The disqualification triad
The disqualification triad

Approximating legislation
Executing requests
Ensuring equivalence

IRCP research series
Volume 45

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<td>BE Belgium</td>
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<td>BG Bulgaria</td>
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<td>CIS Convention Convention of 26 July 1995 on the use of information technology for customs purposes</td>
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<td>CoE Conditional sentence European Convention of 30 November 1964 on the supervision of conditionally sentenced or conditionally released offenders</td>
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<td>CoE ECMA European Convention of 20 April 1959 on mutual assistance in criminal matters</td>
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<td>CoE Extradition European Convention of 13 December 1957 on extradition</td>
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<td>CoE Transfer Proceedings European Convention of 15 May 1972 on the transfer of proceedings in criminal matters</td>
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<td>CoE Validity European Convention of 28 May 1970 on the international validity of criminal judgments</td>
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<td>CY Cyprus</td>
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<td>CZ Czech Republic</td>
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<td>DG JUSTICE Directorate General Justice</td>
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<td>DK Denmark</td>
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<td>DQ Disqualification</td>
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<td>e.g. Exempli gratii</td>
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<tr>
<td>EAW European Arrest Warrant</td>
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<td>ECHR European Convention on Human Rights</td>
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<td>EE Estonia</td>
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<td>EEW European Evidence Warrant</td>
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<td>EIO European Investigation Order</td>
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<td>EL Greece</td>
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<td>EPO (criminal) European Protection Order in Criminal matters</td>
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<td>FD Money Laundering</td>
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<td>ICCM</td>
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<td>Convention Implementing The Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders</td>
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<td>SPOC</td>
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<td>Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member states of the European Union</td>
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<td>TEU</td>
<td>Treaty on the European Union (as amended by the Lisbon Treaty)</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty)</td>
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<td>UK</td>
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Executive summary

Background to the Study

In the past decades the EU has been made little progress with respect to disqualifications as a sanction mechanism. Although the field of cross-border disqualifications is not entirely unregulated, important gaps still exist in spite of the intention voiced in the 2000 Programme of Measures, adopted twelve years ago, to aim at “gradually [extending] the effects of disqualifications throughout the European Union.” The complex nature of this specific sanction mechanism has caused policy initiatives to be postponed time after time.

In light of that policy line, the European Commission has awarded the project team the Study on disqualifications as a sanctioning measure in the national systems of the Member States. The Study aims at providing a better understanding of the nature of the provisions on disqualifications in national sanctioning systems, both criminal and non-criminal. The Study provides a comprehensive view of the legal framework in this area in all 27 member states and in doing so the necessary elements and analysis for future development in the field which will help the Commission shaping its policy objectives.

A disqualification triad is suggested, encompassing approximation, mutual recognition and attaching equivalent effects. Furthermore, the impact on criminal records information was subject to analysis. To illustrate the feasibility of the disqualification triad and highlight the importance of cross-border disqualifications, three case studies were developed, being public procurement, working with children and road safety.

Disqualification diversities in the member states

To identify the practical problems and legal gaps and stumbling blocks with a view to adequately support the policy recommendations, the first part of the study consists of mapping the disqualification diversities in the member states.

The diversity ratione poenae can refer to a number of differences. First, there is the distinction between the types of disqualifications as sanction measures that can be imposed (typology) and the way they are applied in a specific situation (applicability). Second, the applicability of the disqualification can be either offence related (i.e. imposed in the context of a criminal procedure) or access related (i.e. felt only when the person involved seeks to get access to a certain profession or another right to which the disqualification relates to. The access related disqualifications are governed via the technique of requesting certificates of non-prior conviction to be produced. The offence related application of
EXECUTIVE SUMMARY

disqualifications is more complex. Not only should a distinction be made between on the one hand disqualifications as a preliminary measure and on the other hand disqualifications that apply in the convictions stage, the latter comprise both disqualifications that are explicitly imposed and disqualifications that are implicitly added to a particular conviction.

The diversity *ratione personae* relates to whether disqualifications can apply to natural persons and/or to legal persons. As to the meaning of the concept “legal person”, it is sometimes suggested (and in some countries this is indeed the practice) to use the term ‘legal person’ as an umbrella term, to then distinguish two different sets of persons within that group, being natural persons vs. legal entities. Consequently, the wordings ‘legal person’ (or their literal translation) could be interpreted to mean any ‘person’ which is recognized by law, meaning what is called legal persons in this contribution plus natural persons. The project team dismisses this reasoning due to its inherent risk of confusion on the one hand, and – more importantly – due to inconsistency with the existing European legislative framework. When European (be it Council of Europe or EU) laws and regulations refer to what in this latter approach is called “a legal entity” the terminology “legal person” is used. Therefore, this Study uses the concept “legal persons” in the sense of an entity recognized as such by law and thus represents a ‘subgroup’ of the broad meaning given to a legal person in some member states (and outside the Union). In turn, legal persons can be divided in two groups of legal persons: private and public legal persons.

The diversity *ratione auctoritatis* relates to the authorities that are involved in relation to disqualifications. In EU instruments relevant to disqualifications, it often becomes apparent that several types of authorities can be involved in relation to disqualifications. This diversity is included, either through specifying which types of authorities can be involved, or through remaining silent on the subject. The lenience regarding authorities involved in applicable EU instruments reflect the wide variety that occurs throughout the member states. Five types of authorities that are involved in imposing disqualifications/attaching disqualifying effects can be identified throughout the European Union: judicial authorities, administrative authorities, disciplinary authorities, policy authorities and commercial authorities.

The Disqualification Triad

Based on the disqualification diversity the existing mechanisms and the practical problems and needs identified, a combination of three different regimes is recommended.

The first regime relates to a selection of severe offences which in light of the vulnerability of certain sectors should lead to mandatory exclusion throughout the EU. To that end, both the selected offences and the disqualifying effect
should be subject to approximation. The only way to ensure adequate availability of information on convictions with respect to those offences and the disqualifications that should result from it, seems to be a direct access to criminal records information combined with a system of certificates of non prior conviction.

The second regime relates to the situation where disqualifications are handed down in a member state other than the member state of residence, resulting in execution of the measure ineffective. The disqualification will not be felt by the convicted person unless it is executed in its member state of residence. Considering the existence of two instruments in which execution regimes in the member state of residence is included, it is recommended to mirror that regime in a general instrument that would cover the entirety of (remaining) disqualifications.

The third regime relates to the possibility of a member state to attach effects to foreign convictions in absence of an explicit request of the convicting member state. Here too, it should be recommended to link in with an existing instrument and the possibility to attach equivalent effects to prior convictions included therein. Finally, mirroring the recommendation made in the first regime, ensuring the availability of information requires working with sufficiently detailed certificates of prior conviction.

The impact on criminal records information

The functioning of the disqualification triad can only be guaranteed if adequate criminal records information is available.

A person’s criminal record is compiled in the member state of the person’s nationality. In theory, information on all the prior convictions is stored, regardless of the nationality of the convicting authority. A single question directed to the criminal records authority of the member state of the person's nationality should suffice to obtain a complete overview of existing prior convictions. The future policy options elaborated on when seeking to extend the effect of disqualifications in the EU are only practically implementable to the extent information on prior convictions and prior disqualifications are available and accessible. Therefore, a set of recommendations with respect to the impact on criminal records is included.

Analysis revealed that only a minority of disqualifications finds its way to the criminal records. Extending the EU wide effect of disqualifications requires information thereon, and therefore requires the development of a criminal records policy ensuring the availability thereof, both with respect to disqualifications found in national as well as foreign convictions.

Furthermore, considering the wide variety of authorities involved in 'executing' the disqualification, access to information on existing disqualifi-
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cations or convictions that must give rise to disqualifications needs to be better regulated. It should be considered to increase the direct access to criminal records information and develop a system of EU wide certificates of non-prior convictions to support the functioning of the so-called vulnerable sectors.

The procurement case study

A first case study looked into the functioning of disqualifications in a public procurement context and more specifically into the scope *ratione materiae* of the exclusion from participation in a procurement procedure, against the background of the disqualification triad. The recommendations are clustered in three categories, mirroring the axes of the disqualification triad.

*Ensure approximated disqualifications for approximated offences*

First, approximated disqualifications for approximated offences can already be found in the context of public procurement. Art. 45 Procurement Directive elaborates on the mandatory conviction-related exclusion grounds. Three main recommendations are made. Firstly, considering the rapidly developing approximation acquis, it is advised to look for an approach that delineates the scope of the mandatory exclusion grounds in a way that is transparent and can stand the test of time. The current approach cannot suffice. It is suggested to use the EU level offence classification system as a basis to identify the (categories of) offences for which conviction should result in a mandatory exclusion. Secondly, to increase cross-instrument consistency, it is advised to include the existence of mandatory exclusion grounds in instruments that approximate the constituent elements of offences and their sanctions. Thirdly, the current level of detail in the criminal records information cannot support a distinction between a conviction that relates to identified approximated behaviour that should lead to exclusion and a conviction that relates to other behaviour. An increase in the level of detail in the available criminal records information is necessary to ensure the proper functioning of the mandatory exclusion grounds.

*Develop the obligation to attach equivalent effects to foreign convictions*

Second, attaching to foreign convictions effects that are equivalent to the effects national convictions would have, should be further developed. The scope for taking account of foreign convictions can either or not be modelled on the national criminal code, but foremost it is important that due account is taken of the implications of the need to ensure equal treatment between all competing candidates. To that end, convictions can only be taken into account to the extent they relate to the largest common denominator identified, either EU-wide or ad
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hoc based on the specific profiles of the competing candidates. The only exception thereto consists of the public order exception, which can be motivated with respect to a conviction for which the underlying behaviour is criminalised in the national criminal law of the contracting authority. The indirect discrimination complexity makes motivation far more difficult in relation to a conviction for which the underlying behaviour is not criminalised under the national criminal law of the contracting authority. Here too, sufficiently detailed criminal records information is crucial to adhere to the equal treatment principle and remains the main concern for the practical implementation thereof.

Introduce the possibility to issue a mutual recognition request

Third, though mutual recognition is an important element in the disqualification triad that seeks to extend the effect of disqualifications as sanction measures in the EU, the added value thereof specifically in a public procurement context when compared to the effect of attaching equivalent effects to foreign convictions is fairly limited. This can be explained referring to the limited number of member states that actually impose exclusion from participation in a public procurement procedure as a sanction and can have an interest in seeking cross-border execution thereof. More importantly, the cooperation principles governing the current set of mutual recognition instruments have an important limiting impact. Mutual recognition can only have an added value in two very specific situations.

Firstly, mutual recognition can have an excluding effect beyond the technique of attaching equivalent effect in the situation:
- where the duration of the exclusion imposed in the sentencing state exceeds the maximum duration foreseen in the executing member state; and
- the executing member state has not introduced a mandatory adaptation of the duration in case of inconsistency with the national law; and
- execution will not jeopardise the equal treatment of the person involved with the competing candidates for the duration still falls within the largest common denominator identified amongst the relevant EU jurisdictions, provided that no public order exception can be motivated.

Secondly, mutual recognition can have an excluding effect beyond the technique of attaching equivalent effect in the situation:
- where the underlying behaviour is not criminalised in the executing member state; and
- execution is not (made) dependent on a double criminality requirement; and
- execution will not jeopardise the equal treatment of the person involved with the competing candidates for the criminalisation still falls within the largest
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A common denominator identified amongst the relevant EU jurisdictions, provided that no public order exception can be motivated.

Considering the limited added value of mutual recognition when compared to attaching equivalent effect to foreign convictions as complemented by the introduction of approximated disqualifications for approximated offences, the priorities in terms of future policy making should be focussed on those two latter techniques.

The case study on working with children

The second case study relates to the disqualifications with respect to working with children when convicted for sexual offences. Whereas previously the framework decision 2004/68/JHA only contained a reference to optional disqualifications stipulating that a natural person “may, if appropriate, be temporarily or permanently prevented from exercising professional activities related to the supervision of children” the new directive contains a specific provision entirely dedicated to disqualifications. The directive touches upon different aspects which are relevant in the disqualification sphere. The mere fact that this Directive contains somewhat better defined definitions and that it deals with broader range of aspects relevant to disqualifying effects when compared to the framework decision, undoubtedly represents a step forward. However, several questions remain unanswered. The recommendations are clustered in four categories, being first ensuring carefully approximated offences, second introducing an approximated disqualification, third balancing mandatory and optional equivalent effects and fourth ensuring the availability of adequate criminal records information.

Ensuring carefully approximated offences

The new directive seems to comply with the first regime in the disqualification triad: approximated disqualifications for approximated offences. However, the delineation of the disqualification can be improved for the definition of the offence as included in the approximation instrument still leaves room for interpretation due to the fact that the age of sexual consent is still to be defined in accordance with the national law.

To apply the technique of the approximated disqualifications, it is important to carefully approximate the offences they apply to. This those however not mean that member states cannot be left the discretion to be more strict when formulating their national offence definition, be it that the approximated disqualification obligation will not be applicable thereto.
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Introducing an approximated disqualification

In parallel to the previous recommendation it is equally important to carefully define the approximated disqualification. The current version of the new directive refers in general terms to ‘activities involving direct and regular contacts with children’. To fully implement the first axis of the disqualification triad, it is advised to agree on a set of professions to which a mandatory disqualification applies. Mirroring any other minimum definition, member states retain the discretion to add other professions to the list and regulate nationally that also the access to other professions will be denied for people having been convicted for certain sexual offences.

Balancing mandatory and optional equivalent effects

Whereas for some sectors it can be argued that it suffices to provide member states with the possibility to attach equivalent effects to foreign convictions or disqualifications (and in parallel ensure the availability of adequate information), the vulnerability of other sectors justifies the introduction of mandatory equivalent effects, i.e. the obligation for member states to regulate in a way that effectively prevents a person with a sexual offence conviction from exercising a profession in that sector. Reference was made to working with children to illustrate and support that line of argumentation. The mandatory character of the access limitation can only refer to those sexual offences for which criminalisation in the executing member state is guaranteed. However, member states must be provided the discretion to regulate in a way that allows them to introduce an access limitation for persons having been convicted for a sexual offence that is not equally criminalised in their jurisdiction.

Ensuring the availability of adequate criminal records information

Common to all three case studies, the availability of adequate criminal records information to ensure the practical feasibility of the policy recommendation remains problematic. Especially in vulnerable sectors such as working with children, the introduction of EU wide certificates of non-prior conviction should be considered. In parallel, political debate needs to be restarted on the access of relevant actors to criminal records information.

The case study on road traffic offences
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A third case study looked into the application of the disqualification triad to the disqualifications that are known in the context of road traffic offences. The recommendations are clustered in three categories, being first prevention and road safety, second cross-border execution of disqualifications and third data exchange.

Prevention/road safety

In terms of prevention or road safety, a more knowledge-based approach, taking into account the most risky groups, different national procedures and the knowledge on cultures of driving, should be advanced, based on the awareness of the plethora of different types of disqualifications as reactions to particular situations in member states, and that the topic is sensitive from the perspective of fundamental rights.

When one moves from the area of road safety into criminal policy area, sufficient attention should also be paid to the nuances that govern both fields of policy – differences in terms of aims or objectives and general underlying principles and justifications for policy making in respective fields. When it comes to criminalisation or criminal policy, any selection of (traffic) offences to merit special treatment (e.g. enforcement on the basis of the principle of mutual recognition) should be justified on normative grounds, not (alone) on the basis of e.g. effectiveness. The automatic spillage of road safety measures into the field of disqualifications and even more in the field of criminal law, i.e. disqualifications linked to a criminal conviction, should be avoided. If a certain group of driving-related disqualifications should be selected for EU-wide enforcement, then their special treatment must be justified on the basis of the severity or seriousness of harm the underlying offence inflicts upon others.

Cross-border execution of disqualifications

Regime 1, leading to EU-wide mandatory disqualification, is recommended to be generally applied in the case of most severe road traffic offences, which are significantly harmful (or seriously threatening the essential interest which is the object of protection) and committed with high degree of culpability. In the area of road transport, specifically passenger transport, some less severe offences may additionally be deserving of Regime 1, based on legitimate reasons for stricter standards to be used for the category of professional drivers who are regularly involved in passenger transport.

The mutual recognition regime (Regime 2) has already been applied in some parts of the road traffic sector (e.g. driving licences). Regarding other parts, not yet covered by the mutual recognition mechanism, certain approximation of rules and of enforcement/sanctions that could serve as a “common basis” is
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highly advised before contemplating the application of the principle of mutual recognition. Recently highlighted problems with the issue of (violation of) fundamental rights and ECJ’s and ECtHR judgements in this matter, highlight the importance of taking a moderate, reasoned and gradual approach in the areas where fundamental rights are at stake and ensuring some basic common standards (in terms of offences, procedures and sanctions, in our case disqualifications or disqualifying effects) are in place prior to adopting a strict mutual-recognition approach. This is even more pertinent in the case of disqualifications, due to the their variety, the variety of procedures and authorities who issue and enforce them across member states.

With respect to the mutual recognition, the approach, retaining the requirement of double criminality (at least as a refusal ground) is recommended. In the cases when there has been no explicit request for enforcement sent, however, the application of Regime 3 (the equivalence principle) is preferred. Attaching an equivalent effect to the essentially same offence may be easier to achieve and justify, still some sentencing guidelines on what could be considered “equivalent” would be welcome, in order to avoid the problem of alike not be treated alike.

Convention 1998 could be ratified by all member states or, more appropriately, a new Directive with similar contents proposed, based primarily on the equivalence principle (as proposed in this study). Some enthusiasm for the adoption of the 1998 Convention is there: in 2005 (17 years after the member states’ signature) only 3 states have ratified it, today the number of countries who ratified the Convention amounts to 7. Moreover, two countries, UK and Ireland, have taken advantage of the Convention provision allowing member states to go ahead and use it before it enters into force, and applied it in their respective countries. However, at this point (with the Treaty of Lisbon having come into force) and in the light of the evolution of EU policy in this area, it is probably more likely and advisable that a new Directive be adopted, regulating the cross-border enforcement of driving disqualifications – those that are not already covered by the 2006 Driving Licence Directive.

Better explanation and clarity with regards to concepts and terminology in this area are recommended. As regards the execution, various legal instruments currently mention mechanisms, such as adaptation, conversion, substitution etc., without clearly delineating between the concepts.

It is advisable that distinction be made between a (cross-border enforcement of a) disqualification that was pronounced as a sanction for e.g. drink driving, and a (cross-border enforcement of a) disqualification, e.g. driving ban, that resulted out of sufficiently accrued points, i.e. driver reaching the statutorily defined maximum number of permitted penalty points. In terms of road safety and quite aside from the inherent problems of the execution of disqualifications resulting from accrued points, it is much more important (and dangerous, if left
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unattended) that a driver who cannot and should not be allowed to drive due to his state (e.g. his drug or alcohol addiction which impede his driving capabilities) is prohibited from driving in other EU member states as well (not just in the state of the offence), whereas this may not necessarily or even regularly be the case with a driver who received a disqualification on the basis of the accumulation of penalty points (handed out e.g. for several minor or different infractions). There seems to be a normative difference between the two cases, which should be taken into account – at least on the level of the prioritising of EU policy and legislative interventions in this field.

Data exchange

In terms of (careful) operationalization, i.e. of systems for data exchange, one way would be to look into the possibility of granting (limited) access of police force to ECRIS provided that the principle of proportionality (between the burdensomeness of the measure and the purpose it aims to achieve) is respected, rules on data protection observed and an in-depth impact assessment on necessity completed beforehand. As regards ECRIS: in order to be useful for either traffic police officers in the field or member states contemplating enforcement of a disqualification issues in another member state, it would need to include the information on (driving) disqualifications. At the moment, the inclusion on information on disqualifications is only optional, which naturally limits the usefulness of ECRIS for our purposes.

Another option is to use EUCARIS. This is a system that is already tailor-made for the area of road traffic and enables searches to be conducted as regards sanctions and medical restrictions imposed on a driver. For the purpose of the exchange of information on driving disqualifications, the list of “restrictions” should be extended, while respecting rules on data protection and following and in-depth impact assessment on necessity, to incorporate suspension, withdrawal, revocation, cancellation etc. of driving licence and other driving disqualifications.

Should new databases be created or the functionality of existing databases extended, this has to adhere to the principle of proportionality and include sufficient safeguards to prevent abuse and secure data protection in line with the EU rules on data protection.
1 Introduction

1.1 Background to the study

European criminal policy making is a relatively new policy area, for cooperation in criminal matters has not always been part of the European competences. It was introduced when the European Community developed into the European Union. With the 1992 Maastricht Treaty\(^1\), the member states took an important step by incorporating Justice and Home Affairs into the European institutional framework. Art. K.1 of the Maastricht Treaty, clarified what constituted JHA at that time: for the purpose of achieving the objectives of the Union – in particular the free movement of persons – member states regarded the following areas as matters of common interest:

(1) asylum policy;
(2) rules governing the crossing by persons of the external borders of the member states and the exercise of controls thereon;
(3) immigration policy and policy regarding nationals of third countries;
(4) combating drug addiction in so far as this is not covered by (7) to (9);
(5) combating fraud on an international scale in so far as this is not covered by (7) to (9);
(6) judicial cooperation in civil matters;
(7) judicial cooperation in criminal matters;
(8) customs cooperation;
(9) police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (hereafter Europol).

This is the first time police and judicial cooperation in criminal matters appear in EU treaties. However, even though Art. K1 listed areas of common interests, it constituted only a small step forward, as no clear objectives were set. It was not until the entry into force of the 1997 Amsterdam Treaty\(^2\) that the pillars were reshuffled and the policy areas concerned elaborated on more in-depth. Some of the JHA policy areas were shifted to the supranational first pillar and the slimmed down version of the third pillar was renamed accordingly into “police and judicial cooperation in criminal matters”. The Amsterdam Treaty introduced the area of freedom, security and justice in which the free movement of

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\(^1\) OJ C 191 of 29.7.1992.
persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. Police and judicial cooperation in criminal matters are the means to accomplish the goal of creating an area of freedom, security and justice. The development of these policy areas gained momentum after the Tampere European Council, the first European Council entirely dedicated to justice and home affairs at which mutual recognition was presented as the cornerstone of judicial cooperation. Even though it has been cited at countless occasions, the importance of paragraph 33 of the Tampere Presidency conclusions, justify it being cited once more:

Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities (European Council, 15-16 October 1999).

Following the introduction of that principle, a number of framework decisions have been adopted regulating the mutual recognition of sanctions in the European Union. The sanction arsenal that can be imposed by the different authorities in the member states is quite extended. Though they are the most frequently imposed, there is more to sanctions than financial penalties and measures involving deprivation of liberty.

The development of the European legal framework started in 2005 with the adoption of the framework decision on the application of the principle of mutual recognition to financial penalties,5 almost immediately followed by the framework decision on the application of the principle of mutual recognition to

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4 In the past, the project team has pointed several times to the inconsistency that rises from the introduction of mutual recognition as the cornerstone of judicial cooperation only, excluding the application thereof in the field of police cooperation. There is not a single good reason not to introduce mutual recognition in less far reaching forms of cooperation such as police and customs cooperation, when it is accepted in more far reaching forms of cooperation such as judicial cooperation. Even more fundamentally, introducing mutual recognition in judicial cooperation only, presupposes that a clear line can be drawn between police, customs and judicial cooperation. Analysis revealed that this is currently not the case. This unjustified distinction in the development of police as opposed to judicial cooperation in criminal matters was an important aspect to the decision of the project team to again assess the justifiability of that distinction in the context of this new study.
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Two years later, another two instruments were adopted, covering the application of the principle of mutual recognition to sanctions involving deprivation of liberty and a selection of alternative sanctions and probation measures.\(^6\)

An analysis of that legal instrumentarium leads to the conclusion that the application of the principle of mutual recognition to disqualifications as sanctioning measures has not been addressed in a separate instrument, although it was raised in the 2000 Programme of measures for the implementation of the principle of mutual recognition. The Programme explicitly states that the objective should be “gradually to extend the effects of disqualifications throughout the European Union”.\(^8\)

From the very beginning it was clear that disqualifications are somewhat different than the other sanction types and needed a slightly different approach. Differences in the national legal framework with respect to the way they are imposed (both from the perspective of the authorities involved as from the perspective of the position in the criminal justice chain) and the inclusion thereof into the criminal records information system were correctly identified as complicating factors that needed further analysis.

1.2 Purpose of the study

The need for further analysis identified in the 2000 Programme of Measures and reiterated in subsequent policy documents has lead to the drafting of a call for tender on a study on disqualifications as a sanctioning measure.\(^7\)

The purpose of the Study is to provide the Commission with an independent, long-term strategic view on the nature of the provisions governing

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\(^8\) “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001, p. 1

\(^9\) EUROPEAN COMMISSION (2010), “Call for Tender - Study: the development of an EU level system for the classification of criminal offences and an assessment of its feasibility with a view to supporting the implementation of the action plan to develop an EU strategy to measure crime and criminal justice”. JLS/2010/JPEN/PR/0010/E4.
INTRODUCTION

disqualifications in the national sanctioning systems, taking account of the earlier work that has been done by the European Commission and which has been reported on in the Communication from the European Commission to the Council and the European Parliament on the Disqualifications arising from criminal convictions in the European Union. The analysis conducted by will provide the European Commission with the necessary building blocks for future policy making.

2 Detailed methodology and approach

Based on the interpretation of the requirements included in the terms of reference, the project team divided the tasks into five work packages (WP) as shown in the figure below. The following paragraphs will elaborate on each of them.
2.1 Work Package 1 – Clarification of the scope

Especially when conducting a study in relation to a legal concept that differs widely in the national legislations of the member states and in its appearance in existing international legal instruments, it is important to carefully scope the subject at the very beginning of the study. Prior to the start of the analysis, a selection had to be made regarding to the instruments and central principles and concepts to be included in the Study.

As a first step, the project team assessed the existing knowledge on the construction of provisions governing disqualifications in the member states of the European Union. To that end a literature review was conducted combined with an analysis of the legal instruments that include an obligation for the member states to introduce disqualifications into their national criminal justice systems. Such obligations can be found in so-called approximation instruments. For the latter part, the JHA acquis was used as a basis to identify the relevant approximation instruments. The JHA acquis clusters all European and international instruments that are important for the construction and functioning of Justice and Home Affairs as a policy domain. It makes a distinction between
a) Conventions to which accession is obligatory,
b) Joint Actions, Joint Positions (Maastricht Treaty); Common Positions, Framework Decisions and Decisions (Amsterdam Treaty) Instruments adopted under the TEC,
c) Other European Union Instruments and documents,
d) Other Conventions (accession desirable)

As a second step, the project team assessed the extent to which disqualifications are governed by international cooperation instruments.

For these first two steps, the project team could rely on significant in-house knowledge from previous research projects (especially the study on the future
institutional and legal framework of judicial cooperation in criminal matters in the EU\(^\text{11}\) and the output from an ongoing PhD study\(^\text{12}\).

As a third step, the project team looked into the possibility to define disqualification as a sanctioning measure and in doing so scope the subject of the study, based on the instruments identified and analysed in the previous steps.

A brief report on the methodology and approach used for the selection of instruments were included in the kick-off report. During the kick-off meeting at the European Commission, the strategic choices can be discussed in order to finalise the clarification of the scope and the identification of instruments to be included in the Study.

2.2 Work Package 2 – EU Level analysis

Whereas in the first work package, the instruments were analysed with a view to deducing a working definition for ‘disqualifications as a sanctioning measure’ and in doing so clarifying the scope of the study, under the second work package, the instruments are reviewed from a different perspective, with an entirely different objective. The same set of instruments was analysed to identify the gaps and inconsistencies in the currently existing international legal framework with respect to disqualifications and look into the political will to overcome any of the identified difficulties.

The work within this work package is considered to be an important validation mechanism to reaffirm the need for EU intervention in this field and thus justify undertaking the Study. Only in as far as a politically raised need is affirmed from a theoretical and legal perspective, it is valid to test the perceived


need in the third work package and develop a set of future policy options in the fourth work package. Additionally – as show in the figure inserted above, the work in the second work package will identify the topics that need to be more thoroughly reviewed not only in the context of the development of the policy options but also in the context of the member state level analysis to provide the necessary empirical data to support the development of the policy options.

2.3 Work Package 3 – MS level analysis

The third work package and the main part of the study consists of the MS level analysis, which aims at collecting information on the existence, and application disqualifications in the member states, and the analysis of the obtained information.

This phase of the Study requires that firstly a single point of contact is nominated in each of the member states before the data gathering can start, which – as shown on the figure inserted to the right – comprises two steps, being the affirmation of the need for EU level intervention and the mapping of the MS diversity.

2.3.1 Nomination of the single points of contact

Within each of the member states, a single point of contact (SPOC) was nominated. The SPOCs were in charge of completing the member state questionnaire and are ideally placed to collecting and providing the relevant information for the analysis to the project team, as well as, when necessary, make contact with the relevant stakeholders in their country. The project team was able to draw on an extensive network of contacts and on its experience from several studies conducted in the past. The selection of SPOCs participating in the member states’ consultation rounds was a very important milestone in the study.

The input of the SPOCs is crucial to ensure the quality of the outcome of the Study. The SPOCs are familiar with the academic and practical status of and
challenges at hand with respect to disqualifications as sanctioning measures in his country of origin. At the kick-off meeting with the European Commission it was agreed to not only include policy makers and academics in the expert group, but also include experts with a practitioner background participating in personal capacity. The project team highly appreciates the valuable contributions of the following SPOCs.

It should be noted that SPOCs were found for all but one member state, namely Denmark. Consequently, in the course of this Study 26 country reports were produced. For one member state, the results were obtained only after the submission of the final draft report. Consequently, the project team was not able to process these replies within the statistics of this report. The tables, graphics, diagrams produced in this report thus comprise the input of 25 member states.

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**Methodology & Approach**

2.3.2 **Building the questionnaire**

The questionnaire consists of five parts:

- Part 1 Defining a disqualification
- Part 2 Imposing and executing from a domestic perspective
- Part 3 Imposing and executing from a cross-border perspective
- Part 4 New disqualifying effect from a domestic perspective
- Part 5 New disqualifying effect from a cross-border perspective

Having established that there are difficulties in defining what constitutes a ‘disqualification as a sanctioning measure’, and thus the difficulties in scoping the study, the further clarification of the concept of disqualifications was considered to be an important part of the study. Besides open questions with respect to disqualifications, the questionnaire also included a series of possible disqualifications for which member states could identify that they are either or not included in their domestic legal order.

Therefore, in the first part of the questionnaire the concept of disqualifications was examined, and based on the previously conducted desk-top review a highly detailed classification of disqualifications was presented, in order to allow the respondents to in a detailed manner elaborate on all types of occurring disqualifications in their national systems.

Besides the differences in the existence and appearance of disqualifications as sanction measures in the domestic law of the individual member states, the way disqualifications are imposed and executed can also result in significant diversity. Therefore, part 2 of the questionnaire seeks to gain insight in how the member states deal with disqualifications. Based on the outcome of the preparatory desk top review we anticipated to differences ratione poenae, personae and auctoritatis. To complement the questions relating to the pure national diversity, part 3 of the questionnaire looked into how these differences are dealt with from a cross-border perspective, i.e. how – in the current international cooperation practice – these differences have a role to play.

Finally, the differences in the way disqualifications are deployed as a sanction measure, also include the difference between the disqualification being offence related (and therefore ‘imposed’ in the context of a criminal proceeding) as opposed to being access related (and therefore only felt the moment a convicted person seeks to get access to a certain profession or other right for which he has been disqualified. Similar to the interrelation between part 2 and 3 of the study, parts 4 and 5 deal with this access related ‘new disqualifying effect’ first from a national and later on from a cross-border perspective.
Questionnaires have been sent to the member states in June 2011. A copy of the questionnaire is annexed to this report.

2.3.3 Data analysis and validation

The design of the questionnaire has allowed the project team to engage in a comparative analysis of the current national choices with regard to disqualifications, and present both a high-level overview of the implementation status and compatibility issues, as well as a more in-depth analysis of the country specific comments.

Upon receipt of all input, the project team has engaged in an extensive legal analysis of both the current legal framework in the member states and the implementation status. The comments provided by the respondents proved of utmost importance to complement the findings from other parts of the study and contribute to a well-considered formulation of recommendations.

2.4 Work Package 4 – Elaborating policy options

The project team has developed detailed policy proposals for a future framework regarding disqualifications. This was built, taking account of the data collection and data analysis, at EU level as well as at member states level. A nuanced, balanced approach, taking account of economic and political feasibility, was developed.

Three different policy options have been developed.

The first policy option seeks to introduce a disqualification triad, in which the project team advocates a combination of three different regimes, the first one being an automatic disqualifying effect for a limited set of offences; the second one is a system of mutual recognition; the third being the facilitation of equivalent effect mechanisms.

The second policy options seeks to elaborate on the future of refusal grounds in international cooperation in criminal matters with respect to disqualifications.

The third policy options seeks to identify the consequences for the design of criminal records mechanisms.

Furthermore, the entirety of the Study is built on careful data-analysis, based on both a review of the relevant legislation and of the acquired expert input. In order to test whether the developed framework is indeed such that it fits reality.
and that it would constitute a clear added value compared to the situation as it stands today, the framework was tested in light of three case studies, three sectors, where disqualifications play a considerable role. The three case studies are

- Public Procurement;
- Working with Children; and
- Driving disqualifications.

These case studies discuss the member states’ status questionis regarding disqualifications, the relevant EU legislation, to then examine to what extent they answer to the element put forward in the future framework as developed by the project team and, where the present situation differs from that framework, to what extent the latter would bring about improvements.

2.5 Work Package 5 – Preparation for impact assessment

The second annex to this report contains a preparation for impact assessment, elaborating on comprehensive recommendations to provide the European Commission with information to support a long-term strategic and consistent policy plan, related to disqualifications in the national legal systems of the member states. Furthermore, the recommendations will support knowledge based policy making in view to adapt national criminal legislations.

To ensure tangible and practical recommendations, the tenderer has elaborated on a series of future scenarios, including:

- No action at EU level;
- Non-legislative action at EU or national level;
- A legislative approach constituting a minimum harmonisation; and/or
- Comprehensive legislative solution that ensures full harmonisation.

The impact assessment has been conducted using standardized templates.

During the course of this study (particularly in WP 4), the tenderer has assessed the acceptability of the recommendations. Those scenarios deemed acceptable have been subjected to a high-level regulatory impact assessment, to provide a detailed and systematic appraisal of the potential impacts of a new regulation in order to assess whether the recommended regulation is likely to achieve the desired objectives. It is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impact. RIA’s are aimed at structuring and
supporting the development of policies. First, a RIA identifies and assesses the problem at stake and the objectives that are being pursued. As this corroborates with the third chapter of this report (following immediately after this methodological chapter) this was not retaken in the preparatory impact assessment. Second, a RIA identifies the main options for achieving the pursued goal and analyses the likely impacts in the economic and social fields. Third, it outlines advantages and disadvantages of each option and examines possible synergies and trade-offs.
3 Affirming the need for EU intervention

It is important to not only deduce the need for EU intervention with respect to disqualifications from a policy document suggesting EU action, but to support that with an argumentation based on an analysis of theoretical and legal documentation, as well as with information on the acceptability and feasibility from a member state perspective. Therefore, this chapter comprises not only of the more theoretical and legal ‘gaps and inconsistencies in the existing disqualification acquis’, but also reports on the ‘member state perspectives’ with respect to EU intervention.

3.1 Gaps & inconsistencies in the existing disqualification acquis

3.1.1 Disqualifications in the approximation acquis & ECRIS

Following the introduction of the possibility to approximate offence and sanctions in the Amsterdam treaty\(^{13}\), a number of framework decisions have been adopted that include minimum requirements with respect to the constituent elements of offences and the sanctions thereto. The possibility to approximate sanctions means that it is possible for the member states to agree that any of the included behaviour must be punished with a particular disqualification. Therefore, it is interesting to review the appearance of such approximated disqualifications in the current instruments composing the approximation acquis. To visualise the current so-called approximation acquis\(^{14}\), a

\(^{13}\) See old Art. 31 (e) TEU.

\(^{14}\) The possibility to approximate offences and sanctions was formally introduced at EU level in Artt. 29 and 31(e) TEU as amended by the Amsterdam Treaty. They allowed for the adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. To that end Art. 34 TEU introduced the framework decision. With the entry into force of the Lisbon Treaty, the framework decision has been replaced by the Directive. Therefore, this table also includes the new Directives. For reasons of completeness the table also includes the references to the relevant joint actions, that can be characterized as the predecessors to the framework decisions. As argued elsewhere, it is important to note that the actual approximation acquis extends beyond this traditional framework decision only-view even when it is complemented with joint actions and directives. See e.g. DE BONDT, W. and VERMEULEN, G. "Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system", in COOLS, M., Readings On Criminal Justice, Criminal Law & Policing, Antwerp - Apeldoorn - Portland, Maklu, 2009, 2, p 87-124; DE BONDT, W. and VERMEULEN, G. "Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU", in COOLS, M., Readings On Criminal Justice, Criminal Law & Policing, Antwerp-Apeldoorn-Portland, Maklu, 2010, 4, p 15-40
table is inserted below providing an overview of the offence labels and the instruments in which a definition thereto is included.

