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BRIEFING PAPER

A SYNTHESIS OF THE MAIN DEVELOPMENTS AT EU LEVEL TO ENABLE AN EXCHANGE OF CRIMINAL RECORDS

Abstract:
Four EU Member States are currently piloting a project for networking of their national criminal records. Within the EU as a whole, pressure to improve the exchange of criminal records has been growing steadily in recent years. The deficits of existing procedures have been highlighted by a serious of high-profile cases. New measures are needed to ensure that comprehensive records, be they on sex offenders, terrorists or simply road traffic offenders, are passed quickly from one Member State to another. This note charts recent developments at EU level and explains the legal obligations arising from existing and new instruments. Member States have chosen to maintain the centralisation of criminal records in the state of nationality but they now need to modernise their national criminal records and make them more accessible to other Member States, subject to the necessary legal guarantees. The Commission has proposed two Framework Decisions which would develop technical systems of information exchange and elaborate further obligations relating to the storage and transmission of national criminal records in the EU. Proposals are also on the table which would require judges to take convictions handed down in other Member States into account.

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A SYNTHESIS OF THE MAIN DEVELOPMENTS AT EU LEVEL TO ENABLE AN EXCHANGE OF CRIMINAL RECORDS

I. Organisation and function of criminal records in EU Member States

Research shows that all Member States maintain a record of convictions of judgments rendered in criminal cases[1]. The various national systems are, however, by no means uniform. Differences in treatment of criminal records are rooted in the specific national approaches of Member States to certain aspects of criminal policy, e.g. relating to the definition of 'criminal offence', the appropriate level of punishment for offences, the liability of legal persons and the goal of rehabilitation. None of these matters are the subject of a common EU policy so it is quite legitimate for Member States to retain their own approach[2].

There can be little doubt, however, that the differences in national criminal records systems do contribute to 'difficulties in the tracing and exchange of information included in other national criminal records'[3]. The need to ensure more efficient exchange of records has become much more acute with the greater frequency of cross-border movement in the 'Schengen era' of open borders and with the expansion of transnational crime. This paper will examine the steps being taken at EU level to improve the exchange of criminal records relating to nationals of the Member States[4].

II. Exchange of criminal records between EU Member States: Council of Europe and EU instruments

1. Council of Europe Convention on Mutual Assistance of 1959

As in other fields of EU criminal justice policy, EU measures relating to criminal records build on Council of Europe instruments.

Article 13 of the Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April 1959[5] is currently the main vehicle for the courts of a Member State to obtain extracts of criminal records held in respect of nationals of another Member State. It provides that extracts of 'judicial records'[6] should be provided on request made by the judicial authorities of one Contracting Party to another Party 'to the same extent that these may be made available to its own judicial authorities in like case'[7].
Article 22 of the Convention introduces a more concrete and 'automatic' obligation in respect of criminal records. It requires Ministries of Justice to communicate details of convictions of nationals of another Contracting Party to the latter on a regular basis, meaning at least once a

[1] See for example C. Stefanou and H. Xanthaki (eds.), *Financial Crime in the EU: Criminal Records as Effective Tools or Missed Opportunities*, 2005 and G. Vermeulen, T. Vander Beken, E. de Busser and A. Dormaels, *Blueprint for an EU criminal records Database: Legal, politico-institutional and practical feasibility* (Advance copy final report, 2002).
[2] It is therefore misleading to suggest that EU citizens are somehow being discriminated against where different rules, e.g. on rehabilitation, prevail (cf. Stefanou and Xanthaki, op. cit., 26).
[3] Stefanou and Xanthaki, op.cit., 19.
[4] Member States have plans to create a separate index relating to third country nationals convicted in an EU jurisdiction: see JHA Council Conclusions of 14 April 2005.
[5] ETS no. 30. The Council of Europe Convention is in force in all EU Member States and all Member States except Malta have also ratified the Additional Protocol of 17 March 1978.The Second Additional Protocol of November 2001 has not been widely ratified yet by Member States but it is not relevant to the topic of this note.
[6] The French text uses the term *casier judiciaire*, which is rendered in the English text as 'judicial record'. It is clear that the 'criminal record' would be encompassed by 'judicial record', even if in the UK and certain other states, records of criminal convictions are held by the police and not the 'judicial authorities' (*autorités judiciaries*). Article 22 is more specific in referring to 'all criminal convictions and subsequent measures …. entered in the judicial records' (*sentences pénales et des mesures postérieures qui ... ont fait l'objet d'une inscription au casier judiciaire*).
[7] Direct transmission of judicial records from one judicial authority to another is encouraged by Article 15 of the Convention, as amended by Article 4 of the Second Additional Protocol.

