Soviet Union, conflict zones in the Balkans, and more recently North Africa<sup>7</sup>. In addition, there is the growing trade in so called ‘converted firearms’<sup>8</sup>, some of which originate in EU Member States<sup>9</sup>. These call for a stronger, coordinated EU approach to controlling the use of weapons and counteracting IFT, as well as combatting crime and terrorism. There is little official data on the types (civil/military) of firearms circulating in the EU, weapons illegally used and

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<sup>1</sup> EUROPOL, *European Union Serious and Organised Crime Threat Assessment* (SOCTA) 2017, p. 54 (available at [www.europol.europa.eu](http://www.europol.europa.eu)).

<sup>2</sup> Matt Schroeder, *Captured and Counted: Illicit Weapons in Mexico and the Philippines*, in Small Arms Survey, *Everyday Dangers*, Cambridge, 2013, pp. 283-317.

<sup>3</sup> See Paragraph 6, *infra*.

<sup>4</sup> European Commission, *Study to Support an Impact Assessment on Options for Combatting Illicit Firearms Trafficking in the European Union*, Final Report, European Commission, July 2014, pp. 11-12 and 30-31.

<sup>5</sup> The bulk of illicit firearms enter the illicit market by means of diversion; see Ernesto Savona, Marina Mancuso, *Fighting Illicit Firearms Trafficking Routes and Actors at European Level*, Final Report of Project FIRE, 2017, p. 27 ss.

<sup>6</sup> European Commission, *Study to Support an Impact Assessment on Options for Combatting Illicit Firearms Trafficking in the European Union* cit., p. 12 ss.

<sup>7</sup> *Ibid.*, p. ii; Ernesto Savona, Marina Mancuso, *Fighting Illicit Firearms*, *op. cit.*, p. 56 ss.

<sup>8</sup> For a definition of ‘converted firearms’ see Paragraph 6, *infra*.

<sup>9</sup> Nicolas Florquin, Benjamin King, *From Legal to lethal, Converted Firearms in Europe*, Small Arms Survey, 2018, p. 12.

trafficked, and of criminal offences involving firearms<sup>10</sup>. However, it has become clear that gaps in the EU legislation on firearms, and shortcomings in its implementation at national levels, foster criminal activities, and have a negative impact on the overall level of EU citizens' security.

The EU regulatory framework on IFT encompasses both *hard law* (directives and regulations) and *soft law* instruments (action plans, etc.), which simply address recommendations that States may decide to adopt or not. The *European Agenda on Security* (EAS)<sup>11</sup>, adopted by the Commission on 28 April 2015, prioritized the fight against terrorism, organized crime and cybercrime, as interlinked areas with a strong cross-border dimension; and identified, i.a., the need to strengthen the legal framework on firearms and to combat illicit trafficking<sup>12</sup>. The Commission argued that differences in national legislation of firearms are an obstacle to controls and police cooperation. As an urgency, it pointed out the need for a common approach on the neutralization and deactivation of firearms, to prevent reactivation and use by criminals<sup>13</sup>. In the aftermath of the 2015 terrorist attacks in Europe, and with the aim of implementing the EAS, the Commission adopted a package of measures known as “the EU gun ban”, including: i) a proposal to amend the EU Firearms Directive (Directive 91/477/EEC, as amended by Directive 2008/51/EC), to tighten controls on the acquisition, possession and circulation of firearms<sup>14</sup>; ii) an Implementing Regulation on common minimum standards for deactivation of firearms<sup>15</sup>; iii) and an Action Plan against illicit trafficking in and use of firearms and

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<sup>10</sup> Report from the Commission to the European Parliament and the Council on European Commission, Evaluation of Council Directive 91/477/EC of 18 June 1991, as amended by Directive 2008/51/EC of 21 May 2008, on control of the acquisition and possession of weapons, COM(2015) 751 def., 18/11/2015, para. 19, p. 7.

<sup>11</sup> European Commission, *The European Agenda on Security*, COM(2015) 185 final, 15/08/2015.

<sup>12</sup> *Ibid.*, p. 17.

<sup>13</sup> *Ibid.*

<sup>14</sup> European Commission, *Proposal for a directive of the European Parliament and of the Council amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons*, COM(2015) 750 final, 18/11/2015.

<sup>15</sup> *Commission Implementing Regulation (EU) 2015/2403 of 15 December 2015 establishing common guidelines on deactivation standards and techniques for ensuring that deactivated firearms are rendered irreversibly inoperable*, in OJEU L 333/62, 19/12/2015.

explosives<sup>16</sup>. After some rounds of Trilogue negotiations<sup>17</sup>, on 17 May 2017, the European Parliament and the Council adopted Directive 2017/853/EU<sup>18</sup>, amending Directive 91/477/EEC (the new Firearms Directive).

This article examines EU legislation on civilian<sup>19</sup> firearms currently in place, with the aim of assessing its effectiveness in preventing and suppressing IFT. It contends that, notwithstanding undeniable progress, especially after the entry into force of the new Firearms Directive<sup>20</sup>, the EU regulatory framework still requires some steps forward in order to comprehensively tackle IFT. This study covers neither soft law instruments, nor the external dimension of EU legislation adopted to combat illicit accumulation and trafficking of small arms and light weapons (SALW)<sup>21</sup>.

## 2. The first EU regulatory framework on firearms: Directive 91/477/EEC

The acquisition, possession and circulation of civilian firearms within the EU is subject to a comprehensive regulatory framework, originally set out in the already mentioned Directive 91/477/EEC (Firearms Directive)<sup>22</sup>. It establishes common

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<sup>16</sup> European Commission, *Implementing the European Agenda on Security: EU Action Plan against illicit trafficking in and use of firearms and explosives*, COM(2015) 624 final, 2/12/2015.

<sup>17</sup> This formula refers to informal tripartite meetings attended by representatives of the European Parliament, the Council and the Commission.

<sup>18</sup> *Directive (EU) 2017/853 of the European Parliament and of the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons*; in OJEU L 137/22, 24/05/2017.

<sup>19</sup> Civil firearms include weapons manufactured for self-protection, the provision of private security services, shooting sports and hunting, etc.

<sup>20</sup> In accordance with its Article 3 Directive (EU) 2017/853, in force as of 24/07/2017, on the twentieth day following that of its publication in the Official Journal of the European Union.