<table>
<thead>
<tr>
<th>Offence label</th>
<th>as it has been defined in</th>
</tr>
</thead>
<tbody>
<tr>
<td>Euro counterfeiting</td>
<td>Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro as amended by the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro</td>
</tr>
<tr>
<td>Fraud and counterfeiting non-cash means of payment</td>
<td>Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment</td>
</tr>
<tr>
<td>Money laundering</td>
<td>Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime repealed and replaced by the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime</td>
</tr>
<tr>
<td>Illegal (im)migration</td>
<td>Council Framework Decision of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, as complemented by the Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence</td>
</tr>
<tr>
<td>Offence label</td>
<td>as it has been defined in</td>
</tr>
<tr>
<td>---------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Offences against information systems</td>
<td>Council Framework Decision of 21 February 2005 on attacks against information systems</td>
</tr>
<tr>
<td>Participation in a criminal organisation</td>
<td>Joint Action (98/733/JHA) of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union <em>repealed and replaced by</em> the Council Framework Decision of 24 October 2008 on the fight against organised crime</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>Offence label</th>
<th>as it has been defined in</th>
</tr>
</thead>
<tbody>
<tr>
<td>Racism and xenophobia</td>
<td>Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia repeated and replaced by the Council Framework Decision of 29 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law</td>
</tr>
</tbody>
</table>

The table inserted below provied an overview of the current approach with respect to disqualifications in that approximation acquis.

| Disqualification approach in approximation instruments | Euro counterfeiting | Non-cash Fraud and counterfeiting | Money laundering | Terrorism | Trafficking in human beings | Illegal immigration | Environmental offences | Corruption | Child Sexual exploitation and pornography | Drug trafficking | Offences against information systems | Participation in a criminal organisation | Offences against freedom of religion, belief and conscience | Offences against fundamental rights | Racism and xenophobia |
|--------------------------------------------------------|---------------------|----------------------------------|-----------------|-----------|----------------------------|---------------------|-----------------------|------------|--------------------------------------|-----------------|-------------------------------------|-----------------------------------|---------------------------------------------------|---------------------|
| - Sanctions which may include:                         | X                   | X                                | X               | X         | X                         | X                   | X                     |            |                                      |                 |                                     |                                   |                                                   |                     |
| - Penalties which may include:                          |                     | X                                | X               | X         | X                         | X                   | X                     |            |                                      |                 |                                     |                                   |                                                   |                     |
| (a) exclusion from entitlement to public benefits or aid;| X                   | X                                | X               | X         | X                         | X                   | X                     |            |                                      |                 |                                     |                                   |                                                   |                     |
| (b) temporary or permanent disqualification from the practice of commercial activities; | X                   | X                                | X               | X         | X                         | X                   | X                     |            |                                      |                 |                                     |                                   |                                                   |                     |
| (c) placing under judicial supervision;                 | X                   | X                                | X               | X         | X                         | X                   | X                     |            |                                      |                 |                                     |                                   |                                                   |                     |
| (d) a judicial winding-up order                         | X                   | X                                | X               | X         | X                         | X                   | X                     |            |                                      |                 |                                     |                                   |                                                   |                     |

The liability of Legal persons for money laundering is not regulated in the approximation instruments, but finds its legal basis in the second protocol to the PIF convention, OJ C 221 of 19.7.1997.

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An analysis of the approximation acquis and the position of disqualifications therein leads to the following conclusions.

First, the only approximated disqualification found in the approximation acquis consists of the mandatory temporary or permanent disqualification from exercising professional activities involving direct and regular contacts with children found in Art. 10 of the newest Directive on sexual exploitation of children and child pornography. That is also the only disqualification applicable to natural persons that is found in the existing approximation instruments. The other references to disqualifications are mere suggestions done in relation to the sanctioning of legal persons. In a way this is a missed opportunity to use the possibility to approximate sanctions to influence the existence of disqualifications in the national legal systems of the member states.

Second, however, in addition to the suggestions and the one approximated disqualification found in approximation instruments, it must be mentioned that approximated disqualifications can also be found in sector specific instruments regulating e.g. the system of public procurement in the member states. In the case study on public procurement developed below, due attention will be paid
to the inclusion of mandatory exclusion grounds in the European procurement directive. For the purpose of the analysis of the approximation instruments here, it can be recommended to consistently retake the approximation acquis that exists for disqualifications in new approximation instruments. More concretely, the new framework decision on organised crime can be used as an example. In Directive 2004/18/EC governing public procurement procedures, a mandatory exclusion grounds is introduced for candidates that have been convicted (amongst others) for participation in a criminal organisation. To delineate the scope of that offence label, a reference is included to the then existing joint action on the participation in a criminal organisation. More recently, the 2008 framework decision on participation in a criminal organisation repeals the joint action and approximates the said offence and the sanctions applicable to it. Taking account of the existence of the 2004 Procurement Directive, it could be recommended to at least retake the existing approximation acquis and include in the framework decision that member states are obliged to include a mandatory public procurement related exclusion ground for candidates that have been convicted for participation in a criminal organisation as defined in the instrument.

Third, though the suggestions for the introduction of disqualifications are consistent throughout the approximation instruments\textsuperscript{16} using the types of disqualifications included in the ECRIS-template at least more suggestions can be included. E.g. Prohibition to hold or to carry weapons as included in ECRIS code 3016 would be a valid suggestion with respect to participation in a criminal organisation or terrorism. Similarly, the Prohibition to issue cheques or to use payment/credit cards as included in ECRIS code 3018 would be a valid suggestion in relation to fraud non-cash means of payments. The Loss/suspension of right to be a legal guardian as included in ECRIS code Vb 3011 or the Obligation to be under the care/control of the Family as included in ECRIS code 5003 would be a valid suggestion in relation to sexual offences.

\subsection{Disqualifications in the cooperation acquis}

There are three EU cooperation instruments with a particular relevance for disqualifications. The first two concern the framework decision on alternative

\textsuperscript{16} Only the closure of the establishment is not generally introduced in all approximation instruments. This may be due to the perception that Legal persons and establishments cannot be involved in all offences. In the recently completed study on the liability of Legal persons for offences however, it was argued that as a baseline Legal persons can be involved in any offence, for involvement can be limited to e.g. instigation. See more in detail VERMEULEN, G., DE BONDT, W., RYCKMAN, C., Liability of legal persons for offences, Antwerp, Maklu, 2012.
sanctions and probation measures\textsuperscript{17} [hereafter FD Alternatives] and the framework decision on supervision orders\textsuperscript{18} [hereafter FD Supervision]. The third one concerns the European Protection Order in criminal matters\textsuperscript{19} [hereafter EPO]. It will be examined how these instruments relate to each other and what they entail for the scope of “disqualifications” in this Study.

3.1.2.1 Probation measures and supervision

The FD Alternatives deals with a number of disqualifications and governs the cross-border execution thereof upon the request of one member state and the obligation to recognize and execute in another member state. It regulates the recognition of judgments\textsuperscript{20} and probation decisions, the transfer of responsibility for the supervision of probation, measures and alternative sanctions and all other decisions related to the former.\textsuperscript{21} Its aims at facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public, and facilitating the application of suitable probation measures and alternative sanctions, in case of offenders who do not live in the convicing member state.

Following disqualification measures are covered by the FD Alternatives:

\begin{itemize}
\item an obligation for the sentenced person to inform a specific authority of any change of residence or working place;
\item an obligation not to enter certain localities, places or defined areas in the issuing or executing State;
\item an obligation containing limitations on leaving the territory of the executing State;
\item instructions relating to behaviour, residence, education and training, leisure activities, or containing limitations on or modalities of carrying out a professional activity;
\end{itemize}


\textsuperscript{19} By now, this initiative has become a nearly adopted instrument: COUNCIL OF THE EUROPEAN UNION, 24 November 2011, 2010/0802 (COD), Political Agreement on the European Protection Order.

\textsuperscript{20} Except for judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty (FD) 2008/909/JHA, recognition and execution of financial penalties and confiscation orders (resp. FD 2005/214/JHA and 2006/783/JHA).

\textsuperscript{21} Art. 2 FD Alternative.
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- an obligation to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons;
- an obligation to avoid contact with specific objects, which have been used or are likely to be used by the sentenced person with a view to committing a criminal offence;
- an obligation to cooperate with a probation officer or with a representative of a social service having responsibilities in respect of sentenced persons;

Second, the FD Supervision deals with the cross-border execution of disqualifications in the pre-trial stage. It covers the situation where a member state imposes a supervision measure on a non-national or non-resident who is a EU citizen as an alternative to provisional detention. Supervision measures may include, for instance, a prohibition to enter locations, an obligation to avoid contact with specific persons, or an obligation to report weekly to the police. Its aim is to ensure the due course of justice, to promote the use, in the course of criminal proceedings, of non-custodial measures for persons who are not resident in the member state where the proceedings are taking place and to improve the protection of victims and of the general public.
Following disqualification measures are covered by the FD Supervision:
- an obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings;
- an obligation not to enter certain localities, places or defined areas in the issuing or executing State;
- an obligation to remain at a specified place, where applicable during specified times;
- an obligation containing limitations on leaving the territory of the executing State;
- an obligation to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed.

22 For more reflection on this FD, see VERMEULEN, G., DE BONDT W. and RYCKMAN, C. (eds.) Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality. Maklu, 2012.
3.1.2.2  European Protection Order

The third EU instrument which is relevant to disqualifications is the European Protection Order in criminal matters\(^{23}\) [hereafter EPO]. Its purpose is to create the possibility for a member state in which a measure has been adopted with a view to protecting a person against another person which may endanger him/her, to issue a European Protection Order to another member state, enabling the latter to continue the protection of that person in its territory (Art. 1). It be noted that there also is a Proposal for a European Protection Order in Civil matters,\(^{24}\) [hereafter proposed EPO Civil] which aims at complementing the European Protection Order in criminal matters.\(^{25}\) The relation amongst these two instruments needs clarification. When comparing the purpose of the EPO in criminal matters to the definition of a protection measure in the proposed EPO Civil (Art. 2),\(^{26}\) it becomes clear that there is a very thin demarcation line between both instruments. According to the proposal, a ‘protection measure’ means “\textit{any decision, whatever it may be called, of a preventive and temporary nature taken by an authority in a Member State in accordance with its national law with a view to protecting a person when serious reasons exist to consider the person’s physical and/or psychological integrity or liberty to be at risk. It shall include measures ordered without the person causing the risk being summoned to appear}”\(^{27}\). The article goes on to give examples of such measures, a.o. an obligation not to enter certain localities or an obligation not to approach the protected person closer than a prescribed distance. Fortunately, the definition included in the EPO in criminal matters sheds more light on its distinction with the proposed EPO Civil: it explicitly states that a protection measure in this context means “\textit{a decision in criminal matters adopted in the issuing State [...] by which one or more of the prohibitions or restrictions [...] are imposed on a person causing danger in order to protect a protected person against a criminal act which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity}” (emphasis added). Based on this latter definition, it thus covers protection measures issued through a decision in criminal matters whereas protection measures covered by the proposed EPO Civil covers “\textit{any decision}” (read: any other decision). The reason

\(^{23}\) By now, this initiative has become a nearly adopted instrument: COUNCIL OF THE EUROPEAN UNION, 24 November 2011, 2010/0802 (COD), Political Agreement on the European Protection Order.


\(^{25}\) By now, this initiative has become a nearly adopted instrument: COUNCIL OF THE EUROPEAN UNION, 24 November 2011, 2010/0802 (COD), Political Agreement on the European Protection Order.

\(^{26}\) The criterion for comparison is the definition, because the purpose as such was not explicitly defined in the proposal.
that both instruments came to being separately was that the mechanisms used in the EPO in criminal matters based on Art. 82 TFEU, were deemed incompatible with the ambitious standard of mutual recognition already reached for civil matters, covered by Art. 81 TFEU. This became apparent following the consultations which the Commission held in the context of the EPO in criminal matters: they confirmed that many member states had already put civil law protection measures in place and it was found that such measures should follow the common standards used in civil matters, rather than the “more heavy” procedures which are common standard in criminal matters.

As logical as the distinction between both EPO’s may seem, the way the definitions have been construed do not exclude the possibility of confusion. After all, in some member states administrative authorities are allowed to take measures with a criminal justice finality, meaning that administrative authorities are competent to take measures “in the course of criminal investigations which present the characteristics of being an investigation following the commission of a specific criminal offence […] in order to identify and arrest, charge, prosecute or deliver judgment on those responsible.” Several cooperation instruments (not in the sphere of disqualifications) were drafted in order to solve this confusion and clearly indicate when ‘measures’ taken by ‘administrative’ authorities can come within the realm of the judicial cooperation in criminal matters. Suffice to refer to Art. 3 EU MLA, where it is said that that mutual legal assistance is also provided for procedures which according to the law of one (or both) of the member states “in respect of acts which are punishable […] by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.” A similar provision features in mutual recognition instruments, namely in Art. 1,a,i and ii FD Fin Pen. The criterion is thus the safeguards which are specific to criminal law procedures: as long as they are guaranteed (and in the system of Art. 3 EU MLA an appeal possibility before a judge also competent in criminal matters is assumed to do just that), ‘measures’ taken by administrative authorities can come within the criminal justice sphere.

For reasons of clarity and consistency, it is advised to include this reasoning in the drafting processes of respectively the EPO in criminal matters and the

proposed EPO Civil. An extra reason to do so, is that the enumeration of concrete measures which are targeted by both decisions, is very similar.

3.1.2.3 Interrelation and effect on scope of this Study

The EPO in criminal matters does not only risk of being confused with the proposed EPO Civil, it is also closely related to the FD Alternatives and the FD Supervision. Indeed, one might wonder what the added value of the EPO is, in light of the FD Alternatives on the one hand, and the FD Supervision, on the other. The EPO explicitly establishes its relation with these instruments. In Art. 20, it says that it will not affect the application of those decisions, in other words: the EPO exists next to the FD Alternatives and the FD Supervision. Art. 13 (3) and (4) EPO clearly mean that, when it concerns measures covered by the FD Alternatives or FD Supervision, the latter instruments need to be used instead of the EPO. Therefore, it is worth to stress the limited added value the EPO could have in comparison to those instruments. In relation to the FD Alternatives, the only situation which is exclusively covered by the EPO is where the victim moves, but the offender stays. In relation to the FD Supervision, the difference lies mainly in the purpose of the measure, given that the FD Alternatives not only aims at the protection of the victim, but was also designed to improve the social rehabilitation of the offender.

The described instruments all deal with the situation where one member state explicitly asks another member state to enforce a certain disqualification. As will be seen below (Chapter 5), the project team has developed a three-fold approach for future EU policy making in relation to disqualifications: it concerns a combination of three different regimes, whereby only the second one deals with the situation where a member state explicitly requests cooperation of the other member state. Within that regime, the proposed policy options only cover disqualifications which are not covered by the EPO, and/or the FD Alternatives, and/or the FD Supervision. In other words, for those disqualifications, the project team differs to the existing instruments. Even more so, it suggests an analogue approach for disqualifications which are currently not covered by these instruments. It is important to note that the EPO came to being in the

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30 As the EPO Criminal is nearly adopted and it can thus be expected that – politically – it will not be desirable to immediately alter it, at least the proposed EPO Civil should be modified (so as to exclude disqualifications taken by and administrative authority but with a criminal justice finality). However, the EPO Criminal does not contain a clause outlining its relationship with the proposed EPO Civil (which is logical, given that the latter is a proposal rather than law). Consequently, if the demarcation between both instruments is meant to be clear, if and when the proposed EPO Civil becomes law, it is advised to include a specific clause in the EPO Criminal dealing with the relation between the two instruments).

context of the need, established in the Stockholm Programme\textsuperscript{32} and the Commission’s Action Plan implementing the Programme\textsuperscript{33} to create an integrated and co-ordinated approach to victims, in line with the October 2009 JHA Council Conclusions.\textsuperscript{34} Thus, it serves a very specific purpose, being the protection of victims throughout the EU. As was seen above, the FD Alternatives and the FD Supervision, too, serve specific purposes. Evidently however, there are several other disqualifications which are not covered by any of these instruments – and which do serve the purpose of protecting (potential) victims. Additionally and evidently, many other types of disqualifications came into being with very different purposes (e.g. disqualifications related to procurement). None of the disqualifications as identified by the project team (see table below under 3.1.3.1), are \textit{a priori} excluded from the second regime. Precisely because of this combination between certain existing instruments and the need for an overall application of mutual recognition in case of explicit request outside the context of these instruments, it is important that the future mutual recognition rules in the disqualifications field would unambiguously indicate which disqualifying measures are involved and explanatory memoranda are warranted, indicated to what extent the different mutual recognition instruments differ in terms of scope.

Outside the realm of the second regime, the EPO, the FD Alternatives and the FD Supervision do not apply, given that no request from one member state to another is part of any of the other regimes. Consequently, none of the disqualifications as identified by the project team (see table below under 3.1.3.1), including measures which fall under the FD Alternatives, FD Supervision and/or EPO, are \textit{a priori} excluded from any of those regimes. It ranges from hunting and fishing licence over commercial activities and public benefits to the restriction of civil and political rights (to name but a few).

For the bulk of the activities listed in the table, no integrated legislative approach exists. Granted, some restricted activities or rights are covered by certain legislative instruments; however, they mostly feature in an instrument which deals with the broader context of the concerned right (activity). In other words, in those instruments the primary purpose is not to deal with the disqualification. Rather, they list one or more potential disqualifications, as one of the measures related to the topic which is subject to the instrument. One of the

\textsuperscript{34} 2969th JAI Council meeting of 23/10/2009, [14936/09 (Presse 306)].
many examples is the framework decision on Terrorism,\textsuperscript{35} which in its article 8 prescribes certain disqualifying measures which may or may not be included in national legislations. The project team did not include these instruments in this analysis of possibly overlapping instruments. The reason is that this would simply not be feasible, nor desirable: only those instruments which deal in their entirety with disqualifying effects are worth examining in terms of scope. After all, if and when an overall approach to disqualifications would be elaborated upon, it is essential to establish the relation between such an arrangement and the few instruments dealing with disqualifications specifically.

3.1.3 \textbf{No binding definition at EU level}

The project team wishes to underline the absence of a common legally binding definition of “disqualifications” at the EU level, although a description of disqualification is given by the Green Paper on approximation\textsuperscript{36} where at point 2.1.7, it is stated that “a disqualification is a mere penalty withdrawing or restricting rights or a preventive measure whereby a natural or legal person is prohibited, for a limited or unlimited period, from exercising certain rights, occupying a position, going to certain places or doing certain things”. It thus covers a wide part of the criminal procedure given that it refers not only to disqualifications as penalties but also disqualifications as mere preventive measures.

The only European legally binding definition available that refers to the general concept of disqualification (as opposed to enumerating possible disqualifications without introducing a conceptual definition), is the one described in a Convention of the Council of Europe, namely, the European Convention of 28 May 1970 on the international validity of criminal judgments where, in Art 1.e, it is stated that a “disqualification” means any loss or suspension of a right or any prohibition or loss of legal capacity. The project team advocates to use a broad definition of a disqualification, given that disqualifications differ considerably from member state to member state.

Without wanting to make a choice between the existing definitions; it is certain that, as mentioned above, the scope of this Study goes well beyond the definition listed in the White Paper, where the European Commission has described disqualifications as “a special category of penalty which raise specific problems in connection with the availability and exchanges of information and with the


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It goes on to specify that the White Paper only deals with disqualifications in relation to a convictions, and that the disqualifications will expressly be ordered by the judge at the time or that they will be the automatic result of a conviction. The project team would argue against using solely the term ‘penalty’ in a definition of disqualifications, for two reasons. First, ‘penalty’ in many countries implies the involvement of a judicial authority. As will be shown below, in the majority of the member states other authorities are also involved in imposing/enforcing disqualifications. Second, the term ‘penalty’ can be perceived to entail that only measures imposed at the trial phase can be regarded as disqualifications. Given that, here too, the landscape seems to be far more complex in practice, it is advised to also include pre-trial and post-trial stages (as was done in the definition given in the Commission Green Paper, where reference was made to “a mere penalty […] or a preventive measure”.

In spite of the lack of an EU level definition, there have been a number of EU initiatives, to regulate disqualifications, both in a general as well as in an ad hoc thematic fashion. The field of driving disqualifications is a good example of the thematic fashion in which legal definition on what a disqualification constitutes, is sometimes elaborated: a detailed legally binding definition of driving disqualification is reported in the Convention on Driving Disqualifications of 17 June 1998\(^{38}\) that under Art 1.1.a states that ‘driving disqualification’ shall mean any measure related to the commission of a road traffic offence which results in withdrawal or suspension of the right to drive of a driver of a motor vehicle and which is no longer subject to a right of appeal. The measure may constitute either a primary, secondary or supplementary penalty or a safety measure and may have been taken either by a judicial authority or by an administrative authority. In terms of more general initiatives regarding the development of a definition for disqualifications, the Initiative of the Kingdom of Denmark concerning cooperation regarding disqualifications\(^{39}\) never got airborne.


\(^{39}\) Kingdom of Denmark within the COUNCIL OF THE EUROPEAN UNION, “Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on increasing cooperation between European Union Member states with regard to disqualifications”, OJ C 223/17, 19/09/2002.
3.2 Member state perspective on EU intervention

In order to establish whether or not member states deem it necessary to elaborate on an EU strategy intervening in the national legislation governing disqualifications as sanctioning measures in the EU, the project team looked into the use of the current instruments and the perceived necessity to fill any of the existing gaps.

First, member states were asked whether they use any of the existing instruments to seek enforcement of a disqualification imposed in their jurisdiction. The replies to question 3.2.1 reveal that at least 12% (possibly 20% taking account that no reply was received from 8% of the member states) of the member states do not use any of the existing international instruments.

When further looking into the kind of instruments used, the replies to question 3.2.1 reveal that of EU instruments to enforce national disqualifications, the CoE Convention on validity of judgements is the most commonly used legal basis. When redesigning the European policy and considering the introduction of new or amended versions of existing instruments, it is important to also take account of possible existing bilateral agreements between a group of member states.

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AFFIRMING INTERVENTION NEED

At least 7 member states indicated to use bilateral legal instruments. Using the ‘other’ option, member states pointed to the importance of other instruments and/or principles used as a legal basis.

<table>
<thead>
<tr>
<th>3.2.1 What legal basis do you currently use to seek enforcement of your disqualifications or enforce foreign disqualifications?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The Council of Europe Convention on the International Validity of Criminal Judgments</strong></td>
</tr>
<tr>
<td>BU CZ EE BE LV LT NL RO SE FR EL ES</td>
</tr>
<tr>
<td>The Framework Decision on the supervision and probation measures and alternative sanctions</td>
</tr>
<tr>
<td>FI UK LV LT NL FR EL</td>
</tr>
<tr>
<td>Another multilateral legal instrument</td>
</tr>
<tr>
<td>CY FI SL SE EL</td>
</tr>
<tr>
<td>Another bilateral legal instrument</td>
</tr>
<tr>
<td>FI MT RO BE SL FR EL</td>
</tr>
<tr>
<td>Cooperation based on trust and reciprocity without specific legal instrument</td>
</tr>
<tr>
<td>CY FI HU LT RO SE ES</td>
</tr>
<tr>
<td>Other</td>
</tr>
<tr>
<td>BE BU CY LU PT DE SK ES</td>
</tr>
</tbody>
</table>

An example of other multilateral legal instruments is the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.\(^{41}\) Belgium, for example, mentioned the use of the CoE Convention on Conditionally Released offenders.\(^{42}\) It has been ratified by three member states.\(^{43}\) Another instrument that was mentioned by the respondents is the CoE Convention on transfer of prisoners.\(^{44}\) It be noted that not all member states have bilateral agreements with other member states, some of those who did not, have concluded bilateral agreements with third states. Estonia for example, has concluded a bilateral agreement with Austria. Sometimes it is a mixture: it should be mentioned, for example, that between the Nordic countries decisions can be recognized on the basis of an agreement between administrative authorities.\(^{45}\)

Austria indicated not to use any of these instruments in the context of disqualifications. However, Austrian public authorities may inspire foreign authorities to check the requirements for a disqualification imposed by a foreign authority. Some countries have not yet indicated to use the Framework Decision

\(^{41}\) HCCH, Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

\(^{42}\) COUNCIL OF EUROPE (1964), 30 November 1964, “European Convention on the supervision of conditionally sentenced or conditionally released offenders”, CETS 051.

\(^{43}\) Surprisingly, only one of the three member states concerned indicated to indeed use other multilateral instruments, indicating the relatively low relevance of the said instrument for the context of disqualifications.


\(^{45}\) Or even informally.
on the supervision and probation measures and alternative sanctions,\textsuperscript{46} [referred to below as FD Alternatives] because it is in the process of being implemented (e.g. Belgium, the Czech Republic). Despite having indicated to use the CoE Convention on validity of judgements, the Czech Republic does not seek enforcement of its disqualifications and cannot enforce foreign disqualifications, it adds that there is no legal basis for such action at present in the Czech legal system. According to the Criminal Code (Section 11) a criminal judgment of another state cannot be enforced on the territory of the Czech Republic nor to have there any other effect if not stipulated by an Act or international treaty otherwise. There is no such international treaty - the Czech Republic is not a party to European Convention on the International Validity of Criminal Judgments and national legal provisions do not allow such procedure. The Czech Republic has contemplated accession to the 1970 Convention when implementing EU acquis before joining EU. There are two main reasons for not being a party to the 1970 Convention – low number of parties to the Convention and that such accession would have fundamental impact on the Czech legal system. This being said, however, the Czech Republic is in the process of implementing the FD Alternatives. The same goes for Spain, where – as opposed to the Czech Republic – the 1970 Convention has been ratified, but to date, it has not led to judicial practice related to enforcement of disqualifications, given that most countries which have ratified the European convention on the international validity of criminal judgments do not belong to the countries Spain is most used to cooperate with.

In Germany, no sufficient legal basis exists. The enforcement of foreign disqualifications requires a bi- or multilateral treaty (Section 49 para 5 Law on International Legal Assistance in Criminal Matters), and no such treaties have been concluded by Germany. Interestingly, despite this absence of legal basis, Germany did not indicate to see a need to extend the legal basis, based on the argument that first, the flow of information should be improved. From the nine countries who indicated not to see a need to extend the current legal basis, five use one or more of the instruments listed in 3.2.1 and seem to deem them sufficient. A majority of the member states, however, clearly indicate to see a need for an extension of the legal basis. This is meaningful, given that almost all of them already use a mechanism appearing in 3.2.1, but clearly do not seem the sufficient. Especially the CoE Convention on the validity of judgments is clearly not experienced to form a sufficient legal basis to employ in the field of disqualifications: no less than eight of the twelve member states who indicated

to use that Convention, also said that they saw a need for an extension of the legal basis in relation to disqualifications.

3.2.2 Do you consider there to be a practical need to extend the current legal basis?

3.3 Conclusion

The above evaluation of the current legal framework and the member state use and perceptive thereof affirmed the need for the EU intervention that was expressed in a number of policy documents and most recently with the call for tender underlying this Study. Using that affirmation as a base line, the member state analysis can continue with the identification of the conceptual differences that will influence the development of the future policy options.
4 Member state conceptual diversity

In order to fully understand the subject matter of disqualifications in the EU and formulate acceptable and feasible policy options, evidently, a thorough understanding of its scope is necessary. One of the gaps identified is the lack of a definition of what constitutes a ‘disqualification as a sanction measure’. To anticipate to the fact that asking member states to define what constitute a disqualification will not necessarily provide the information needed to conduct a comparative analysis on the legislative conceptual diversity in the member states, questions were directed to the systematical differences and the limitation of the scope of disqualifications.

Therefore, this chapter examines the (lack of) existing definitions at EU level, the applicable legislation and contains a scope demarcation in relation to certain instruments applicable at EU level. Subsequently, based on the imput received by the member states, an overview is provided of the considerable variety that occurs throughout the EU, particularly the variety ratione poenae, ratione personae and ratione auctoritatis.
CONCEPTUAL DIVERSITY

4.1 Ratione poenae

The conceptual diversity *ratione poenae* can refer to a number of differences. First, there is the distinction between the types of disqualifications as sanction measures that can be imposed (typology) and the way they are applied in a specific situation (applicability).

Second, the applicability of the disqualification can be either offence related (i.e. imposed in the context of a criminal procedure) or access related (i.e. felt only when the person involved seeks to get access to a certain profession or another right to which the disqualification relates to. The access related disqualifications are governed via the technique of requesting certificates of non-prior conviction to be produced. The offence related application of disqualifications is more complex. Not only should a distinction be made between on the one hand disqualifications as a preliminary measure and on the other hand disqualifications that apply in the convictions stage, the latter comprise both disqualifications that are explicitly imposed and disqualifications that are implicitly added to a particular conviction.

The following paragraphs aim at elaborating on the figure inserted below.
4.1.1 Typology of the disqualifications

The first variety ratione poenae follows from the fact that, in terms of content (typology), member states many different disqualifications: most member states apply a wide range of disqualifications: their national systems foresee applications in the sphere of driving licences, hunting and fishing licences, concerning weapons, in the field of commercial activities, regarding managing, directing or leading a company, in the field of working with children, regarding other professions or functions, in relation to public benefits, aids or funding, regarding closure of an establishment, in relation to the freedom to go somewhere, in the sphere of civil/political rights and/or the right to vote, regarding the position within a family, and in relation to animal and sports. Some, however, only apply disqualifications in some of these domains.

Even if they apply all, the details of the measures differ greatly: some, for example, apply temporary prohibitions; others permanent. Of course, the matter is often nuanced. An example can be found in the Netherlands: in this member state, the temporary or permanent nature of a disqualification depends on the way information is obtained and which information is used. When the issuing of a certificates/permits/licences is dependent on the certificate of non-prior conviction as issued by the mare, there is little room for manoeuvring by the administering authority. If however, our national legislation allows the administering authority to rely on a personal statement of the person involved or is allowed to differentiate the disqualifying effect based on the time lapse between the offence and the issuing of the certificates/permits/licences, it is possible that the administering authority attaches a fading effect to the offence. The severity fades over time and the administering authority may deem the disqualifying effect for the specific offence disproportionate.

The variety in content of disqualifications will be discussed in greater detail in relation to the three case studies included in this report, namely public procurement, working with children and driving disqualifications (see below Chapter 6). As to the many other domains, the project team construed a detailed overview of different possible typologies and included which member states apply which typology. Even though this list is highly precise (no less than seventy-five typologies were included) it is still not exhaustive. This, however, is also reflected in the table, given that for every different sector, a category “other” was included, again with an indication of which member states’ systems have such an “other” typology. The table is included in the following subsection, given the link with the question whether or not it concerns imposed disqualifications, or disqualifying effects at a later stage.
CONCEPTUAL DIVERSITY

4.1.2 Applicability: offence related vs access related

As elaborated by the European Commission in its Communication on disqualifications arising from criminal convictions in the EU, different kinds of disqualifications, prohibitions and incapacities exist, and the concepts of disqualifications, prohibitions and incapacities are not used in a consistent manner.

In order to map the diversity in terms of applicability of disqualifications, the project team asked the member states to indicate whether or not a certain disqualification exists in their member state, and, if so, whether it concerns an ‘offence related disqualification’ (i.e. imposed at a preliminary stage or conviction stage or added to a conviction) and/or whether it concerns an ‘access related disqualification’ (i.e. concerns a disqualification that appears in a later stage based on the rules regulating access to – for example – certain activities, professions, financing opportunities.)

It be noted that many countries apply a combination of offence and access related disqualifications. A good in example is the Netherlands. There, in general, a distinction should be made between the licence itself and the capacity to do whatever is licenced. A judge cannot withdraw a licence but can only limit the capacity to use it. It is up to the licencing authority to withdraw the licence, based on the conviction and possibly the judge’s limitation of the capacity.

In the context of commercial activities, again the same distinction is made. First, with respect to the imposing of disqualifications: in economic criminal law there are some possibilities for a temporary ban from conducting commercial activities. Here also, permanent bans are a result of the non-re-administering of a certificates/permits/licences and not so much the result of a permanent disqualifying sanction imposed.

Second, with respect to the disqualifying effect: almost any type of commercial activity, even plain fund raising requires a form of certificates/permits/licences; this means that there is plenty of opportunity to limit the administering of certificates/permits/licences based on the presence of convictions.

### 1.2 Which of the listed types of disqualifications appear as sanction measures in your national legislation?

<table>
<thead>
<tr>
<th>Typology of the disqualification</th>
<th>Offence related: Imposed /added disqualification</th>
<th>Access related: Disqualifying effect in a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DRIVING LICENCE</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Restriction of the driving licence (e.g. not being allowed to drive during the weekends)</td>
<td>UK HU LV NL SK FR EL</td>
<td>CY CZ HU SE FR AT</td>
</tr>
<tr>
<td>Temporary suspension of the driving licence</td>
<td>BU CY EE FI UK HU BE LT MT LU NL DE IT RO SL SK FR EL ES</td>
<td>BU CY CZ FI HU NL SE FR AT</td>
</tr>
<tr>
<td>Permanent withdrawal or cancellation of the driving licence</td>
<td>BU CY BE MT LU PT DE IT FR EL ES</td>
<td>BU CY CZ LT NL SK FR</td>
</tr>
<tr>
<td>Temporary prohibition to drive certain vehicles</td>
<td>CY CZ UK HU BE PL RO SL SK FR EL</td>
<td>BU CY NL PL SE FR AT</td>
</tr>
<tr>
<td>Permanent prohibition to drive certain vehicles</td>
<td>BU CY UK HU BE PL EL</td>
<td>BU CY NL PL</td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification of a driving licence</td>
<td>BU CY UK BE DE FR</td>
<td>CY NL PL</td>
</tr>
<tr>
<td><strong>HUNTING AND FISHING LICENCE</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Temporary immobilisation of a vessel</td>
<td>BU CY UK BE ES</td>
<td>CY NL PL SE</td>
</tr>
<tr>
<td>Temporary suspension of the fishing licence</td>
<td>BU CY CZ EE FI UK BE LV LT MT PT SL SK ES</td>
<td>BU CY CZ NL PL SE AT</td>
</tr>
<tr>
<td>Permanent withdrawal of the fishing licence</td>
<td>CY BE LU PT FR ES</td>
<td>CY LV LT NL PL DE</td>
</tr>
<tr>
<td>Temporary suspension of the hunting licence</td>
<td>BU CY CZ FI UK BE LV LT DE IT SL SK EL ES</td>
<td>BU CY CZ FI NL PL AT</td>
</tr>
<tr>
<td>Permanent withdrawal of the hunting licence</td>
<td>CY BE MT LU DE IT FR EL</td>
<td>CY LT NL PL</td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification of a hunting or fishing licence</td>
<td>CY CZ UK BE LV</td>
<td>CY CZ</td>
</tr>
<tr>
<td><strong>WEAPONS AND OTHER ITEMS</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Permanent prohibition to hold or carry weapons</td>
<td>CY FI UK HU BE LT MT LU IT FR ES</td>
<td>BU CY EE FI HU LV LT LU NL PL DE SL SK FR AT</td>
</tr>
<tr>
<td>Permanent prohibition to possess or use certain items other than weapons</td>
<td>CY FI LT MT LU ES</td>
<td>BU CY FI LY LU NL PL DE SL SK AT</td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to weapons or other items</td>
<td>BU EE UK LV MT IT SL SK FR EL ES</td>
<td>BU SE ES</td>
</tr>
<tr>
<td><strong>COMMERCIAL ACTIVITIES</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Temporary disqualification from the practice of commercial activities</td>
<td>BU CY CZ EE FI UK HU BE LV LT MT LU NL PL PT DE IT SK FR ES</td>
<td>BU CY CZ FI HU BE LV LU NL SE FR ES AT</td>
</tr>
</tbody>
</table>
1.2 Which of the listed types of disqualifications appear as sanction measures in your national legislation?