year[8]. All Parties of nationality should be informed, where the person has more then one[9]. A copy of the convictions should be sent on request[10].

These provisions have three principal shortcomings. *First*, the Convention does not ensure the completeness of the criminal record where non-nationals are concerned, or even where a state's own nationals are concerned. It does not oblige a Contracting Party to record offences committed on its territory by non-nationals. In practice, several Contracting Parties fail to record such convictions, thus emptying the notification obligation of content[11]. A state may also omit to record convictions of its nationals handed down in other states[12]. *Second*, the 'request mechanism' of Article 13 is criticised for being too slow or too cumbersome to encourage judges to make effective use of it[13].*Third*, the mode of presentation of information which is communicated is said sometimes to be difficult for the recipient to understand, not only because of linguistic translation problems but also because of 'legal translation', meaning the different legal content of each state's national criminal record[14].

These criticisms originate from the European Commission. They are also echoed, at least in general terms, by the report into the operation of mutual legal assistance undertaken under the auspices of the Council of the EU and completed in 2001[15]. It pinpointed lack of proper record-keeping and cumbersome methods for transferring documents as obstacles to effective mutual assistance and called for a 'specific approach to mutual assistance between the Member States in the area of freedom, security and justice'[16].

2. Council Decision 2005/876/JHA of 21 November 2005[17]

2.1. Legal and policy background to Decision 2005/876

A number of recent headline-grabbing cases have served to highlight the lack of effective exchange between Member States of information concerning previous convictions. These cases have in particular concerned sex offenders who have moved from one EU Member State to another to seek employment and whose past criminal record has not come to the attention of the authorities in the new host Member State[18]. There may be a case for dealing with convicted sex offenders in separate legislation, as these cases raise distinct issues, such

[8] In its entirety, Article 22 reads: 'Each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other Contracting Parties, the information shall be given to each of these Parties, unless the person is a national of the Party in the territory of which he was convicted.'

[9] Except where the person is a national of the Party in the territory of which he was convicted.

[10] The Additional Protocol of 1978 requires this.

[11] White Paper, 4.

[12] White Paper, 5.

[13] Ibid.

[14] Ibid.

[15] Final Report on the first evaluation exercise – mutual legal assistance in criminal matters, OJ C216, 1.8.2001, 14.

[16] Ibid., 15.

[17] The full name of this instrument is 'Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record', OJ L 322, 9.12.2005, 33. Note that special rules apply to convictions concerning terrorist offences which must be communicated to Europol, Eurojust and other Member States under Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, OJ L 253, 29.9.2005, 22.

[18] The discussion over a common register of convicted murderers or sex offenders was sparked by the case of Michel Fourniret, a French forest warden who confessed to nine murders on both sides of the Franco-Belgian border. The 62-year-old was given a job at a school in Belgium despite a rape conviction in France because no one in Belgium knew of his criminal record(see report by R. Reichstein 'EU rules out central criminal register, on website of *Deutsche Welle*, www.dw-world.de/dw). The case also raises questions of access to criminal records by private entities.

as access by private parties to records of professional disqualifications (not only criminal records)[19].

Discussion has also focused on information about convicted terrorists[20].

Apart from these special cases, the EU has acknowledged the need for a new *general* policy which should apply as widely as possible, including to more banal but still important crimes or 'quasi-crimes' such as road traffic offences[21].

Two guiding principles of EU criminal justice policy can be used to justify the elaboration of a general policy on exchange of convictions: the first is the recently coined principle of '*availability*', the second the principle of '*mutual recognition*'. The former has particular application to information being sought by law enforcement to assist their investigations of transnational crime[22], the second to information wanted by judicial authorities to inform a forthcoming judgment and/or sentence.