<sup>21</sup> SALW refer to weapons which are manufactured to military specifications for use as lethal instruments of war; broadly speaking, small arms are those weapons designed for personal use, and light weapons are those designed for use by several persons serving as a crew. For a classification of SALW, including ammunitions, see *Report of the Panel of Governmental Experts on Small Arms*, UN Doc. A/52/298, 27/08/1997, Annex. For an overview of the EU strategy against the proliferation of SALW see Council of the European Union, *EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition*, Doc. 5319/06, 13/1/2006; and the contribution of Alessandra Lang in this Journal.

<sup>22</sup> *Council Directive of 18 June 1991 on control of the acquisition and possession of weapons (91/477/EEC)*, in OJEC L 256/51, 13/09/1991; for an overview of Directive 91/477/EEC see André Collet, *L'Europe des armes, une double démarche*, in "Revue trimestrielle de droit européen", (1) 1992, pp. 105-110; Luis Leme, *The Council Directive on Control of the Acquisition and Possession of Weapons*

minimum standards, which Member States have to transpose into their national laws, and is aimed at balancing internal market objectives (i.e. cross border movement of firearms) and security policy purposes (to guarantee a high level of security for European citizens). Directive 91/477/EEC is based on the rationale that mutual confidence among Member States requires that the abolition of controls at intra-Community frontiers is underpinned by partially harmonized legislation on firearms<sup>23</sup>. The Firearms Directive consequently determines the category of firearms whose acquisition and possession by individuals are prohibited, or subject to authorization or declaration<sup>24</sup>; and lays down the minimum requirements that Member States must impose as regards the acquisition and possession of the different categories of firearms. The transfer from one Member State to another while in possession of a weapon should, in principle, be prohibited, unless a specific procedure is adopted that enables Member States to be notified that a firearm is to be brought into their territory (the 'European firearms pass' grants more flexible rules for hunting and target shooting)<sup>25</sup>.

Directive 91/477/ECC does not specifically address IFT<sup>26</sup>. However, it does contain a few provisions that are indirectly relevant to leakage of firearms to the illicit market. First, the above mentioned categorization of firearms is aimed at preventing citizens from a Member State with strict laws from easily buying a weapon in another Member State with more permissive legislation and then taking it back with them to their State of origin. This could encourage smuggling<sup>27</sup>. Second, directive 91/477/ECC establishes an obligation on Member States to domestically register

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*and its Categorization of Firearms: A Rational Approach to Public Safety?*, in "Harvard International Law Journal", 37(2) 1996, pp. 568-581.

<sup>23</sup> Directive 91/477/EEC (Preamble, paras. 4 and 5).

<sup>24</sup> Id (Annex 1); Category A lists prohibited firearms (automatic weapons, etc.); these weapons must, in principle, be excluded from private possession. Categories B and C contain the firearms subject to licence or to reporting. Category D comprises other firearms, which may be sold freely.

<sup>25</sup> *Ibid.*

<sup>26</sup> Preamble, para 8: "Whereas the Directive does not affect the right of Member States to take measures to prevent illegal trade".

<sup>27</sup> On this point, see Toine Spapens, *Trafficking in Illicit Firearms for Criminal Purposes within the European Union*, in "European Journal of Crime, Criminal Law and Criminal Justice", 2007, p. 359 ss., p. 374.

firearms that enter the market<sup>28</sup> and to exchange and share information relating to firearms<sup>29</sup>.

### 3. The ‘minimalist approach’ and the limited effective contribution of Directive 2008/51/EC to eradicate IFT

The existing EU legislative framework dealing with IFT largely derives from the UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (UNFP)<sup>30</sup>, which supplements the United Nations Convention against Transnational Organized Crime (UNTOC)<sup>31</sup>. The UNFP is an international instrument to which both the EU and its Member States are parties<sup>32</sup>. Directive 2008/51/EC, amending Directive 91/477/ECC<sup>33</sup>, intervened to reinforce its ‘security aspects’, and to partially integrate into the Firearms Directive the appropriate provisions required by the UNFP as regards intra-Community transfers of firearms<sup>34</sup>. The EU completed the process of transposition into EU legislation of

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<sup>28</sup> Art 4.

<sup>29</sup> Art. 13.

<sup>30</sup> The UNFP (see *United Nations, Treaty Series*, vol. 2326, A-39574), was adopted in May 2001 as the third supplementary Protocol to the UNTOC, by General Assembly resolution 55/255, 08/06/2001. The UNFP entered into force on 3 July 2005. It is aimed at promoting and strengthening international cooperation and developing cohesive mechanisms to prevent, investigate and prosecute the offences stemming from the illicit manufacturing of and trafficking in firearms.

<sup>31</sup> *United Nations, Treaty Series*, vol. 2225, I-39574.

<sup>32</sup> In accordance with *Council Decision 2001/748/EC of 16 October 2001 concerning the signing on behalf of the European Community of the UNFP, annexed to the UNTOC* (in OJEC L 280, 24.10.2001, p. 5), the Commission signed the Protocol on behalf of the Community on 16 January 2002; for the subsequent European Union approval of the UNFP see *Council Decision of 11 February 2014 on the conclusion, on behalf of the European Union, of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*; in OJEU L 89/7, 25/03/2014.

<sup>33</sup> In OJEU, L 179/5, 08/07/2008.

<sup>34</sup> Recital 3 of Directive 2008/51/EC. Furthermore, the legislative intervention was necessary in order to improve certain issues, in particular those that were identified in the report of the Commission to the European Parliament of 15 December 2000 on the implementation of Directive 91/477/EEC; see *Report from the Commission to the European Parliament and the Council. The implementation of Council Directive 91/477/EEC, of 18 June 1991, on control of the acquisition and possession of weapons*, COM (2000) 837 final. Brussels, 15.12.2000. According to this report, the legal framework created by the Directive was sufficient as a whole. However, key problems related to the national implementation of the Directive were identified in some areas (difficulties with the exchange of information; disparity and complexity of national legislations, administrative measures and authorization procedures; differences in the classification of hunting and sporting firearms). This underlined the need for clarification of certain provisions (e.g. defining certain types of weapons, namely deactivated and antique weapons) to ensure a more uniform application of the Directive.