<table>
<thead>
<tr>
<th>Typology of the disqualification</th>
<th>Offence related: Imposed / added disqualification</th>
<th>Access related: Disqualifying effect in a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent disqualification from the practice of commercial activities</td>
<td>BU CY BE MT LU DE</td>
<td>BU CY CZ FI HU BE LV LU NL SL SK</td>
</tr>
<tr>
<td>Temporary disqualification from the practice of industrial activities</td>
<td>BU CY CZ EE UK BE LT LU NL PT DE IT RO SK FR ES</td>
<td>BU CY CZ BE LU NL PL FR ES AT</td>
</tr>
<tr>
<td>Permanent disqualification from the practice of industrial activities</td>
<td>BU CY BE LU DE IT SL</td>
<td>BU CY BE LU NL SK</td>
</tr>
<tr>
<td>Temporary disqualification from the practice of social activities</td>
<td>BY CZ UK HU LT MT NL IT RO SK</td>
<td>BU CZ NL PL AT</td>
</tr>
<tr>
<td>Permanent disqualification from the practice of social activities</td>
<td>BU LU PL IT SL</td>
<td>BU LU NL PL SK</td>
</tr>
<tr>
<td>Prohibition to issue cheques or to use payment/credit cards</td>
<td>UK LT MT LU PT IT SK</td>
<td>CY LU</td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to commercial activities</td>
<td>UK DE</td>
<td>IT</td>
</tr>
</tbody>
</table>

**MANAGING, DIRECTING OR LEADING A COMPANY**

<table>
<thead>
<tr>
<th>Type of disqualification</th>
<th>Offence related: Imposed / added disqualification</th>
<th>Access related: Disqualifying effect in a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Temporary prohibition of a natural person with a leading position in a company within a certain concerned business from carrying on that particular or comparable business activity in a similar position or capacity</td>
<td>BU CY EE FI UK HU BE LV LT MT PL PT DE IT SL SK FR EL ES</td>
<td>BY CY CZ FI HU NL PL PT SL SE FR AT</td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to managing activities</td>
<td>CZ UK</td>
<td></td>
</tr>
</tbody>
</table>

**WORK WITH CHILDREN**

<table>
<thead>
<tr>
<th>Type of disqualification</th>
<th>Offence related: Imposed / added disqualification</th>
<th>Access related: Disqualifying effect in a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent prohibition for a natural person from exercising professional activities related to the supervision of children</td>
<td>CY UK BE LV LU PL PT DE IT RO EL AT</td>
<td>BY CY CZ FI UK LV LU NL PL SL SK</td>
</tr>
<tr>
<td>Temporary prohibition for a natural person from exercising professional activities related to the supervision of children</td>
<td>BU CY CZ UK BE LT MT NL PL DE IT RO SL SK FR ES AT</td>
<td>CY CZ EE NL PL FR</td>
</tr>
<tr>
<td>Permanent prohibition for a natural person from exercising professional activities involving regular contacts with children</td>
<td>CY UK BE LV LU PL DE IT RO EL AT</td>
<td>BU CY CZ FI UK LV LU NL PL SK</td>
</tr>
<tr>
<td>Temporary prohibition for a natural person from exercising professional activities involving regular contacts with children</td>
<td>BU CY CZ UK BE LT MT NL PT DE SL SK FR ES AT</td>
<td>BU CY CZ NL FR</td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to working with children</td>
<td>UK DE</td>
<td></td>
</tr>
</tbody>
</table>
### Conceptual Diversity

1.2 Which of the listed types of disqualifications appear as sanction measures in your national legislation?

<table>
<thead>
<tr>
<th>Typology of the disqualification</th>
<th>Offence related: Imposed /added disqualification</th>
<th>Access related: Disqualifying effect in a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>children</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**OTHER PROFESSIONS OR FUNCTIONS**

<table>
<thead>
<tr>
<th>Typology of the disqualification</th>
<th>Offence related: Imposed /added disqualification</th>
<th>Access related: Disqualifying effect in a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Temporary prohibition for a lawyer from practicing a legal profession</td>
<td>BU CZ FI UK LT MT NL PL PT IT RO SK FR EL ES</td>
<td>BU CY CZ FI HU LV NL PL DE SE FR ES AT</td>
</tr>
<tr>
<td>Permanent prohibition for a lawyer from practicing a legal profession</td>
<td>HU LV LT MT LU PL IT SL SK FR EL</td>
<td>CY CZ EE FI HU LV LY NL PL PT DE SK FR AT</td>
</tr>
<tr>
<td>Temporary prohibition to practice (even through an intermediary) occupational activity in the exercise of which an offence was committed</td>
<td>CY CZ LT MT NL PL PT DE IE RO SL SK FR ES</td>
<td>CY CZ FI NL PL SE FR</td>
</tr>
<tr>
<td>Permanent prohibition to practice (even through an intermediary) occupational activity in the exercise of which an offence was committed</td>
<td>CY LU PL DE IT SK FR</td>
<td>CY CZ FI LU NL PL FR</td>
</tr>
<tr>
<td>Temporary prohibition to practice directly the occupational activity in the exercise of which an offence was committed</td>
<td>BY CY CZ UK LT MT NL PT DE IT RO SL SK SE EL ES</td>
<td>BY CY CZ FI NL PL SE AT</td>
</tr>
<tr>
<td>Permanent prohibition to practice directly the occupational activity in the exercise of which an offence was committed</td>
<td>CY UK LU DE EL ES</td>
<td>CY CZ FI LU NL PL SK AT</td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to professions or functions</td>
<td>BU ES</td>
<td>BU DE ES</td>
</tr>
</tbody>
</table>

**PUBLIC BENEFITS, AID, FUNDING**

<table>
<thead>
<tr>
<th>Typology of the disqualification</th>
<th>Offence related: Imposed /added disqualification</th>
<th>Access related: Disqualifying effect in a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent exclusion from entitlement to public benefits or aid</td>
<td>CY BE IT RO EL</td>
<td>CY EE LV NL SK</td>
</tr>
<tr>
<td>Temporary exclusion from entitlement to public benefits or aid</td>
<td>BU CY UK BE MT PL PT IT RO SK FR ES</td>
<td>BU CY CZ LV NL PL</td>
</tr>
<tr>
<td>Permanent exclusion from entitlement to tax relief</td>
<td>CY MT</td>
<td>CY NL</td>
</tr>
<tr>
<td>Temporary exclusion from entitlement to tax relief</td>
<td>BU CYES</td>
<td>CY CU HY NL</td>
</tr>
<tr>
<td>Permanent exclusion from participation in a procurement procedure</td>
<td>CY UK LT MT LU NL PT EL</td>
<td>CY NL IT</td>
</tr>
<tr>
<td>Temporary exclusion from participation in a procurement procedure</td>
<td>BU CY CZ UK LT MT EL ES</td>
<td>CY NL AT</td>
</tr>
<tr>
<td>Permanent exclusion from obtaining public subsidies</td>
<td>CY EL</td>
<td>CY NL</td>
</tr>
<tr>
<td>Temporary exclusion from obtaining public subsidies</td>
<td>BY CY LT PT FR EL ES</td>
<td>BU CY NL</td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to public benefits, aid</td>
<td>FR</td>
<td>FR</td>
</tr>
</tbody>
</table>
## Conceptual Diversity

### 1.2 Which of the listed types of disqualifications appear as sanction measures in your national legislation?

<table>
<thead>
<tr>
<th>Typology of the disqualification</th>
<th>Offence related: Imposed /added disqualification</th>
<th>Access related: Disqualifying effect in a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>or funding</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Closure of an establishment</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial winding-up order</td>
<td>CY CZ EE UK BE LV MT LU NL PT BU SK FR EL ES</td>
<td>BU LU SK FR</td>
</tr>
<tr>
<td>Temporary closure of establishments which have been used for committing an offence</td>
<td>CY UK LT MT LU NL PT RO SK FR ES</td>
<td>NL SK FR</td>
</tr>
<tr>
<td>Permanent closure of establishments which have been used for committing an offence</td>
<td>BU EE UK LV LT LU PT IT SL SK FR EL ES</td>
<td>BU LU NL SK FR</td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to the closure of an establishment</td>
<td>ES</td>
<td></td>
</tr>
<tr>
<td><strong>Prohibition to go somewhere</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Permanent prohibition from frequenting certain places</td>
<td>CY BE LU PL FR EL</td>
<td>CY LU NL PL FR</td>
</tr>
<tr>
<td>Temporary prohibition from frequenting certain places</td>
<td>CY CZ EE FI UK HU BE LV LT MT NL PL PT IT RO SL SK FR EL ES AT</td>
<td>CY FI HU LT NL PL IT SE FR</td>
</tr>
<tr>
<td>Permanent prohibition to stay in certain places</td>
<td>CY LU PL FR EL</td>
<td>CY LU NL PL FR</td>
</tr>
<tr>
<td>Temporary prohibition to stay in certain places</td>
<td>CY CZ EE UK LV LT MT NL PL PT IT RO SL SK FR EL ES AT</td>
<td>CY LT NL PL IT SK SE FR</td>
</tr>
<tr>
<td>Permanent prohibition from entry to a certain mass event</td>
<td>CY LU EL</td>
<td>CY LU NL</td>
</tr>
<tr>
<td>Temporary prohibition from entry to a certain mass event</td>
<td>BU CY CZ EE UK LV LT MT NL PL PT IT RO SL SK FR EL ES AT</td>
<td>BU CY LT NL PL SE</td>
</tr>
<tr>
<td>Permanent prohibition to enter in contact with certain persons through whatever means</td>
<td>CY EE BE MT LU PL EL</td>
<td>CY LU PL</td>
</tr>
<tr>
<td>Temporary prohibition to enter in contact with certain persons through whatever means</td>
<td>BU CY CZ FI UK LV LT MT NL PL PT DE IT RO SL SK FR EL ES AT</td>
<td>BU CY FI HU LT PL SE</td>
</tr>
<tr>
<td>Permanent restriction to travel abroad</td>
<td>CY CZ LU</td>
<td>CY LU NL</td>
</tr>
<tr>
<td>Temporary restriction to travel abroad</td>
<td>CY EE FI UK BE LV LT MT LU NL PL DE IT FR EL ES AT</td>
<td>BY CY FI HU LT PL IT SK</td>
</tr>
<tr>
<td>Permanent placement under electronic surveillance</td>
<td>UK</td>
<td></td>
</tr>
<tr>
<td>Temporary placement under electronic</td>
<td>EE FI BE NL PL IT SK</td>
<td>FI HU PL PT DE IT</td>
</tr>
</tbody>
</table>
### Conceptual Diversity

#### 1.2 Which of the listed types of disqualifications appear as sanction measures in your national legislation?

<table>
<thead>
<tr>
<th>Typology of the disqualification</th>
<th>Offence related: Imposed / added disqualification</th>
<th>Access related: Disqualifying effect in a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>surveillance</td>
<td>FR ES AT</td>
<td></td>
</tr>
<tr>
<td>Permanent obligation to report at specified times to a specific authority</td>
<td>LU EL.</td>
<td>LU</td>
</tr>
<tr>
<td>Temporary obligation to report at specified times to a specific authority</td>
<td>BY CY CZ EE FI UK BE LV LT MT LU NL PL PT DE IT RO SK FR EL ES</td>
<td>BU FI FU LU IT SK</td>
</tr>
<tr>
<td>Permanent obligation to stay/reside in a certain place</td>
<td>CY UK AT</td>
<td>CY</td>
</tr>
<tr>
<td>Temporary obligation to stay/reside in a certain place</td>
<td>BU CY CZ EE FI UK BE LV LT MT LU NL PL PT IT SL SK EL ES</td>
<td>BUY CY FI HU LU PL</td>
</tr>
<tr>
<td>Obligation to be at the place of residence on a set time</td>
<td>CZ EE LT NL PT IT SK FR ES AT</td>
<td></td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to the prohibition to go or leave somewhere</td>
<td>CY CZ UK DE IT ES</td>
<td>CY</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CIVIL AND POLITICAL RIGHTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent loss of capacity to hold or to be appointed to public office</td>
</tr>
<tr>
<td>Temporary suspension of capacity to hold or to be appointed to public office</td>
</tr>
<tr>
<td>Permanent loss of right to be an expert in court proceedings/ witness under oath/juror</td>
</tr>
<tr>
<td>Temporary suspension of right to be an expert in court proceedings/ witness under oath/juror</td>
</tr>
<tr>
<td>Permanent loss of right of decoration or title</td>
</tr>
<tr>
<td>Temporary suspension of right of decoration or title</td>
</tr>
<tr>
<td>Loss of military rank</td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to civil or political rights</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>RIGHT TO VOTE/ TO BE ELECTED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Suspension of the right to vote or to be elected</td>
</tr>
</tbody>
</table>
### Conceptual Diversity

1.2 Which of the listed types of disqualifications appear as sanction measures in your national legislation?

<table>
<thead>
<tr>
<th>Typology of the disqualification</th>
<th>Offence related: Imposed / added disqualification</th>
<th>Access related: Disqualifying effect in a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loss of the right to vote or to be elected</td>
<td><em>BU CY CZ UK BE LU NL PL PT IT EL</em></td>
<td><em>BU CY CZ LT MT LU NL PL SK</em></td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to the right to vote or be elected</td>
<td><em>FR (loss of nationality)</em></td>
<td><em>FR</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Position Within the Family</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Suspension of the parental authority</td>
<td>By <em>CY CZ UK BE MT LU NL PT IT RO SK FR EL ES</em></td>
</tr>
<tr>
<td>Loss of the parental authority</td>
<td>By <em>BU CY CZ UK BE MT LU NL PT IT SK FR EL ES</em></td>
</tr>
<tr>
<td>Suspension of the right to be a legal guardian</td>
<td>By <em>BU CY FI UK BE MT LU NL IT RO SK FR EL ES</em></td>
</tr>
<tr>
<td>Loss of the right to be a legal guardian</td>
<td>By <em>BU CY CZ FI UK BE MT LU NL IT FR EL</em></td>
</tr>
<tr>
<td>Obligation to be under the control of the family</td>
<td>By <em>CY LZ BE LT MT NL IT RO SK EL ES</em></td>
</tr>
<tr>
<td>Obligation to be under the care of the family</td>
<td>By <em>CY CZ HU BE MT NL SK EL ES</em></td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to the position within the family</td>
<td>By <em>LT</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Animals / Sports</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibition to keep animals</td>
<td>By <em>CY EE FI UK BE LV MT LU DE IT SK FR ES</em></td>
</tr>
<tr>
<td>Prohibition to play certain games</td>
<td>By <em>CY EE FI UK BE LV MT LU SK FR ES</em></td>
</tr>
<tr>
<td>Prohibition to play certain sports</td>
<td>By <em>BU CZ BE MT PL IT SK FR ES</em></td>
</tr>
<tr>
<td>Other: Insert any other type of disqualification related to animals and sports</td>
<td>By <em>CZ FR</em></td>
</tr>
</tbody>
</table>
4.1.3 **Offence related: preliminary measure vs. conviction stage**

In question 2.3.1 the respondents were asked to distinguish between the type of offence related disqualifications included in the national system.

A distinction was made between five types of offence related disqualifications:

- Preliminary measure
- Main sanction
- Explicit additional sanction
- Implicit additional sanction
- Alternative sanction

This distinction was repeated for several listed authorities. As will be seen below, the type of authority competent for disqualifications varies throughout the Union – or, at least the extent to which they are competent (*ratione auctoritatis*). Therefore, in order to give an accurate overview of the status questions *ratione poenae* it is important to distinguish the replies not only from this perspective, but also from a *ratione auctoritatis* perspective.

As the figures below show, disqualification measures often take the form of main sanction. However, when imposed by judicial authorities, the most frequent ‘type’ of disqualification measure is one imposed as an explicit additional sanction. This does not mean that disqualifications as a main sanction do not occur frequently: indeed, nearly 80% of the member states replied that such types of disqualifications can be imposed by judicial authorities. For administrative and disciplinary authorities, the majority indicates to apply disqualifications as a main sanction; however, it appears that also disqualifications as an explicit additional sanction or preliminary measure occur frequently throughout the EU: both when imposed by administrative and by disciplinary authorities, the numbers reach approximately 60%. With police and commercial authorities it is different: in relation to the former, over half of the
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replies indicated that police authorities cannot impose a disqualification as a main sanction. With commercial authorities, this was over 70%. When imposed by police authorities, disqualifications mostly take the form of a preliminary measures, whereas when imposed by commercial authorities, the most common form is the explicit additional sanction.

Essential is that all five types of sanctions occur as a means to impose a disqualification, no matter which authority is involved.

- Possibility of imposing disqualifications *ratione poenae* when the authorities involved are judicial in nature.

2.3.1 What kind of disqualifications can be imposed by judicial authorities?

Noteworthy is that for every listed type of authority, a last category of type of measure was added ("other"). Merely five member states have indicated to indeed foresee other types of measures than those listed. For the other types of authorities (see figures below) hardly any other possible measures were indicated.
- Possibility of imposing disqualifications *ratione poenae* when the authorities involved are administrative in nature.

**2.3.1 What kind of disqualifications can be imposed by administrative authorities?**

<table>
<thead>
<tr>
<th>Type of Disqualification</th>
<th>Percentage Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other</td>
<td>10%</td>
</tr>
<tr>
<td>Alternative sanction</td>
<td>30%</td>
</tr>
<tr>
<td>Implicit additional sanction</td>
<td>20%</td>
</tr>
<tr>
<td>Explicit additional sanction</td>
<td>15%</td>
</tr>
<tr>
<td>Main sanction</td>
<td>10%</td>
</tr>
<tr>
<td>Preliminary measure</td>
<td>5%</td>
</tr>
</tbody>
</table>

- Possibility of imposing disqualifications *ratione poenae* when the authorities involved are disciplinary in nature.

**2.3.1 What kind of disqualifications can be imposed by disciplinary authorities?**

<table>
<thead>
<tr>
<th>Type of Disqualification</th>
<th>Percentage Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other</td>
<td>15%</td>
</tr>
<tr>
<td>Alternative sanction</td>
<td>40%</td>
</tr>
<tr>
<td>Implicit additional sanction</td>
<td>20%</td>
</tr>
<tr>
<td>Explicit additional sanction</td>
<td>10%</td>
</tr>
<tr>
<td>Main sanction</td>
<td>5%</td>
</tr>
<tr>
<td>Preliminary measure</td>
<td>10%</td>
</tr>
</tbody>
</table>
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- Possibility of imposing disqualifications *ratione poenae* when the involved authorities involved are police authorities.

2.3.1 What kind of disqualifications can be imposed by police authorities?

- Possibility of imposing disqualifications *ratione poenae* when the authorities involved are commercial in nature.

2.3.1 What kind of disqualifications can be imposed by commercial authorities?
Linked to the results above, is the question whether or not a formal indictment is necessary in order for a disqualification to be imposed.

The results from the survey (figure below, question 2.2.1) reveal that in no less than a third of the member states, it is not at all possible to make people subject to a disqualifying measure based on suspicion. Only 16% indicates that a flexible systems regarding disqualifications following suspicion exists. The remaining 55% applies a system whereby it might be possible, but either only in some limited cases and/or under strict conditions.

Measures imposed by the court during pre-trial proceedings are the most common form of disqualifications based on suspicion. Examples are: restrictions of liberty such as the obligation to reside at a certain address, the prohibition to leave the country, the prohibition to communicate with certain persons and/or the obligation to present oneself periodically to the police.

2.2.1 As of when is there sufficient ground to be subject to a disqualification as a sanction measure? Does your national law allow that a disqualification is imposed merely on the basis of suspicion?

Later on in the survey, the respondents were again asked whether suspicion could serve as a basis to disqualify, this type including rumours, and foreign elements (both rumours and suspicion). From the table below clearly follows that only a very limited number of member states would easily attach disqualifications to suspicions, but even when the respondents tick the box of “any domestic verified suspicion”, then of course still conditions are set for a disqualification to take effect. Spain for example, ticked the box of domestic verified suspicion, but specified the following: if under ‘suspicion’ it is...
understood ‘rational indications of criminality’, that is to say, when there is a “prima facie case”, then it can be said that Spanish law allows that disqualifying effect merely on the basis of suspicion. Therefore, this category is closely related to the second option, being “some domestic suspicions”: there, eight countries replied no; nine answered yes. These scattered replies again show the variety between the member states regarding the phase in which disqualifications can be imposed. They are, however, unanimous in not attaching any effects to foreign suspicions, let alone rumours.

| 4.1.3 Which situations can give rise to a disqualifying effect under your national law? |
|-----------------------------------------------|-----------------------------------------------|
| Basis for DQ | Yes | No |
| Any domestic verified suspicion | FI ES | BU CZ EE HU BE LV LT MT LU NL PT DE IT SK FR |
| Some domestic verified suspicions | EE FI HU LT PT IT FR ES | BU CZ BE LV MT LU NL DE SK |
| Any foreign verified suspicion | BU CZ EE FI HU BE LV LT MT LU NL PT DE IT SK FR ES |
| Some foreign verified suspicions (explain) | HU BE LV LT MT LU NL PT DE IT SK FR ES |
| Any domestic rumour | BU CZ EE FI HU BE LV LT MT LU NL PT DE IT SK SE FR ES |
| Some domestic rumours | BU CZ EE FI HU BE LV LT MT LU NL PT DE IT SK SE FR ES |
| Any foreign rumour | BU CZ EE FI HU BE LV LT MT LU NL PT DE IT SK SE FR ES |
| Some foreign rumours | BU CZ EE FI HU BE LV LT MT LU NL PT DE IT SK SE FR ES |

In addition to being asked about the situation as it stands today, the respondents were asked to indicate whether or not a cross-border effect to disqualifications based on suspicion would be feasible in the future. The results are quite clear in the sense that a mere 17% replied fully positive to this question, as the figure below shows. Half made a clear choice for a simple “no” reply. Some of the 33% that indicated that the answer would depend on the concerned case provided with some more details through the comments. Suggestions often made are related to the character of the disqualification: it being temporary or permanent for example. Often voiced objections relate to the presumption of innocence.
2.2.2 Would it be an acceptable future policy option to introduce an obligation to recognise and execute a foreign disqualification on the basis of suspicion if such basis is not allowed in your national law?

![Survey Results]

Yes: 50%
No: 17%
Depending on the case: 33%

4.2 Ratione personae

The second variable aspect of disqualifications is their scope *ratione personae*. It is necessary to map whether disqualifications can apply to natural persons and/or to legal persons. As to the meaning of the concept “legal person”, it is sometimes suggested (and in some countries this is indeed the practice) to use the term ‘legal person’ as an umbrella term, to then distinguish two different sets of persons within that group, being natural persons vs. legal entities. Consequently, the wordings ‘legal person’ (or their literal translation) could be interpreted to mean any ‘person’ which is recognized by law, meaning what is called legal persons in this contribution plus natural persons. The project team dismisses this reasoning due to its inherent risk of confusion on the one hand, and – more importantly – due to inconsistency with the existing European legislative framework. Indeed, when European (be it Council of Europe of EU) laws and regulations refer to what in this latter approach is called “a legal entity” the terminology “legal person” is used. Therefore, this Study uses the concept “legal persons” in the sense of an entity recognized as such by law and thus represents a ‘subgroup’ of the broad meaning given to a legal person in some member states (and outside the Union). In turn, legal persons can be divided in two groups of legal persons: private and public legal persons.
4.2.1 **Private legal persons**

The matter of the scope *ratione personae* of disqualifications is of considerable importance, given that not all member states recognize criminal liability of private legal persons and even between those who do, the regime differs.\(^4^9\) Five countries in the European Union do not accept criminal liability of legal persons: Germany, Bulgaria, Greece, Sweden and Latvia. In the Czech Republic and Spain, criminal responsibility of legal persons has been introduced only recently. Additionally, even in those countries which do not recognize the criminal liability of private legal persons, disqualifying measures as sanction measures can sometimes be imposed.

Bulgaria, for example, does not recognize criminal liability of private (or public, see below) legal persons: whereas, for natural persons, disqualifications are imposed as a sanction for wrongful conduct which constitutes a crime or an administrative or a disciplinary violation and whereas these sanction measures may be ordered in criminal, administrative or disciplinary proceedings, depending on the type of the infringement, this is not the case for legal persons: Bulgaria does not accept criminal liability of legal persons in its domestic legislation. Legal persons cannot be subject to criminal proceedings, and can consequently not be subject to a disqualification as a criminal sanction measure, either. The same understanding applies to the disciplinary liability, which we also assume to be strictly personal. So the legal persons cannot be subject to a disqualification as a disciplinary sanction measure either. Nevertheless, the private persons can be disqualified from the practice of certain activities (either temporary or permanently) under the administrative procedure. In cases of violation of the relevant legislation the respective companies or establishments can be deprived of their licence for certain activities as an administrative sanction by means of a penal ordinance, issued by the administrative supervisory bodies. Administrative liability refers to the natural persons, but also to the private legal persons. In Bulgaria, private legal persons can be disqualified only from the practice of particular activities.

Striking is that 23 of the 25 respondents indicated that private legal persons can also be subject to disqualifications. Three of the five countries where criminal liability of legal persons is not applied, have still indicated the possibility for such legal persons to be subject to a disqualifying measure. The explanation for this, as is the case with Bulgaria, lies in the fact that in many member states, disqualifications as sanction measures can also occur beyond the demarcations of strict criminal law. Here lies the link between the varieties *ratione auctoritatis* and *ratione personae* (and as was seen above, *ratione*...
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*auctoritatis* and *ratione poenae* are also closely intertwined. Only Germany and Greece indicated that, in relation to private legal persons, disqualification measures are in no circumstances applied as sanction measures. However, in the case of Germany, An association (non-profit organisation) may be forbidden by administrative authorities if it is proven that its purpose or its activities violate the criminal acts or the constitution (section 3 Act on associations - Vereinsgesetz), which actually also qualifies as a disqualification as a sanction measure in the context of this Study.

### 2.1.1 Who can be subject to a disqualification as a sanction measure under your national law?

- **Yes**
- **No**

<table>
<thead>
<tr>
<th>natural persons</th>
<th>private legal persons</th>
</tr>
</thead>
<tbody>
<tr>
<td>30</td>
<td>25</td>
</tr>
<tr>
<td>20</td>
<td>20</td>
</tr>
<tr>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

**4.2.2 Public legal persons**

As is apparent from the figure below, the disqualifications landscape is completely different in relation to public legal persons than it is in relation to public legal persons.
Above it was explained how in Bulgaria, despite the lack of criminal liability of legal persons, private legal persons can still be subject to certain disqualifications imposed by administrative authorities. This is different for public legal persons: they cannot be subject to a disqualification, even as an administrative sanction measure, the *rationale* being that the state power is based on and operates through its system of state bodies, institutions and organs and that they cannot be deprived of their constitutional functions, because it would affect the functioning and organizational capacity of the state itself.

Even though the *rationale* of course differs slightly from member state to member state, it is striking that merely seven member states apply disqualification measures to public legal persons. Even here, however, a considerable variety occurs, as is apparent from the very meaning those member states attach to ‘public legal persons’. Four out of seven member states have indicated that they interpret public legal persons as ‘state authorities’, as well as ‘state controlled bodies’. Three, however, only apply disqualifications to public legal persons in the sense of ‘state controlled bodies’. Additionally, some member states have also indicated to apply yet another definition to public legal persons in this context, such as public funds. In the Netherlands, case law has clarified the distinction between the liability of a state authority in the context of its state duties and the liability beyond that. However, the cases of the Enschede Fire (2009) and the more recent fire at Chemitec in Moerdijk (2009) made clear that the distinction is not always considered satisfying. A legal initiative in this respect seems likely. ‘Grey zones’ appear in several member states: in Portugal for example, criminal liability is restricted to legal persons, private societies and
associations, excluding the State, public legal persons with public authority and international public organizations (art. 11º, nº 3, of the Penal Code). However, it is not obvious whether this restriction applies to the existent special schemes, for instance, to the crimes committed within the scope of the Law nº 24/84, of 20th of January, which does not exclude public legal persons from the definition of art. 3º (criminal responsibility of the legal persons), or within the scope of the Law 15/2001, of 5th June (tax crime law), which also makes no distinction between legal persons in order to ascertain their criminal responsibility.

4.2.3 Legal persons and disqualifications beyond borders

Before examining what the facts given in the two above subsections (on resp. private and public legal persons) mean for the application of disqualifications over the national borders, it be remembered that, in addition to the fact that several member states do not apply liability of legal persons for offences all together, there are of course certain disqualifications which will, by their nature, not be imposed on legal persons. An example can be the disqualifications imposing a prohibition to go somewhere, which can, per definition, not be applied to legal persons. For other examples, debate is possible, such as the prohibition to carry out a certain commercial activity.

Now, even when the very nature of a certain disqualification would not necessarily exclude its application, as seen above there are national systems whereby no (or not all) disqualifications can be imposed on public legal persons, and in some, no disqualifications stemming from a strictly criminal conviction can be imposed on private legal persons. Consequently, the project team deemed it useful to measure the readiness in member states to let go of these differences in a cross-border context. In other words, whether member states would still be willing to apply a foreign disqualification to a (private or public, depending) legal person, despite the fact that their national law does not allow the imposition of such a measure to (where appropriate, that particular) legal person. In the question, reference is made to Art. 9, par. 3 FD Financial Penalties, a provision which obliges member states to recognize and execute financial penalties against legal persons, even if they cannot be held criminally liable in the executing member state.

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2.1.2 Is it an acceptable future policy option to introduce an obligation to recognise and execute disqualifications with respect to legal persons, even if legal persons cannot be held liable in such a way according to your national law? Such an obligation would mirror the obligation that currently exists with respect to the mutual recognition of financial penalties.

<table>
<thead>
<tr>
<th></th>
<th>CZ</th>
<th>BE</th>
<th>LU</th>
<th>NL</th>
<th>PT</th>
<th>SK</th>
<th>SE</th>
<th>BU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Depending on the case</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
</tbody>
</table>

The replies to the question concerned were remarkable in many ways: first of all, only eleven respondents actually ticked one of the reply possibilities. This can be partly explained by the fact that those member states which apply criminal liability for legal persons, potentially did not feel addressed by the question. Secondly, only two of the five member states which do not apply criminal liability to legal persons replied to this particular question, and they replied with a positive answer. The following will elaborate on Bulgaria. Regarding the obligation with respect to the mutual recognition of financial penalties, Bulgaria stressed that although the legal persons are not criminally liable under the domestic legislation, imposed financial penalties and confiscation are recognized and executed in the Republic of Bulgaria. Different than in Bulgaria, the Czech Republic – before they introduced the criminal liability of legal persons, which took effect on 1 January 2012 – drafted its refusal ground based on fundamental legal principles such that it was not bound by the obligation set in Art. 3, par. 9 FD Fin Penalties.

Thirdly, it is remarkable that only one respondent answered ‘no’ to the question. The comment to that reply, however, reveals that this negative response is not linked to the *ratione personae* matter. In other words, this reply was not given due to the specificities of liability of legal persons. Rather, it followed from the opinion that in general, cross-border execution of disqualifications is not desirable.

In sum, it is safe to say that, considering the caution in replying to this question, and the virtual absence of a negative reply, the climate is such that the time is ripe for a debate on this matter.
4.3 Ratione auctoritatis

In EU instruments relevant to disqualifications, it often becomes apparent that several types of authorities can be involved in relation to disqualifications. This diversity is included, either through specifying which types of authorities can be involved, or through remaining silent on the subject. An example of the first one is the Convention on Driving Disqualifications of 17 June 1998\(^1\) that under Art 1.1.a states the meaning of a ‘driving disqualification’ and adds that “the measure may […] have been taken either by a judicial authority or by an administrative authority”. An example of the second one is the Directive relating to the profession of lawyer,\(^2\) where there is mere talk of “the competent authority” and the Directive does not give a specific meaning to what kind of authority a “competent authority” can be: art. 7.6 “Although it is not a prerequisite for the decision of the competent authority in the host Member State, the temporary or permanent withdrawal by the competent authority in the home Member State of the authorization to practise the profession shall automatically lead to the lawyer concerned being temporarily or permanently prohibited from practising under his home-country professional title in the host Member State”.

The lenience regarding authorities involved in applicable EU instruments reflect the wide variety that occurs throughout the member states. Indeed, five types of authorities that are involved in imposing disqualifications/attaching disqualifying effects can be identified throughout the European Union:

- Judicial authorities
- Administrative authorities
- Disciplinary authorities
- Policy authorities
- Commercial authorities

The following table reflects the vast diversity in the member states: indeed, many foresee a role for several kinds of authorities. Not surprisingly, judicial authorities are involved the most. However, also administrative and disciplinary authorities are granted a considerable role in this regard. For preliminary measures, thirteen countries indicated that administrative authorities can be

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competent – the same goes for disciplinary authorities. For main sanctions, respectively seventeen and eighteen countries ticked the “yes” box. For explicit additional sanctions, the results were, respectively, fourteen and twelve.

<table>
<thead>
<tr>
<th>2.3.1 What kind of disqualifications can be imposed by which authorities?</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Judicial authorities</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preliminary measure</td>
<td>UK HU RO SL SE AT</td>
<td>BU CY CZ EE FI BE LV MT NL PT DE IT SK FR EL LT LU ES</td>
</tr>
<tr>
<td>Main sanction</td>
<td>LV DE RO SE AT</td>
<td>FI BU CY CZ EE UK HU BE LT MT LU NL PT IT SL SK FR EL ES</td>
</tr>
<tr>
<td>Explicit additional sanction</td>
<td>SE AT</td>
<td>FI BU CY CZ EE UK HU BE LV LT MT LU NL PT DE IT RO SL SK FR EL ES</td>
</tr>
<tr>
<td>Implicit additional sanction</td>
<td>EE HU PT SE FR</td>
<td>BU UK BE LV NL SL SK CY CZ LT MT LU DE IT RO ES AT</td>
</tr>
<tr>
<td>Alternative sanction</td>
<td>BU CZ EE HU LV MT LU NL DE IT RO SL SE FR ES AT</td>
<td>UK BE LT PT</td>
</tr>
<tr>
<td><strong>Administrative authorities</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preliminary measure</td>
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<td>BU CY EE BE LV MT DE SE FR ES AT LU</td>
</tr>
<tr>
<td>Main sanction</td>
<td>HU LV NL PT SL</td>
<td>BU CY CZ FI BE LT MT SK SE FR ES AT EE UK LU DE EL</td>
</tr>
<tr>
<td>Explicit additional sanction</td>
<td>EE HU LT NL DE SL FR</td>
<td>BU CY CZ FI BE MT SK ES AT UK LV LU PT EL</td>
</tr>
<tr>
<td>Implicit additional sanction</td>
<td>CZ HU LT NL PT DE FR</td>
<td>BU EE UK BE LV MT SL SK ES AT LU</td>
</tr>
<tr>
<td>Alternative sanction</td>
<td>BU CZ EE HU LV MT NL PT DE SL FR AT</td>
<td>LT ES UK LU RO EL</td>
</tr>
<tr>
<td><strong>Disciplinary authorities</strong></td>
<td></td>
<td></td>
</tr>
<tr>
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<tr>
<td>Explicit additional</td>
<td>CZ EE FI BE LT MT NL DE SL</td>
<td>BU UK HU IT SK FR LV LU</td>
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</table>
### 2.3.1 What kind of disqualifications can be imposed by which authorities?

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<td>Alternative sanction</td>
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5 Future policy options, feasibility & impact

Based on the conceptual diversity found in the member states and the knowledge on the functioning of international cooperation in criminal matters applied to the specificities of disqualifications, the project team has developed a three-layered set of recommendations.

First, the project team recommends to develop a disqualification triad that combines three policy domains to cover the entirety of disqualifications and truly extend the effect of disqualifications throughout the European Union.

Second, the project team has reviewed the traditional refusal grounds that limit international cooperation in criminal matters and has looked their position in the future legal framework governing disqualifications in the EU.

Third and final, the project team has evaluated the feasibility thereof in light of the existing mechanisms to exchange information in criminal records and therefore also on disqualifications.

In the following chapter, the policy options will be further developed along three case studies, being disqualifications in relation to public procurement, in relation to working with children and in relation to the ability to drive a vehicle.
5.1 Towards a disqualification triad

In the Programme of Measures, adopted twelve years ago, it was said that the Union should aim at “gradually extending the effects of disqualifications throughout the European Union.” Along this policy consideration the authors have developed concrete proposals for what they consider to be the best way forward. Essentially, three policy questions need to be asked.

First, the question arises whether there is a category of offences for which the member states agree that it is necessary – in light of certain vulnerable sectors – to introduce an EU wide disqualification obligation. The first axis in the disqualification triad therefore consists of the need to further develop approximation in this sphere.

Second, the question arises to what extent and under which conditions member states can oblige one another to mutually recognise a disqualification they have imposed. This question deals with the location of the execution of the disqualification, taking account of the fact that disqualifications are only truly felt in the member state of residence of the person involved and that a convicting member state might explicitly ask for its disqualification to be executed by another member state. The second axis in the disqualification triad therefore consists of the need to further develop mutual recognition in this sphere.

Third, the question arises to what extent and under which conditions member states can/should take account of a disqualification imposed in another member state or more generally take account of a foreign conviction which would/could lead to disqualification if handed down in their jurisdiction. The third axis in the disqualification triad therefore consists of the need to further develop the obligation at least possibility to attach equivalent effect to a foreign conviction (in general) or to a specific disqualification as a sanction measure.

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54 It is however important to note that exceptions can exist. To the extent member states have made disqualification dependent on the existence of prior convictions (be it national or foreign prior convictions) a disqualification can also be felt outside the member state of residence of the person involved.
This line of reasoning results in the drawing up of three different disqualification regimes that govern different situations and can therefore be subject to different requirements and restrictions. Together they form what is called the disqualification triad. Considering the vast diversity in the types of disqualifications, the situations that can/should lead to disqualifications, the spheres in which candidates should be (able to be) disqualified, the three axes of the triad need to be combined. The further development of only one axis will not have the potential to cover the entirety of the disqualification scene.

The following scheme gives an overview of the distinctions which are proposed to form the basis for future legislative EU-action in the field of disqualifications.