As things stand, police authorities in the EU have access to specific categories of information held by other Member States concerning wanted persons, using the 'Schengen Information System' (SIS). This system does not apply to convictions as such but the criminal record may be used to show that the persons being sought are violent[23]. Article 39 of the Schengen Implementing Convention enables police authorities in Member States to request data on criminal convictions where necessary for their investigations, provided that such requests are not reserved to judicial authorities. The principle of 'availability' is designed to extend the Schengen approach to additional categories of law-enforcement-relevant information and will also apply to Europol[24].

Judicial authorities in the EU may make use of Council of Europe procedures and now also the EU's own Convention on Mutual Legal Assistance of 12 May 2000, which is finally in force[25]. Article 6 of the latter enables judicial authorities to request information directly from their counterparts in another Member State. Where mutual recognition comes in is in relation to the *effect* of convictions rendered by the criminal courts of another Member State. The existence of a single area of justice in the EU, in which the legal effects of judgments of other criminal courts are recognised across the Union, implies that convictions should be taken into account, as illustrated by the decision of the European Court of Justice in the case of *Gözütok* and *Brügge*[26].

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[19] See the Belgian initiative for a Framework Decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children, presented to the Council on 5 November 2004. This initiative is discussed in European Parliament Working Document PE 362.566v01-00 of 29.8.2005 (*rapporteur* B. Sonik).

[20] A special Council Decision was adopted in September 2005 which deals with exchange of information, including final convictions, in respect of terrorist offences: see note 17 above.

[21] See the explanatory memorandum of the Proposal for Framework Decision on the taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings, COM (2005) 91 final, Brussels 17.03.2005.

[22] As Vermeulen et al, op.cit., have noted, criminal records may well be used by the police 'as intelligence in investigations' (11). Checking of those records will be part of the police 'screening' of suspects (41).

[23] See Article 94 of Schengen Convention.

[24] See Commission Proposal for a Council Framework Decision of 12 October 2005, COM (2005) 490 final. Annex II specifies the type of information which may be obtained.

[25] OJ C 197, 12.7.2000, 1. The Protocol to this EU Convention of 16 October 2001 does not have any bearing on the present discussion (cf. OJ C 326, 21.11.2001, 1).

[26] Judgment of 11 February 2003, published in [2003] European Court Reports I-1345. See also White Paper, 5. This case concerned convictions on the same facts, in respect of which the *ne bis in idem* principle may be invoked. This paper is concerned with previous convictions on different facts.

2.2. Main terms of Council Decision 2005/876/JHA

The first goal of the Decision is to create the conditions where the conviction of one of its nationals in another Member State is notified to the Member State of nationality as soon as possible. To this end, Article 2 of the Decision reinforces the terms of Article 22 of the Council of Europe Convention by calling for transmission of the conviction and subsequent measures 'without delay'[27] by a 'central authority' designated for this purpose[28]. Article 2 makes clear this is an 'own-initiative' procedure.

Article 3 of the Decision then lays down a 'request' procedure akin to Article 13 of the Council of Europe Convention. It stipulates that one central authority should reply 'immediately' to requests from another central authority for transmission of extracts from or other information relating to criminal records. The maximum time limit for a reply to another central authority is ten working days from receipt of the request[29]. A request may also be made by an individual, in which case the time limit is twenty days.

The Decision recognises that the primary purpose of the establishment of criminal records is 'to inform the authorities responsible for the criminal justice system of the background of a person subject to legal proceedings with a view to adapting the decision to be taken to the individual situation.'[30] Article 4 of the Decision limits the use of the transmitted data to the specific criminal proceedings in question. Uses for non-criminal purposes, e.g. in relation to job applications, may inhibit the goal of social rehabilitation which the Decision stipulates should be taken into account in accordance with Council of Europe standards[31]. The requested state is therefore free to reject information requested for other uses on the basis of its national law[32]. Separate proposals for use of the criminal record or records of disqualifications to detect sex offenders seeking employment in sensitive posts have been tabled by Belgium and are under consideration in EU fora[33].