UNFP provisions through Regulation 258/2012<sup>35</sup>, which addresses the trade and transfers of firearms with countries outside the EU<sup>36</sup>. Directive 2008/51/EC introduced into the EU legislation definitions (and a new classification) of ‘firearms’<sup>37</sup>, ‘illicit manufacturing’<sup>38</sup> and ‘illicit trafficking’<sup>39</sup>.

Directive 2008/51/EC, in clear continuity with Directive 91/477/ECC, essentially aims to ensure the proper functioning of the internal market of licit firearms, and to strengthen the security of EU citizens from dangers arising from them, through a variety of preventive measures. Accordingly, it supplemented the minimum conditions for the acquisition and possession of firearms for civil use, and further harmonized administrative requirements for their transfer and circulation within the EU<sup>40</sup>. Pursuing the objective to align EU legislation to legal requirements of the UNFP, it introduced into Directive 91/477/EEC several stipulations that are quite

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<sup>35</sup> *Regulation (EU) no. 258/2012 of the European Parliament and of the Council of 14 March 2012 implementing Article 10 of the United Nations’ Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against Transnational Organised Crime (UN Firearms Protocol), and establishing export authorisation, and import and transit measures for firearms, their parts and components and ammunition*; in *OJEU*, L 94/1, 30/03/2012.

<sup>36</sup> EU Regulation 258/2012 is based on the principle that firearms and related items should not be transferred between States without the knowledge and consent of all States involved. It establishes procedural rules for export, and import - as well as for transit of firearms, their parts and components and ammunition. Exports of firearms are subject to export authorizations, containing the necessary information to trace them, including the country of origin, the country of export, the final recipient and a description of the quantity of the firearms and related items. Member States have the obligation to verify that the importing third country has issued an import authorization. In the case of transit of weapons and related items through third countries, each transit country must give notice in writing that it has no objection. Member States must refuse to grant an export authorization if the person applying has any previous record concerning illicit trafficking or other serious crime.

<sup>37</sup> ‘[...] “firearm” means any portable barrelled weapon that expels, is designed to expel or may be converted to expel a shot, bullet or projectile by the action of a combustible propellant, unless it is excluded for one of the reasons listed in Part III of Annex I. Firearms are classified in part II of Annex I’; see art. 1, par. 1(a) Directive 91/477/EEC, as amended by Directive 2008/51/EC.

<sup>38</sup> ‘[...] “illicit manufacturing” means the manufacturing or assembly of firearms, their parts and ammunition: (i) from any essential component of such firearms illicitly trafficked; (ii) without an authorisation issued in accordance with Article 4 by a competent authority of the Member State where the manufacture or assembly takes place; or (iii) without marking the assembled firearms at the time of manufacture in accordance with Article 4(1)’; see art. 1, par. 2(a) Directive 91/477/EEC, as amended by Directive 2008/51/EC.

<sup>39</sup> ‘[...] “illicit trafficking” means the acquisition, sale, delivery, movement or transfer of firearms, their parts or ammunition from or across the territory of one Member State to that of another Member State if any one of the Member States concerned does not authorise it in accordance with the terms of this Directive or if the assembled firearms are not marked in accordance with Article 4(1)’; see Art. 1, par. 2(b) Directive 91/477/EEC, as amended by Directive 2008/51/EC.

<sup>40</sup> See new art. 5 and revised art. 6 and 7 Directive 91/477/EEC, as amended by Directive 2008/51/EC.

relevant to counter IFT. Such measures include some specific obligations aimed at facilitating the *tracing*<sup>41</sup> of firearms. First, Member States must ensure that any firearm or its parts placed on the market has been *marked* and *registered*<sup>42</sup>. For this purpose, Member States, at the time of manufacture of each firearm, require either a unique marking (including the name of the manufacturer, the country or place of the manufacture, the serial number and the year of manufacture) or maintain any alternative marking with a number or alphanumeric code, thus allowing clear identification of the country of manufacture<sup>43</sup>. In order to facilitate and strengthen the traceability of firearms Directive 2008/51/EC also obliges Member States to introduce *national computerized data-filing systems*<sup>44</sup> (which will register key information on all circulating firearms in Member States)<sup>45</sup>. It improves the *exchange of information* among Member States (through the establishment of a contact point)<sup>46</sup> and provides a few minimum standards on *deactivation* of firearms<sup>47</sup>.

In 2015 the Commission published a Report (REFIT Report)<sup>48</sup> on the implementation of Directive 91/477/EEC (as amended by Directive 2008/51/EC). At the outset, with specific reference to security, the REFIT Report raises a

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<sup>41</sup> For a definition of tracing, see footnote n. 66, *infra*.

<sup>42</sup> See art. 4, par. 1 Directive 91/477/EEC, as amended by Directive 2008/51/EC.

<sup>43</sup> See art. 4, par. 2 Directive 91/477/EEC, as amended by Directive 2008/51/EC. The marking shall be affixed to an essential component of the firearm, the destruction of which would render the firearm unusable.

<sup>44</sup> Either a centralised system or a decentralised system, which guarantees access to authorized authorities to the data-filing systems in which the necessary information regarding each firearm is recorded (see art. 4, par. 4 Directive 91/477/EEC, as amended by Directive 2008/51/EC). Access by police, judicial and other authorised authorities to the information contained in the computerised data-filing system must be subject to compliance with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see Recital 8 Directive 2008/51/EC).

<sup>45</sup> While the UNFP provides that the registers containing information on weapons are to be kept at least 10 years, Directive 2008/51/EC, in view of the dangerous nature and durability of weapons, extends this period up to a minimum of 20 years in order to allow the proper tracing of firearms (information shall include: firearm type, make, model, calibre and serial number, as well as the names and addresses of the supplier and the person acquiring or possessing the firearm); throughout their period of activity, dealers are required to maintain a register in which all firearms subject to the Directive and which are received or disposed of by them are recorded, together with such particulars as enable the firearm to be identified and traced; see art. 4, par. 4 Directive 91/477/EEC, as amended by Directive 2008/51/EC.

<sup>46</sup> Art. 13 par. 3 Directive 91/477/EEC, as amended by Directive 2008/51/EC.

<sup>47</sup> See Paragraph 6, *infra*.