<table>
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<tr>
<th>Overview of different disqualification regimes</th>
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<tr>
<td>Regime 1</td>
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<tr>
<td>Severity of the offence &amp; Vulnerability of the sector</td>
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<tr>
<td>Proposed regime: approximated disqualifications for approximated offences</td>
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</table>

Before discussing the three different regimes, a general recommendation needs to be made: given the sensitivity of disqualifying measures and the direct impact it would resort on EU citizens, it is advised to allow sufficient time to carefully consider the several options, and to involve all relevant stakeholders, not in the least the Council of Europe – preferably at an early stage. Indeed, legislation dealing with cross-border disqualifications has an undeniable link with fundamental (human) rights. Considering the occasional turmoil, the EU should at all cost avoid a repetition of its so-called “discourteous” negligence.

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in including the Council of Europe in the process of drawing up the framework decision on procedural rights. Additionally, omitting a lengthy consultation of the Council of Europe would entail an enhanced risk of seeing any future disqualifications related measures being struck down by the Strasbourg Court.57

5.1.1 Approximated disqualifications for approximated offences

In the past, there have been several cases of convicted persons being able to reoffend or escape the effect of their disqualifications simply because the authorities in another member state were not aware of the conviction or the disqualification. The example of the Fourniret case has shown to which dramatic consequences insufficient information exchange combined with insufficient substantive rules on disqualifying measures can lead. In 2003 Michel Fourniret was arrested for attempting to kidnap a Belgian girl. The police investigation then connected him to a series of previous rapes and murders. Although in 1987, a French court had convicted him of rape and indecent assault of minors, upon release Fourniret had been able to obtain a job in Belgium as a school supervisor, committed murders and avoided capture for years. In the wake of the Fourniret case, France established a national sex offender register, Belgium increased punishments and controls over serious sex offenders and launched a number of innovative treatment initiatives. Some Belgians and other Europeans urged supranational action to prevent paedophiles, after serving a sentence in one EU member state, moving to another EU member state where their identity and prior offending is not known.

As elaborated on when discussing the conceptual differences in the member states, not all member states use the same application strategy when it comes to disqualifications.

In some member states, a disqualification is offence-related and applied when dealing with the offence. The sanction is mostly (but not always) included in the person’s criminal record and upon application for a job in the educational sector the person’s criminal record will be checked for the appearance of disqualifications from the right to work with children. In other member states a disqualification is access-related and applied when dealing with a person’s access to certain professions or other rights that can be subject to disqualifications. In those member state, upon application for a job in the educational sector, the person’s criminal record will be checked for offences (as opposed to sanctions) for which it has been regulated that these offences will result in a disqualification from the right to work with children.

57 Especially in light of the accession of the EU to the ECHR (giving the Strasbourg Court direct power to rule on EU measures) foreseen in Art. 6 TEU of which the concrete implementation is currently being debated.
In the example illustrated below, the person concerned was convicted for a sexual offence in a member state that applies an ‘access related’-strategy. At the conviction stage no disqualification will be imposed and the entry into the woman's criminal record will only refer to the offence. Within the convicting member state access to the educational sector is restricted for persons having been convicted for that type of offence. In this example however, the person involved applies for a job in the educational sector in another member state, in which a different application strategy is used. Disqualifications are applied in the context of a criminal proceeding and upon application for a job in the educational sector, the person’s criminal record is searched for a specific educational-sector related disqualification. Such information will not be found in this person’s criminal record as a result of which the access to a job in the educational sector will not be restricted though this should have been the case taking account of the underlying legal philosophy in both member states.

In order to avoid that these differences lead to a situation where the person involved can escape the effect of the disqualification simply due to the combination of member states with a different application strategy, it must be considered to approximate the offences and the disqualifications that are brought in relation thereto. Therefore, for certain offences it is vital to ensure that convictions result an effect in the entire European Union, so that it should be advised that all member states agree on exact definitions of such offences, and on the disqualifications they can give rise to. Though it may seem far-reaching, this recommendation mirrors the line of reasoning in the Programme of Measures\(^8\) it which measure 20 suggested the compilation of a list of disqualifications common to all member states.

Firstly, the basic requirement to further develop this policy option, is the identification of the vulnerable sectors. In a study conducted in 2002, a vulnerable sector is to be understood as a sector in which professional positions

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lend themselves easily to abuse of profession. Examples given are certain public sectors (e.g. sensitive positions within the police), education, medical sector, finance, transport, telecom and procurement. The latter has been subject to a more in-depth study as a case study, reported on in the next chapter.

Secondly, having identified the vulnerable sectors, the offences that can be brought in relation thereto can be identified. For the selected offences, it should be advised to agree on a common offence definition and also the disqualifications to which they would give rise. This is the only way of guaranteeing an efficient approach regarding the cross-border execution of disqualifications in the most sensitive sectors. In doing so, it will no longer be possible to escape the effects of a disqualification due to a combination of member states that have a different application strategy. Member states that have an offence- or proceeding-related application strategy will still include the disqualification in the conviction and possibly in the person’s criminal record. When reviewing a person’s track record to decide on the access to certain professions, the member state will have to not only look into the disqualifications included in the criminal records, but also to the appearance of convictions for offences for which it has been agreed that a disqualification will follow.

Considering the relevance for the public interest in all member states, it can be expected to be politically feasible, and a harmonisation of both offences and disqualifications carries the potential of making information exchange and efficient EU-wide enforcement of those disqualifications far more efficient than it is today. Whereas for the majority of cases, only extensive political debate can define which specific characteristics of behaviour might give rise to certain agreed upon disqualifications, for certain specific cases no such debate seems necessary given that this mechanism already exists. In relation to central European procurement procedures the applicable instruments already introduce mandatory exclusion grounds for candidates that have been convicted for any of the listed and defined offences.

5.1.2 Executing mutual recognition requests

Even where member states do not consider it necessary to agree on approximated disqualifications for approximated offences, it can still be considered undesirable that a person can escape the effect of a disqualification by leaving the convicting member state. Therefore, member states should look into the development of the second axis in the disqualification triad, namely the execution of mutual recognition requests with respect to disqualifications as a sanction measure.

If it would only be possible to feel the effect of an applied disqualification in the applying or convicting member state, it risks being ineffective due to the increased mobility of the European citizens. The person involved will be able to escape the effect of the disqualification by moving to another member state. The following example aims at illustrating this situation. A person is convicted to a three month disqualification from the right to drive a vehicle as a result of drunk driving during the annual family holiday. The disqualification will effectively prevent the person involved from renting another vehicle at his holiday destination. It will however lose its effect as soon as the person returns home because without a mutual recognition mechanism the disqualification stays at the holiday location. It is clear that further execution after the end of the family holiday of a disqualification will in this case be totally ineffective if it is limited to the member state of conviction and thus only effective outside the member state of the person’s residence. It is therefore important that execution of a disqualification can be transferred to the member state of residence, the only member state in which execution of this type of disqualification would be felt by the person involved. This transfer of the execution of a disqualification leads to the application of the principle of mutual recognition to applied disqualification as it seeks to ensure the recognition and execution of disqualifications handed down in another member state. For the purpose of consistency and to avoid confusion, the concept of mutual recognition of disqualifications in only used in this strict sense of the word.

The application of the principle of mutual recognition to disqualifications is not entirely unregulated. As identified in the introduction the FD Alternatives and FD Supervision cover the execution of a number of measures in the member state of residence, but do not cover the entire scene of disqualifications. For the sake of consistency, it is important to develop a system that is analogous to the existing one. This policy option was explicitly voiced back in 2000: measure 22 of the Programme of Measuresforesaw the drawing up one or more instruments.

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enabling the listed disqualifications to be enforced in the sentenced person’s Member State of residence; the Stockholm Programme explicitly prescribed that the Union should aim for the “mutual recognition of judgments imposing certain types of disqualification”.  

The scope of mutual recognition should be linked to the place of residence lying outside of the member state where the behaviour inflicting the disqualification has occurred. It is suggested to use the definition given in the Third Driving License Directive (Art. 12): “normal residence’ means the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal an occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living”.

A detailed debate is needed on the scope ratione auctoritatis of a future mutual recognition decision on disqualifications. It is advised to broaden (in the spirit of amongst others Art. 3 EU MLA) the scope to decisions of administrative authorities which are competent to take measures in “in the course of criminal investigations which present the characteristics of being an investigation following the commission of a specific criminal offence […] in order to identify and arrest, charge, prosecute or deliver judgment on those responsible.” Even though the measures were taken with a criminal justice finality, the measures themselves are not necessarily of a criminal law nature. Broadening the scope of future MR instruments guarantees that situations are covered such as the situation where a person was convicted of a fraud offence (criminal law), but where according to the national law the disqualification arising from it (e.g. exclusion from certain commercial activities) is not necessarily imposed in the judgment, but rather by the administrative authority in charge of permits concerning those particular activities. (i.e. at a later stage).

An application of the mutual recognition principle would thus entail that when an authority in the convicting state (issuing state) wishes to avoid impunity of the offender, it can issue a ‘disqualification order’ to the (new) state of residence (executing state). The competent authority of the executing state shall recognise the decision and take all necessary measures for the execution of

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63 The second paragraph contains more nuances on this definition.
64 G. VERMEULEN, W. DE BONDT and C. RYCKMAN (eds.) Rethinking international cooperation, op.cit.
the disqualification, unless it decides to invoke refusal grounds as defined in analogy with Art. 11 FD Alternatives.\textsuperscript{65}

In the margin of this policy recommendation, the question arises what how execution can take place if the executing member state’s legal system does not contain the particular disqualification measure imposed by the issuing member state. Reference can be made to the adaptation mechanism foreseen in existing mutual recognition instruments. Art. 9 FD Alternatives foresees an optional adaptation system that allows both the nature and/or duration of a sanction measure to be adapted to correspond as far as possible to the sanction measure that would have been imposed in the issuing state. The authors suggest to use this as a basis for adaptation provisions in a future disqualifications MR instrument, with the note that the prohibition to aggravate the existing disqualification should be further elaborated, amongst others by making a judicial review mechanism available to the person involved.

5.1.3 Equivalent effect to foreign convictions/disqualifications

Finally, the third axis of the disqualification triad consist of the introduction of the possibility to attach equivalent effects for foreign convictions or disqualifications in absence of an approximation instrument or a specific mutual recognition request. As was said in the Commission’s 2006 Communication “there would accordingly be merit in recognising the effect of certain disqualifications throughout the entire territory of the Union”.\textsuperscript{66}

According to Art. 2 FD Prior Convictions member states are obliged to attach to a conviction handed down in other member states effects equivalent to those attached to a conviction handed down by their own courts in accordance with national law.

The explanatory memorandum of the proposal for the FD Prior Convictions is brief in explaining the concept of “equivalent effects”.\textsuperscript{67} It specifies that it is for the member states to define the conditions in which equivalent effects will be attached to the existence of a conviction handed down in another member state.

In the explanatory memorandum, it is described how two different situations can occur in the member states: either the existence of previous convictions are factual elements that can be taken into account when deciding on a sentence

\textsuperscript{65} The authors have scrutinized all refusal grounds occurring in the relevant EU instruments. (G. VERMEULEN, W. DE BONDT and C. RYCKMAN (eds.) \textit{Rethinking international cooperation, op. cit.}). Suggestions made regarding refusal grounds occurring in the FD Alternative of course also apply to the refusal grounds which ought to be included in the future disqualifications regime.

\textsuperscript{66} EUROPEAN COMMISSION (2006), Communication \textit{op.cit.}

within the initially foreseen sanction scales, and one where they are governed by complex provisions which can, for example, provide for aggravation of the penalty or of the procedural arrangements applicable to repeat offenders. In this context, it explicitly says that it will be up for the member states to adopt national legislation to assimilate convictions handed down in the other member states to national convictions “and give the same effect to them whatever they may be”. Apart from the prior convictions being either factual elements or giving rise to aggravation, the European Commission made reference to the variety flowing from the national structure of offences and penalties. In this context too, it is said that application of the equivalence doctrine entails that “it will be up to the member states to take all necessary measures to ensure that convictions handed down in other member states are taken into account.”

Recital 3 FD Prior Convictions stipulates that the equivalent effect aims at establishing a mere “minimum obligation” for the member states to take account of convictions handed down in other EU countries. It goes on to specify that this does not entail a harmonisation of the consequences attached by the different national legislations to the existence of previous convictions. It stresses the distinction with other framework decisions, in that this is not a mutual recognition instrument and therefore does not aim at the execution in one member state of judicial decisions taken in other member states. Therefore, there is no obligation to take foreign decisions into account when, for example, the information obtained under applicable instruments is not sufficient, where a national conviction would not have been possible regarding the act for which the previous conviction had been imposed or where the previously imposed sanction is unknown to the national legal system.

Here lies the main distinction with mutual recognition systems, whereby the executing authorities are under an obligation to execute the measure even if they are not foreseen in their legal systems. Given the considerable differences the member states’ criminal justice systems regarding the effect attached to previous conditions, the authors see merit in this approach.

The European Protection Order contains a system very close to the equivalent effect mechanism applied in Art. 2 FD Prior Convictions. Indeed, the

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perception that the EPO applies a system of mutual recognition is incorrect.\textsuperscript{72} In traditional mutual recognition instruments, the default position is that the executing member state shall recognise the judgment, unless it decides to invoke refusal grounds (e.g. Art. 8 FD Alternatives).\textsuperscript{73} In the EPO, the executing state must merely recognize the fact that a certain criminal conviction might indeed lead to the issuing of certain protection measures and then attach the effects it would resort were it to have occurred in national law.

With regard to the disqualifications covered by this section, the authors propose to include the equivalence doctrine in the future approach to disqualifications. Broadly speaking, this would come down to the adoption of an instrument containing a provision based on Art. 2(1) FD Prior Convictions. In concrete terms, the provision could read as follows: “Each member state shall ensure that a behaviour, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of criminal records, or following rules regarding certificates of non-prior convictions, resorts disqualifying effects equivalent to the disqualifying effects the behaviour would have resorted in accordance with national law”.

Breaking down the proposed provision in its different components:

- “a behaviour which resorts disqualifying effects”: considering the difference between the member states it is advised not to speak of ‘offences’. Regardless of whether ‘behaviour’ or ‘offence’ is used, it is irrelevant whether or not the country where the behaviour occurred attaches a disqualifying effect to that behaviour. Indeed, only the occurred behaviour is relevant, and whether or not the member state in which the person finds himself now (or in which he is applying for a job/permit and the like) assesses that – after application of the equivalence test – the behaviour should give rise to a disqualification. Member states should be given discretionary powers with regards to the meaning they attach to a “behaviour”:

\textsuperscript{72} See VAN DER AA, S. and OUWERKERK, J. “The European Protection Order: no time to waste or a waste of time?” 19 European Journal of Crime 2011, 267-287: at p. 268 the authors state that “the EPO would provide a legal basis for EU member states to mutually recognize a victim protection order that was granted in another member state” (emphasis added). However, on p. 269 the authors accurately describe the three steps approach used in the EPO, an approach which differs from the traditional mutual recognition approach, thus suggesting that their terminology used earlier was not meant to claim the usage of a full, traditional mutual recognition effect by the EPO.

\textsuperscript{73} Granted, some ‘traditional’ mutual recognition instruments also contain provisions hinting at deference to the national law of the executing member states (adaptation mechanisms, see above). Yet, this does not change the fact that the default position is different.
On the one hand, if a member state chooses to only disqualify people when they have committed an offence in the sense of a certain provision in their criminal code, then they should be free to do so. In the spirit of the equivalence mechanism, it is then up to the member states to decide whether or not they decide on the result of an application of the equivalence test (after all, it is thinkable that, even if according to its law only an offence as defined in the national law could resort disqualifying effects, the member state still decides that a certain behaviour is equivalent to that offence and can thus give rise to a disqualification).

On the other hand, the freedom for the member states in applying the equivalence theory also works the other way around: if the policy choice is made to attach a disqualifying effect to any offence in relation to a certain behaviour, then EU law and the application of the equivalence method should not be able to prevent this. The authors opinion that particularly in certain vulnerable sectors member states should be allowed to decide that it is possible within their member states to restrict the access to certain jobs for anyone who was involved in an offence hinting towards them not being qualified for the position. In other words, it should be possible for a member state to state that, for example, anyone convicted for any offence related to (sexual) child abuse/exploitation/intimidation can be disqualified from the right to work with children, in spite of possible concerns about unequal treatment, which, if not overruled altogether by security and public order arguments, would only arise in contents regulated by EU law in view of shaping or developing the internal market.

In other words, key concept in the application of the equivalence doctrine to disqualifications is flexibility. There is one important limit: any future legislation in this regard should explicitly state that the disqualifying effect member states impose must stay as close as possible to the disqualifying effect the behaviour would have resorted under national law. It might seem that this obligation implicitly lies in the term ‘equivalent’; however, the authors underline the necessity of this specification: it rules out the risk of member states interpreting the equivalence doctrine as a mere minimum obligation and attaching a disqualifying effect which would for example last much longer than the disqualification an equivalent national offence would have given rise to.

An example to clarify the difference between the equivalence reasoning and the situation when the convicting member state explicitly orders the execution of a disqualification: imagine a person being convicted for a sanction giving rise to

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74 Especially those identified as justifying the introduction of mandatory disqualifying effects.
75 As was said in the explanatory memorandum on the FD Prior Convictions, see above.
a disqualification in Belgium. France however, does not attach a disqualification
to that (or an equivalent) offence. The outcome of the equivalence test will most
probably be negative: the person will not be subjected to a disqualification in
France. In case of an explicit order from the Belgian authorities however, France
will have to (be it through adaptation mechanisms of existing disqualification
measures) subject the person to a disqualifying measure (unless refusal grounds
are in order).

Given the practical importance of the aspect “in respect of which information
has been obtained under applicable instruments on mutual legal assistance or on
the exchange of criminal records”, this will be dealt with separately in the
following subsection.

5.2  Place of refusal grounds in the future
disqualifications framework

The refusal grounds which feature in internation cooperation in criminal
matters in general, will be examined. Care will be taken to discuss all – but not
exclusively – the refusal grounds contained in the FD Alternatives in order to
maintain the consistency with this instrument, as was proposed above in the
context of the second regime as a part of the future disqualifications framework.
This second regime is mutual recognition based; however, the refusal grounds
discussed below would not only be useful in the context of this second regime.
Indeed, also in the context of the theory of equivalent effects, the member state
which is in principle under the obligation to grant effects equivalent to those
which would have been attached in its own member state, should have the
possibility to not grant such an effect. In the first regime, the regime from the
automatic effect, certain refusal grounds can also be useful. It be noted that in
the context of both the automatic effect and the equivalent effect theory, the
refusal grounds are no refusal grounds in the classical sense of the word: after
all, there is no formal request for execution from one country to another, which
entails that the applicable refusal grounds will not be explicitly relied upon to
formally refuse a certain request. However, the content of certain refusal
grounds, for example ne bis in idem, can be important considerations for a state
not to grant effect (be it under regime 1 or 3) to a certain disqualification. Thus,
the net result of these considerations would be the same as in the strict context of
mutual recognition.

First, in relation to double criminality, the project team reiterates the position
defended in previous research projects. With respect to the offences that have
been subject to approximation, double criminality testing should not be allowed.
Member states that have complied with their approximation obligations will not
have a double criminality problem. Member states that have not (yet) (correctly) implemented the approximation obligations should not be allowed to use their lagging behind as a reason not to cooperate with respect to disqualifications. In light thereof it should be noted that the list of 32 offences for which double criminality is abandoned goes beyond the approximation acquis which is why member states advocated to include the possibility to issue a declaration not to agree with the abandonment of the double criminality requirement. As argued elsewhere, the possibility to disagree with the abandonment of the double criminality requirement to the extent approximation instruments exist is a missed opportunity to enforce the approximation acquis.\footnote{W. DE BONDT, Double criminality in international cooperation in criminal matters , in VERMEULEN, G., DE BONDT, W. and RYCKMAN, C. (eds.) Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, rooted in reality, Antwerpen-Apeldoorn, Maklu, 2012.}

When the member states were asked about this aspect\footnote{Please note that 19 out of the 25 respondents provided answers to this question.} (see figure below) it is remarkable that only a mere 21% mentioned the 32 offence list. Over half of the respondents replied that execution of a disqualification is not possible when the double criminality is not fulfilled, regardless of inclusion of the offence label in the 32 MR offence list. This raises serious questions with respect to the functioning of the list and the abandonment of the double criminality requirement in light thereof.

### 3.4.2 When you are contacted as the executing member state, do you enforce a DQ issued by another member state although the act concerned does not constitute an offence in your member state?

- Yes, but only if issued by some member states
- Yes, but only with respect to some offences (e.g. 32 listed offences in mutual recognition instruments)
- No, our national legislation does not foresee this possibility
- Other
In reply to question 3.4.3 an astonishing 81%\(^{78}\) of the respondents indicated that the 32 list could bring added value in relation to disqualifications. The results subscribe the position of the project team, in the sense that 67% of the respondents indicated that the 32 MR list needs to be clearly defined before it can be relied upon for avoiding that double criminality problems lead to refusal of cooperation.

\[\text{3.4.3 To what extent would it be an acceptable future policy option to introduce an obligation for member states to enforce foreign disqualifications for the 32 offences currently listed in the mutual recognition instruments?}\]

Second, in relation to the political offence exception: even though it can be acknowledged that the actual use of a political offence exception would be rare in many contexts, the project team advises against removing it all together. It remains deplorable that it was removed from the FD EAW, especially given that 70 to 80% of the member states cling onto the political offence exception in their national legislation.\(^{79}\) Therefore, it is advised to keep the political offence exception as an optional refusal ground in the context of disqualifications. On the other hand, in relation to terrorism, since 1996 it has been part of the \textit{acquis} that political offence exception cannot play. Given that the project team strongly believes that we should resolutely take the route towards a stronger and more flexible cooperation in criminal matters, this prohibition should be maintained.

\(^{78}\) Please note that 21out of the 25 respondents provided answers to this question.

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Third, a refusal on the basis of serious indications of discriminatory prosecution or treatment of a suspect in the requesting/executing member state must be possible or made possible – even though it is de facto being applied in practice, it needs to be reinstalled de jure as well.

Fourth, in relation to ne bis in idem, the Gözütok/Brügge jurisprudence\(^8^0\) regarding ne bis as formulated in Art. 54 SIC can also be applied to the principle as used in the EU cooperation instruments; the jurisprudence can be interpreted broadly in that every decision where further prosecution is definitively barred, regardless of whether it was made by a judge or not, should be seen as a case which has been finally disposed of or, in other words, as a final judgment. Consequently, granting full immunity from prosecution qualifies as a decision where further prosecution is definitively barred, hence in light of the cited jurisprudence, it is mere logic that immunity from prosecution would be an (optional) refusal ground in all EU cooperation instruments. Given that it is unfortunately far from sure that member states would automatically apply Art. 50 EU Charter (even though they are under a legal obligation to do so), an inclusion of the strict meaning of ne bis in all EU cooperation instruments is necessary. Regardless of whether or not the above recommendations are followed, the member states perceive it as an important problem that the application of ne bis in idem differs throughout the member states.\(^8^1\) Hence, agreement on what the principle entails in cross-border situations is long overdue.

Fifth, in relation to ordre public clauses, it is indeed thinkable that certain considerations would be play in this regard; especially in the field of disqualifications, it is difficult to predict which considerations could be in play. Nonetheless, it is recommended to narrow down and tailor the ordre public clause in all EU cooperation instruments, modelled after Art. 13, par. 1, g FD European Evidence Warrant.\(^8^2\) If not, it is suggested to at least consider reducing it in the sense of the Dutch-German ´Wittem´ Convention of 30 August 1979.\(^8^3\)

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concluded to supplement the European Convention on Cooperation in Criminal Matters.\textsuperscript{84}

Sixth, the extra-territoriality has always taken a prominent place in extradition law – and rightly so – but it should not be transposed into instruments with a different nature and purpose than extradition (surrender). Consequently, it is not advised to retain this refusal ground in the disqualifications sphere. Over half of the respondents who replied to this question indeed indicated not to apply this refusal ground.\textsuperscript{85}

\textbf{3.8.2 Do you refuse to enforce a disqualifications if the act was committed outside the territory of the requesting Member State?}

- Yes
- Yes, but only with respect to some offences (e.g. 32 listed offences)
- Yes, the refusal is mandatory
- Yes, the refusal is optional

Seventh, the fact that the person cannot be held criminally liable due to \textit{his/her age} under the law of the executing member state could also have their spot in the disqualifications framework, according to the project team. An overwhelming majority of the member states indicated that they indeed check this aspect, and almost 75\% even said to apply this as a mandatory refusal ground.


\textsuperscript{85} However, the response rate to this question was rather low: only fourteen out of the twenty-five respondents provided input.
3.5.7 When your receive a request to enforce a disqualification, do you check if the age of the person sentenced at the time of the offence was such that he could not have been prosecuted in your State?

Sweden replied that there are no data on this, but if the situation were to arise, enforcement as such will probably be refused but the Swedish authorities might issue an independent disqualification order based on the same set of circumstances. Example: In country X the age of criminal responsibility is 14 while only persons over 15 years of age can be sentenced for a crime in Sweden. A, a 14 year old girl in X, has grossly mistreated her pet hamster and was sentenced in X for a crime with fines as a sanction together with an injunction to keep animals for one year. If A then moves to Sweden and the authorities in X requests that the disqualification order issued in X be enforced in Sweden, an injunction cannot be issued solely on that ground. However, the authority in Sweden may take the mistreatment into consideration when deciding whether to issue an injunction to keep hamsters in Sweden.

Eighth, optional refusal grounds such as those related to the person being convicted after a trial in absentia, as amended by the 2009 framework decision, those related to medical/therapeutic treatment being foreseen which cannot be received in the executing member state, and those related to the duration of the measure (cfr. Art. 11, par. 1, h), i), j)) are deemed useful and relevant in the context of disqualifications. The project team recommends to keep these refusal grounds, as is the case with the FD Alternatives, optional. Regarding the refusal ground related to the duration of the sentence, the threshold of that duration (refusal ground when measure is less than six months) is inconsistent with other

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framework decisions in the EU cooperation sphere, namely the FD EAW.\textsuperscript{87} In the FD Deprivation of Liberty\textsuperscript{88} and the FD Alternatives the threshold is six months, whereas in the FD EAW the threshold is four months. This difference in threshold can be explained historically: the 4 months in the EAW seems to have been copied from Art. 2, par. 1 of CoE Convention on Extradition, whereas the 6 months from the FD Deprivation of Liberty is inspired by Art. 3, par. 1, c of the CoE Convention on the transfer of sentenced persons. Given that the FD Alternatives and the FD Deprivation of Liberty were negotiated simultaneously, it does not surprise that the former used the same threshold as the latter. Even though the difference can thus be explained based on historical arguments, consistency would still be served if these thresholds would be equalized. In order to avoid unnecessary hindrance of the surrender mechanism, the project team suggests to bring down the 6 months from the FD Alternatives and FD Deprivation of Liberty to 4 months. This should also be applied in the future mutual recognition system of disqualifications not covered by the FD Alternatives, which is a mere logic implication of the project team’s position that future mutual recognition systems regarding disqualifications should be tailored after the FD Alternatives. It be noted that this refusal ground (sentence too low) should never play in the first regime as developed by the project team. After all, once offence definitions and the disqualifications to which they can give rise are agreed upon, it should not be allowed to do away with these agreed terms, based on the fact that the sentence is too short. In the equivalent effect theory, this refusal ground should also not play necessarily.

Lastly, in terms of fundamental rights, it is interesting to look into the current cooperation instruments and how reference is made to fundamental rights. Art. 1,3 FD EAW does contain a fundamental rights clause, namely the general clause stating that the Framework Decision does not modify the obligation to respect FR and fundamental legal principles as enshrined in Art. 6 TEU. This clause can be found in many of the Framework Decisions issued in the field of ‘judicial’ cooperation in criminal matters: Art. 1, second sentence FD Freezing, Art. 3 FD Fin Pen, Art. 1, par. 2 FD Confiscation, Art. 1, par. 2 FD Prior Convictions, Art. 3, par. 4 FD Deprivation of Liberty, Art. 1, par. 3 FD EEW, Art. 1, par. 4 FD Alternatives, Art. 5 FD Supervision. In the context of the EU MLA Convention, the only reference to fundamental rights applicable to the entirety of the


instrument is contained in the preamble: Member States confirm in more general terms - with the same self-satisfaction - that they ‘express their confidence in the structure and the operation of their legal systems and in the capacity of all the Member states to guarantee a fair system of justice’.

It is problematic that fundamental rights do not form an explicit refusal ground anymore. Regarding the implementation of in particular the EAW, it is apparent that many are indeed of the opinion that in order to give this clause the weight it deserves, it should be stated amongst the refusal grounds. Indeed, Art. 1,3 FD EAW and its potential to justify refusals of execution which has stirred the debate in the implementation of the FD EAW. Several countries included an explicit fundamental rights refusal ground, others used a general clause such as Art. 1,3 FD EAW which is however used as a refusal ground (e.g. section 73 of the German Mutual legal Assistance and Extradition Act, even though this is is only used for rather evident cases of human rights abuse), others rarely apply the fundamental rights clause (but all have included it in their legislation in one way or another). What is certain, is that a significant number of member states would interpret the EAW as permitting refusal to execute on human rights grounds. The need to move the relevant provision manifests itself even more clearly in the EU MLA Convention, where the only specific reference to fundamental rights can be found in the preamble, in a strikingly soft manner.

The absence of a fundamental rights refusal ground is even more surprising in the light of the Soering judgment90: according to the European Court on Human Rights, because of a certain future violation of human rights in the state to which Mr. Soering would be executed (death row in the US), the execution in itself violated Art. 3 ECHR. The fact that the Court rules that an extradition can entail a violation of human rights following practices in the country to which is being extradited necessarily entails that human rights considerations are a reason for refusing extraditions.

The reason why it was not stated as an explicit refusal ground any more is the same for abolishing the non-discrimination considerations all together: in a EU based on fundamental rights, such refusal ground is not necessary, says the reasoning. Indeed, it was considered satisfactory to have a presumption of the observance of the ECHR in the various member states – a presumption which is obviously of no use at all de jure for the legal person whose rights are (potentially) under threat. Furthermore, the many cases before the European Court of Human Rights and many violations established by that court (as with the European Court of Justice), prove otherwise.

The mere realization that it is important to achieve a balance between maintaining the law and protecting rights, or that all the EU member states have

90 ECtHR, 7 July 1989, Nr. 14038/88, Soering v. the United Kingdom.
signed the ECHR, does not guarantee that the required balance in the proceedings will always exist in practice, and that human or other fundamental rights will be respected. Naturally, to refuse based on fundamental rights considerations is a politically sensitive issue and can indeed be expected to only be used in extreme cases. This only support the suggestion of moving the clause to the refusal grounds list, however: given the presumption of sufficient mutual trust it can be expected that the refusal grounds would not readily be called upon in practice and would consequently have a small effect the cooperation between member states. However, as a matter of principle, precisely because of the firm belief that we live in a European Union based on respect for fundamental rights, as a safeguard against those few situations where cooperation would have to be refused based on such considerations, the ‘general’ fundamental rights clause should (additionally to the more precise non-discrimination clause, see above) be made an explicit refusal ground. A person who knows that his legal position has been violated is able to appeal to the possible violation of the ECHR and in this light, the introduction of an exception which could be appealed to by the states concerned would have been particularly logical.

Concluding, in the context of disqualifications as well, it is advised to include an explicit refusal ground based on fundamental rights in any future instrument (and to alter currently applicable instruments, such as the FD Alternatives, in that sense.)
5.3 Impact on criminal records

A person’s criminal record is compiled in the member state of the person’s nationality. In theory, information on all the prior convictions is stored, regardless of the nationality of the convicting authority. A single question directed to the criminal records authority of the member state of the person’s nationality should suffice to obtain a complete overview of existing prior convictions. The future policy options elaborated on above when seeking to extend the effect of disqualifications in the EU (i.e. establishing a disqualification triad & rethinking the position of refusal grounds) are only practically implementable to the extent information on prior convictions and prior disqualifications are available and accessible. Therefore, the following paragraphs look into the criminal records requirements originating from the policy options and the extent to which the current criminal records mechanisms are able to meet those requirements.

5.3.1 Inclusion of information

5.3.1.1 Inclusion of information in the national records

The development of policy options aiming to extend the effect of disqualifications in the EU, starts with the availability of information on those disqualifications. The primary source of information are the national criminal records databases. Therefore, the member states were asked to indicate to what extent disqualifications are included into the national criminal records databases.

Taking account of the various authorities that can impose disqualifications and the various application strategies that can be found in the domestic legal systems of the member states, the answer to that question is not straightforward and needs to take due account of those differences. Therefore, with respect to the authorities involved question 2.3.1. distinguished between judicial, administrative, disciplinary and police authorities. For each of these authorities a distinction is made between disqualifications as a preliminary measure, a main sanction, an explicitly imposed additional sanction, an implicitly added additional sanction, an alternative sanction and a free text field in which other types of sanctions could be added. Finally, the results show whether or not the disqualification is included into the persons criminal record. A lighter shade of grey represents the proportion of disqualifications that are included into the criminal record, whereas the darker shade of grey represents the proportion of disqualifications that are not entered into the criminal record. The figures inserted below present the outcome of that question. They reveal that not all disqualifications find their way into the criminal record. Whereas in relation to
judicial authorities it is safe to say that most of the disqualifications are entered into a person's criminal record (with the exception of disqualifications imposed as a preliminary measure), the balance flips over to the ‘non-inclusion’-side when looking at the other authorities involved.

2.3.1. Are judicial authorities competent to impose this type of disqualification and will that disqualification be included in the person's criminal record?

Starting with the disqualifications that are imposed by administrative authorities, the replies to question 2.3.1. clearly indicate that only a minority of the disqualifications finds its way into the criminal records. The same is true for disqualifications imposed by disciplinary and policy authorities. This means that the practical application of the policy options might be hindered by a limited availability of information on disqualifications. Therefore, it is important to look into mechanisms that link in with the conviction and more specifically with the underlying behaviour as opposed to the sanction (i.e. the disqualification) that was imposed.
2.3.1. Are administrative authorities competent to impose this type of disqualification and will that disqualification be included in the person’s criminal record?

<table>
<thead>
<tr>
<th>Type of Sanction</th>
<th>Yes/Yes</th>
<th>Yes/No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary measure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Main sanction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Explicit additional</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Implicit additional</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alternative sanction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2.3.1. Are disciplinary authorities competent to impose this type of disqualification and will that disqualification be included in the person’s criminal record?

<table>
<thead>
<tr>
<th>Type of Sanction</th>
<th>Yes/Yes</th>
<th>Yes/No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary measure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Main sanction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Explicit additional</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Implicit additional</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alternative sanction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
2.3.1. Are police authorities competent to impose this type of disqualification and will that disqualification be included in the person’s criminal record?

<table>
<thead>
<tr>
<th>Measure</th>
<th>Yes/Yes</th>
<th>Yes/No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary measure</td>
<td>12</td>
<td>2</td>
</tr>
<tr>
<td>Main sanction</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>Explicit additional sanction</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>Implicit additional sanction</td>
<td>4</td>
<td>12</td>
</tr>
<tr>
<td>Alternative sanction</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

5.3.1.2 Inclusion of foreign information

Besides the difficulties that have surfaced in relation to the inclusion of disqualifications into the criminal records in general, the inclusion of information on foreign disqualifications is far from self-evident and is strongly dependent not only on the exchange of information when a member state hands down a conviction against a national of another member state, but also on the will of the receiving member state to store foreign conviction information of its nationals. Because the implementation deadlines of the new EU level instruments have not passed yet, the current legal framework is still largely based on the 1959 European Convention on Mutual Assistance (abbreviated to ECMA)\(^{90}\), which has two important weaknesses that are baleful for the inclusion of information on foreign convictions and therefore the availability thereof for later use in cross-border recidivism cases.

First, even though Art. 22 ECMA stipulates that states shall inform one and other of all criminal convictions and subsequent measures in respect of nationals of another state party at least once a year and in spite of the full ratification thereof, the exchange of criminal records information is considered problematic. The ECMA provisions are deemed to be inadequate\(^{91}\) and states simply do not

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\(^{90}\) European Convention on mutual assistance in criminal matters ETS n°30 of 20.4.1959.

\(^{91}\) Recital 8 Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information from the criminal record between Member States. OJ L 93 of 7.4.2009.
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seem to go through the trouble of complying with this commitment.\textsuperscript{92} Because the flow of information on foreign convictions to the member state of the person's nationality was not guaranteed, judges could not rely on the content of the criminal record kept in the member state of a person's nationality and had to send a request to each of the other 26 member states.