The Decision introduces a standard form to be used for the exchange of information from the criminal record. It also lays down certain rules regarding languages: Member States may send their requests in one of their own official languages but the requested state may reply in its language; they may also agree on a different language for the reply[34]. In general the Decision encourages consultation between Member States, also with regard to problems in identifying persons in respect of whom requests are made.

Member States are required to implement the Decision no later than 21 May 2006, i.e. within six months of its adoption. Here, 'implementation' means putting in place the new procedures

[27] No time limit is specified here, unlike in Article 3. The European Parliament suggested a three-month limit but the Council did not follow this recommendation: see Legislative Resolution P6_TA(2005) 0029 of 22 February 2005 (*rapporteur* A Di Pietro).
[28] Member States may designate more than one central authority (see Article 1).
[29] The European Parliament suggested this ten-day period rather than the five days originally proposed by the Commission. The Parliament had also suggested a shorter limit of 48 hours for urgent cases, for example where the person was being held in custody, but the Council did not follow this recommendation. See Legislative Resolution referred to in note 27, above.
[30] See preamble, recital 10.
[31] See Council of Europe Recommendation No R (84) 10 on the criminal record and rehabilitation of convicted persons (referred to in recital 10 of the preamble).
[32] See preamble, recital 10 and Annex (reply form). Where information is passed for use other than in criminal proceedings, Article 4 of the Decision restricts the use to the purpose indicated by the requesting state; moreover, the request must respect any limits set by the requested state in the reply form.
[33] See note 19 above and Council Document 15346/05 of 5 December 2005 for latest developments.
[34] See Article 5 of the Decision.

to operate smoothly. Member States are thus under a clear legal obligation to follow these procedures, including the time limits[35].

Assuming it is implemented correctly, the Decision should lead to significant improvements in exchange of criminal records. It should greatly speed up and simplify requests between central authorities and enable them to build up more comprehensive criminal records of offences by their nationals which can then also be exchanged with other Member States in the context of criminal proceedings[36]. The European Parliament welcomed Decision 2005/876/JHA in its Resolution of 22 February 2005 though it remains concerned about the need to protect adequately the rights of the individual regarding use of the data transferred[37].

The content of the national criminal record is left in principle unaltered by the Decision; its rehabilitative function is respected. The preamble makes clear that the Decision does not require any change to national law regarding the criminal record[38]. The Decision is therefore limited in that it does not *require* information obtained about convictions of nationals in other Member States to be registered nor does it *require* convictions handed down in other Member States to be taken into account in judgment or sentence. Two Framework Decisions were proposed by the Commission in 2005 which would introduce new obligations for Member States in relation to precisely these matters.

3. Proposed Framework Decisions of 2005: main elements

3.1. Proposed Framework Decision relating to the organisation and content of the criminal records exchanged with other Member States[39]

This Framework Decision would replace the Council of Europe Article 22 procedure and repeal Council Decision 2005/876/JHA. The draft further defines and extends the obligation of the convicting Member State to transmit notice of convictions to the Member State(s) of nationality, having first defined what 'conviction' means[40]. The Member State of nationality must also be immediately updated on alterations or deletions of the criminal record by the convicting state – the Framework Decision makes clear that the records held by both states should be identical[41].

It is, however, an important principle of this draft Framework Decision and the draft Framework Decision on taking account of convictions that the integration in the national criminal record of convictions obtained in other Member States should not entail negative consequences for the individual concerned compared to the situation he or she would have been in if convicted by a national court[42]. This implies that the rehabilitative guarantees of national law must also apply to the treatment of foreign convictions (it might be supposed that national judges would anyway follow such an approach).

The Member State of nationality must under Article 5 faithfully store all information transmitted to it by other Member States – this is a new obligation designed to ensure that the domestic criminal record is a complete one and can in turn be used as a reliable source of information when subsequent requests come in for information on a Member State's nationals.

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[35] The legal basis of the Decision is Articles 31 and 34 (2)(c) of the Treaty on European Union,

[36] The Decision does not, however, prevent judicial authorities from exchanging records directly, under existing procedures for mutual legal assistance. See preamble, recital 8.