<sup>48</sup> *Evaluation of Council Directive 91/477/EC of 18 June 1991, as amended by Directive 2008/51/EC of 21 May 2008, on control of the acquisition and possession of weapons*, cit.



methodological problem, namely the absence of disaggregated data on the types/categories of firearms circulating in the EU, and/or illegally used and trafficked, as well as the lack of comparable and detailed data on trends in criminal offences and activities involving civilian firearms at the EU level<sup>49</sup>. As to its effectiveness, the REFIT Report underlines that, in general terms, Directive 91/477/EEC (as amended by Directive 2008/51/EC) has positively contributed to increasing the level of security. This is especially due to a) the introduction of tracing requirements for Member States authorities (i.e. computerized registry) and the obligation for dealers to register all firearms transactions, b) marking obligations for manufacturers and c) minimum requirements for the acquisition and possession of firearms<sup>50</sup>. The Commission was however hampered in addressing a more comprehensive assessment of its effectiveness in connection with the security objectives. In particular, this was due to the lack of an information base including specific and detailed data on criminal offences committed with legally owned firearms, converted alarm weapons and reactivated firearms in EU Member States<sup>51</sup>. In addition, the REFIT Report also underlines that the implementing process of the Firearms Directive has shown several inconsistencies, and revealed its very limited impact to counter IFT. This is mainly due to the lack of clarity and vagueness of some of its provisions. In this regard, the REFIT Report especially points out some limitations. These include a) the limited harmonization of the rules on marking (differences in marking standards which limited the ability to trace firearms), b) differences in deactivation techniques and standards as well as in the designation of the authority carrying them out<sup>52</sup>, c) differences in categorization and registration of firearms in national legislations, which also cause problems in traceability and law enforcement<sup>53</sup>, d) the lack of interconnection of national tracking and data filing

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<sup>49</sup> *Ibid.*, para. 19.

<sup>50</sup> *Ibid.*, para. 21.

<sup>51</sup> *Ibid.*, para. 22.

<sup>52</sup> *Ibid.*, para. 27. Such differences cause concerns as not only the authority or actor in charge of the deactivation might not have the necessary technical skills, but also because the standards in some Member States are not considered sufficient.

<sup>53</sup> This is the case in particular when an object considered as a firearm in one Member State is transferred to a Member State where it is not considered as a firearm any longer and hence the authorities lose trace of it.

systems, e) the unclear definition of convertibility in the Firearms Directive<sup>54</sup> and f) differences in the interpretation of key terms included in the Directive (essential components, brokers, alarm weapons and antique weapons). Based on these findings, the Commission concludes its assessment recommending a legislative intervention (through a new amendment of Directive 91/477/EEC, in particular with the aim: i) of clarifying the definition of convertibility and to establish common criteria to define alarm weapon, ii) of continuing the harmonization of standards and rules on deactivation of firearms; and iii) of strengthening the harmonizing rules on marking<sup>55</sup>.

#### **4. The ‘security’ oriented approach of Directive 2017/853/EU**

The overall objectives of Directive 2017/853/EU mirror those established by previous EU legislation on firearms. It finds its legal basis in Article 114 of the Treaty on the Functioning of the European Union (in line with the initial legal basis of the Firearms Directive), aiming to better regulate (and facilitate) the functioning of the internal market in firearms, while guaranteeing a high level of safety for EU citizens. However, since the Commission submitted its proposal in 2015, it became quite clear that the new amendment of Directive 91/477/EEC would have been strictly focused on ‘security issues’. The Commission framed its first draft text as a legislative response to emerging and increasingly more complex security threats, including the challenge of IFT<sup>56</sup>. The Preamble of Directive 2017/853/EU reflects this approach stating that: ‘certain aspects of Directive 91/477/EEC need to be further improved in a proportionate way, in order to address the misuse of firearms for criminal purposes and considering recent terrorist acts’<sup>57</sup>. Accordingly, many of its provisions expressly deal with issues that have a great impact on security, taking into account the conclusions of studies that the Commission carried out in the

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<sup>54</sup> See Paragraph 6, *infra*.

<sup>55</sup> *Evaluation of Council Directive 91/477/EC of 18 June 1991, as amended by Directive 2008/51/EC of 21 May 2008, on control of the acquisition and possession of weapons*, cit., para. 34.

<sup>56</sup> *Proposal for a directive of the European Parliament and of the Council amending Council Directive 91/477/EEC* cit., para.1.

<sup>57</sup> See Para. 2 of Preamble, Directive 2017/853/EU.

preparatory phase<sup>58</sup>. On the whole, the new Firearms Directive does not go beyond what is necessary to achieve the objective of ensuring the security of EU citizens without unnecessarily restricting the internal market (*proportionality* principle)<sup>59</sup>. Another rationale inspiring Directive 2017/853/EU is that organized crime and terrorism threats and the potentially huge social and economic costs of violent actions (including IFT), are inherently characterized by their transnational nature, affecting more than one Member State at the same time. In this sense, the EU is required to intervene because these security issues cannot be dealt with in a fully satisfactory manner either by the individual Member States, or bilaterally (*subsidiarity* principle)<sup>60</sup>.

By establishing a stricter regulation of the acquisition, possession<sup>61</sup> and online trade<sup>62</sup> of licit firearms, the new Firearms Directive will positively contribute to preventing the leakage of licit firearms to the illicit market. Member States' obligation to take all appropriate measures in order to prohibit (with very limited exceptions)<sup>63</sup> the acquisition and possession of firearms, the essential components and the ammunition classified in Category A (prohibited firearms)<sup>64</sup>, will also be

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<sup>58</sup> See Paragraph 3, *supra*.

<sup>59</sup> See para. 33 of Preamble, Directive 2017/853/EU.

<sup>60</sup> *Ibid.*

<sup>61</sup> See new art. 5 Directive 91/477/EEC (as amended by Directive 2017/853/EU).

<sup>62</sup> The new Firearms Directive stipulates that the acquisition of firearms, essential components and/or ammunitions through the Internet shall require the permission of a collector or a broker; see new art. 5a Directive 91/477/EEC (as amended by Directive 2017/853/EU). A report of the Commission (see European Commission, *Evaluation of the Firearms Directive*, Final report, December, 2014, pp. 50-51) demonstrated the increasing use of the Internet as a sales channel for firearms and the growing difficulties in controlling this online market. The role of the Internet in the illicit arms trade was confirmed in recent terrorist attacks (see Paragraph 6, *infra*) where in some cases firearms were illegally assembled with components legally purchased via Internet. Another very challenging problem is the role of emerging illicit firearms markets in the dark Web; however, this issue is not addressed by Directive 2017/853/EU; for a detailed study on the dark Web see Ernesto Savona, Marina Mancuso, *Fighting Illicit Firearms*, *op. cit.*, p. 62 ss.