Second, with a view to ensuring that foreign conviction information is available for future reference and thus future disqualification, the other concern relates to the absence of an obligation to store foreign conviction information on own nationals. It comes as no surprise that when there is no obligation to store information there is no guarantee that national criminal records databases will include foreign criminal record data on their nationals. Only few countries stored information without further restrictions, many member states filtered along a double criminality criterion and only included those convictions of their nationals for which the underlying behaviour would also have constituted an offence if committed in their jurisdiction and some member states stored no information at all. Reportedly, in the past Hungary did not store foreign criminal record information on its nationals, neither did the UK.\textsuperscript{93} Therefore, even if member states notify their counterparts in the member state the person's nationality, the completeness of the information in the person's criminal record is undermined by the lack of storage guarantees. As a result of these two weaknesses, the information with respect to foreign convictions actually included in a person's criminal record – at the time of the adoption of FD Prior Convictions – is partial and unreliable and therefore insufficient to support the commitment to take account of foreign convictions in the course of a new criminal proceeding. To obtain a full overview of a person's prior criminal history, a request needs to be directed to the criminal records authorities of each of the 26 other member states in order to learn whether a conviction has been handed down against that person in that particular member state. This is far from the ideal starting point to guarantee an effective cross-border recidivism practice.


Upon the passing of the implementation deadline on 7 April 2012, criminal records information exchange in the EU will be governed by FD Crim Records and the complementing ECRIS Decision. To overcome the two main weaknesses in the current legal framework governing criminal records, there will be a quasi real time information exchange obligation complemented with the obligation to store information. In doing so, the availability of foreign criminal records information will be guaranteed for the future, though it must be added that no mechanism is foreseen to fill in the blanks in the criminal records of the European citizens as a result of the currently existing regime.

5.3.1.3 Impact on/of the policy options

Because information on disqualifications as sanction measures is not always stored in the national criminal records databases – first because some member states have not developed an offence & proceeding based system but have developed an access based system in which disqualifications only come into play at a later stage, second because some disqualifications are imposed only implicitly and not automatically entered into the criminal records database and third because more in general member states have indicated to not always enter information on disqualifications into the national criminal record database – and the future legal framework does not hold sufficient guarantees that this will be corrected in the future, it is advisable to look into the possibilities to focus on the conviction and the underlying offence as opposed to the sanction.

When applying this option to the first part of the disqualification triad – i.e. the option to approximate the disqualifications for approximated offences – an approach to take account of a conviction for an approximated offence as opposed to the sanction that was imposed would constitute the least invasive option for the member states and would maximally respect the national differences. Using the conviction as a baseline means that it is no longer relevant whether or not the disqualification itself is included in the criminal records database nor is it relevant whether the information on the disqualification is transferred through ECRIS. In essence, as soon as an approximated disqualification for an approximated offence is agreed amongst the member states, information on the conviction for the approximated offence is sufficient as it would automatically also entail the existence of the approximated disqualification, regardless of whether it is imposed during the criminal proceeding and regardless of whether it is included in the national criminal records data base. This would of course require that the level of detail on the offence underlying the conviction is sufficiently detailed to distinguish between a conviction that automatically entails a disqualification and another conviction for which no such disqualification has been agreed. The difficulties relating to the level of detail in the conviction information will be dealt with below.
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This reasoning can also apply to the policy option to support the member states in attaching a disqualifying effect that is equivalent to the effect a national conviction would have. In that scenario too, it can be argued that it is irrelevant to know whether or not a disqualification was imposed or added in the proceeding. Member states would be allowed to attach a disqualification to a foreign conviction the way a disqualification would be attached to a national conviction. Here too, only information on the offence underlying the conviction is relevant to be able to deploy that policy option in practice. Here too however, the level of detail in the available information is crucial as that is the only way to determine whether the foreign conviction is similar (enough) to the national conviction, i.e. whether the foreign conviction passes the double criminality test with the national conviction that would give rise to any form of disqualification.

5.3.2 Access to information

5.3.2.1 Access for national authorities & legal persons

The access to information on disqualifications (or on the offences that give rise to disqualifications) is crucial for the proper functioning of the policy options. With respect to the purely internal national situations, the replies to question 2.4. provide an overview of the access different authorities & legal persons have to records kept by other authorities.

The replies to question 2.4. indicate that even in a purely national situations, the access to criminal records is not open to anyone not even the official public authorities let alone legal persons.

<table>
<thead>
<tr>
<th>Record Keeper</th>
<th>Authority</th>
<th>Legal Person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>Disciplinary</td>
<td>Judicial</td>
</tr>
<tr>
<td>POLICE BU CY CZ FI UK HU LV LT NL PT DE RO SK ES AT EL</td>
<td>FI UK HU LV RO SK</td>
<td>BU CY FI UK HU LT NL PT RO SK EL</td>
</tr>
<tr>
<td>Disciplinary</td>
<td>BU CZ HU</td>
<td>BU CZ HU BE LV MT NL PT ES AT EL</td>
</tr>
<tr>
<td>Administrative</td>
<td>BU CY CZ FI BE LT</td>
<td>SK</td>
</tr>
</tbody>
</table>
### 2.4 Who can have access to information about disqualifications kept in the records?

<table>
<thead>
<tr>
<th>Record Keeper</th>
<th>Authority</th>
<th>Legal Person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>Disciplinary</td>
<td>Administrative</td>
</tr>
<tr>
<td>PT DE SK FR</td>
<td>MT NL SK FR ES AT</td>
<td>NL PT SK EL</td>
</tr>
<tr>
<td>Judicial (criminal)</td>
<td>BU CY CZ FI UK HU LT NL PT IT SL SK FR AT</td>
<td>HU LV SK</td>
</tr>
<tr>
<td>BU CY CZ FI UK HU BE LV LT MT NL PT DE IT SL SK ES AT</td>
<td>UK MT SK FR AT</td>
<td></td>
</tr>
<tr>
<td>CZ UK BE PT IT SK FR ES AT</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

When analysing the table included above, the boxes coloured in the lightest shade of grey can be used as a reference boxes for the existing databases in the member states depending on the authority involved (depending on the number or replies to this question). It is clear that judicial authorities have access to the most records databases, though their access is not always guaranteed. Taking the access of police authorities to police records as an example, it can be deduced from the light grey box that 16 member states have indicated that a police record including disqualification information exists and at least the police authorities have access thereto. When looking at the access of other authorities, the small numbers of member states that have indicated that disciplinary and administrative authorities have access to police records can be expected, though it is more surprising that only 11 member states have indicated that their judicial authorities have access to the police records. It shows that CZ, LV, DE, ES, AT have replied that their judicial authorities do not have automatic access to police records on disqualifications. The same trend can be found for the records kept by disciplinary authorities and (though not as clear) administrative authorities.

With respect to legal persons, the access is very limited, though it is also clear that the information included in the judicial criminal records is most relevant and therefore the access is the most developed. Specifically with respect to legal persons operating in a vulnerable sector, the questions on direct access where complemented with questions on indirect access through working with information provided by the person involved. From the replies to question 4.1.5, it becomes clear that most member states do not allow direct access to criminal records information, but work with a system in which the person involved is to present a certificate of non-prior conviction. The final option in which a self-declaration is followed by a certificate in a later stage is considered to be the best practice that should be further developed in other member states. At least for a number of scenarios it is not necessary to have a certificate from all candidates; it
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can suffice to request only the certificates of the candidates that make it to the last round of a selection process or even only of the candidate that is awarded the contract/position/access.

<table>
<thead>
<tr>
<th>4.1.5 How is the relevant offence related information obtained?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Direct access – information obtained by the legal person</strong></td>
</tr>
<tr>
<td>The vulnerable sector can seek information upon formal prior written consent of the persons involved</td>
</tr>
<tr>
<td>The vulnerable sector can seek information on its own</td>
</tr>
<tr>
<td><strong>Indirect access – information presented by the person involved</strong></td>
</tr>
<tr>
<td>Through a request to provide an official certificate of non-prior conviction</td>
</tr>
<tr>
<td>Through the request to provide a self-declaration of non-prior conviction</td>
</tr>
<tr>
<td>Through the request to provide a self-declaration of non-prior conviction that suffices in the first stage and needs to be complemented with a certificate upon selection/admission</td>
</tr>
</tbody>
</table>

5.3.2.2 Access for foreign authorities & legal persons

Interestingly, the above information on the accessibility of records for authorities and legal persons cannot be used as a basis to decide on the accessibility of records for other authorities in a cross-border situation. When reviewing the access for foreign authorities & legal persons, the replies to question 2.5 clearly indicate that in the current situation foreign authorities do not have the same access to national databases as national authorities would have.

2.5 Do foreign authorities & legal persons have the same access to your national databases on disqualifications?

Yes 37%
No 63%
5.3.2.3 Impact on/of policy options

The access to criminal records information is dependent on the situation and on the policy choices made in relation to specific offences and the disqualifications they give rise to. With respect to the approximated disqualifications for approximated offences, the authors submit that there is only one option to make the effort of offence and disqualification codification worthwhile: direct access to criminal records information, be it national or belonging to other EU member states. With respect to the policy option to allow member states to attach a disqualifying effect to foreign convictions that is similar to the effect a national conviction would resort, the access of foreign authorities should at least be equivalent to the access national authorities & legal persons have. Additionally, to the extent that this would not suffice for the application of the national rules governing disqualification, the use of certificates should be further looked into. The following paragraphs further elaborate on the interrelation between access to information and the policy options developed.

First, with respect to the approximated disqualifications for approximated offences, it is submitted that authorities & legal persons should have direct access to criminal records information.

However, given that it is not desirable to grant authorities & legal persons which are not concerned with criminal investigations Unlimited access to criminal records information,\textsuperscript{94} strict conditions should apply. The authors repeat that the selected severe offences would concern a limited set of offences which are commonly agreed upon by the member states, thus implying that anyone convicted for such offence in any member state would justify a disqualification in any other member state. The only way to act swiftly and efficiently to indeed enforce those “EU disqualifications” is to grant all public authorities in the EU direct access, in relation to these clearly defined offences. To that end in can be considered to draw up a so-called EU index on offenders as suggested in by the European Commission its White Paper on the exchange of information on convictions,\textsuperscript{95} issued in 2005. This index would constitute the gateway to the information stored in the national criminal records databases. It would not grant interested officials any direct information: it would merely show which member states holds conviction records on a certain person. Based on that information, the requesting officials could then ask the relevant information of the competent authorities. Under this construction, it would have

\textsuperscript{94} VERMEULEN, G., DE BONDT W. and RYCKMAN, C. (eds.) \textit{Rethinking international cooperation}, Maklu, 2012.

been up to the member states’ authorities to determine whether the requesting official was competent under national law to request the information. The idea of a genuine central index was never fully supported; only for non-EU nationals convicted in a member state, such index was drawn up.

Crucial however, are the requirements of consent and functionality. First, regarding the consent condition, applicants for functions, tenders, certificates and the like, have to be required to give their consent. Different options for such consent are to either require it explicitly or to include it in a clause in the application procedure. In the latter case, the future negotiations should grant considerable attention to requirements of visibility and clarity of such clauses. The only justifiable exception to the consent requirement is when authorities involved in national security matters need to screen the full profile of for example a potential employee. Second, regarding the functionality requirement it seems clear that only information functional to the reason for inquiry (e.g. drunk driving for the transport section rather than whether or not the person has ever been caught surfing on illegal websites) should be disclosed.

The matter is more complex when it comes to private authorities, given the traditional and understandable reluctance to grant such authorities access to criminal records (let alone to grant such foreign authorities access to the records). However, the authors submit that, in the limited amount of sectors for which a number of selected severe offences would be agreed upon, and subject to the conditions of consent and functionality, the debate on granting private employers active in those sectors access to criminal records should be opened.

Second, with respect to the polity option to support the granting of a disqualifying effect to a foreign conviction that is equivalent to the disqualifying effect a national conviction would have, it is submitted to grant the authorities & legal persons an access that is equivalent to the access national authorities and legal persons would have.

Surprisingly, when compared to the percentage of member states that currently provides foreign authorities with an access that is equivalent to the access national authorities would have, more member states would consider it an acceptable future policy option to introduce a mandatory access to information included in the national criminal records database.

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2.6 Would it be an acceptable future policy option to introduce the obligation to grant foreign authorities & legal persons the same access to information from your national databases on disqualifications as national authorities?

The questions elaborated above must be seen in the context of public authorities. The situation with respect to private authorities significantly differs. What then, when there is no political will amongst member states to grant private entities access to their criminal records, even if it concerns core crimes and despite the conditions of consent of the person involved and the functionality requirement? As was already suggested in a study conducted in 2002,\textsuperscript{97} the authors recommend to develop a system of European certificates of non-prior convictions. Not every criminal justice system allows for the practice of such certificates. Consequently, it should be considered to limit the certificate to vulnerable professions.\textsuperscript{98} An EU certificate of non-conviction could be made available for all EU citizens through the national criminal records authorities. In this regard the authors’ position is very clear: the person involved should request it from its national central criminal records authority.\textsuperscript{99}

\textsuperscript{97} VERMEULEN, G., VANDER BEKEN, T., DE BUSSER, E. op. cit.
\textsuperscript{98} Ibid.
\textsuperscript{99} Alternatively, the potential employer should acquire his/her consent before asking such information, provided that the potential employer is allowed to ask for the certificate directly from the foreign criminal records authority. Not doing so would again imply administrative burden and loss of time.
5.3.3 Level of detail of information

5.3.3.1 Current situation & future prospects

Regardless of the preference for a system of direct access or a complementary system of certificates of non prior conviction, it is important that the level of detail of the criminal records information is sufficiently high to be able to distinguish between information that can be accessed/shared and information that is not available within this mechanism.

The currently existing criminal records exchange mechanisms hold no specific provisions with respect to the level of detail in the exchanged or stored information. It is up to the member states to share information in a way that ensures the ‘comprehensability’ of the information by other member states. This technique has led to serious interpretation and nationalisation problems in the past for it is not always easy to deduce information on the underlying behaviour from the information exchanged. This problem received special attention when redesigning the criminal records exchange mechanism and developing ECRIS, short for the European criminal records information system. That new system introduces templates to facilitate the exchange of criminal records information which is an important novelty when compared to the existing exchange mechanisms. To overcome the difficulties experienced with the interpretation and so-called nationalisation of foreign convictions, the choice was made to introduce a reference index which would be the backbone of criminal records exchange and against which all member states could map their criminalisation provisions. Recital 12 ECRIS Decision highlights its ambition to have classified all possible offences/behaviour for which one can be convicted and has introduced a reference code for each of those offence(s) (categories).

To implement the European criminal records information system, each member state has to develop a conversion table linking each and every one of the provisions of its criminal code to the ECRIS coding system. As a result, in a fictitious example, a member state will know that the behaviour criminalised under Art. X of its national criminal code corresponds to the behaviour that is included in code 111 of the ECRIS template. Similarly, the behaviour criminalised under Art. Y of its national criminal code corresponds to the behaviour that is included in code 222 of the ECRIS template. As soon as each of the 27 member states has developed a conversion table, ECRIS will become a sort of Esperanto that can be used as a language that is understood by each of the member states.

Subsequently, Art. 4 ECRIS Decision requires that criminal records information exchange is based on those codes. When sending information on a conviction for which the underlying behaviour is criminalised in Art. X of the national criminal code, the sending criminal records authority will indicate that
the conviction relates to the ECRIS code 111. At the receiving end, the receiving authority will know to which provision in his national criminal code a conviction corresponding to ECRIS 111 will relate.

Because ECRIS is a very young instrument that is still being implemented in the member states, there is little practical experience. In reply to question 3.3.1 eight member states (32%) indicate to use ECRIS as a basis for information exchange on disqualifications.

3.3.1 When you are the issuing member state, do you use ECRIS (the European Criminal Records Information System) to exchange information on your disqualification?

- Yes 32%
- No 64%
- Depending on the case 4%

However, in spite of limited practical experience, analysis leads to the conclusion that this technique cannot suffice when reviewed in light of the requirements that follow from this first part of the disqualification triad. If approximated disqualifications are linked to approximated parts of offences, it is important that convictions for those approximated parts of offences can easily be distinguished from other convictions. The ECRIS classification system – and therefore also its coding system is – not detailed enough. The following example – which presupposes that an approximation instrument exists in which not only certain behaviour under the umbrella label of child pornography is approximated but also a set of disqualifications are approximated – clarifies this concern. In the event a person is convicted for an offence related to child pornography, ECRIS code 1009 00 which comprises offences related to child pornography will be used when exchanging criminal records information. However, though it may seem that a reference to that code gives very specific information on the behaviour underlying the conviction, it should be noted that all member states have a different conception of the offences they relate to child pornography.
Therefore, in spite of that code, the underlying behaviour is still not clear enough to decide whether or not the conviction relates to approximated behaviour and therefore gives rise to the approximated disqualification. It can hardly be disputed that the diversity in the member states’ incriminations is common knowledge, because it has been explicitly recognised by the then framework decision (abbreviated to FD Child Pornography) and has been reinforced by the new directive (abbreviated to Dir Child Pornography), when defining child pornography. Art. 3.2 FD Child Pornography lists the behaviour member states may exclude from the scope of the incrimination, affirming that at least for that behaviour, the criminal codes will differ. Similarly, Art 5.7 and Art 5.8 Dir Child Pornography stipulate that member states retain the discretion to decide whether the included behaviour is considered to be criminal or not. Therefore a reference to ECRIS code 1009 00 will not be (nor become) sufficient to establish whether or not the approximated disqualification applies. This lack of detail is highly problematic in light of the policy option to work with approximated disqualifications for approximated offences. When accessing or receiving foreign conviction information, the reference to code 1009 00 will not have any added value whatsoever when deciding on the disqualifying effect of the conviction.

5.3.3.2 Impact on/of policy options

However, though ECRIS has its obvious weaknesses, with the implementation deadline in sight it would be inappropriate to throw away the baby with the bathwater. Such a radical intervention is not even necessary. The coding system can easily be redesigned in a way that strikes the right balance between ensuring swift information exchange, safeguarding the approximation acquis and supporting the prior conviction policy. Retaking the example of a prior conviction for child pornography, the application of the approximation based policy option calls for a distinction between types of child pornography that have been subject to approximation and for which disqualification is made mandatory in an approximation instrument on Child Pornography (e.g. using the code 1009 01 and in doing so introducing suffix 01) and types of child pornography for which criminalisation is uncertain due to the exclusion possibilities included in the approximation instrument (e.g. using the code 1009


02 and in doing so introducing suffix 02). Following that distinction a conviction with a reference to ECRIS code 1009 01 in the context of criminal records exchange will immediately be recognised as a foreign conviction that has been subject to approximation and therefore gives rise to an automatic disqualification. Building a template that includes that level of detail is exactly what has been done when developing EULOCS, short of EU level offence classification system.102

Increasing the level of detail would be necessary at least beneficial for all three parts of the disqualification triad.

With respect to the execution of mutual recognition requests that relate to disqualifications, an increased level of detail on the offence underlying the conviction would facilitate the adaptation procedure and can be beneficial for the limitation of refusal grounds.

As can be found in several mutual recognition instruments, the executing member state is allowed to adapt either the nature or the duration of the sanction if that sanction is incompatible with the law of the executing member state. Amongst the reasons for incompatibility is the diversity in the links between offences and disqualifications. It is very well possible that the type of disqualification imposed in the issuing member states – though known in the executing member state – cannot be imposed in the executing member state in relation to that particular offence. Should this be the case, the executing member state can adapt the disqualification to be compatible with its national law. Similarly, if the duration of the disqualification is incompatible with the law of the executing member state, the latter has the possibility to adapt the duration thereof. Obviously, this adaptation process can be facilitated by an increased level of detail. It will be much easier to assess the double criminality and the possibility to impose a disqualification in the case presented if the information on the facts underlying the conviction are as detailed as possible.

Additionally, an increased level of detail in the criminal records information can also be beneficial for the debate on the limitation of refusal grounds in relation to mutual recognition of disqualifications in the EU. Already in various previous studies, it has been established that member states are willing to abandon some of the refusal grounds in relation to requests for which the underlying behaviour meets the double criminality requirement (or more specific, in relation to requests for which the underlying behaviour relates to any of the approximated offences). To be able to further explore this policy line, it is necessary to first ensure that the level of detail in the criminal records information that is required can be provided.

102 VERMEULEN G. en DE BONDT W. “EULOCS. The EU level offence classification system : a bench-mark for enhanced internal coherence of the EU’s criminal policy”, Maklu, Antwerpen-Apeldoorn-Portland, 2009, 112p
Finally, the same reasoning applies to the third part of the disqualification triad, namely the support of the member state practice of attaching a disqualifying effect to foreign convictions that is equivalent to the disqualifying effect a national conviction would ressort. To be able to apply such equivalence mechanism, it is important to first be able to determine whether the foreign conviction could have existed in a mere national situation for that is the basic requirement to be able to attach an effect to it that is equivalent to a national conviction. Such a double criminality testing is facilitated with the inclusion of an increased level of detail in the information that is exchanged on the criminal record. Additionally, it can even be suggested that the exchange of criminal records information for which it is uncertain that the underlying behaviour constitutes an offence in all 27 member states should be complemented with a brief description on the facts to support double criminality testing and equivalence interpretation.
6 Case-studies

6.1 Rethinking public procurement exclusions in the EU

6.1.1 Introduction

The case study on public procurement seeks to test the applicability of the recommendations developed to increase the effect of disqualifications in the EU. Public procurement refers to the government’s activity of setting up public procedures for the purchasing of the services, goods and/or work which it needs to carry out its functions.\textsuperscript{103} When a government seeks to renovate a building with a view to house an administrative department, the purchasing of \textit{services} will refer to the architectural advice preceding the renovation, the purchasing of \textit{goods} will refer to the building materials necessary for the renovation and the purchasing of \textit{work} to the actual man-hours to complete the renovation. The public procedure aims at ensuring that the best available product is purchased at the best available price.

The reason why public procurement is singled out as a case study in this analysis of the future of disqualifications as sanction measures in the EU can be found in the mandatory exclusion grounds that are inserted in the revised legal framework. Member states are to legislate that candidates convicted for any of the listed offences are disqualified from participating in public procurement procedures. Those disqualifying exclusion grounds are subject to analysis in this case study.

The current EU legal framework governing public procurement procedures has a long history. Already in the 70s the then EC decided to approximate the national provisions governing public procurement procedures. Approximation was considered necessary for an effective public procurement policy which is considered fundamental for the common market to be successful in achieving its objectives.\textsuperscript{104}

\textsuperscript{*} This first case study was developed by Wendy De Bondt in the context of her doctoral research.


PUBLIC PROCUREMENT

Art. 2 TEC states that the Community has as its task the establishment of a common market, a goal to be reached – as explained in Art. 3 TEC – by the abolition of obstacles to the free movement of goods, persons, services and capital. The main concern has always been to eliminate any possible form of unequal treatment and discrimination amongst others in the field of public procurement. All policy documents called for the elimination of restrictions with respect to foreigners only, which exclude, limit or impose conditions upon the capacity to submit offers or to participate in public tender procedures. To that end, a series of directives was adopted.

The first coordinating directives adopted are related to public works contracts and public supply contracts. It must be said that – in spite of the large political consensus on their importance – the implementation of this first set of directives was far from successful. Looking to boost the debate on the regulation of public procurement in the EU, the 1985 White Paper on the Completion of the Internal Market contained a chapter on Public Procurement and served as a catalyst for the amendments made in the following years. It was not until 1992 a directive was adopted with regard to the public service contracts. The establishment of the procurement trilogy did not mean the

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§ 85 reads: In order to stimulate a wider opening up of tendering for public contracts, there is a serious and urgent need for improvement of the Directives to increase transparency further. Priority should be given to a system of prior information; to publication of the intention to use single tender procedures; to publication of the awards of contracts; and to improve the quality and frequency of statistics. [...] Besides, more visible action by the Commission in policing compliance with existing law will increase the credibility of the Community’s efforts to break down the psychological barriers to crossing frontiers.
end of the debate on this topic. In 1996 a Green Paper\textsuperscript{112} was issued followed in 1998 by a Commission Communication\textsuperscript{113} recognising the need to further consolidate and integrate, modernise and simplify the legal framework. It took until 2004 to adopt a consolidating directive which coordinates the three procurement domains, comprises the revised legal framework for public procurement in the member states and introduces – as one of the novelties – mandatory exclusion grounds for candidates convicted for any of the listed offences.\textsuperscript{114} From the preamble it becomes clear that the main objective remains the creation of the conditions of competition necessary for the non-discriminatory award of public contracts, the rational allocation of public money through the choice of the best offer presented, suppliers' access to a truly single market with significant business opportunities and the reinforcement of competition among European enterprises. This is important to keep in mind, for it will be argued that an incorrect interpretation and application of the exclusion grounds might jeopardise that objective.

In January 2011, the European Commission launched a new Green Paper on the modernisation of the EU's public procurement policy, in which it is stipulated that exclusion of bidders is a powerful weapon to punish – and also to a certain extent prevent – unsound business behaviours. However, a number of questions relating to the scope, interpretation, transposition and practical application of this provision remain open, and member states and contracting authorities have called for further clarification. It should be examined in particular whether the exclusion grounds in Article 45 are appropriate, sufficiently clear (notably the exclusion ground of “professional misconduct”) and exhaustive enough, or if further exclusion grounds should be introduced. Contracting authorities also seem to be faced with practical difficulties when trying to obtain all relevant information on the personal situation of tenderers and candidates established in other member states and their eligibility according to their national law. Furthermore, the scope for implementing national legislation on exclusion grounds will probably need to be clarified. Providing for member states to introduce additional exclusion grounds in their national legislation might enable them to tackle specific problems of unsound business behaviours linked to the national context more effectively. On the other hand, specific national exclusion grounds always entail a risk of discrimination against foreign bidders and could

\textsuperscript{112} Green Paper on Public Procurement in the European Union: Exploring the way forward, Communication adopted by the Commission on 27 November 1996.


jeopardise the principle of a European level playing field.\textsuperscript{115} Considering that those concerns receive little attention in the results of that latest consultation\textsuperscript{116}, the exclusion grounds introduced in the 2004 Procurement Directive will be critically assessed against the background of the recommended disqualification triad to increase the effect of disqualifications in the EU, which consists of:

- Approximating exclusion grounds for approximated offences;
- Attaching equivalent effect to foreign convictions; and
- Executing a mutual recognition request.

6.1.2 Approximated exclusion grounds for approximated offences

The first policy recommendation within the disqualification triad consists of introducing approximated disqualifications as sanction measures for a set of approximated offences. Applied in the context of public procurement, the disqualification as a sanction measure relates to the exclusion from participating in a procurement procedure. Once convicted for identified approximated offences, a person is no longer eligible as a candidate in a public procurement procedure and will be excluded from participation. In the current EU legal instruments, an exclusion can be found for having been convicted for participation in a criminal organisation, fraud, corruption and money laundering. In doing so, disqualification upon being convicted for certain approximated offences is guaranteed throughout the EU, regardless of attaching an equivalent effect to a foreign conviction or cross-border execution of foreign convictions, which are the second and third policy recommendation that will be elaborated on below.

\textsuperscript{115} COM(2011) 15 final, Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market, Communication adopted by the European Commission on 27 January 2011.

\textsuperscript{116} The synthesis of the replies only rephrases the concern raised in the Green Paper itself, providing that there is consensus amongst all stakeholder groups that Article 45 of Directive 2004/18/EC is a useful instrument to sanction unsound business behaviours. Nevertheless, certain clarifications are considered useful by many respondents, notably with regard to generic notions such as "professional misconduct", as well as rules on a maximum duration of the debarment, Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market, Synthesis of replies, available at http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf.
The analysis of the way this policy recommendation is currently developed in the EU’s legislative instruments revealed three issues that need further elaboration. The first issue relates to the legal instruments used to approximate. Whereas traditionally approximation is found in (former third-pillar) framework decisions or post-Lisbon directives, analysis reveals that approximation with respect to procurement procedures is found in (former first-pillar) directives. The second issue relates to the approach used to delineate the scope of the disqualification ratione materiae, i.e. the delineation of the offences that give rise to a disqualification from participation in a procurement procedure. The third issue relates to the necessary flanking measures with respect to the availability of information to live up to the commitments with respect to the approximated disqualifications.

6.1.2.1 Framework Decisions & Directives

The first issue relates to the instruments used to approximate. When reviewing approximation in criminal matters, focus is directed towards framework decisions. In parallel to the introduction of the possibility to approximate the constituent elements of offences and sanctions in the Amsterdam Treaty, the framework decision was introduced as the new instrument specifically designed to develop an approximation acquis. Art. 31.1 (e) TEU stipulated that common action on judicial cooperation in criminal matters shall include progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking and was complemented by Art. 34.2 (b) TEU which stipulated that the Council may adopt framework decisions for the purpose of approximation of the laws and regulations of the member states. Framework decisions shall be binding upon the member states as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect. In the mean time, post-Lisbon directives have to be added to the list of instruments in which approximation provisions can be found. The coming into force of the Lisbon treaty – which lead to the disappearance of the three pillar structure and a corresponding restructuring of the legal instruments – has

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117 For reasons of completeness, it must be added that approximation extends beyond what is regulated in framework decisions (complemented with the post-Lisbon directives) and the complementing first-pillar instruments. See more elaborately: W. De BOND and G. VERMEULEN (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. COOLS (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

designated the directive as the instrument to be used for approximation in the future. Therefore, as suggested by the subtitle of this section, an analysis of the approximation acquis requires looking into the content of both framework decisions as well as directives. Approximation instruments have been adopted for euro counterfeiting, fraud and counterfeiting of non-cash means of payment, money laundering, terrorism, trafficking in human beings, illegal (im)migration, environmental offences, corruption, sexual exploitation of a child and child pornography, drug trafficking, offences


against information systems\textsuperscript{129}, participation in a criminal organisation\textsuperscript{130} and racism and xenophobia\textsuperscript{131}.

Within those framework decisions and directives, provisions can be found instructing member states to legislate in a way that allows certain sanctions to be imposed on natural persons as well as on legal persons. With respect to natural persons, the approximated sanctions are mainly sanctions involving deprivation of liberty. Art. 4.2 FD Corruption stipulates that [e]ach member state shall take the necessary measures to ensure that the conduct referred to in Article 2 is punishable by a penalty of a maximum of at least one to three years of imprisonment. With respect to legal persons, the approximated sanctions are mainly mandatory financial sanctions and a set of optional alternative sanctions. Art. 6 FD Corruption stipulates that [e]ach member state shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as exclusion from entitlement to public benefits or aid [...]. Unfortunately, the exclusion from participation in a public procurement procedure is not listed as a possible sanction. Nevertheless, this would be the place where approximation of sanctions would be expected.

However, this does not mean that exclusion from participation in a public procurement procedure has not been subject to approximation. Whereas traditionally review of approximation in criminal matters is limited to the above mentioned framework decisions and post-Lisbon directives, approximation is also pursued via former first pillar directives. As clarified when elaborating on the built-up to the current EU framework governing public procurement, the approximation of mandatory exclusion from being able to participate in a public procurement procedure is precisely one of the novelties of the consolidating 2004 Procurement Directive.

Besides consolidating the then existing legal framework, a number of novelties were introduced\textsuperscript{132}, one of them being the mandatory character of certain conviction related exclusion grounds. In the old directives, contracting authorities were allowed to exclude candidates for having been convicted for an


\textsuperscript{132} For a complete overview, see e.g. S. ARROWSMITH (2004). As assessment of the new legislative package on public procurement. Common Market Law Review, 41, p 1277-1325.
offence concerning their professional conduct. In addition to this optional conviction related exclusion ground, Art. 45(1) introduces a mandatory exclusion ground applicable to any contractor who has been subject of a conviction by final judgement for one or more of the listed offences, in as far as the contracting authority is aware of it. In doing so an approximated disqualification is introduced for a selection of offences. These four offences are participation in a criminal organisation, corruption, fraud against the financial interests of the European Communities and money laundering. They were singled out because public procurement is said to be particularly vulnerable to those offences.

It must be said, that in light of the discussions on the division of competences between the former first and third pillar, it is surprising to find approximating provisions with respect to sanctions in a first pillar instrument. The position of the Court of Justice has always been that – in the event the competence with respect to a policy domain is shared between the first and third pillar (e.g. when third pillar criminal law are wanted to strengthen the legal framework with respect to a first pillar domain) – approximation of the offence can be done in a first pillar instrument whereas approximation of the sanction should always be done in a third pillar instrument. Though there are old examples in which the split has not caused any problems, there has been considerable debate with

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133 Art. 29(c) Dir 92/50/EEC, Art. 20(c) Dir 93/36/EEC and Art. 24(c) Dir 93/37/EEC can be criticised for not clarifying which specific behaviour they relate to. See e.g. E. PISELLI (2000) The scope for excluding providers who have committed criminal offences under the E.U. Procurement Directives. Public Procurement Law Review, 6, p 267-286.

134 Now included in Art 45(2)(c) Procurement Directive.


137 Reference can be made to the 2002 framework decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328 of 5.12.2002) as complemented with the 2002 directive defining the facilitation of unauthorised entry, transit and residence (OJ L 328 of 5.12.2002).

respect to the legal basis for an instrument on the protection of the environment through criminal law. The inclusion of a disqualification measure in the 2004 Procurement Directive is contrary to that policy line.

In any event, the current approximation acquis governing the disqualification from participation in a public procurement procedure requires a combination not only of the approximating framework decisions and the new approximating directives, but additionally needs to be combined with the approximating provisions that can be found in other EU instruments. Based on the analysis above, two types of directives exist. For the purpose of this case study, the directives in which the constituent elements of offences, will be referred to as the approximating directives; the directive in which the procurement procedures are ‘approximated’ will be referred to as the Procurement Directive, to clearly distinguish between the two types of directives currently included in the relevant EU instrumentarium.

It remains regrettable though, that the approximation of sanctions is not bundled into one instrument, but requires the combination of multiple instruments. There have been a number of missed opportunities to better coordinate the coexistence of the various instruments. Considering that the 2004 Procurement Directive for example introduced the obligation to exclude candidates for having been convicted for participation in a criminal organisation, it is unfortunate that no references to that obligation is included when reviewing the approximation instrument that specifically deals with participation in a criminal organisation. When looking into the sanctions included in the 2008 FD Organised Crime, Art. 3 with respect to natural persons refers to traditional sanctions involving deprivation of liberty and Art. 6 with respect to legal persons refers to the traditional sanctions including criminal and non-criminal fines and a set of suggested alternative sanctions.

The fact that disqualification from participation in a public procurement procedure is not included as a sanction in FD Organised Crime can be explained by the diversity in the approach member states have developed with respect to that and other types of disqualifications. Whereas some member states have included it into their criminal justice system as a sanction that can be imposed by


a judge in the course of a criminal procedure, other member states have implemented it through restricting the access to *in casu* procurement procedures for persons that have been convicted in the past. In doing so, the disqualifications from participating in a public procurement procedure is not a sanction *sensu stricto* for it is not imposed by a judge. Nevertheless, it is important to recall that approximation consists of aligning the result, leaving the choice of form and methods up to the member states. From that perspective, it is very much possible to introduce a disqualification from participation in a public procurement procedure as a mandatory sanction for both natural and legal persons in the approximating Directives, leaving it up to the member states to decide whether this disqualification will be imposed in the course of a criminal justice procedure or will be implemented into the national law as a restriction with respect to the eligibility to participate in a public procurement procedure.

The recommendation to include the exclusion from participation in a public procurement procedure into the instruments that approximate the constituent elements of offences and their sanctions, would increase cross-instrument consistency. However, there are two other issues with respect to the interaction between the relevant EU instruments that require anticipation to ensure the proper applicability of these instruments. The second issue relates to the delineation of the offences in the procurement directive and linked to that the delineation of the mandatory exclusion grounds. The third issue relates to the availability of sufficiently detailed criminal records information to single out the convictions for which exclusion is mandatory following the provisions in the procurement directive.

6.1.2.2 **Delineation of the approximated offences**

The second issue relates to the delineation of the offences in the procurement directive and linked to that the delineation of the mandatory exclusion grounds. Interestingly, the scope of the offences and thus the exclusion obligations in the procurement directive is explicitly clarified through the introduction of a reference to an approximation instrument. At first sight this provision perfectly matches the first policy option developed above when elaborating on the disqualification triad, namely the introduction of approximated disqualifications for **approximated offences**.

- First, for participation in a criminal organisation, reference is made to the behaviour included in Art. 2(1) of the Council Joint Action 98/33/JHA;
- Second, for corruption, reference is made to the behaviour included in Art. 3 of the Council Act of 26 May 1997 and Art. 3(1) of the Council Joint action 98/742/JHA;
- Third, for fraud, a reference is made to Art. 1 of the Convention relating to the protection of the financial interests of the European Communities; and

Though the references may reflect the status of approximation at the time of adoption of the Procurement Directive, the approximation acquis develops rapidly and it is only a matter of time before the scope (at least the legal basis) of the approximated parts of the offence labels included in the list has changed. This raises a number of concerns.