[37] See Legislative Resolution P6_TA(2005) 0029 of 22 February 2005 (*Rapporteur* A Di Pietro).

[38] See recital 12.

[39] The full title is 'Proposal for a Council Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States', COM (2005) 690 final, Brussels 22.12.2005.

[40] See Article 2 (a).

[41] See Articles 4 (4) and 5 (2).

[42] This is made clear in the Explanatory Memoranda to both proposals and then see Articles 5 (5) and 6 (2), respectively, of the two drafts.

The draft Framework Decision follows broadly the lines of Council Decision 2005/876/JHA where time limits, use of forms and languages are concerned. It also contains similar provisions regarding use of data transmitted, including respect for the social rehabilitation function of criminal records. There is, however, a clause which would allow use of conviction data for purposes other than those requested where this is necessary to prevent 'an immediate and serious threat to public security.'[43]

Finally, the draft outlines the framework for the setting up in the medium-term of a 'computerised conviction-information exchange system' in which records will be communicated electronically according to a standardised format. Procedures and a timetable are set out for this[44].

3.2. Proposed Framework Decision relating to the taking into account of convictions obtained in other Member States[45]

Taking its cue from the EU's Mutual Recognition Programme[46], this draft Framework Decision would require the 'assimilation' of criminal convictions obtained in another Member State to domestic convictions[47]. This would in particular empower national judges who do not necessarily enjoy this power at present to give effect to the foreign conviction in executing sentence in a case on different facts. The foreign conviction would also be assimilated with respect to its possible effects at other stages of the criminal proceedings. The draft thus aims to ensure that convictions handed down in other Member States are taken into account when implementing national policies concerning recidivism. This is said to be in the interests of the citizen: previous convictions may currently be considered in some Member States but not others, resulting in unequal treatment[48].

In the absence of a common European policy on recidivism, the Framework Decision will not, however, result in anything like equal treatment of persons with past criminal records by judges across the EU. It remains to be seen what the response of judges and lawyers in the Member States will be to this proposal. The draft expressly eschews any stipulation as to the appropriate effects of previous convictions, leaving this to national law, but some judges might regard a formal obligation to take foreign convictions into account as unduly restrictive their discretion in matters of judgment and sentencing. More generally, one might ask whether criminal lawyers in Member States are yet sufficiently acclimatised to the idea of 'mutual recognition' to make these proposals workable at any stage of the criminal proceedings. The proposed grounds for not taking convictions handed down in other Member States into account will in any case require careful debate[49].

III. Conclusions on direction of EU policy to improve exchange of criminal records

Member State central authorities are now under a clear EU legal obligation to exchange information on criminal records of their nationals with each other. This is in itself an important step forward. It does not of course amount to anything like the more ambitious plans mooted for a Central Criminal Register[50]. Current EU policy aims at ensuring that the new duties of full and prompt exchange of criminal records are discharged efficiently. The question is how best to achieve greater effectiveness, while at the same time showing due respect for the fundamental rights of the individual, including his or her rights under data

[43] See Article 9 (3).
[44] See in particular Article 11 of the proposal.
[45] The full title is 'Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings', COM (2005) 91 final, Brussels 17.03.2005.
[46] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12, 15.1.2001, p. 10.
[47] The core provision of the proposal is Article 3.
[48] See Explanatory Memorandum, 2.
[49] See Articles 4 and 5 of the draft.
[50] Cf. White Paper and also Vermeulen et al., op.cit.

protection legislation[51]. Policy should in the author's opinion also move forward with due respect for the legitimate differences between Member States' criminal justice systems. The two Framework Decisions proposed in 2005 will stimulate further debate on these important legal questions, as well as on technical aspects. It should be possible to operate a technologically more advanced system of exchange of criminal records which involves minimum change to the substance of national record systems. In April 2005 a pilot project was launched by four Member States with just this objective[52].

[51]. This 'balanced' approach is consistent with the overall goals of EU criminal policy in an 'Area of Freedom, Security and Justice'.

[52] The planned networking of the German, French, Spanish and Belgian registers was announced in Paris on 4 April 2005 with the intention of setting up an electronic exchange of records by the end of 2005 (see press releases of the respective Ministries of Justice on that date).