<sup>63</sup> Under new art. 6 para. 2 Directive 91/477/EEC (as amended by Directive 2017/853/EU) such exceptions refer exclusively to those firearms held for the protection of the security of critical infrastructures, commercial shipping, high-value convoys and sensitive premises, as well as for national defense, educational, cultural, research and historical purposes. In such cases, the national competent authorities may grant, in individual cases, exceptionally and in a duly reasoned manner, authorizations for firearms, essential components and ammunition classified in category A where this is not contrary to public security or public order. Also collectors may be authorized (under very strict conditions) to acquire and possess firearms, essential components and ammunition classified in category A (see art. 6, para. 3).

<sup>64</sup> Member States shall ensure that those firearms, essential components and ammunition unlawfully held in contravention of that prohibition are seized; see art. 6, para. 1 Directive 91/477/EEC (as amended by Directive 2017/853/EU).

useful to indirectly pursue the above mentioned goal. The same is true for the ban of the most dangerous semi-automatic firearms, which move from Category B (firearms subject to authorization) to Category A of Directive 91/477/EEC, and will not, under any circumstances, be allowed to be held by private persons, even if they have been permanently deactivated<sup>65</sup>.

## 5. Enhanced traceability of firearms

Directive 2017/853/EU provides for several measures specifically dealing with the prevention and suppression of IFT. The enhancement (through a reinforced normative framework) of the *traceability*<sup>66</sup> of firearms is at the heart of the new Firearms Directive strategy against criminal activities. The traceability of firearms is of paramount importance to allow law enforcement and judicial authorities both to prevent (detect) and to investigate and prosecute IFT offences<sup>67</sup>. For this purpose, the new Firearms Directive aims first of all to better harmonize Member States' legislation on the *marking* of firearms which, as already pointed out<sup>68</sup>, was lacking in uniformity and facilitated criminals in illegally trading weapon parts or illicitly reactivating firearms<sup>69</sup>. Directive 2017/853/EU obliges Member States to introduce tighter rules on marking of firearms in three areas, in order for them to be better tracked in case of theft, loss, diversion from the licit market, or illicit trafficking. With respect to *marking techniques*, the Commission must adopt binding implementing acts establishing technical specifications and common standards, so that the

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<sup>65</sup> See Annex 1, Part II new category A7 Directive 91/477/EEC (as amended by Directive 2017/853/EU).

<sup>66</sup> '[...] "tracing" means the systematic tracking of firearms and, where possible, their parts and ammunition from manufacturer to purchaser for the purpose of assisting the competent authorities of Member States in detecting, investigating and analysing illicit manufacturing and illicit trafficking'; see art. 1, para. 1 (13) Directive 91/477/EEC, as amended by Directive 2017/853/EU.

<sup>67</sup> According to Interpol firearms tracing can: link a suspect to a firearm in a criminal investigation; identify potential firearm traffickers; detect firearm crime trends; targeted intelligence-led police operations aimed at curbing the firearms supply to terrorist networks and violent individuals; see Interpol, *Illicit Arms Records and tracing Management System (iARMS)*, 2018; available at [www.interpol.int/Crime-areas/Firearms-trafficking/INTERPOL-Illicit-Arms-Records-and-tracing-Management-System-iARMSiCC](http://www.interpol.int/Crime-areas/Firearms-trafficking/INTERPOL-Illicit-Arms-Records-and-tracing-Management-System-iARMSiCC).

<sup>68</sup> See Paragraph 3, *supra*.

<sup>69</sup> See European Commission, *Evaluation of the Firearms Directive*, cit., p. 64.

marking of firearms will be harder to erase<sup>70</sup>. Second, the obligation of marking is extended to *imported firearms*<sup>71</sup>, as required by the UNFP<sup>72</sup>. Finally, as to the placement of the mark, Directive 2017/853/EU clarifies that, with respect to firearms manufactured or imported into the Union on or after 14 September 2018, the marking will be affixed on any *essential component*<sup>73</sup> of the firearm<sup>74</sup>. With respect to traceability, Directive 2017/853/EU also establishes an obligation to extend records by keeping computerized data-filing systems in the Member States for a period of 30 years after the destruction of the firearms or essential components concerned<sup>75</sup>. There is also a more efficient sharing of information between dealers and brokers, on the one hand, and national competent authorities, on the other<sup>76</sup>. Finally, the Commission must provide for an electronic system to improve the *exchange of information* on firearms among Member States<sup>77</sup>.

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<sup>70</sup> See art. 4, para. 2a Directive 91/477/EEC, as amended by Directive 2017/853/EU.

<sup>71</sup> See art. 4, para. 1 Directive 91/477/EEC, as amended by Directive 2017/853/EU.

<sup>72</sup> See art. 8 UNFP.

<sup>73</sup> 'Essential component' means the barrel, the frame, the receiver, including both upper and lower receivers, where applicable, the slide, the cylinder, the bolt or the breech block, which, being separate objects, are included in the category of the firearms on which they are or are intended to be mounted; see art. 1, para. 1(2) Directive 91/477/EEC, as amended by Directive 2017/853/EU.

<sup>74</sup> See art. 4, para. 1 Directive 91/477/EEC, as amended by Directive 2017/853/EU. According to a study of the Commission (see European Commission, *Evaluation of the Firearms Directive*, cit., p. 64) "Differences related to the placement of the mark and namely to the essential components to be marked [...] create room for criminals to illegally trade firearms parts that can be used to build or reactivate a firearm. Moreover, the disassembly of a fully assembled weapon in which only one essential component was marked can provide a source of unmarked essential components that can be sold to other member State without being traced".

<sup>75</sup> See art. 4, para. 4 Directive 91/477/EEC, as amended by Directive 2017/853/EU. This is in view of the dangerous nature and durability of firearms and essential components, in order to ensure that competent authorities are able to trace firearms and essential components for the purpose of administrative and criminal proceedings.