The first concern relates to the reference to Council Joint Action 98/33/JHA on participation in a criminal organisation to delineate the scope of participation in a criminal organisation. The joint action referred to has been repealed and replaced by Council Framework Decision 2008/841/JHA on organised crime. Fortunately, Art. 9 FD Organised Crime elaborates on the faith of outdated references to the joint action and clearly stipulates that “references to participation in a criminal organisation within the meaning of Joint Action 98/733/JHA in measures adopted pursuant to Title VI of the Treaty on European Union and the Treaty establishing the European Community shall be construed as references to participation in a criminal organisation within the meaning of this new Framework Decision”. Even though from a technical legal perspective, there is no real problem and the reference to the joint action in the procurement directive should now be read as a reference to the framework decision, this approach requires that whoever is using the Procurement Directive is fully aware of any changes in the approximation acquis. This presumption or requirement of knowledge about the approximation acquis is far from ideal. The approximation acquis changes rapidly and procurement experts cannot be expected to be experts on offence approximation as well. At least, striving for consistent and user friendly policy making, it would make sense to warn the user of the Procurement Directive for the fact that the references are not kept updated. This can be done for example, by stipulating that the offence is defined in accordance to an identified article in any of the approximation instruments “and the provisions amending and replacing

140 It is important to note that in the following paragraphs it will be made clear that even at the time of the adoption of the 2004 Procurement Directive, the instruments referred to provide an incorrect overview of the approximation acquis.
that instrument". There are two options to accommodate this concern. A first option would be to introduce provisions into the approximation instruments that truly amend the references to repealed and replaced approximation instruments in any other EU instrument. Instead of stipulating that references to old instruments shall be construed as references to new instruments, the references are actually amended and replaced by a reference to the new instrument. This requires a thorough analysis of the entirety of the EU instrumentarium to catalogue all references to approximation instruments in other EU instruments and includes the inherent risk to miss some of the references. A second option would be to keep track of the approximation acquis in a separate document so that the specific reference to an approximation instrument can be lifted out of the procurement directive and replaced with a single reference to the approximation acquis as a whole, stipulating that the exclusion obligation relates to the said offence labels to the extent that they have been subject to approximation. To ensure transparency and not jeopardise the user-friendliness of the instrument, this approach requires that a consolidated approximation acquis is easily available for anyone to consult.

The second concern is more pressing. Whereas the first concern mainly relates to the user-friendliness of the procurement directive, and the presumptions of knowledge on the changes in the approximation acquis, the second concern relates to the questions that can rise when changes in the approximation acquis are not complemented with a provision stipulating that all references to the older instrument must be construed as references to the newer instrument. An example thereof can be found in the Council Joint Action 98/742/JHA on corruption in the private sector which has been repealed by the Framework Decision 2003/568/JHA. Unfortunately though, no explicit replacement provision – as found in the instruments on organised crime – is included in the instrument on corruption. Even though the framework decision can be interpreted to have the intention to replace the joint action so that references to the joint action should be construed as references to the framework decision, there is no explicit legal basis for a such interpretation, which might give rise to a legal conflict when determining whether or not a candidate falls within the scope of the mandatory exclusion grounds. If a new instrument changes the constituent elements of the offence and broadens the definition,

143 This approach is copied from the approach used in the Europol Convention and the new Decision to define the unlawful drug trafficking. It is defined as the criminal offences listed in Article 3(1) of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in the provisions amending or replacing that Convention.


there is no explicit legal basis to expand the scope of the exclusion ground accordingly. A candidate convicted for a type of corruption that has been added to the offence definition in the new framework decision, will argue that his conviction falls outside the scope of the mandatory exclusion from participation in a public procurement procedure for his behaviour is not included in the definition found in the joint action that is referred to in the procurement directive, and the new approximating instrument does not stipulate that references to the old joint action should be construed as references to the new framework decision. Art. 8 FD Corruption for example merely stipulates that the joint action is repealed. It does not stipulate that the joint action is repealed and replaced as is done in some other framework decisions, let alone that it explicitly stipulate that references should be construed as references to the new FD Corruption. Taking account of this complexity, it is most unfortunate that the 2004 procurement directive includes a reference to a joint action that at the time of the adoption had already been repealed by the 2003 FD Corruption. This discussion could have been avoided if the most recent approximation instrument was used to delineate the scope of the mandatory exclusion ground. This unfortunate introduction on an outdated reference comes to testify how challenging it can be to keep pace with the rapidly evolving approximation acquis.

The third concern relates to the potential coexistence of multiple definitions for the same offence label. To delineate the scope of money laundering, the procurement directive refers to Art. 1 of the Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering. That instrument has copy pasted the definition of laundering offences as introduced in the 1990 Council of Europe Money Laundering Convention into a EU instrument. Because a copy pasting exercise detaches the EU definition from the Council of Europe definition, an autonomous EU definition is created, be it at the time a perfect copy of the Council of Europe definition. However, in the following years also other EU instruments with respect to money laundering were adopted. Instead of using the existing EU definition as a basis to further develop the EU money laundering policy, a reference to the definition in the 1990 Council of European Convention was

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included in the 1998 Joint Action\textsuperscript{149} which was subsequently repealed by the 2001 Framework Decision\textsuperscript{150}. This means that two different approaches co-exists with respect to the definition of money laundering: on the one hand a copy pasted and therefore \textit{autonomous} EU definition and on the other hand a referenced and therefore \textit{Council of Europe-dependent} EU definition. Though currently still matching, this double approach runs the risk of creating two co-existing definitions at EU level in the event the definition at Council of Europe level is adapted and that adaptation would be pulled into the EU framework through the reference to the Council or Europe instrument included in the latest approximation instrument. Especially when the definition of money laundering is used to delineate the scope of obligations imposed on the member states, consistent EU policy making would strive to have one approximated EU definition (be it or not linked to the Council of Europe definition) that is used as a basis throughout EU policies.

The concerns with respect to the delineation of the approximated offences that in their turn delineated the scope of the mandatory exclusion from participating in a public procurement procedure, raise questions on the feasibility to tackle them and improve the approach currently used. Though it is necessary to clearly delineate the scope of the offences and the use of the approximation acquis to that end should be applauded, including explicit references to the approximation instruments cannot stand the test of time – as illustrated by the replacement of the joint action on organised crime with a framework decision on organised crime – and even runs the risk of being outdated to begin with – as illustrated by the reference to the 1997 joint action which was already repealed by the 2003 framework decision at the time the 2004 procurement directive was adopted. Alternatively, in order to avoid any discussion on the scope of the approximated offences and the legal basis to be used, a well-considered policy would stipulate that the offences are to be delineated as indicated in a separate instrument that contains an overview of the approximation acquis at any given time. To that end, information on the approximation acquis should be compiled in a separate instrument that is kept up to date and made available for any practitioner confronted with the situation that requires application of the approximation acquis. The recommendation to lift the references to approximation instruments out of the Procurement Directive and replace them with a single reference to the approximation acquis as a whole stipulating that the offences are to be interpreted in light thereof,


\textsuperscript{150} Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182 of 5.7.2001.
could be further explored and elaborated on. Specifically with that added value in mind, EULOCS – short for EU level offence classification system – should be included in the discussion.  

EULOCS is a classification system that presents an overview of the approximation acquis. It makes a distinction between those parts of offences that have been subject to approximation and those parts of offences for which criminalisation is subject to national discretion. Additionally, each offence category is provided a code and for the approximated parts a reference to the legal basis is included as well as an updated version of the behaviour that has been subject to approximation.

Considering that mandatory exclusion grounds have been introduced for participation in a criminal organisation, fraud, corruption and money laundering, the following table is intended to provide insight into what EULOCS looks like.

<table>
<thead>
<tr>
<th>0200 00 Open Category</th>
<th>PARTICIPATION IN A CRIMINAL ORGANISATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 1 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime</td>
<td>“Criminal organisation” means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit; “Structured association” means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure</td>
</tr>
</tbody>
</table>

| 0201 00 OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION |
|-------------------------|-------------------------------------------------|
| 0201 01 Directing a criminal organisation |
| Article 2 (b), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime | Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity. |

| 0201 02 Knowingly participating in the criminal activities, without being a director |
|-----------------------------|----------------------------------------------------------------------------------|
| Article 2 (a), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime | Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's |

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against organised crime criminal activities, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the member state concerned, even where the offences concerned are not actually committed.

<table>
<thead>
<tr>
<th>0201 03</th>
<th>Knowingly taking part in the non-criminal activities of a criminal organisation, without being a director</th>
</tr>
</thead>
</table>

Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation’s other activities (i.e. non-criminal) in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities.

<table>
<thead>
<tr>
<th>0202 00</th>
<th>OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION</th>
</tr>
</thead>
</table>

Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy.

[...]
<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0905 01 02</td>
<td>Passive corruption in the public sector involving a EU public official</td>
</tr>
<tr>
<td></td>
<td>The deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute passive corruption. EU public official (community official) shall mean any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities; or any person seconded to the European Communities by the member states or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants.</td>
</tr>
<tr>
<td>0905 01 03</td>
<td>Active corruption in the private sector</td>
</tr>
<tr>
<td></td>
<td>promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person’s duties</td>
</tr>
<tr>
<td>0905 01 04</td>
<td>Passive corruption in the private sector</td>
</tr>
<tr>
<td></td>
<td>directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one’s duties</td>
</tr>
<tr>
<td>0905 02</td>
<td>Other forms of corruption</td>
</tr>
<tr>
<td></td>
<td>Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy</td>
</tr>
</tbody>
</table>

152 Art. 8 FD Corruption stipulates that Joint Action 98/742/JHA – the instrument referred to in the 2004 Procurement Directive – shall be repealed.
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<table>
<thead>
<tr>
<th>0906 00</th>
<th>MONEY LAUNDERING</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>“Money laundering” or laundering of proceeds of crime “proceeds”, consists of any economic advantage from criminal offences.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>0906 01</th>
<th>Offences jointly identified as Money Laundering</th>
</tr>
</thead>
<tbody>
<tr>
<td>0906 01 01</td>
<td>The conversion or transfer of property</td>
</tr>
<tr>
<td>Article 6(1) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime</td>
<td>The illicit conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions</td>
</tr>
<tr>
<td>0906 01 02</td>
<td>The illicit concealment or disguise of property related information</td>
</tr>
<tr>
<td>Article 6(1) of CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime</td>
<td>The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds</td>
</tr>
<tr>
<td>0906 01 03</td>
<td>The illicit acquisition, possession or use of laundered property</td>
</tr>
<tr>
<td>Article 6(1) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime</td>
<td>The acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>0906 02</th>
<th>Other forms of Money Laundering</th>
</tr>
</thead>
</table>

[...]
Revenue fraud means:
- The use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities
- The non-disclosure of information in violation of a specific obligation, with the same effect
- The misapplication of a legally obtained benefit, with the same effect

In practice, using EULOCS as a reference tool would mean that legal instruments such as the procurement directives would no longer need to include an *ad nominem* reference to the approximation instrument that constitutes the legal basis for the scope demarcation of the mandatory exclusion grounds, but include a reference to EULOCS and clarified that in EULOCS it is indicated which approximated parts of offences\(^\text{153}\) are included in the scope of the mandatory exclusion ground.

In accordance to the old approach, the scope of the exclusion ground will be delineated stipulating that participation in a criminal organisation is defined in *Art. 2(1) of the Council Joint Action 98/33/JHA*; In accordance to the suggested EULOCS approach, it would be stipulated that the scope of participation in a criminal organisation as an exclusion grounds is to be delineated as indicated *in the EU level offence classification system*.

This also means that discussions on the adoption or alteration of approximation instruments should include the relation between the new or altered approximated offence and the mirroring scope of the approximated disqualifications. By working with EULOCS as a reference tool, it will also be possible to extend the scope of the approximated offence, i.e. extend the obligation for member states to criminalise the behaviour included in the instrument, but at the same time stipulate that the obligation to attach a disqualifying effect to a conviction in the course of a public procurement procedure remains the same. In other words, the inclusion of approximated behaviour in separate categories of EULOCS allows for a very detailed

\(^{153}\) It should be noted that using EULOCS as a reference tool also opens the possibility to make a selection within an approximated offence. It is not a given that the extension of the approximation immediately entails an extension of the exclusion ground. Because EULOCS works with a categorisation system that differentiates between different categories of behaviour included in one offence label, it is possible to use that level of detail in the identification of the behaviour for which conviction should lead to exclusion.
differentiation between offences for which a conviction is automatically complemented with a disqualification from entering in a procurement procedure and a conviction for which no such mandatory exclusion is foreseen. This recommendation rounds out the discussion on the second issue, being the delineation of the offences for which exclusion is mandatory.

6.1.2.3 Access to detailed information

The third issue relates to the availability of sufficiently detailed criminal records information to single out the convictions for which exclusion is mandatory following the provisions in the procurement directive. Besides the clear demarcation of the scope of the approximated offences and thus the approximated disqualification obligation, the proper functioning of disqualification obligations is also dependent on the availability of (sufficiently detailed) conviction information to determine whether or not a case falls within the scope of the disqualification obligations. In spite of the extensive critiques raised with respect to the functioning of these mandatory exclusion grounds (e.g. with respect to the scope ratione personae\(^{154}\), the scope ratione temporis,\(^{155}\) the scope ratione auctoritatis\(^{156}\) and the outdated character\(^{157}\) of the references to clarify the scope of the offence labels), analysis has never touched upon the feasibility to adhere to the obligation and disqualify a candidate that has been convicted for any of the listed offences due to the unavailability of sufficiently detailed criminal records information. Adhering to the obligation to exclude a candidate for having been convicted for any of the listed offences requires that convictions for those offences can be identified and singled out in the midst of other existing


\(^{156}\) It has been argued that a strong criminal policy essentially needs to include the private sector in the regulatory framework. See e.g. I. CARR, (2007) Fighting Corruption through Regional and International Conventions: A Satisfactory Solution? *European Journal of Crime, Criminal Law and Criminal Justice*, p 121-153

convictions. This requires a review of the level of detail in the conviction information that is (made) available to contracting authorities.

When reviewing the access to criminal records information for sensitive sector-actors such as contracting authorities in a procurement context, different regimes were identified. Some member states allow the contracting authorities direct access to the criminal records databases. Other member states work with certificates of non prior conviction. Either way it is important that the information provided can differentiate between offences that have been subject to approximation and offences for which no approximated definition and therefore no approximated disqualification exists. Based on previous research on the architecture and content of the national criminal records databases\textsuperscript{158}, it is safe to say that in the current format, member states cannot make a distinction between a money laundering conviction that relates to money laundering as found in the approximation instrument and a money laundering conviction that relates to a type of money laundering that is nationally criminalized under the label of money laundering beyond the minimum requirement. Though a lot has happened with respect to criminal records in the last decade, the new policy with respect to criminal records information cannot positively adjust that presumption. The limited importance attached to completing information on an existing conviction with detailed information on the underlying offence when designing the new European Criminal Records Information System illustrates this. From 7 April 2012 onwards, the criminal records information exchange will be governed by the 2009 framework decision on the organization and content of criminal records databases\textsuperscript{159} complemented by the 2009 decision on the development of ECRIS\textsuperscript{160}, short for European criminal records information system. When reviewing the level of detail introduced in the coding system that will govern the future criminal records exchange, it is clear that it is not deemed important to be able to distinguish between convictions that relate to an approximated part of an offences and convictions that relate to behaviour that were nationally added to an offence label. For money laundering, only one

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\textsuperscript{159} Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, OJ L 93 of 7.4.2009.

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reference code is included in the ECRIS coding system, namely 1504 covering *laundering of proceeds from crime*. The lack of detail that results from it is most unfortunate considering that for a lot of mechanisms that take account of convictions such as exclusion grounds, more detailed information on the behaviour underlying the convictions is necessary. From this perspective the information exchanged can only provide an indication of an existing conviction that may result in an exclusion and always requires that additional information is sought. Nevertheless, the ECRIS coding system can be easily upgraded by introducing a distinction between convictions related to *the jointly identified part* of money laundering and convictions related to *other forms* of money laundering, mirroring the approach used when developing EUOCS.

It can therefore be concluded that the lack of sufficiently detailed criminal records information constitutes a significant obstacle to the proper functioning of the approximated exclusion grounds for the approximated offences found in the legal instruments governing the access to public procurement proceedings. In today’s reality, it is not possible to make the necessary distinctions to uphold the exclusion obligation. Based on the information available in the criminal records information systems it will never be possible to determine whether or not the behaviour underlying the conviction matches with the behaviour that should give rise to exclusion from participation in a procurement procedure. In practice, that knowledge can only be gathered when conducting a case analysis, looking into the description of the facts in the conviction.

In light of this limited detail in the criminal records information available in general and therefore also available to the contracting authorities in a procurement procedure, the question arises to what extent it is a problem to exclude candidates for having been convicted for offences beyond the minimum requirements found in the procurement directives. After all, mandatory exclusion grounds found therein are only a minimum requirement. Member states are allowed to introduce a more stringent regime at national level. If member states legislate that candidates are excluded for having been convicted for *any type* of money laundering, the minimum requirement is surely fulfilled. The question therefore arises whether knowing that someone was convicted for ‘a’ money laundering offence corresponding to code 1504 in ECRIS cannot suffice and automatically lead to exclusion. This discussion on the acceptability of legislation that will exclude candidates for having been convicted for behaviour beyond the approximation acquis forms the central question with respect to the functioning of attaching equivalent disqualifications to foreign convictions as attached to national convictions and will therefore be dealt with in the following section. The link between being disqualified from participating in a public procurement procedure and mutual recognition will be dealt with as the final item of this case study.
6.1.3 Attaching an equivalent disqualifying effect to foreign convictions

The second policy recommendation consists of extending the requirement to attach to a foreign conviction a disqualifying effect that is equivalent to the disqualifying effect a national conviction would evoke. That policy option links in with the equivalency principle underlying the framework decision on the taking account of foreign convictions in the course of new criminal proceedings (abbreviated to FD Prior Convictions), that recently entered into force.¹⁶¹

In the 2008 FD Prior Convictions, the member states committed themselves to take account of foreign prior convictions in the course of new criminal proceedings and attach effects to them that are equivalent to the effects attached to a prior national conviction. Art. 3 reads that previous convictions handed down against the same person for different facts in other Member States are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law. The effect of a prior conviction in a new criminal procedure can be dependent on the underlying offence and/or the sanction imposed.¹⁶² As a second branch of the disqualification triad, it is recommended to extend that commitment to encompass also the obligation to take account of foreign convictions in the course of a procurement procedure. Considering the inherent cross-border character of the EU procurement directives which are intended to support and facilitate participation in procurement procedures outside the candidate’s member state¹⁶³ and considering that conviction related exclusion grounds are introduced at EU level to protect the contracting authority from entering into a contractual relationship with an unreliable candidate¹⁶⁴, an extension of the equivalency principle to procurement procedures is in line with the philosophy underlying the elaboration of an EU procurement policy.

¹⁶² See more in detail: W. De Bondt (forthcoming), Cross-border recidivism in the EU: Fact or Fiction?
6.1.3.1 Transferability concerns

Prior to transferring a principle from one context into another, it must be assessed whether the specificities of the new context give rise to transferability concerns. In other words, it is important to thoroughly assess to what extent it is feasible to transfer an existing principle into another context and to what extent it is necessary to adapt the principle or complement it with correction or flanking measures for it to work properly. The transferability concern here relates to the position of duality with respect to the underlying offence or the imposed sanction when taking account of foreign convictions in the course of a procurement procedure. In the following paragraphs, the line of argumentation will be developed in relation to the duality with respect to the underlying offence (i.e. the double criminality requirement). That line of argumentation applies mutatis mutandis also to the duality with respect to the imposed sanction.

Double criminality is not a mandatory but an optional requirement when taking account of foreign convictions in the course of a criminal procedure. When analyzing the equivalency principle as introduced in the FD Prior Convictions, it becomes clear that the commitment to take account of foreign convictions is not unlimited. Recital 6 clearly provides that the obligation to take account of and give effect to foreign convictions does not stretch to encompass a conviction that could not have existed under national law for reasons of lacking double criminality. It stipulates that this framework decision contains no obligation to take into account such previous convictions [...] where a national conviction would not have been possible regarding the act for which the previous conviction had been imposed [...]165. This means that the member states are not obliged to take account of a foreign conviction if the underlying behaviour is not equally criminalized under their national law. However, the framework decision does not prohibit such effects. Therefore, it is left up to the member states to decide whether or not effects are attached to foreign prior convictions that do not meet the so-called double criminality test. In the course of a criminal proceeding it is possible to take account of foreign convictions – even beyond the double criminality requirement – to the extent that the national law of the prosecuting member state allows it. Double criminality is an optional refusal ground.

165 The sentence continues with 'or where the previously imposed sanction is unknown to the national legal system' supporting that the argumentation developed applies mutatis mutandis also to the duality with respect to the imposed sanction.
The question arises whether double criminality should be a mandatory or optional refusal ground when taking account of foreign convictions in the course of a public procurement procedure. The relevance of that question can be illustrated using the following example. Two candidates – applying for the same public contract – operate under the jurisdiction of two different member states. The difference in jurisdiction can raise double criminality issues in that the same behaviour may be qualified differently. Whereas one candidate can present behaviour without criminal consequences, the other candidate risks criminal proceedings because the behaviour is criminalized in the jurisdiction it operates in. Not only will prosecution and conviction for the said behaviour be regarded as unfair when the candidate compares itself with its competitors operating under the jurisdiction of another member state, the situation will be regarded as even more unfair if the conviction results in being excluded from participation in a procurement procedure, whereas the other candidate could never have been convicted – let alone excluded – while presenting the exact same behaviour. Especially when the main objective underlying the public procurement directives in the EU relate to creating the conditions of competition necessary for the non-discriminatory award of public contracts, access to a true single market and the reinforcement of competition amongst European enterprises, this feeling of unfair and unequal treatment cannot be ignored. It should be noted that this concern therefore extends beyond the question whether foreign convictions can be taken into account if the underlying behaviour is not equally criminalized in the jurisdiction of the contracting authority. The question is broader and looks into whether convictions – foreign or national – can be taken into account if the underlying behaviour is not equally criminalized in the jurisdictions in which the other candidates operate, regardless of the jurisdiction of the contracting authority. To that end, the position of double criminality in the national implementation legislation should be carefully analysed.

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6.1.3.2 *Different national approaches*

The application of the equivalency principle as found in the context of taking account of foreign convictions in the course of a criminal procedure is dependent on the formulation of the national law. Therefore a transfer to apply it also in the context of taking account of foreign convictions in the course of a public procurement procedure will be equally dependent on the formulation of the national law. In light thereof, it is necessary to first look into the provisions in the national law of each of the member states to assess to what extent the double criminality requirement has received a central position therein, and whether the question on the faith of both foreign and national convictions for which the underlying behaviour is not equally criminalized in the jurisdictions in which co-competitors operate has not been already sufficiently and adequately tackled.

The procurement directive has introduced mandatory exclusion grounds for candidates that have been convicted for participation in a criminal organization, fraud, corruption and/or money laundering, avoiding feelings of unequal treatment by limiting the scope of the exclusion ground to approximated offence. It is interesting to see how member states have implemented that provision and to what extent member states have tackled the questions related to the position of foreign convictions and the double criminality requirement more in general.

The fact that the Procurement Directive provides little guidance on how to implement this provision and how wide member states are allowed to introduce mandatory exclusion grounds for convicted candidates, has led to different implementation approaches. When assessing how member states have used their implementation discretion, roughly two different approaches can be distinguished.

A first type of member states has clearly identified the behaviour for which convictions will lead to exclusion. On the one hand reference can be made to Sweden who has introduced minimalist exclusion grounds through limiting the scope thereof to the offences the way they are commonly defined in the European instruments. In doing so Sweden has limited the scope of the exclusion grounds to having been convicted for behaviour that is known to be criminalised throughout Europe. Because exclusion is only based on convictions for which the underlying behaviour is known to be criminalised throughout Europe, double criminality is guaranteed and the exclusion grounds are in effect exactly the same for all competing candidates. There will be no feelings of unfairness when applying the Swedish exclusion provisions. Apparently, Sweden did not consider it problematic not to be able to exclude candidates for having been convicted in Sweden for behaviour that is not included in the

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167 Chapter 10 Art. 1 Swedish Public Procurement Law, SFS 2007:1091.
minimum requirement introduced in the procurement directive. Germany on the other hand too has clearly identified the behaviour for which a conviction will lead to exclusion, but it has not used references to EU level instruments to clarify the scope of the exclusion grounds, but referred to provisions in its own criminal code to determine the behaviour for which conviction will lead to exclusion. §11a 2(1) German Procurement Law lists the relevant provisions of the criminal code. The first exclusion ground stipulates that convictions will lead to exclusion if they relate to “§ 129 of the Criminal Code (criminal organizations, education), § 129a of the Criminal Code (Formation of terrorist organizations), § 129b of the Criminal Code (criminal and terrorist organizations abroad)”. This means that the scope of the exclusion ground is not necessarily limited to the behaviour included in the EU level instruments and Germany has used its discretion to introduce a more severe policy at national level, also excluding convictions for behaviour that is not included in the approximation instruments. Bulgaria too has complemented the national offence labels with the references to its national criminal code.\footnote{Art. 47 Bulgarian Public Procurement Law, SG n° 28 of 6 April 2003 lastly amended by SG n° 79 of 26 September 2008.}

In doing so, double criminality will only be guaranteed in one direction. Candidates with a foreign conviction will only be excluded to the extent double criminality is guaranteed with respect to the national (in casu German) criminal law of the contracting authority. However, this does not guarantee that their conviction will only be taken into account to the extent that the underlying behaviour is equally criminalised in the jurisdictions in which the competitors operated, for double criminality is only tested using the criminal law of the (German) contracting authority as a guideline, regardless of double criminality with the jurisdictions in which competitors have operated. Similarly, candidates with a national (German) conviction will not have the guarantee that their conviction will only be taken into account to the extent that the underlying behaviour is equally criminalised in the jurisdictions in which the competitors operated. Situations may occur in which a candidate is excluded for having been convicted in Germany for behaviour that does not constitute an offence in the other member states, which may be perceived as unfair.

A second type of member states has not explicitly indicated for which underlying behaviour convictions will lead to exclusion. The use of undefined offence labels leaves significant room for interpretation. Some member states – though having copied the wording of Art. 45(1) of the Procurement Directive – have not bothered to also copy the references to the European instruments into their national implementation legislation and have merely copied the offence labels. In doing so, Lithuania and Romania have not given any indication on

\footnote{Art. 47 Bulgarian Public Procurement Law, SG n° 28 of 6 April 2003 lastly amended by SG n° 79 of 26 September 2008.}
how to interpret the offence labels, leaving us with the presumption that they should be interpreted in light of the national (criminal) meaning thereof, though much can be said also for an interpretation in light of the mother provision in the directive, and even an interpretation including any criminalisation underneath that label in any other member state can be defended. Other member states have reinterpreted the offence labels itself in accordance with the labels used in their national criminal code, suggesting that the scope of the labels must be interpreted in light of the scope of the criminalisation in the national criminal code. The Czech Republic has clarified that candidates will be excluded for having been finally sentenced for “crimes committed to the benefit of a criminal conspiracy, by participation in criminal conspiracy, legislation on proceeds of criminal activity, accessoryship, accepting bribes, bribery, indirect bribery, fraud, loan fraud.”

Even though the reformulation of the offence labels strengthens the presumption that their scope is to be interpreted in light of the criminalisation provisions in the national criminal code, from a strict legal perspective the wording of the national implementation provision is technically inconclusive.

Within those two implementation typologies (i.e. either or not explicitly including for which behaviour a conviction will lead to exclusion) only few national implementation legislations explicitly deal with the differences in the criminalisation legislation of the member states. In doing so, the Hungarian legislation falls within the second category described above. Interestingly, in addition to clarifying how it will deal with national situations, Art. 60(3) Hungarian Public Procurement Law clarifies that for candidates established in another member state of the European Union, the exclusion grounds will be as mentioned in Art. 45(1) of the Procurement Directive. The Hungarian implementation legislation takes account of the fact that in a public procurement procedure, it might be confronted with foreigners and foreign convictions. For those foreigners the scope of the exclusion ground is limited in the same way Sweden has limited the exclusion grounds – mirroring the minimum requirement introduced in the directive – though Sweden did not differentiate between national and foreign candidates. This approach can be criticised though, for the applicability of criminal law is not dependent on the nationality of the person involved. It may very well be that a person established abroad is convicted by a Hungarian judicial authority. Technically, this means that the

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171 Art. 60(3) Hungarian Procurement Law (Törvény közbeszerzésekről szóló, 2003; évi CXXIX).
Hungarian conviction cannot be used as a ground for exclusion when it relates to behaviour that is not included in the approximation instruments.

Alternatively, whilst Art. 23(1) a-e UK’s Public Procurement Law reinterprets the offences listed in Art. 45(1) in light of the UK criminal law\textsuperscript{172}, its Art. 23(1) f adds that also convictions for “any other offence within the meaning of Art. 45(1) of the Directive as defined by the national law of any relevant state” will lead to exclusion. In doing so, the UK’s Public Procurement Law does not differentiate between national and foreign candidates, but between national and foreign convictions. With respect to national convictions, the national criminal law applies and with respect to foreign convictions, foreign criminal law applies, though that foreign law is limited to mirror the scope of the mandatory exclusion grounds in the procurement directive.

The fact that some member states have not dealt with the topic of foreign convictions in their national legislation and other member states have not developed a uniform way to deal with foreign convictions and more broadly the concerns related to the double criminality requirement, necessitates an analysis on whether or not the feeling of unfair treatment when excluded for having been convicted for behaviour that is not equally criminalized in the jurisdictions in which the competitors operated can be substantiated to give rise to an unequal treatment problem that would stand in court.

6.1.3.3 Equal treatment limits to exclusion grounds

The feeling of unfair treatment originates from the argumentation that candidates are not treated equally because they could not have been convicted equally for the same behaviour (i.e. the underlying the conviction) for it is not criminalised equally throughout the jurisdictions they operate in.

Equal treatment is a basic principle in European law.\textsuperscript{173} Its importance in the context of public procurement is recognised by its explicit inclusion in Art. 2 Procurement Directive, and additionally the Court of Justice has clarified that even where it is not explicitly included in the body of the text, the principle is so fundamental, that procurement cannot function without it. In the Storebælt case the ECJ had to judge a Danish call for tender with respect to the construction of a bridge, which required all candidates to use as much as possible Danish resources. One of the candidates took this matter to court arguing that such a requirement would result in the unequal treatment of foreign candidates. It was

\textsuperscript{172} In doing so, the UK’s legislation falls within the first category described above.

argued that Danish resources are better known and more accessible for Danish candidates. With the Storebælt case, the ECJ clarified that even where directives do not expressly mention in casu the principle of equal treatment of candidates, the duty to observe that principle lies at the very heart of the directive whose purpose it is to ensure the development of effective competition in the field of public contracts and which lays down criteria for selection and for award of the contracts by means of which such competition is to be ensured.\textsuperscript{174} The principle requires an objective comparison of the tenders submitted by the various candidates.\textsuperscript{175} The same reasoning can also be found in several other cases.\textsuperscript{176} Undeniably, equal treatment is a fundamental principle in a public procurement context and the interpretation and application of procurement legislation should be done with respect for the equal treatment principle.

Equal treatment requires that equal situations are treated in an equal manner and different situations are treated in a different manner.\textsuperscript{177} Though that might seem self-evident as a baseline, the application thereof in practice is far from self-evident. The difficulty in this case study with respect to conviction-related exclusion grounds consists of determining which situations should be compared and assessed for equality. Should the behaviour be used as a baseline, or should it be the criminalisation/conviction.

The table inserted below is meant to illustrate how that would influence the outcome of the equality assessment.

<table>
<thead>
<tr>
<th>Behaviour</th>
<th>Criminalization</th>
</tr>
</thead>
<tbody>
<tr>
<td>Candidate 1</td>
<td>Same</td>
</tr>
<tr>
<td>Candidate 2</td>
<td>Same</td>
</tr>
<tr>
<td>Interpretation</td>
<td>Same behaviour</td>
</tr>
<tr>
<td></td>
<td>- same situation</td>
</tr>
<tr>
<td></td>
<td>- same treatment?</td>
</tr>
</tbody>
</table>

When taking the behaviour itself as a basis, equal treatment would mean that the same behaviour is regarded as the same situation and thus requires the same treatment. This means that considering the behaviour is not criminalized in one of the jurisdictions under which one of the candidates operates, and therefore no (conviction) information is available on whether or not that candidate has

\textsuperscript{174} ECJ, Case C-243/89 Storebælt, 22 June 1993, at §33.  
\textsuperscript{175} ECJ, Case C-243/89 Storebælt, 22 June 1993, at §37. In casu the ECJ decided that the requirement to use domestic resources would amount to an unequal treatment of the foreign candidates.  
\textsuperscript{176} See e.g. ECJ, Case C-13/63 Italy v. Commission, 17 July 1963; ECJ, Case C-304/01 Spain v. Commission, 9 September 2004; ECJ, Case C-210/03, Swedish Match, 14 December 2004.  
\textsuperscript{177} See e.g. ECJ, Joint cases C-21/03 and C-34/03 Fabricom, 3 March 2005, at §27; ECJ, Case C-434/02 Arnold André, 14 December 2004, at §68; Case C-210/03 Swedish Match, 14 December 2004, at §70.
presented the behaviour, the said behaviour cannot lead to an exclusion. Same
behaviour should have the same consequences in the context of a public
procurement situation.

When taking the criminalization as a basis, the situations are different in that
candidates 1 has committed criminalized behaviour and candidate 2 has not
committed any criminalized behaviour. Taking this perspective as a baseline, the
situations are different and therefore a difference in treatment can be justified.

To decide which of both scenarios results in equal treatment as required by the
Court of Justice, it is required to look into the court’s case law. To that end, it is
interesting to first examine the court’s opinion with respect to the
criminalization diversity in the member states. If the mere fact that behaviour is
criminalized in one member state and is not in another gives rise to an unequal
treatment problem, the choice between both scenarios would be clear. In that
case, diversity in criminalization amounts to unequal treatment, which would
mean that the only acceptable scenario is a scenario in which convictions are
only taken into account to the extent that the underlying behaviour would also
lead to a conviction in the other member states. The question whether or not the
diversity in criminal law amounts to unequal treatment was subject to debate in
the Hansen & Søn case. That Danish transport and logistics company was being
prosecuted in its capacity as the employer of a driver on the grounds that the
latter had infringed certain provisions with respect to the maximum daily
driving period and the compulsory daily rest period. 178 The Danish legislator
had introduced a system of strict criminal liability of legal persons when
implementing the European minimum standards with respect to those driving
regulations. Hansen & Søn argued that the risk of being convicted is now greater
in Denmark when compared to that risk in another member state as a result of
which competition within the common market is distorted. 179 The court however
clarifies that the economic consequences of an infringement vary not only
according to the system of criminal liability introduced by the member state in
question but also according to the level of the fine imposed and the degree of
effectiveness of the checks carried out. Accordingly, the introduction of a system
of strict criminal liability does not in itself involve a distortion of the conditions
of competition. 180 Unfortunately, what would involve a distortion of the
conditions of competition in the internal market is not included in the
judgment. 181 Hansen & Søn have not asked the right question to receive an
answer thereto. The mere diversity in criminal law is not the problem, neither is

178 Art. 7-11 Regulation (EEC) No 543/69 of 25 March 1969 on the harmonization of certain social
179 ECJ, Case C-326/88 Hansen & Søn, 10 July 1990, § 13.
180 ECJ, Case C-326/88 Hansen & Søn, 10 July 1990, § 15.
the application thereof. Anyone operating under the jurisdiction of the Danish criminal law will be treated equally. Anyone operating under the jurisdiction of any other criminal law system that has introduced a different system of attributing liability to (legal) persons will be treated equally. There is no overarching obligation for all member states to legislate and criminalise behaviour in the same manner. Each member state is the master of his own criminal justice system and has the prerogative to decide which behaviour is criminalised and which behaviour is kept outside the criminal justice sphere.

Even though the diversity in itself does not involve a distortion of the conditions of competition, this does however not mean that the diversity in criminalisation cannot amount to unequal treatment in a specific context, especially a context that does require that everyone is treated equally. Where no overarching obligation exists to criminalise behaviour equally throughout the Union, an obligation does exist to ensure the equal treatment of all competing candidates in a procurement procedure. It is submitted that not the difference in itself is problematic, but the consequences of that difference in a procurement procedure are problematic. As soon as candidates with convictions handed down by different member states are compared in a public procurement procedure – in which equal treatment is a fundamental principle – the differences must be neutralised to ensure that competition is not distorted by the diversity in criminalisation in the member states.

Equal treatment in its purest form requires that the differences between the criminal justice situations of the member states are neutralized and account is taken of the behaviour that has been presented by the candidates.

The implementation thereof requires that behaviour is only taken into account to the extent that reliable information on the commission of that behaviour is available regardless of the jurisdiction in which a candidate operates, i.e. to the extent that information on convictions for that behaviour is available, i.e. to the extent that the behaviour is criminalized throughout the EU. Differently put, this means that convictions can only be taken into account to the extent that they relate to behaviour that would equally constitute an offence in the jurisdictions in which the other actors operate. Exclusion can only be based on convictions that relate to behaviour that represents the largest common denominator amongst the criminalizations.

In practice, the identification of the largest common denominator can be done in two ways: either the largest common denominator is identified prior to the start of the public procurement procedure based on the largest common denominator in the entirety of the EU, or the largest common denominator is identified ad hoc using the background of the tendering candidates within a specific public procurement case as a basis.

The first option would result in a common denominator from an EU wide perspective, reflecting the common denominator amongst the 27 member states.
This option is a maximalist option, for it includes all 27 member states in the analysis. However, the more member states involved in the analysis, the smaller the largest common denominator will be. The biggest advantage of this approach is the fact that the largest common denominator will be the same for each public procurement procedure, regardless of the member state in which the procedure takes place. Exclusion is transparent and predictable. This also means that the quest to identify the largest common denominator can be a common project supported by each of the 27 individual member states, in cooperation with the European Union. An overview needs to be produced clearly delineating the behaviour that is criminalized throughout the EU. An important step in that direction was taken with the development of the EU level offence classification system, abbreviated to EULOCS. As clarified above, EULOCS is a classification system that provides an overview of the offences that have been subject to approximation and in doing so provides an overview of the behaviour that was jointly identified as criminal and other forms of behaviour that may be subject to criminalization upon a national decision to do so. The approximation acquis as presented in EULOCS will provide valuable information for the identification of the largest common denominator amongst the member states as it provides an overview of the smallest common denominator. At least those offences that have been subject to approximation are common. Because the set of offences for which approximating instruments have been adopted is relatively limited, it is highly likely that a lot more will be common. Should the member states want to be able to exclude candidates for offences beyond what is approximated, additional comparative legal analysis will be necessary to delineate the largest common denominator.


183 The question arises whether limiting the taking account of foreign convictions to the approximation acquis still has an added value compared to the first technique in the disqualification triad, i.e. approximated disqualifications for approximated offences. To clarify the added value, two comments need to be made. First, no approximated disqualifications exists for all offences that have been subject to approximation. Therefore, the technique of attaching equivalent effect to a foreign conviction for which the underlying behaviour relates to the approximation acquis can still have an added value. Second, as argued above, it is very well possible that an approximated disqualification is introduced only with respect to a specific category within the approximated offence. The categorisation within the offence labels as done in EULOCS, creates the opportunity to be very specific about the scope of mandatory exclusion grounds and it is possible that they are limited to a selection of the subcategories within an offence. Here too, equivalent effect for the approximation acquis was a whole can provide an added value compared to the first technique in the disqualification triad.
The second option would result in an *ad hoc* identification of the largest common denominator, taking account of the specific profiles of the candidates participating in a specific public procurement procedure. After all, equal treatment must be ensured between the *actual* participants in a public procurement procedure and does not need to be ensured in relation to *hypothetical* candidates that did not participate. Based on the specific profiles of the participating candidates, the number of member states in the analysis may be reduced. A such analysis might result in an *ad hoc* largest common denominator that includes behaviour that would not make it to the EU largest common denominator. The identification of such an *ad hoc* largest common denominator requires taking account of the criminal law of the member states represented by the nationalities of the competing candidates as well as the ‘nationality’ of the convictions they hold.

In sum, the reasoning based on the equal treatment principle leads to the conclusion that attaching equivalent disqualifying (*in casu* excluding) effect to foreign prior convictions in the course of a public procurement procedure is compatible with the equal treatment requirement under the condition that disqualifying (*in casu* excluding) effect is only attached to convictions for which the underlying behaviour falls within the largest common denominator of what is criminalized throughout the EU or a set of relevant jurisdictions. This conclusion raises questions not only with respect to the availability of information but also with respect to the position of the member states with respect to the consequence that the situation can occur in which a contracting authority cannot take account of a national conviction if it relates to behaviour that is not equally criminalized in the jurisdictions in which the other candidates operate.

6.1.3.4 Availability of information

If the use of prior convictions as exclusion grounds in the context of a public procurement procedure is limited to the largest common denominator amongst the criminalizations, this requires that the information on the prior convictions is sufficiently detailed to be able to decide whether or not the conviction falls with the scope of that largest common denominator.

This has a considerable impact on the required level of detail in the prior conviction information. If member states decide to allow exclusion in their jurisdiction for the predefined “common denominator” across the criminal codes of the entirety of the EU, that common denominator can be modelled to match the existing knowledge deduced from the approximation obligations. The difficulties related to the availability of information with respect to this policy option mirror the difficulties with respect to the availability of information elaborated on above in relation to the introduction of approximated exclusion.
grounds for approximated offences. The current level of detail in criminal records information cannot suffice; Striving for a comprehensive, consistent and well-balanced EU approach, it could be recommended to require member states to be able to distinguish between a conviction that relates to behaviour that has been subject to approximation and another conviction.

Alternatively, if the member states decide to further develop the EU largest common denominator beyond what jointly identified as (to be) criminalized in the national law of each of the member states and wish to exclude candidates for behaviour that is currently not included in the approximation acquis, similar flanking measures with respect to the availability of sufficiently detailed information are necessary. The same is true when member states decide to work with maximalist option and establish work with ad hoc largest common denominators based on the specific profiles of the tendering candidates.

6.1.3.5 Acceptability of exceptions to the equal treatment limitations

Following the conclusion that equal treatment requires a limitation in the convictions that are eligible for use as a ground for exclusion of the tendering candidate, the question arises to what extent exceptions to that policy recommendation are acceptable. Based solely in the equal treatment principle, it is possible that a candidate convicted nationally for a money laundering offence may not be excluded from participating in a public procurement procedure, for the behaviour underlying the money laundering conviction is not equally criminalized throughout the relevant jurisdictions.

At first sight it seems as though the decision on the fate of the national convictions is the sole competence of the individual member state, relying on the purely internal rule.184 According to that purely internal rule, the EU principles related to free movement and equal treatment cannot be applied to situations that are confined to a single member state. However, such conclusion cannot be supported for two main reasons. First, the ‘national’ character of the conviction does not reveal any information on the nationality of the person involved and whether or not use was made of the free movement right. At least to the extent the national conviction is imposed to a foreign national, the purely internal rule cannot be applied. Second, with respect to the national candidates the purely

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internal rule cannot prevent the applicability of the equal treatment principle either. Acting as a participant in a public procurement procedure governed by EU law establishes the required link with EU law. Furthermore, the requirement to treat candidates equally is introduced in the Procurement Directive, indiscriminately and should therefore apply equally to foreign and national candidates, to foreign and national convictions.

The question arises whether a contracting authority can argue that disregarding a national conviction for money laundering simply because the underlying behaviour is not equally criminalized throughout the relevant jurisdictions in which the competitors operate, would not be acceptable.

It is important to understand that two interests collide. On the one hand, the interest of the tendering candidates consists of adhering to the principle of equal treatment. On the other hand, the interest of the contracting authority consists of allowing the exclusion of convicted candidates. Considering the importance of equal treatment of the tendering candidates for the proper functioning of public procurement in a European internal market, adhering to the equal treatment principle should be considered to be the baseline. However, to the extent that it can be motivated, an exception can be allowed to safeguard public order, national security or the integrity of the contracting authority. Therefore exceptions are only acceptable to the extent they can be motivated in light of a specific procurement procedure (no general motivation is allowed) and to the extent that an independent judicial review of the exclusion is available for the tendering candidates.

Two questions arise. First, what would be the impact of the acceptance to include national convictions in the scope of convictions that result to exclusion? Second, would it be acceptable to also want to be allowed to exclude a candidate for having been convicted for behaviour that does not constitute an offence under the national criminal law of the member state of the contracting authority?

First, if duly motivated, a contracting authority can be allowed to extend the scope of the exclusion grounds to include also its national money laundering convictions for reasons of public order, national security or the integrity of the contracting authority. In that situation the question arises how the scope of the exclusion ground with respect to money laundering is extended. It can be extended to encompass the largest common denominator complemented with the national money laundering convictions, or it can be extended to encompass the largest common denominator complemented with any conviction for which the underlying behaviour corresponds to the behaviour national criminalized as money laundering. The first would only sacrifice the equal treatment with respect to national money laundering convictions and in doing so maintain equal treatment between all other candidates. In doing so, a form of unequal treatment would be created between candidates with a national conviction and candidates with a foreign conviction for the exact same behaviour. The second
would sacrifice the equal treatment with respect to all candidates that have a conviction – foreign or national – for the behaviour that is nationally criminalized, ensuring equal treatment between candidates with a conviction for the said behaviour, but creating a more extended form of unequal treatment in relation to candidates that fell within the jurisdiction of a member state that does not criminalize the said behaviour. Choosing the least bad option is not easy, because it is not clear which option is the least bad. Striving for a comprehensive, coherent and well-balanced system, it could be recommended to extend the exclusion ground in a way that best reflects equal treatment which is the second option. In sum, if duly motivated a contracting authority can be allowed to extend the scope of the largest common denominator to encompass also other offences as criminalized in its national law, provided that the scope extension applies to all candidates’ convictions. Differently put, when compared to the largest common denominator, so-called further reaching national convictions can be used as a basis for exclusion, provided that the scope extension applies to all the candidates’ convictions, national or foreign.

Secondly, the question may arise whether a contracting authority can be allowed to exclude candidates from participation in a procurement procedure for having been convicted for committing behaviour that is criminalized abroad though not it its own member state. Differently put, the question would be whether, when compared to the largest common denominator, so-called further reaching foreign convictions can be used as a basis for exclusion. Not only will it be more difficult to motivate this extension of the exclusion ground for reasons of public order, national security or the integrity of the contracting authority, a such extension could amount to a form of indirect discrimination as a result of which the exception will be even more difficult to motivate.

The link with indirect discrimination is complex and requires further clarification. It is commonly accepted that in the EU all citizens are equal before law, and no discrimination based on a person’s nationality is allowed. This principle is enshrined in Art. 18 TFEU (ex Art. 12 TEC) which stipulates that “discrimination on grounds of nationality is prohibited”. This means it is not allowed to stipulate in national implementation provisions that with respect to national candidates, national criminal law shall apply to determine the scope of the exclusion grounds and with respect to foreign candidates, foreign criminal law shall apply to determine the scope of the exclusion grounds. A such formulation clearly distinguishes based on nationality and – considering the diversity between the criminalization in the criminal codes of the member states – declares different rules applicable depending on the person’s nationality. This would mean that the scope of the exclusion grounds would not be the same for nationals and foreigners. To the extent that foreign criminal law criminalizes behaviour that is not criminalized in the criminal law of the contracting authority, this would mean that the foreign national is treated less favourably.
because the access requirements to enter the public procurement procedure would be stricter. This less favourable treatment of foreign candidates is not allowed.

However, at first sight, this is not what the member state or contracting authority intends to do. The member state or contracting authority wishes to foresee that all EU citizens will be excluded if their money laundering conviction relates to nationally behaviour criminalized or behaviour criminalised in any other member state. This means that the same exclusion ground applies to all EU citizens, without a distinction based on their nationality. Differently put, this means that with respect to national convictions (not national candidates), national criminal law shall apply and with respect to foreign convictions (not foreign candidates), foreign criminal law shall apply regardless of the nationality of the persons involved. However, this provision is an example of a so-called seemingly neutral provision that in its effect entails a discrimination based on nationality which is – in analogy to the courts’ settled case law – not allowed.

Though the suggestion is not directly discriminating, it is so in effect, and is therefore indirectly discriminating. This problem has been recognised by the Court of Justice in several cases. A frequently used example is the Schönheit case, relating to the differential treatment of part-time and full-time employees. The rules governing the pension of part-time workers were different than the rules governing the pension of full-time workers. The disadvantageous pension regime of part-time workers was applicable to all workers, regardless of nationality, age, sex or any other protected criterion. However, because in practice, around 88% of the part-time workers are female, the rule will be discriminatory in its effect, because it will lead to a disadvantageous treatment of female employees. This latter example of indirect discrimination on grounds of sex will be used as a basis for the argumentation to reject the reformulation of the provision on exclusion grounds.

In his opinion with respect to the Nolte case, Advocate General Léger summarised the position of the court when he stated that “in order to be presumed discriminatory, the measure must affect ‘a much greater number of women than men’, ‘a considerable lower percentage of men than women’ or ‘far more women than men’.


186 ECJ, Joint cases C-4/02 and C-5/02 Hilde Schönheit v. Stadt Frankfurt am Main and Silvia Becker v. Land Hessen, 23 October 2003.


The court has never specified as of which percentage a measure is considered to be discriminatory, but has clearly held that the effect does not have to be exclusively related to a protected category of persons to be discriminatory. The fact that there were also male part-time workers did not prevent the measure from being discriminatory on grounds of sex.

Applied to the wish of the member state or contracting authority, the appreciation of its discriminatory nature is dependent on the effect of the application thereof. Upholding that with respect to national convictions (not national candidates), national criminal law shall apply and with respect to foreign convictions (not foreign candidates), foreign criminal law shall apply, will only be discriminating based on nationality if national convictions are predominantly handed down against nationals and foreign convictions are predominantly handed down against foreigners. If, in spite of the increased mobility in the European Union, convictions are still predominantly handed down against the nationals of each of the respective member states, then, the policy option should – in its effect – be read as “With respect to national convictions (meaning mostly national candidates), national criminal law shall apply and with respect to foreign convictions (meaning mostly foreign candidates), foreign criminal law shall apply”. A such provision would not be allowed in light of the prohibition to discriminate on grounds of nationality, to the extent that this would lead to a less favourable treatment of non-nationals and thus would lead to excluding candidates with further-reaching foreign convictions and no objective and reasonable justification (e.g. referring to a public order issue) is available.

Therefore, a correct appreciation of the policy option requires looking into the national conviction statistics to be able to determine whether convictions are or are not predominantly handed down against a Member State’s own nationals. Because data gathered under the auspice of UNODC reveals that indeed, convictions are predominantly handed down against a Member States own nationals, the suggestion is not neutral in its effect and entails a prohibited form of discrimination in as far as the protected group would be disadvantaged and no objective and reasonable justification is available. This means that it would amount to discrimination if the protected group, in casu the foreign

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189 For this formulation, he refers to ECJ, Case C-343/92 De Weerd, née Roks and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Laatschappelijke Belangen and Others, 24 February 1994, at §31


nationals, are excluded more easily and have to fulfil more requirements than nationals.

Due to this additional discrimination complication, an exception to the equal treatment requirement to limit the scope to the offences for which the underlying behaviour represents the largest common denominator in the national criminal law provisions applicable to the convictions of the competing candidates, will be difficult to sufficiently motivate.

It can therefore be concluded that the introduction of the obligation to attach equivalent effect to foreign convictions in the course of a public procurement procedure is not unlimited. Whereas taking account of foreign convictions in criminal procedures may be limited along a double criminality requirement – as desired by the individual member state – the taking account of foreign convictions in the course of a procurement procedure should be limited along an overarching criminality requirement in absence of objective and reasonable justifications for exceptions. Convictions – foreign or national – can only be taken into account to the extent the underlying behaviour is included in the EU or ad hoc largest common denominator, to the extent that no public order exception can be substantiated. The adequate motivation of an exception with respect to convictions related to behaviour that is nationally criminalised and penalised with an exclusion from participation in a public procurement procedure will be more plausible than the motivation seeking to be allowed to exclude a candidate for having been convicted for behaviour that is not even criminalised in a national context.

6.1.3.6 Interpreting the national approaches

It was argued that roughly two approaches can be distinguished when analysing the national legislation with respect to the exclusion grounds.

A first type of member states has clearly identified for which behaviour conviction will lead to exclusion from participation in a public procurement procedure. It was clarified that Germany introduced references to its own national criminal code to delineate the scope of the exclusion grounds. An interpretation thereof in line with the equivalent effect principle as elaborated on means that German contracting authorities can only take account of convictions, national or foreign, for which the underlying behaviour matches with the German criminal code. A German contracting authority cannot exclude a candidate for having been convicted for e.g. a type of participation in a criminal organisation that is not criminalised under German criminal law. Having

192 'double' criminality is deliberately changed into 'overarching' criminality because working with the largest common denominator requires that not only 'double' criminality is tested between the conviction of the candidate and the national criminal law of the contracting authority, but criminality is 'overarching' all jurisdictions represented by the candidates.
selected the prior convictions reflecting on the delineation included in the national criminal code, it is still important to adhere to the equal treatment principle, which means that the selected convictions can only have an excluding effect to the extent they fit into the largest common denominator. Exception thereto is only allowed to the extent a public order issue can be motivated. Taking account of the delineation of the exclusion grounds, such a public order exception cannot result in the exclusion of a candidate based on a conviction for which the underlying behaviour is not criminalised under German law.

A second type of member states has not explicitly identified for which behaviour a conviction will lead to exclusion. This means that there is no limitation to the exclusion grounds based on the national criminal law. Those member states have left the door open for a public order motivation that seeks to be allowed to exclude a candidate for having been convicted for behaviour that is not criminalised in a national context.

6.1.4 **Mutual recognition of exclusion from participating in a procurement procedure**

The third policy recommendation within the disqualification triad consists of supporting mutual recognition for disqualifications as a sanctioning measure.

Mutual recognition in criminal matters hardly needs any introduction. It is well known that in the context of cooperation in the European Union, the principle of mutual recognition in criminal matters was first brought up by Jack Straw at the Cardiff European Council in 1998. At the time, the Council was asked to identify the scope for greater mutual recognition of decisions of each other’s courts. The momentum grew in the course of the following year and was

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used to launch mutual recognition as the cornerstone of judicial cooperation at the Tampere European Council in 1999.

Even though it has been cited at countless occasions, the importance of paragraph 33 of the Tampere Presidency conclusions, justify it being cited once more:

*Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities*.

To implement the principle of mutual recognition in practice, mutual recognition instruments have been adopted with respect to a series of sanction measures. Though no instrument exists yet that specifically and exclusively deals with the mutual recognition of disqualifications as sanctioning measures, the main features in the other mutual recognition instruments can be used as a baseline to determine what mutual recognition of a disqualification in casu the exclusion to participate in a procurement procedure would look like. To draw the parallel with the principles in the existing mutual recognition instruments, the framework decision on the application of the principle of mutual recognition to alternative sanctions will be used as a basis.

In the following paragraphs it will become clear that the technique of mutual recognition in the specific case of being excluded from participating in a public procurement procedure will have only very limited added value when compared to the technique of ensuring equivalent effect as elaborated on above. The reason can be found in the specific characteristics of mutual recognition, but also in the fact that only few member states have introduced the ‘sanction’ of being excluded from participation in a public procurement procedure in their criminal law system. Most member states have opted for a system that limits the access to participation in a public procurement procedure via the provisions governing the procurement procedure itself.

When interpreting the replies to question 1.2 specifically in relation to the exclusion from participation in a procurement procedure, only a minority of

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member states have indicated that the exclusion from participation in a procurement procedure is imposed or added in the course of a criminal procedure. In 68% of the member states the disqualifying effect of a conviction only rises when attempting to participate in a procurement procedure.

1.2 Is the disqualification from participating in a public procurement procedure imposed or added in the context of a criminal procedure?

This finding has a significant impact on the possibility to use mutual recognition in relation to being excluded from participating in a public procurement procedure. More importantly, the specific characteristics of mutual recognition play a crucial role in limiting the added value mutual recognition can have in relation to attaching equivalent effect. To clarify that position, the following paragraphs will elaborate on those specific characteristics. To that end, a distinction will be made between:

- the situation in which a mutual recognition request is received in relation to an offence that would *nationally also* give rise to an exclusion from participation in a public procurement procedure; and

- the situation in which a mutual recognition request is received in relation to an offence that would *nationally not* give rise to an exclusion from participation in a public procurement procedure.
6.1.4.1 National exclusion foreseen

The first situation that will be discussed relates to a mutual recognition request received for an offence that would nationally also give rise to an exclusion from participation in a public procurement procedure. Whenever a member state receives a mutual recognition request that perfectly mirrors the national situation in that the sanction imposed corresponds to the sanction that would be imposed in a national situation, execution of the mutual recognition request will not be a problem. If, for example, a member state has foreseen in its national legislation that a conviction for a (particular form of) money laundering results in being excluded from participation in a public procurement procedure, the execution of a request to do just that will not create any problems. However, the question arises whether the mutual recognition request was at all necessary to achieve that result. After all, if the foreign money laundering conviction is taken into account via the technique of attaching effects to a foreign conviction that are equivalent to the effect a national conviction would bring about, the person involved would have been excluded from participation in a public procurement procedure based on the national legislation of the member state in which the public procurement procedure takes place, even in absence of a mutual recognition request. From that perspective, the mutual recognition request only doubles the basis upon which exclusion will take place, and can bring no added value in relation to the technique of attaching equivalent effect to foreign convictions.

However, the overlap between equivalent effect and mutual recognition is not complete. There is one situation in which the mutual recognition request can have an added value when compared to the technique of attaching equivalent effects to foreign conviction. There is one situation in which the exclusion based on mutual recognition extends beyond the exclusion based on equivalent effect. The situation may occur in which the duration of the foreign imposed execution from participation in a public procurement procedure exceeds the duration that is foreseen in the national legislation of the executing member state. It is important though that this situation is further elaborated on, for not every exceeding duration will automatically create an added value for mutual recognition.

In the current mutual recognition instruments, provisions are included on how to deal with situations in which the duration imposed in the issuing member state exceeds the duration known in the executing member state. Art. 9 FD Alternatives clarifies that if the nature or duration of the relevant probation measure or alternative sanction, or the duration of the probation period, are incompatible with the law of the executing State, the competent authority of that State may adapt them in line with the nature or duration of the probation measures and alternative sanctions, or duration of the probation period, which apply, under the law of the
executing State, to equivalent offences. This means that the member states have the discretion to decide on the faith of the execution of in casu being excluded from participation in a public procurement procedure for a duration that exceeds the duration forecast in the national legislation of the executing member state. Where the member states have decided that the duration will be limited to the duration forecast in the national legislation, again mutual recognition of the foreign conviction will have no added value whatsoever to attaching equivalent effects to the foreign conviction, for the net effect will be the same: an exclusion corresponding to the national legislation of the executing member state. Where member states have decided to execute a foreign decision even where the duration exceeds the maximum duration forecast in their national legislation, mutual recognition may have an added value when compared to attaching equivalent effects to foreign convictions, provided that one more condition is satisfied. 197

Even where the duration of the foreign exclusion exceeds the duration forecast in the national legislation of the executing member state, and that member state has provided in its national legislation to be willing to execute foreign convictions regardless of exceeding durations, still it is not guaranteed that mutual recognition will be able to have an added value compared to attaching equivalent effects to that foreign conviction. After all, as soon as the decision is taken to execute the foreign conviction and exclude the person involved from participating in a public procurement procedure, it must be assessed whether or not proceeding with the execution would not jeopardize the equal treatment principle that is fundamental to the proper functioning of the public procurement procedure. This means that a contracting authority can only take account of the exceeding duration to the extent that such would not result in an unequal treatment of the candidate involved. To that end, it must be assessed whether or not the duration does not exceed the largest common denominator of exclusion durations as provided for in the relevant jurisdictions of the competitors in the public procurement procedure. Only when the duration – though exceeding the duration forecast nationally in the legislation of the member state in which the public procurement procedure takes place – does not exceed the duration forecast in the jurisdictions of the other (relevant) member states, can mutual recognition actually take place. Only in this very specific

197 Elsewhere, it has consistently been argued that adaptation should not be a possibility but an automatic consequence when there is a differences in duration between the sanction imposed in the sentencing member state and the maximum forecast in the executing member state. It has been argued to introduce a mandatory lex mitior principle. See: G. VERMEULEN, A. VAN KALMTHOUT, N. PATERSON, M. KNAPE, P. VERBEKE & W. DE BONDY (2011). Cross-border execution of judgements involving deprivation of liberty in the EU: Overcoming legal and practical problems through flanking measures (Vol. 40, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.
situation, mutual recognition will have an added value compared to the technique of attaching equivalent effects to foreign convictions.

6.1.4.2 National exclusion not foreseen

The second situation that will be discussed relates to a mutual recognition request received in relation to an offence that would nationally not give rise to an exclusion from participation in a public procurement procedure. There are two reasons why the offence would not give rise to an exclusion in a national situation: either the offence is not punishable according to the national law of the executing member state and therefore is not sanctioned with an exclusion from participation in a public procurement procedure; or the offence – though criminalized under the national law of the executing member state – is not punished with an exclusion but with a different sanction under national law. These two possibilities will be dealt with consecutively.

First, the situation may occur in which a mutual recognition request relates to a conviction for which the underlying behaviour is not criminalized under the national law of the executing member state. A such situation will give rise to a double criminality concern. Whether or not the mutual recognition request will be executed is dependent on the specificities of the underlying behaviour, and more specifically dependent on either or not abandoning the double criminality requirement for that offence type.

Firstly, the abandonment of the double criminality requirement for a set of 32 listed offences is one of the most controversial features of the mutual recognition instruments. Member states have agreed to draw up a list of offences for which the differences in criminalization are deemed considerable enough to hinder cooperation and execution of foreign judgments. The fact that national exclusion is not foreseen because the underlying behaviour is not criminalized in the national legislation is completely irrelevant in case the behaviour underlying the conviction is included amongst those 32 offence labels. This means that mutual recognition might have an added value when compared to attaching equivalent effects to foreign convictions to the extent that a double criminality problem occurs in relation to a listed offence, and again provided that the execution of the mutual recognition request will not result in an unequal treatment of the candidate involved when compared to the other competitors in the procurement.

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procedure. Equal treatment will prevent execution of the foreign conviction in the event the underlying behaviour is not equally criminalized in the (relevant) jurisdictions of the competitors.

Secondly, for the offences not included in the 32 offence list, it is left to the member states to decide whether or not it is deemed appropriate to limit execution of foreign convictions to situations where double criminality is met. In the event member states have limit execution to situations where double criminality is met, mutual recognition will not have any value when compared to the technique of attaching equivalent effects to foreign decisions. In the event member states have agreed to execute foreign decisions, even beyond the double criminality requirement, the added value of mutual recognition will be limited to those situations in which execution will not jeopardize equal treatment between candidates. Here too, the added value of mutual recognition is limited to a very specific situation.

Second, the situation in which the exclusion is not foreseen in the national law of the executing member state can also be caused by the simple fact that exclusion from participation in a public procurement procedure is not foreseen as a sanction for the specific offence involved. Similar to what was argued above, this situation requires that the national adaptation provisions are looked into. Art. 9 FD Alternatives allows member states to adapt the foreign sanction if either the nature or duration of the sanction is incompatible with their national law. Though no common understanding (yet) exists on the interpretation of the incompatibility concern\footnote{i.e. whether or not incompatibility in terms of the nature of the sanction can only be invoked in relation to sanctions that are unknown altogether in the national law of the executing member state, or whether incompatibility in terms of the nature of the sanction also occurs when a particular sanction is not foreseen in relation to the offence involved.} it can be argued that the imposed exclusion from participation in a public procurement procedure is incompatible with the law of the executing member state, for such sanction is not foreseen in relation to the offence involved. If member states have legislated that the sanction will be adapted and the exclusion disregarded, the introduction of mutual recognition will have no added value when compared to the technique of attaching equivalent effect to foreign convictions. Only where member states accept to execute a sanction in spite of it not being foreseen for the offence involved in the national legislation and under the condition that execution thereof would not give rise to an unequal treatment of the person involved when compared to the other competitors, mutual recognition can have an added value.

Considering the limited added value of mutual recognition when compared to attaching equivalent effect to foreign convictions as complemented by the introduction of approximated disqualifications for approximated offences, the priorities in terms of future policy making should be focussed on those two latter techniques.
6.1.5  Summary of recommendations in the area of public procurement

This case study looked into the functioning of disqualifications in a public procurement context and more specifically into the scope *ratione materiae* of the exclusion from participation in a procurement procedure, against the background of the disqualification triad.

First, approximated disqualifications for approximated offences can already be found in the context of public procurement. Art. 45 Procurement Directive elaborates on the mandatory conviction-related exclusion grounds. Three main recommendations are made. Firstly, considering the rapidly developing approximation acquis, it is advised to look for an approach that delineates the scope of the mandatory exclusion grounds in a way that is transparent and can stand the test of time. The current approach cannot suffice. It is suggested to use the EU level offence classification system as a basis to identify the (categories of) offences for which conviction should result in a mandatory exclusion. Secondly, to increase cross-instrument consistency, it is advised to include the existence of mandatory exclusion grounds in instruments that approximate the constituent elements of offences and their sanctions. Thirdly, the current level of detail in the criminal records information cannot support a distinction between a conviction that relates to identified approximated behaviour that should lead to exclusion and a conviction that relates to other behaviour. An increase in the level of detail in the available criminal records information is necessary to ensure the proper functioning of the mandatory exclusion grounds.

Second, attaching to foreign convictions effects that are equivalent to the effects national convictions would have, should be further developed. The scope for taking account of foreign convictions can either or not be modelled on the national criminal code, but foremost it is important that due account is taken of the implications of the need to ensure equal treatment between all competing candidates. To that end, convictions can only be taken into account to the extent they relate to the largest common denominator identified, either EU-wide or *ad hoc* based on the specific profiles of the competing candidates. The only exception thereto consists of the public order exception, which can be motivated with respect to a conviction for which the underlying behaviour is criminalised in the national criminal law of the contracting authority. The indirect discrimination complexity makes motivation far more difficult in relation to a conviction for which the underlying behaviour is not criminalised under the national criminal law of the contracting authority. Here too, sufficiently detailed criminal records information is crucial to adhere to the equal treatment principle and remains the main concern for the practical implementation thereof.

Third, though mutual recognition is an important element in the disqualification triad that seeks to extend the effect of disqualifications as sanction measures in the EU, the added value thereof specifically in a public
procurement context when compared to the effect of attaching equivalent effects to foreign convictions is fairly limited. This can be explained referring to the limited number of member states that actually impose exclusion from participation in a public procurement procedure as a sanction and can have an interest in seeking cross-border execution thereof. More importantly, the cooperation principles governing the current set of mutual recognition instruments have an important limiting impact. Mutual recognition can only have an added value in two very specific situations.

Firstly, mutual recognition can have an excluding effect beyond the technique of attaching equivalent effect in the situation:
- where the duration of the exclusion imposed in the sentencing state exceeds the maximum duration foreseen in the executing member state; and
- the executing member state has not introduced a mandatory adaptation of the duration in case of inconsistency with the national law; and
- execution will not jeopardise the equal treatment of the person involved with the competing candidates for the duration still falls within the largest common denominator identified amongst the relevant EU jurisdictions, provided that no public order exception can be motivated.

Secondly, mutual recognition can have an excluding effect beyond the technique of attaching equivalent effect in the situation:
- where the underlying behaviour is not criminalised in the executing member state; and
- execution is not (made) dependent on a double criminality requirement; and
- execution will not jeopardise the equal treatment of the person involved with the competing candidates for the criminalisation still falls within the largest common denominator identified amongst the relevant EU jurisdictions, provided that no public order exception can be motivated.

Considering the limited added value of mutual recognition when compared to attaching equivalent effect to foreign convictions as complemented by the introduction of approximated disqualifications for approximated offences, the priorities in terms of future policy making should be focussed on those two latter techniques.
6.2 Working with children

As was also envisaged in the Commission’s White Paper, a sectorial approach is needed in the area of disqualifications. In support of this statement and considering the prominent position the sectorial approach takes in the policy recommendations for the development of a future disqualifications regime as developed by the project team (cfr. supra chapter 5), this section deals with the second sectorial case study contained in this report: working with children.

6.2.1 Increased international attention for the fight against sexual exploitation of children

Not only at EU level, but also in the context of other international institutions, the fight against sexual abuse and exploitation of children has increased. Despite the major general human rights conventions having contained provisions specifically concerning the protection of children, it was not until 1989, with the CoE Convention on the rights of the Child, [hereafter CRC] that it was explicitly provided that State parties undertake to protect the child against all forms of sexual exploitation, including pornography and sexual abuse. According to Art. 18 CRC, a child is every human being below the age of 18, unless the law applicable to the child provides that majority is attained earlier. The latter exception endangers the international uniformity of the CRC.

The scope of this Study does not allow for a detailed analysis of the international legislative instruments, but the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the so called Lanzarote Convention) should of course be discussed, particularly Art. 5. The entirety of this article is dedicated to the “recruitment, training and awareness raising of persons working in contact with children”. In Art. 5, par. 3, the Convention explicitly requires the commitment of the Parties to take the necessary legislative

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204 For such an overview, see VERMEULEN, G., DHONT, F. and DORMAELS, A. European Data Collection on Sexual Offences Against Minors, Antwerpen/Apeldoorn, Maklu, 2001, 8-44.
or other measures, in conformity with their internal law, to ensure that the conditions to accede to those professions whose exercise implies regular contacts with children ensure that the candidates to these professions have not been convicted of acts of sexual exploitation or sexual abuse of children. It be noted that Art. 27 is also relevant, given that it provides that Party shall take the necessary legislative or other measures to ensure that the offences established in accordance with that Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness, and it is specified that measures have to be taken to ensure that legal persons held liable and subject to effective, proportionate and dissuasive sanctions. Several possible disqualifying measures are mentioned (exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; judicial winding-up order). It mentions that each Party may adopt other measures in relation to perpetrators, such as withdrawal of parental rights or monitoring or supervision of convicted persons. The Convention has entered into force in eleven member states: in 2010 and 2011, depending, in entered into force in no less than ten member states. In one member state, the entry into force dates from January 1st 2012. This Convention will undoubtedly contribute to a more efficient approach regarding disqualifications in the field of working with children.

The EU legislation relating to disqualifications in the sector of working with children, however, is more precise, and will be discussed in 6.2.3. It is more stringent than the Lanzarote Convention. As opposed to the EU legislation, the Convention leaves it entirely up to the member states how to attain the situation where it is guaranteed that certain persons would not be allowed to work with children.

### 6.2.2 Status questionis in the member states

The member states were asked to indicate which type of disqualification exists in their country in relation to the sector of working with children, and whether those disqualifications are imposed at the time of the conviction (be it implicit or explicit) or appear a later stage based on the rules regulating access to those activities.
The results drawn from the survey are comprised in the table below. The main observations drawn from these results are listed below the table.

<table>
<thead>
<tr>
<th>Status questions DQ related to working with children</th>
<th>Typology of DQ</th>
<th>Imposed DQ</th>
<th>DQ appearing at a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Permanent</em> prohibition for a natural person from exercising professional activities related to the supervision of children</td>
<td>CY UK BE LV LU PL PT DE IT RO EL AT</td>
<td>BY CY CZ FI UK LV LU NL PL SL SK</td>
</tr>
<tr>
<td></td>
<td><em>Temporary</em> prohibition for a natural person from exercising professional activities related to the supervision of children</td>
<td>BU CY CZ UK BE LT MT NL PL DE IT RO SL SK FR ES AT</td>
<td>CY CZ EE NL PL FR</td>
</tr>
<tr>
<td></td>
<td><em>Permanent</em> prohibition for a natural person from exercising professional activities involving regular contacts with children</td>
<td>CY UK BE LV LU PL DE IT RO EL AT</td>
<td>BU CY CZ FI UK LV LU NL PL SK</td>
</tr>
<tr>
<td></td>
<td><em>Temporary</em> prohibition for a natural person from exercising professional activities involving regular contacts with children</td>
<td>BU CY CZ UK BE LT MT NL PT DE SL SK FR ES AT</td>
<td>BU CY CZ NL FR</td>
</tr>
</tbody>
</table>

Firstly, when comparing the existence of disqualifications from professional activities “related to the supervision of children” to such activities “involving regular contacts with children”, it becomes apparent that all member states which exclude professional activities involving regular contacts with children, also exclude professional activities related to supervision of children. In the same token – be it with one exception (Estonia) – all member states which exclude professional activities related to supervision, also exclude professional activities involving regular contacts with children. Indeed, the terminology used in Estonian law is specifically “supervision of children”. The applicable legislation contains specific rules on how long the disqualification lasts, depending on the committed offence. Jobs related to the supervision of children would in the UK cover examples such as a janitor or a cook in a school.

Secondly, in terms of permanent vs. temporary disqualifications, the table shows that a total of fifteen countries apply a permanent disqualification to activities related to the supervision of children, and fourteen to activities involving regular contacts with children (which is, as said above, approximately the same for both typologies of disqualifications). As to the temporary disqualifications, there is are four more countries that apply it in relation to supervision activities than regarding activities involving regular contacts with children. However, in general, the rules do not differ depending on the typology of the disqualification. In Slovenia for example, the national shows that
regarding the temporary exclusion, the law is the same regardless of which type of activity is involved (Art. 71 of the Slovenian penal code).

Also within each category minor differences exist: regarding supervision activities, three countries (Latvia, Luxembourg and Finland) only apply a permanent exclusion, whereas three member states (Lithuania, Malta and Estonia) only apply temporary exclusions. Regarding activities involving regular contacts, six member states only apply a permanent exclusion, whereas five only exclude people temporarily from activities involving regular contacts with children.