<sup>76</sup> To facilitate this, national competent authorities should establish a means of electronic connection accessible to dealers and brokers, which can include submission of the information by email or directly through a database or other registry (see art. 4, para. 3 Directive 91/477/EEC, as amended by Directive 2017/853/EU). Access to these records and all related personal data should be restricted to competent authorities and should be permitted only up until 10 years after the destruction of the firearm or essential components concerned for the purpose of granting or withdrawing authorizations or for customs proceedings, including the possible imposition of administrative penalties, and up until 30 years after the destruction of the firearm or essential components concerned where that access is necessary for the enforcement of criminal law.

<sup>77</sup> "The competent authorities of the Member States shall exchange, by electronic means, information on the authorisations granted for the transfer of firearms to another Member State and information with regard to refusals to grant authorisations as provided for in Articles 6 and 7 on grounds of security or relating to the reliability of the person concerned"; see new art. 13, para. 4-5 Directive 91/477/EEC, as amended by Directive 2017/853/EU. The main problems in relation to the exchange of information dealt with the difficulty to identify national contact points in some cases, the lack of

## 6. Regulatory measures on ‘converted firearms’

The term ‘converted firearms’ refers to modifications of an object that is incapable of firing a projectile, to one capable of doing so<sup>78</sup>, and typically indicates: i) the *conversion of imitation firearms* – or any object resembling a firearm, but incapable of expelling a projectile – to lethal-purpose weapons<sup>79</sup>; and ii) *the reactivation of deactivated firearms*<sup>80</sup>. In 2014, the Commission published a study<sup>81</sup> underlining the challenge of converted firearms, which represent a new peculiar feature of ITF. The problem of converted firearms has emerged in Europe in the last two decades, particularly as a consequence of the Balkan wars<sup>82</sup>. Directive 91/477/EEC does not regulate firearms conversion. A first major change in the EU legislation to address illicit firearms conversion came with the adoption of Directive 2008/51/EC, which introduced a revised definition of what constitutes a firearm. This definition included weapons that ‘may be converted to expel a shot’<sup>83</sup>. Although this definition was an important achievement, EU legislation left Member States free to decide the technical standards that would be required to prevent conversion. Moreover, Directive 2008/51/EC obliged Member States to introduce national procedures for the deactivation of firearms, which render the weapons permanently inoperable, to be verified by a competent authority<sup>84</sup>. The REFIT Report identified several

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transparency, and the fact that information on firearm transfers were mainly paper-based; see *Evaluation of the Firearms Directive*, cit., p. 70.

<sup>78</sup> See Nicolas Florquin, Benjamin King, *From legal to lethal*, op. cit., p. 16.

<sup>79</sup> Following the classification proposed by Nicolas Florquin, Benjamin King, *ibid.*, p. 18, non-lethal-purpose imitation firearms easily convertible into firearms include: alarm weapons/blank-firing firearms and airsoft (or air/gas guns).

<sup>80</sup> Deactivated firearms refer to real firearms rendered permanently unfit for use. Other firearms whose firing capabilities were significantly downgraded included: acoustic expansion weapons - AEWs (real firearms modified to be unable to fire a solid projectile), and firearms modified to Flobert calibres (real firearms modified or designed for Flobert calibres, which are unrestricted in some countries); see Nicolas Florquin, Benjamin King, *ibid.* Converted firearms also include a third category, namely the modification of semi-automatic firearms into automatic ones.

<sup>81</sup> See European Commission/SIPRI, *Study to support an Impact Assessment on a possible initiative related to improving rules on deactivation, destruction and marking procedures of firearms in the EU, as well as on alarm weapons and replicas*, Luxembourg, June 2014.

<sup>82</sup> *Ibid.*, p. 10 ss.

<sup>83</sup> ‘For the purposes of this Directive, an object shall be considered as capable of being converted to expel a shot, bullet or projectile by the action of a combustible propellant if: it has the appearance of a firearm, and as a result of its construction or the material from which it is made, it can be so converted.’; see art. 1, par. 1(a) Directive 91/477/EEC, as amended by Directive 2008/51/EC.

<sup>84</sup> Annex I, section III Directive 91/477/EEC, as amended by Directive 2008/51/EC. These minimum restrictions include the obligation for Member States to make arrangements for the deactivation measures to be verified by a competent authority. This authority shall ensure that the national

problems arising from the implementation of Directive 91/477/EEC (as amended by Directive 2008/51/EC) provisions regulating converted firearms. These were namely the lack of clear definitions on alarm weapons, and the lack of technical guidelines and common rules on deactivation<sup>85</sup> and 'convertibility'. They created scope for national interpretation, which resulted in differences in national approaches, but also produced cases of incomplete or improper implementation of the Firearms Directive at the national level. All these loopholes and shortcomings in the EU legislation have created vulnerabilities (and limited traceability of converted firearms) that significantly bolstered the smuggling of these weapons and other criminal activities throughout Europe; and have created several obstacles for law enforcement and for police and judicial cooperation<sup>86</sup>. In the aftermath of the 2015 terrorist attacks in Europe (Paris and Copenhagen), which included, *inter alia*, the use of firearms that had been incorrectly deactivated or firearms assembled with badly deactivated components (as well as acoustic weapons being converted into real firearms)<sup>87</sup>, the EU, as already pointed out, has introduced an Implementing Regulation<sup>88</sup> (including a revised annex)<sup>89</sup> establishing common guidelines on deactivation standards and techniques. Its provisions aim to harmonize technical standards of the entire deactivation process (including marking and verification

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procedures for deactivation of firearms render the weapons permanently deactivated. As requested by the co-legislators at the time of the amendment, Annex I - Part III point (a) states that 'the Commission shall issue common guidelines on deactivation standards and techniques to ensure that deactivated firearms are rendered irreversibly inoperable'. Until the common guidelines on deactivation are adopted, Member States are free to adopt the most suitable procedures in this regard.

<sup>85</sup> See Paragraph 3 (especially footnote n. 52), *supra*. Permanently deactivated firearms were generally no longer considered weapons under the domestic legislation of several Member States, and consequently they could be held by private persons and freely move within the internal market.

<sup>86</sup> See European Commission/SIPRI, *Study to support an Impact Assessment on a possible initiative related to improving rules on deactivation, destruction and marking procedures of firearms in the EU, as well as on alarm weapons and replicas* cit., p. 39.

<sup>87</sup> See European Investigative Collaborations-EIC, "*Mapping the Weapons of Terror: East Europe's shadow gun market is fuelling terrorism in the west, as criminal gangs use legal loopholes and open borders to traffic weapons*", 18/03/2016, (eic.network/projects/arms).

<sup>88</sup> See footnote n. 15, *supra*. For a criticism of technical requirements embodied in the original annex of the new Regulation on deactivation of firearms, see Nicolas Florquin, Benjamin King, *From legal to lethal*, *op. cit.*, p. 51.

<sup>89</sup> See *Commission Implementing Regulation (EU) 2018/337 of 5 March 2018 amending Implementing Regulation (EU) 2015/2403 establishing common guidelines on deactivation standards and techniques for ensuring that deactivated firearms are rendered irreversibly inoperable*, in *OJEU*, L 65/1, 8/03/2018.

requirements), ensuring that deactivated firearms are rendered irreversibly inoperable<sup>90</sup>. Subsequent Directive 2017/853/EU provides for a more comprehensive regulation of converted firearms. National registries must keep records of deactivated firearms<sup>91</sup> and their owners. Deactivated firearms must now be classified as category C (firearms and weapons subject to declaration)<sup>92</sup>. As a consequence, deactivated firearms now fall within the scope of the Firearms directive, and are consequently submitted to all its requirements with reference to possession and circulation. The new Firearms Directive also focuses on acoustic expansion weapons (AEW)<sup>93</sup>, given their easily convertibility to lethal firearms. It establishes that AEW have to be classified in the same legal category as the original weapon and are therefore subject to the same restrictions as their unaltered version<sup>94</sup>. Also Alarm weapons are included within the scope of Directive 2017/853/EU. States must classify alarm pistols that are capable of being converted as real firearms<sup>95</sup>. The determination of which alarm weapons qualify as being capable of conversion is to be established based on manufacturing characteristics<sup>96</sup>. The Commission will adopt technical specifications on conversion through implementing acts<sup>97</sup>.

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<sup>90</sup> The Implementing Regulation is based on the criteria for deactivation developed by the Permanent International Commission for the Proof of Small Arms (the CIP).

<sup>91</sup> 'Deactivated firearms' means firearms that have been rendered permanently unfit for use by deactivation, ensuring that all essential components of the firearm in question have been rendered permanently inoperable and incapable of removal, replacement or modification in a manner that would permit the firearm to be reactivated in any way; see art. 1, para. 1(7) Directive 91/477/EEC, as amended by Directive 2017/853/EU.

<sup>92</sup> See Annex I, Part IV category C, para. 6 Directive 91/477/EEC, as amended by Directive 2017/853/EU.

<sup>93</sup> Nicolas Florquin, Benjamin King, *From legal to lethal*, *op. cit.*, p. 52, question if Directive 2017/853/EU also applies to firearms altered to Flobert calibres; see footnote n. 80, *supra*.

<sup>94</sup> See Annex I, new categories A9, B8 and C5 Directive 91/477/EEC, as amended by Directive 2017/853/EU.

<sup>95</sup> See new art. 10a, para. 2 Directive 91/477/EEC, as amended by Directive 2017/853/EU.

<sup>96</sup> See new art. 10bis, para. 1 Directive 91/477/EEC, as amended by Directive 2017/853/EU.

<sup>97</sup> See new art. 10a, para. 3 Directive 91/477/EEC, as amended by Directive 2017/853/EU.



## 7. Criminalization and prosecution of IFT

The criminalization and prosecution of certain acts are crucial to tackle IFT. EU legislation does not provide for a wide framework criminalizing IFT. Directive 91/477/ECC (as amended by Directive 2008/51/EC and Directive 2017/853/EU) does not cover at all criminalization of IFT. This omission is not unexpected since the Firearms Directive does not have a criminal law focus. A general provision on sanctions for infringements of the national rules adopted pursuant to the Firearms Directive is set out in the revised Article 16 of Directive 2008/51/EC. Accordingly, national legislations have to establish adequate penalties (effective, proportionate and dissuasive) with reference to IFT<sup>98</sup>. A previous proposal of the Commission expanded the text of Article 16 establishing an obligation for Member States to make IFT a serious crime<sup>99</sup>. Moreover, this proposal extended criminalization to actions such as attempts, or participation as an accomplice, which cannot be directly qualified as IFT<sup>100</sup>. However, this draft provision was finally deleted from the final text of Directive 2008/51/EC.

EU Member States' obligation to domestically criminalize IFT arises from their ratification of the UNFP, which deals with IFT as a typical form of 'transnational organized crime'<sup>101</sup>. However, UNFP, in itself, does provide for very wide legal

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<sup>98</sup> A similar provision is embodied in Recital 16 of Regulation (EU) No 258/2012 (see, footnote n. 35, *supra*).

<sup>99</sup> See *Proposal for a directive of the European Parliament and of the Council amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons*, COM(2006) 93 final, 2/3/2006.

<sup>100</sup> *Ibid.*, proposal of new art. 16.

<sup>101</sup> Transnational crimes refer to a category of crimes which are dealt with by an emerging branch of international law known as 'Transnational Criminal Law' (see Tom Obokata, *Transnational organised crime in international law*, Oxford, 2010, pp. 30-31), which does not establish individual criminal responsibility in international law, nor does it prohibit a conduct directly. Instead, it promotes, by means of international treaties, such as the UNTOC and UNFP (see footnotes n. 30-31, *supra*), indirect suppression of a crime through domestic criminal law by imposing obligations on States to enact legislation. In some cases, IFT can be prosecuted under 'International criminal Law', which, on the contrary, directly prohibits international crimes (genocide, crimes against humanity and war crimes) and establishes an individual criminal responsibility. These cases refer to arms transfers which constitute complicity (aiding and abetting) in international crimes; in particular, in the event that the supplier of arms (the trafficker) provides arms to a recipient (the principal perpetrator of the crime) to be used in committing genocide, crimes against humanity or war crimes; for an overview of this profile see Antonio Leandro, *Arms transfer and complicity in war crimes*, in Fausto Pocar, Marco Pedrazzi, Micaela Frulli (Eds.), *War Crimes and the Conduct of Hostilities. Challenges to Adjudication and Investigation*, Cheltenham, Northampton, 2013, p. 225 ss.; and Christian Ponti, *Arms Transfer, Human Rights and Humanitarian Law. Some Remarks after the Adoption of the Arms Trade Treaty*, in "Diritti umani e diritto internazionale", vol. 7, 2013, n. 3, p. 662 ss.

definitions of IFT offences. Article 5 of the UNFP stipulates that each State Party must adopt such legislative and other measures as may be necessary to establish as criminal offences acts committed intentionally, the illicit manufacturing<sup>102</sup>, or illicit trafficking in firearms<sup>103</sup>, and falsification or illicit obliteration, removal or altering of marking(s) of firearms<sup>104</sup>. UNFP leaves a considerable margin of discretion to States Parties in matters of IFT criminalization, and the related elements of level and type of penalties, in line with their legal traditions. In 2014, the Commission published a study<sup>105</sup> which analyzed the legal framework in all Member States, including the definitions of specific offences relating to firearms trafficking, penalties and sanctions and other complementarity aspects (i.e. aggravating circumstances or mitigating factors; liability of legal persons; and the notion of intent and negligence). The Commission concluded its report by stating that as a result of the different legal cultures of Member States and this ‘non-prescriptive approach’ of the UNFP, there is a considerable diversity of legal frameworks in relation to IFT offences and penalties at the national level<sup>106</sup>. This research also underlined that the lack of harmonization with regard to the definition of offences and penalties for IFT could hinder cross-border efforts to combat IFT<sup>107</sup>. For instance, as a consequence of the above-mentioned diversity of national legislation on sanctions, cross-border cooperation by police and judicial authorities could be hampered<sup>108</sup>. In this regard, harmonization of the sanctions regime among EU Member States could facilitate smoother application of many preventive and investigative measures, and minimize the so called ‘forum shopping’ by criminals<sup>109</sup>.

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<sup>102</sup> Art. 5, para. 1a UNFP.

<sup>103</sup> Art. 5, para. 1b UNFP.

<sup>104</sup> Art. 5, para. 1c UNFP.

<sup>105</sup> See European Commission, *Study to Support an Impact Assessment on Options for Combatting Illicit Firearms Trafficking in the European Union*, Final Report, 2014.

<sup>106</sup> *Ibid.*, p. 87.

<sup>107</sup> *Ibid.*, p. 73.

<sup>108</sup> *Ibid.*, p. 78.

<sup>109</sup> According to this theory, criminals may pick and choose EU jurisdictions between which to move illicit firearms on the basis that such activity carries a lower (or a non-existing) penalty if the offenders are caught in the chosen Member State(s).

## 8. Conclusion

The EU has adopted several legal binding instruments to counteract IFT, but no single tool regulates all the different aspects of this criminal activity. This study demonstrates that with the adoption of Directive 2017/853/EU, the legislator has consolidated a positive legislative trend inaugurated by Directive 2008/51/EC, particularly aiming to strengthen the ‘security issues’ linked to the possession and circulation of licit and illicit firearms. In line with the recommendations of the Commission, Directive 2017/853/EU will bring a decisive improvement in several areas of the EU legal framework to detect, investigate and prosecute IFT. First, Directive 2017/853/EU will considerably strengthen legal measures aimed at *effectively tracing* illicit firearms, thanks to its more harmonized rules on markings, as well as to the newly envisaged electronic system to exchange information on licit and illicit firearms among Member States. Second, the new Firearms Directive will establish an effective legal basis for a common regulation of ‘converted firearms’ in the EU, by introducing innovative requirements and obligations on deactivated firearms and alarm weapons<sup>110</sup>. All these norms, if properly translated into domestic legislation, will offer a great contribution to countering this emerging ‘new’ form of IFT throughout Europe, which has been for a long time confined to a ‘grey area’ between the licit and illicit markets. The guiding role of the Commission envisaged by Directive 2017/853/EU will facilitate this process.

Notwithstanding this undeniable progress, the EU still lacks a legislative policy to fight all aspects of IFT comprehensively. In particular, it would be desirable to introduce further legislative intervention with the purpose of effectively harmonizing Member States’ substantive criminal law on IFT (common definitions on offences and penalties), including the illegal possession and illicit trafficking of converted firearms. This achievement would reduce legal uncertainty on behalf of police and investigating authorities, as well as facilitate prosecutions, where difficulties are often the result of deficient national legislation<sup>111</sup>. It will also

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<sup>110</sup> Future efforts to address firearms conversion should also focus on the destruction of surplus firearms; on this point see Nicolas Florquin, Benjamin King, *From legal to lethal*, *op. cit.*, p. 52.

<sup>111</sup> According to the Commission (see *Study to Support an Impact Assessment on Options for Combatting Illicit Firearms Trafficking in the European Union* *cit.*, pp. 138-139) there are also significant complications of tackling cross-border IFT of a non-legal nature, such as lack of resources,

constrain opportunities for criminals to exploit loopholes, as well as reduce their incentives for forum shopping between EU jurisdictions. The legal basis for such an intervention lies in art. Article 83(1) TFEU. This provides for the establishment of minimum rules concerning the definition of criminal offences and sanctions in the area of IFT with a cross-border dimension, given that this is necessary as a consequence of the nature or impact of this offence or due to a special need to combat such trafficking on a common EU basis. However, in considering any EU initiative in this direction it is necessary to bear in mind at least two challenging issues. First, there is likely to be political sensitivity in harmonizing the constituent elements (*actus reus* and *mens rea*) and other related elements, including penalties, of the illicit firearms trafficking offence, where and to the extent that these involve fundamental principles of criminal law at the national level<sup>112</sup>. Second, in the last fifteen years, the EU criminal law legislative policy has been predominantly driven by the paradigm of mutual recognition of judgments and judicial decisions (on which judicial cooperation in criminal matters in the Union is based)<sup>113</sup>, with very limited actions aiming to harmonize substantive criminal law of Member States.

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conflicting policy priorities (for example with anti-terror legislation) and lack of enforcement of existing laws.

<sup>112</sup> The study of the Commission (*id.*, p. 139) points out issues such as aggravating or mitigating circumstance, sanctions and penalties, and the factor of negligence and degrees of intent to commit the offence of IFT.

<sup>113</sup> See, for instance, (2002/584/JHA) Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW), in OJEC L 190, 18/07/2002, and Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (EIO), in OJEU, L 130/1, 01/05/2014), which both do apply, *inter alia*. to illicit trafficking in weapons, munitions and explosives (see art. 2 para. 2 EAW and annex d EIO).

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