Thirdly and finally, the difference between disqualifications imposed (explicitly or implicitly) at the time of the conviction and disqualifications imposed at a later stage is analysed. It is clear that temporary prohibitions are rarely only imposed at a later stage: regarding supervision activities, six states indicate to apply disqualifications in this stage, yet only one member state says only to do so in this phase (Estonia). Regarding activities involving regular contacts with children, only five member states have replied that their national legislation foresees that prohibition of such activities can occur at a later stage than the convictions; however, all those national legislations also foresee the possibility for the imposition of these prohibitions at the convicting stage.

Additionally, certain questions in the member states survey were built specifically around the difference depending on sector involved. Almost all respondents indeed indicated to allow disqualifications based on offence related information in the field of education (see figure below). Zooming in on one member state: In the United Kingdom, there is an automatic prohibition from working with children if the person has committed certain offences either against children or against adults, under the Protection of Children Act 1999 as amended especially by The Education (Prohibition of Teaching or Working with Children) (Amendment) Regulations 2003 and 2007. Section 142 of the Education Act 2002 as amended by the Safeguarding Vulnerable Groups Act 2006 (covering England, Wales and Northern Ireland) and the Protection of Vulnerable Groups (Scotland) Act 2007 introduces a central list of people who are unsuitable to work in certain positions in the education sector. Any type possible provided that it will prevent the offender from reoffending and it is linked to and proportionate with the previous offence. The figure below shows that many member states also apply disqualifications in the field of education.
4.1.1 To what extent does offence related information have a disqualifying effect in that it limits access to functions in the educational sector?

- Not allowed
- Allowed by private and/or public actors

Important reservations should be made to the figure above, however, particularly in relation to Finland, which was one of the countries replying no to this question. The replies indicated that this member state’s law allows to disqualify people permanently from supervising or working with children, not necessarily at the moment of conviction. Yet, in this question, Finland indicated not to allow disqualifications based on information regarding offences. This apparent discrepancy needs to be examined further. As to Hungary and Lithuania, the other countries which replied that disqualifications based on offence related information are not allowed in the educational sector, there is no apparent contradiction with previous replies: indeed, Hungary indeed indicated that no disqualifications in the educational field are included in their national law. Lithuania indicated to only know the imposed disqualifications, which can indeed be aligned with their reply to the question from the figure above.
In relation to information exchange, question 4.1.2. asked about the organisation of the records information, particularly to what extent the member states work with general lists of offences or sector specific offences, in relation to disqualifications. The results drawn from the survey are comprised in the table below. More details are listed below the table.

### 4.1.2 Does the educational sector have a specific list of offences for which disqualification is considered functional, or does your national law work with a general list, regardless of the sector?

<table>
<thead>
<tr>
<th></th>
<th>For any offence</th>
<th>For an offence included in a general list</th>
<th>For an offence included in sector specific list</th>
</tr>
</thead>
<tbody>
<tr>
<td>CY UK BE MT NL RO AT</td>
<td>BU FI IT FR</td>
<td>BE EE UK HU LV PT IT SL</td>
<td></td>
</tr>
</tbody>
</table>

In Belgium, there are two kinds of certificates of non-prior conviction: the first kind ("model 1"), in application of Art. 595 Criminal Procedural Code is the default document. It is not meant for an activity qualifying as education, psycho-medical-social treatment of youth or the social sector related to youth, as well as child protection, animation or guidance of minors. The second kind ("model 2"), in application of Art. 596.2 of the Criminal Procedural Code is meant to be used in relation to one of those activities; it contains more offences than the first model. In the UK, it is mandatory to check the Monitoring Scheme (TMS) when employing someone and it is an offence for employers to knowingly appoint someone to a post from which they have been barred. This is different in Belgium: there, private employers are given the possibility to request certain information, yet they are not obliged not to grant the person a certain position.

In the Czech Republic, there is no general list, individual acts regulate prerequisites differently. However, common is reference to an intentional criminal offence or a negligent criminal offence related to the respective field or a sentence of imprisonment. In The diversity is again very prominent. As opposed to some member states, where detailed lists of offences exist, others only work with generic offences, regardless of sector. In Slovakia for example, there are no specific lists of offences. Generally one must prove non-prior conviction by the criminal record from central Criminal Register.

Concluding, a large majority of the member states indeed foresee the possibility to grant disqualifying effect to certain offences. However, the variety throughout the member states is considerable concerning which offences can have such effects (general list of offences or specific offences and in both cases, the content of the offences), concerning how to ask for the information, concerning which information is contained and for how long, concerning whether or not the disqualifying effects are obligatory etc.

Consequently, the road ahead to a more streamlined EU landscape regarding disqualifications is long. It can be expected that the recent Directive combating
exploitation of children and child pornography,\textsuperscript{206} is a first important step. It is discussed in the next subsection.

6.2.3 \textit{Relevant provisions of the new Directive combating sexual abuse and exploitation of children}

The Directive on combating the sexual abuse and sexual exploitation of children and child pornography\textsuperscript{207} [hereafter the Directive] replaces framework decision 2004/68/JHA.\textsuperscript{208} The latter did contain provisions regarding disqualifications (e.g. Art. 5, par. 3), yet these gave considerable freedom to the member states: it said that member states must take measures to ensure that a natural person “may, if appropriate, be temporarily or permanently prevented from exercising professional activities related to the supervision of children.” Especially the words “if appropriate” made that this framework decision gave decision makers the freedom not to impose an employment disqualification.\textsuperscript{209} As stated in the Proposal for the Directive, the framework decision “does not contain adequate measures to prevent offences”. The Directive takes the matter further. After the failed attempt of the Belgian presidency to introduce EU wide disqualifications related to working with children, combined with a system of recognition of employment prohibitions imposed in another member state,\textsuperscript{210} this Directive seeks to introduce concrete measures in the area of disqualifications, aiming at the protection of children.

The Directive establishes definitions (minimum definitions) concerning criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. It explicitly says in its first article that it “also introduces...”

\begin{itemize}
\item \textsuperscript{209} J. JACOBS, and D. BLITSA, “Peadophiles, employment disqualification, and European integration”, Public law and legal theory research paper series, WP nr. 11-73, New York University School of law, October 2011, (355) 339.
\item \textsuperscript{210} COUNCIL OF THE EUROPEAN UNION (2004), Initiative by Belgium, Initiative of 5 November 2005 with a view to adopting Council framework decision on the recognition and enforcement of prohibitions arising from convictions for sexual offences committed against children, 14207/04, COPEN 133.
\end{itemize}
provisions to strengthen the prevention of those crimes and the protection of the victims thereof”. Art. 2 contains definitions of certain concepts which form part of the minimum offences and sanctions that are established in the following articles. Clearly an attempt was made to make these definitions far more detailed than those contained in the framework decision 2004/68/JHA (see for example, the definition of child pornography211). Articles 3 to 6 set minimum maximum sentences for offences in relation to sexual abuse (Art; 3), sexual exploitation (Art. 4), child pornography (Art. 5), the solicitation of children for sexual purposes (Art. 6) and the incitement, aiding and abetting, and attempt of such offences (Art. 7). As will be discussed below, some discretion is still left to the member states. Art. 8 and Art. 9 deal with, respectively, consensual sexual activities and aggravating circumstances (with, again, discretion for the member states, see below).

Disqualifications are regulated in Art. 10 (“Disqualifications arising from convictions”). The article touches upon different aspects which are relevant in the disqualification sphere. Broadly speaking, the following three aspects are dealt with.

First, it deals with the requirement to take measures in relation with the prohibition of conducting certain professional activities (Art. 10, par. 1).

Second, it treats the matter of the obtainment of relevant information by the employers (Art. 10, par. 2). Member states are required to foresee measures to ensure that employers, when recruiting a person for activities involving direct and regular contacts with children, are entitled to request information of the existence of criminal convictions for any of the offences as set out in articles 3 to 7 or of the existence of any disqualification from exercising activities involving direct and regular contacts with children arising from those criminal convictions. The impetus of the European Parliament led to the inclusion of such provisions. Its committee on Civil Liberties, Justice and Home Affairs (LIBE) had recommended amendments that would strengthen the proposed directive in the sense that member states would have to ensure, in accordance with their national law, that employers have access to job applicants’ and employees’ sex

211 A definition of child pornography is given (this was already the case in the framework decision; thus nothing revolutionary in that respect). Naturally, such a definition is useful given that it creates a common understanding of what child pornography constitutes, a necessity which was pointed out on several occasions before the creation of the definition in the framework decision. However, a definition on the concept of child pornography does not imply a common understanding of offences related to possessing and/or selling child pornography. This is dealt with in Art. 5 of the directive. Compared to the framework decision, this provision contains more concrete obligations for the member states given that the framework decision required the punishment of pornography related offences without specifying the sanctions. Art. 5 of the directive sets minimum maximum sanctions for the concerned offences.
offence convictions and employment disqualifications imposed by any other member state.\textsuperscript{212}

Third, it deals with the application of the mechanisms foreseen in the FD Crim Rec (Art. 10, par.3). It requires the member states to ensure that the information regarding the offences in article 3 to 7 is transmitted in accordance with that framework decision.

The mere fact that this Directive contains somewhat better defined definitions and that it deals with broader range of aspects relevant to disqualifying effects when compared to the framework decision, undoubtedly represents a step forward. However, several questions remain unanswered.\textsuperscript{213}

6.2.4 Directive combating sexual abuse and exploitation of children

tested in light of the proposed future disqualifications regime

6.2.4.1 Approximated disqualifications for approximated offences

Art. 10, par. 1 of the Directive states that member states must take measures to ensure that a person convicted of any offence referred to in Articles 3 to 7 may be prevented from exercising professional activities involving direct and regular contacts with children. As said above, this is undoubtedly put in more straightforward wordings than the framework decision the Directive replaces, and in that sense it is a step forward. Yet, several important questions remain. First, scrutiny of articles 3 to 7 show that even with this Directive, uncertainty regarding the exact content of offences which should give rise to disqualifications remains unclear. Art. 3, par. 4 for example prescribes that “engaging in sexual activities with a child who has not reached the age of sexual consent shall be punishable by a maximum term of imprisonment of at least five years”. In the list of definitions (Art. 2) the age of sexual consent is said to be age below which, in accordance with national law, it is prohibited to engage in sexual activities with a child. Crucial are the wordings “in accordance with national law”. Given that in some member states the age of consent is considerably low (as low as 13) whereas in others it is 18 years old, the definition of Art. 3, par. 4 hardly seems to be applicable Union-wide. It is not clear what to do with a person who engaged in sexual activities with a child of 14 years old, when applying for a job in a country where the age of sexual consent is 18. This example shows that in terms of definitions provided for in the Directive, improvement is still possible. Before discussing what such improvement should consist of, it be stressed that certain definitions from Art. 3 to 7 are precise and will indeed considerably decrease

\textsuperscript{212} J. JACOBS, and D. BLITSA, “Peadophiles, employment disqualification, and European integration”, Public law and legal theory research paper series, WP nr. 11-73, New York University School of law, October 2011, (355) 342.

\textsuperscript{213} Cfr infra
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confusion existing today. When looking at ECRIS for example, no definitions are given: the classification system merely consists of rather generic terms. Examples are nr. 1008 00 and nr. 1009 00 (resp. “sexual exploitation of children” and “offences related to child pornography or indecent images of minors”). As said above, also compared to the framework decision which the Directive replaces, the definitions have become more precise.

Yet, examining how the Directive fits (or should fit) in the future approach proposed in chapter 6 seems useful given that articles 3 to 7 are not exhaustively detailed.

An agreement on a set of severe offences in a limited number of vulnerable sectors would imply that disqualifying effects for such offences are also agreed upon and are inscribed in national law. Such an approach in relation to working with children could, in terms of definitions, represent an added value vis à vis the new Directive, in the sense that Art. 10 of the latter requires the member states to take measures to ensure that the people convicted for certain offences may be excluded from certain activities. Working with a set of severe offences would mean that it would be certain that, throughout the Union, people convicted for certain offences will be excluded from an agreed set of activities. In terms of definitions of the offences for which the persons concerned are convicted, there is little doubt that several sets of behaviour could qualify under a future Regime 1 as developed by the project team.

6.2.4.2 Traditional mutual recognition with transitivity

The second regime as developed by the project team relates to the situation where one member state explicitly asks another member state, where the person concerned has his/her normal residence as defined in Chapter 5, to execute a disqualification in order to avoid that the person could circumvent the disqualification by moving to the second member state (or, in case the person already had his/her normal residence in the latter, in order to avoid impunity). Tailored on the current mutual recognition instruments dealing with disqualifications, i.e. primarily the FD Alternatives, one member state could then ask another member state to execute the concerned disqualification, in order to avoid that the person concerned were to work with children in his/her state of normal residence. Of particular relevance in this regard in the 32 list, comprising offences for which the double criminality requirement is abolished. For those types of behaviour not qualifying as one of the 32 offences, an optional refusal

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214 For a detailed overview on the development of the 32 list and the critiques on its functioning, see W. DE BONDT, Double criminality in international cooperation in criminal matters, in VERMEULEN, G., DE BONDT, W. and RYCKMAN, C. (eds.) Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality, Antwerpen-Apeldoorn, Maklu, 2012.
ground based on double criminality should remain in place. However, considering the particular vulnerability of this sector, it could be envisaged to take the matter a step further than is currently the case, for example by requiring the executing member state to extensively justify the refusal through elaborating on considerations *de jure* and *de facto*. Doing so would guarantee that refusals would have to be justified on a case by case basis, rather than allowing standard refusal formulas.

It be noted that, in as far as it concerns offences as would be agreed upon under Regime 1, the double criminality is met per definition. Naturally, if Regime 1 were to function fully as envisaged by the project team (i.e. entailing a true approximation of definitions and an automatic effect), relying on Regime 2 (i.e. one member state having to explicitly ask for the execution of the disqualification) would not even be necessary.

6.2.4.3 *Attaching equivalent effects*

Under the 3rd regime as developed in Chapter 5, member states would be obliged to ensure that a behaviour, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of criminal records, or following rules regarding certificates of non-prior convictions, resorts disqualifying effects equivalent to the disqualifying effects the behaviour would have resorted in accordance with national law. Under this Regime, as opposed to the first and the second where the offence classification comes into play, only the occurred behaviour is relevant, and whether or not the member state in which the person finds himself now (or in which he is applying for a job/permit and the like) assesses that – after application of the equivalence test – the behaviour should give rise to a disqualification.

Member states should be given discretionary powers with regards to the meaning they attach to a “behaviour”:

On the one hand, if a member state chooses to only disqualify people when they have committed an offence in the sense of a certain provision in their criminal code, then they should be free to do so. In the spirit of the equivalence mechanism, it is then up to the member states to decide whether or not they decide on the result of an application of the equivalence test (after all, it is thinkable that, even if according to its law only an offence as defined in the national law could resort disqualifying effects, the member state still decides that a certain behaviour is equivalent to that offence and can thus give rise to a disqualification).
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On the other hand, the flexibility should work in other direction as well, however. Aware that this policy recommendation might be a more sensitive issue, the project team submits that *in casu* the overriding element should again be the particularly vulnerable character of the sector that is working with children. Indeed, in vulnerable sectors, a member state should be allowed to decide that it is possible within its jurisdiction to restrict the access to certain jobs for anyone who was involved in an offence hinting towards them not being qualified for the position. In other words, it should be possible for a member state to state that, for example, anyone convicted for any offence related to (sexual) child abuse/exploitation/intimidation can be disqualified from the right to work with children, in spite of possible concerns about unequal treatment, which, if not overruled altogether by security and public order arguments, would only arise in contents regulated by EU law in view of shaping or developing the internal market.

6.2.4.4 Information exchange in the field of working with children

Apart from the problem of definitions, the proposal for the future developed earlier in this contribution also included provisions in relation to the information exchange.

The first relevant provision is Art. 10, par.2 Directive. It is crucial to keep in mind that this only touches on the national situation in member states. Above the several options regarding whether or not interested parties should be obliged to ask for criminal records information and whether or not such decision should be left to the member states or not, were mentioned without taking a clear position. The Directive, however, does: it foresees that member states have to take measures to ensure that employers are entitled to request information by way of any appropriate means (Art. 10, par. 2). This provision, which represents a major extension of EU authority in the area of freedom, security and justice needs to be received with cautious optimism for two reasons: first, practice has shown that such an approach indeed leads to preventing unsuitable adults from working with children. Second, it obliges states to allow private entities to request the information. This only concerns the national situation but it is a good starting position to create a climate where the proposal of the project team (namely the access to foreign criminal records for private entities or the ability to

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215 J. JACOBS, and D. BLITSA, “Peadophiles, employment disqualification, and European integration”, Public law and legal theory research paper series, WP nr. 11-73, New York University School of law, October 2011, (355) 343.
216 Notable in the UK, see K. FITCH, SPENCER, K. CHAPMAN and Z. HILTON, November 2007, “Protecting children from sexual abuse in Europe: Safer recruitment of workers in a border-free Europe”, NSPCC: since 2002 pre-employment checks on individuals applying to work in regulated positions are carried out.
ask for EU certificate of non-prior convictions (the subtleties being different according to the concerned type of offence, see above).

Apart from the positive aspects, objections need to be raised in terms of the required consent: at first sight, it may seem that the wordings of the Directive guarantee the consent of the person involved, given that it specifies that information should be obtained through “an access upon request or information via the person concerned”.

However, Recital 42 of the Directive shed more light on this matter: whether or not the consent of the person is required remains a matter of national law. Consequently, given that one option is “information via the person concerned” and consent is not a necessity, the other option “access upon request” does not necessarily mean access upon request to the person involved. It thus appears that access upon request simply means access after a request to the concerned authority.

Furthermore, it remains unclear what the position of certificates of non-prior convictions is, when reading Art. 10, par. 2. Recital 41 clearly solves this: it makes clear that such certificates (as well as the matter of access) remain matters of pure national law. This is unfortunate, and a missed chance, given the above shown malfunctioning of ECRIS, and the understandable reluctance to grant private entities access to criminal records (let alone foreign criminal records): the EU certificate of non-prior conviction is the only viable alternative to compensate for those problems. The project team expresses its hope, however, that the deference to national law as included in the Directive does not necessarily entail that future steps regarding EU certificates of non-prior convictions are impossible as well. The legislative history of the Directive, however, does not induce much hope: the LIBE committee in the Parliament proposed several amendments to in favour of the establishment of a European certificate of good conduct, a proposal which did not stand. Consequently, the Directive as it stands today does not make clear how employers will obtain criminal records information from another member state: Jacobs and Blitsa give the following example: suppose member state A only allows the record subject to request criminal record information, but member state B authorizes employers to access such info. How will an employer from B find out about a prospective employee’s criminal record from member state A? The questions

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217 “This Directive does not establish an obligation to modify the national systems governing criminal records or the means of access to those records”.

218 Regarding disqualifications. The matter is less (but still) problematic when it comes to taking account of prior convictions.

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rises whether Art. 10, par. 3 Directive might solve this problem: after all, as opposed to Art. 10, par. 2 Directive, this paragraph contains provisions dealing with cross-border exchange of information. The answer is negative: it however, refers to the FD Crim Rec and in particular its Art. 6: as explained extensively above, the FD Crim Rec does not provide with an adequate framework to deal with disqualifications. Information regarding disqualifications is merely optional, definitions in ECRIS are not detailed enough, the access rules in relation to disqualifications are very restrictive, and it is up to national criminal records authorities whether or not to disseminate information when it is not requested for the purpose of criminal proceedings. Additionally, it is deplorable that the opportunity was not seized to, through Art. 10, par. 3 Directive introduce improvements with regards to ECRIS, namely by imposing the introduction of the offence definitions from Art. 3 to 7 in the ECRIS classification system.

6.2.4.5 Remark relating to entirety of Art.10 Directive

A general remark applicable to the entirety of Art. 10 relates to which positions involving working with children are covered by this disqualifications related article: it mentions the relatively general term of ‘activities involving direct and regular contacts with children’. Member state A might foresee that a person convicted for abuse of children cannot work as a nurse’s aid, while member state B’s legislation does not cover nurses aids. This example brings us back to the system proposed regarding a set of selected severe offences: to not only agree on content of definitions, yet also on which disqualification must follow from it. In other words: approximation of disqualifications as suggested by Jacobs and Blitsa as the only future option when it comes to sexual offences against minors. The project team submits that full approximation is not necessarily the best way forward; one can wonder how far the disqualifications should go, in other words, next to the discussions on what constitutes “direct and close contact with children”, whether the disqualifying effects should or should not reach beyond “direct and close contact with children”. One might point to the example of Ian Huntley, who was a school caretaker, and one can wonder what to do with the local snack bar close to the school. Such legislation, however, risks opening Pandora’s box: it is hardly possible to foresee any possible situation which might lead to some form of contact with children. Additionally, preventing people who have been convicted for sexual offences in relation to minors from a wide range of potential jobs, of which some might

220 J. JACOBS, and D. BLITSA, “Peadophiles, employment disqualification, and European integration”, Public law and legal theory research paper series, WP nr. 11-73, New York University School of law, October 2011, (355) 344-345.

221 Convicted for murder of two British school girls, the so-called Soham murders.
show no direct link with children whatsoever, risks hindering if not rendering impossible those offenders’ social rehabilitation. Further specification of definitions is desirable insofar as considerable differences between the member states exist in terms of definitions of the *offences*; a widening of the application of the disqualifying effects however, should be approached with far greater caution.222

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222 An option can be to issue guidelines raising awareness of the fact that also in professions which might not involve *direct* contact with children, risks are not inexistent, but it does not seem wise to go much further than that.
6.3 Road Traffic

6.3.1 Introduction: disqualifications in the area of road traffic

The area of road traffic is one ridden with disqualifications. Moreover, it enjoys a great amount of attention from the EU. Road safety is namely one aspect of the transport safety and represents an important facet of EU policy. The Commission has several times to date expressed its concern over the death toll the streets and roads in Europe take annually. The reduction of road fatalities is also one of the driving factors behind the recently adopted Directive facilitating the cross-border exchange of information on road safety related traffic offences. In this Directive, the European Parliament and the Council of the EU have stressed that improving road safety is “a prime objective of the Union’s transport policy”, aiming at reducing fatalities, injuries and material damage. At the same time, however, it has also been emphasised that “an important element of that policy [is] the consistent enforcement of sanction for road traffic offences committed in the Union which considerable jeopardise road safety”. “Sanctions” is a generic term that can mean imprisonment, a financial penalty (or fine) and so forth; in may also include various other measures, such as disqualifications.

Regarding sanctions in the form of financial penalties, the Directive recognises that they are often not enforced when those offences are committed with a vehicle which is not registered in the member state in which the offence was committed but in some other member state. Similar applies to disqualifications. In contrast to the pecuniary nature of the fine, a disqualification is “a measure which restricts, for a limited or unlimited period, a natural or legal person from exercising certain rights, occupying certain functions, engaging in certain activities, going to certain places or carrying out certain measures”. The Commission Communication defines it also as “a form

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226 Point 1 of the Preamble.
of sanction the nature of which is likely to vary within the same member state and a fortiori from one member state to the other” and adds that “they can be ordered in the context of criminal, civil/commercial, administrative or disciplinary proceedings or be the automatic result of a conviction.” As seen above, the nature of disqualifications as well as the duration and types vary significantly among states. A maiore ad minus that holds true also for disqualifications in the area of road traffic. What is important, however, is that (some) driving disqualifications exist in all member states, which makes it an area of disqualifications where the regulation at EU level, aiming at harmonisation or recognition of commonalities would not perhaps run into too much of a political, academic or judicial resistance on the part of member states.

The European Commission itself voiced its preference for the “sectoral approach” to regulating disqualifications, seeing in driving disqualifications one of those sectors where some common basis or a sufficient degree of homogeneity with respect to the sanctions imposed, already exists. This has been to a certain degree confirmed also by our study, which asked member states about five different driving disqualifications, revealing the biggest convergence in the disqualification of “temporary suspension of the driving licence” (shared by 22 member states).

6.3.2 Status questionis in the member states

The member states were asked to indicate which type of disqualification exists in their country in relation to the sector of driving disqualifications, and whether those disqualifications are imposed at the time of the conviction (be it implicit or explicit) or appear a later stage.
The results drawn from the survey are comprised in the table below. The main observations drawn from these results are listed below the table.

<table>
<thead>
<tr>
<th>Status questionis DQ related to driving disqualifications</th>
<th>Typology of DQ</th>
<th>Imposed DQ</th>
<th>DQ appearing at a later stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restriction of the driving licence (e.g. not being allowed to drive during the weekends)</td>
<td>UK HU LV NL SK FR EL</td>
<td>CY CZ HU SE FR AT</td>
<td></td>
</tr>
<tr>
<td>Temporary suspension of the driving licence</td>
<td>BU CY EE FI UK HU BE LT MT LU NL DE IT RO SL SK FR EL ES</td>
<td>BU CY CZ FI HU NL SE FR AT</td>
<td></td>
</tr>
<tr>
<td>Permanent withdrawal or cancellation of the driving licence</td>
<td>BU CY BE MT LU PT DE IT FR EL ES</td>
<td>BU CY CZ LT NL SK FR</td>
<td></td>
</tr>
<tr>
<td>Temporary prohibition to drive certain vehicles</td>
<td>CY CZ UK HU BE PL RO SL SK FR EL</td>
<td>BU CY NL PL SE FR AT</td>
<td></td>
</tr>
<tr>
<td>Permanent prohibition to drive certain vehicles</td>
<td>BU CY UK HU BE PL EL</td>
<td>BU CY NL PL</td>
<td></td>
</tr>
</tbody>
</table>

This table reveals that no less than 22 member states have a disqualification leading to a temporary suspension of the driving licence. 19 member states impose this disqualification at the time of the conviction, and in 6 of them, the disqualification can also be issued at a later stage, according to the law regulating access to e.g. certain professions, certain financing opportunities or certain activities. Three more indicated to only apply such disqualifying effects at a later stage than the conviction. A relatively small amount of member states (11) indicated to apply mere restrictions of driving licences. Furthermore, it is clear from the table that far less permanent than temporary disqualifications exist within the EU, although over half of the member states do withdraw driving licences permanently.

Not only the type of disqualifying measures but also the underlying offences differ considerably from member state to member state. As the European Commission stated in its White Paper: “a motorist driving from Cologne to London on the E40 and E15 motorways has to restrict his speed to 120 km/h on crossing the Belgian frontier, then to 130 km/h in France before slowing down to the speed limit of 112 km/h in the United Kingdom. Once there he can drink alcohol up to a blood alcohol level of 0.8 mg/ml, but on the way back he will have to observe a maximum limit of 0.5 mg/ml. The French authorities have the power to take away the driving licence of a motorist driving with a blood alcohol level of over 0.8 mg/ml or exceeding the speed limit by more than 40 km/h. In neither case, however, does French law allow this to be done to a driver who is not of French nationality”. Indeed, the maximum authorised blood

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alcohol levels indeed vary significantly across Europe. Although in most countries, this level is 0.5 g/l, higher values are in force in Luxembourg, UK and Ireland (0.8 g/l), while in Sweden a much lower maximum of 0.2 g/l is in force. 233

6.3.3 Legal bases for cross-border enforcement of driving disqualifications

The European Union has been very active in this area in the last few years, adopting directives which – when fully implemented – should further the enforcement of driving disqualifications outside the state of offence, thereby improving EU-wide road safety as well as equal treatment of offenders, irrespective of their moving the countries. Before we focus on the EU legislation in this field, however, certain Council of Europe conventions are also worth mentioning, as they provide to those member states which were signatory to these conventions (including several, most or all EU member states) grounds for enforcement of disqualifications.

The European Convention on Mutual Assistance in Criminal Matters234 was one of the collaborative agreements, which established procedures for providing mutual assistance between states for the purposes of imposing and enforcing penalties for criminal offences. It set out rules for the enforcement of letters rogatory relating to a criminal matter, whose aim is to procure evidence (audition of witnesses, experts and prosecuted persons, service of writs and records of judicial verdicts) or to communicate the evidence (records or documents) in criminal proceedings, undertaken by the judicial authorities of a signatory State.

The European Convention on the Punishment of Road Traffic Offences235 sets out a framework of mutual co-operation for more effective punishment of road traffic offences in the territories of the parties. It derogates from the principle of territoriality by empowering the contracting party in whose territory a road traffic offence has been committed to choose to either institute proceedings itself or request the State of residence of the offender to prosecute the offence. It may also request the State of residence to enforce the existing judgment or administrative decision, which has become enforceable in the State of the offence, after the offender has been given an opportunity to present his defence. The State of residence shall take action on the request for proceedings or

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enforcement; however, enforcement of judgments “rendered by default” is not compulsory. The Convention applies to a limited number of offences, the list of which can be found in Annex 1 (“Common Schedule of Road Traffic Offences”). Moreover, the road traffic offence in respect of which proceedings or enforcement are requested must be punishable under the laws of both the State of the offence and the State of residence (Art. 2, par. 1). Art. 12 seems particularly relevant for driving disqualifications, as it stipulates that when a request is made for the enforcement of some penalty other than a fine, the State of residence shall, if necessary, “substitute for the penalty imposed in the State of the offence the penalty prescribed by the law of the State of residence for a like offence”. Such penalty has to correspond in nature to that previously imposed by the State of the offence.

The European convention on the International Validity of Criminal Judgments enabled each Party to acquire competence to enforce a sanction imposed in another Party, provided that the request for enforcement was submitted by the requesting State, that under the law of the requested State the act for which the sanction was imposed would be an offence, and that the judgment delivered by a requesting State is final and enforceable. Art. 49 stipulates that “where a request for enforcement of a disqualification is made such disqualification imposed in the requesting State may be given effect in the requested State only if the law of the latter State allows for disqualification for the offence in question” and that the court dealing with the case shall appraise the expediency of enforcing the disqualification in the territory of its own State. Article 50 deals with the “adaptation” of disqualifications to the legislation of the State of enforcement, should they be necessary. This adaptation can performed either in terms of duration or in terms of rights forfeited. The first paragraph demands that the court, ordering the enforcement of the disqualification, determines the duration thereof within the limits prescribed by its own law, but that it may not exceed the limits laid down in the sentence imposed in the requesting State. The second paragraph, on the other hand, envisages the possibility of only partial enforcement of disqualification, i.e. the court may order the disqualification to be enforced in respect of only some of the rights whose loss or suspension has been pronounced.

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Under The European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle,\textsuperscript{238} the state of offence (the party which has ordered a final measure designed to restrict the right to drive of a driver who has committed a road offence) must notify without delay the state that issued the driving licence and the state of residence (the party which delivered the driving licence and the party in whose territory the offender is habitually resident) – any of the two may, in accordance with their law, execute the order. Only 12 countries have, however, ratified this Convention; only 4 among them are EU member states.\textsuperscript{239}

As regards EU instruments, several legislative efforts have already been made to support cross-border enforcement relating to road traffic offences, some of which have not entered into force or become fully operational. The Convention on Driving Disqualifications\textsuperscript{240} is one of them. Adopted in 1998, it has been to date ratified by seven states alone: Bulgaria, Cyprus, Spain, United Kingdom, Ireland, Romania and Slovakia.\textsuperscript{241} The Convention covers driving disqualifications - withdrawals or suspensions of driving licences which are no longer subject to right of appeal - imposed for an offence arising from the following conducts:\textsuperscript{242}

1. reckless or dangerous driving (whether or not resulting in death, injury or serious risk); (2) wilful failure to carry out the obligations placed on drivers after being involved in road accidents (hit-and-run driving); (3) driving a vehicle while under the influence of alcohol or other substances affecting or diminishing the mental and physical abilities of a driver, refusal to submit to alcohol and drug tests; (4) driving a vehicle faster than the permitted speed; (5) driving a vehicle whilst disqualified; and (6) other conducts constituting an offence for which a driving disqualification has been imposed by the State of the offence of a duration of six months or more or of a duration of less than six months where that has been agreed bilaterally between the member states concerned.

The Convention starts with definitions: ‘driving disqualification’ is defined as “any measure related to the commission of a road traffic offence which results in the withdrawal or suspension of the right to drive of a driver of a motor vehicle and which is no longer subject to the right of appeal. The measure may constitute either a primary, secondary or supplementary penalty or a safety measure and may have been taken either by a judicial authority or by an


\textsuperscript{239} Greece, Italy, Romania and Slovenia.


\textsuperscript{241} Information accessible on: http://www.consilium.europa.eu/policies/agreements/

administrative authority.” ‘State of the offence’ is defined as member state in which territory the road traffic offence was committed, whereas ‘state of residence’ is that member state within the territory of which the person who has been disqualified from driving is normally residing within the meaning of the Directive 91/439/EEC on driving licences. The latter defines ‘normal residence’ in Art. 9 as the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living. The second paragraph gives priority to personal ties, in the case where personal and occupational ties can be found in different places, with some further specification and excludes attendance of a university or school as a transfer of normal residence. This article has been verbatim copied into the later Directive 2006/126/EC on driving licences, now numbered as Article 12.

The Convention stipulates that the State of residence shall without delay give effect to the decision imposing disqualification from driving in the State of the offence in one of the following ways: (a) by directly executing the decision imposing disqualification from driving, while taking into account any part of the period of disqualification which has already been served in the State of offence; (b) by executing the decision imposing disqualification from driving via a judicial or administrative decision; or (c) by converting the decision from driving into a judicial or administrative decision of its own (substituting the original decision by the State of the offence with a new decision).

Article 6 contains grounds for refusal to give effect to the driving disqualification: some are mandatory (“shall refuse”), while others are optional (“may refuse”). The latter include the requirement of dual criminality. The first approach (direct execution) resembles to the mutual recognition principle, although the Commission has in the past seen it in a different light. In the Communication COM(2006)73 final on disqualifications arising from criminal conviction in the EU, the Commission has namely stated that “[t]his Convention does not provide for direct recognition of driving bans imposed in one member state by all the other member states and the mechanisms it establishes do not follow the rationale underlying the principle of mutual recognition. In particular, the Convention enables the member state of implementation to choose to convert the foreign decision into a domestic judicial or administrative order.” Yet, the claim that the Convention does not provide for direct recognition is unexpected, considering the wording of the Art. 4, echoed in the Explanatory report to the Convention on driving disqualifications (point 4.2.), which actually stated the opposite, namely, that there are three ways of enforcing or giving effect to the decision of the state of the offence, one way

being the “direct execution of the decision imposing the disqualification”. It went on to assure the member states that, “in effect, the State of residence recognises the decision taken in the State of the offence and is able to give effect to it with a minimum of formality and without the need for the decision to be endorsed or confirmed in any way by a court in the State of residence”.

The direct execution is therefore possible, it is not, however, mandatory (or the only option) – which is where the Commission of 2006 seems to like to have taken it. Hence also the announcement in the same paper that the Commission plans to propose a Framework Decision to replace the 1998 Convention concerning driving disqualifications “with a view to ensuring the full recognition of driving disqualifications.” Reading this Communication, it would be fair to observe that the Commission intended to spread the principle of mutual recognition wide across this area; mutual recognition in this area understood in a narrow way, removing the option of conversion (c) of the decision and the option of indirect execution (b), i.e. execution through endorsement or confirmation by a judicial or administrative authority of the State of residence. These latter two options are namely subject to a number of conditions, which are – according to the Explanatory report – designed mainly “to give flexibility to cater for differences in laws in the member states”.

Despite the official preparations for its “funeral”, the Convention has not, however, been entirely without its supporters. The EU-funded project CAPTIVE, for example, concludes that what is needed is the implementation of this Convention as soon as possible, claiming that their study has shown that in general, the states do not have significant concerns over the content of the Convention and that failure to implement it should not, therefore, be seen as a broad unwillingness to ratify it. “Rather, this failure is a consequence of a series of pragmatic issues coupled with the low priority that cross-border enforcement has historically had on national political agendas.” Moreover, despite the limited number of ratifications, two countries, UK and Ireland, have recently exercised the option envisaged in the Convention, which allows member states to go ahead and apply the terms of the Convention before it enters into force. From 28 January 2010 onwards the mutual recognition of driving disqualifications between the United Kingdom and Republic of Ireland thus came into force, enabling the disqualification of a driver, resident in the UK, who obtained his disqualification from driving in Ireland, to be imposed also in the

247 CAPTIVE, p. 12.
UK, his state of residence – if the driver has been given an adequate opportunity to defend himself according to the laws of Ireland. The driver is informed of any remaining period of disqualification due to be served in the UK and must surrender the driving licence until the disqualification period has been served in full. This arrangement applies only to 6 listed offences or categories of driver behaviour, in line with the 1998 Convention.

Agreement on Cooperation in Proceedings for Road Traffic Offences and the Enforcement of Financial Penalties Imposed in respect thereof of 28 April 1999 is a part of the Schengen acquis and regulates vehicle registration information exchange and execution of financial penalties (of 40 euros or above) in the state of residence. On its basis the authorities of the vehicle’s state of residence must provide details of the vehicle as well as the identity and address of the registered driver, to the authorities of the state of offence if they request the information. The authorities of the state of offence may send details of the offence and the resulting fine, to the address of the offender and request payment. If, however, the offender does not pay the fine, the authorities of the state of offence can request the authorities of the state of residence to take action under their national law to enforce payment. Article 7, par. 1, lists grounds for refusal, stipulating that the transfer of the enforcement of a decision may not be refused unless the requested Contracting Party deems that: (a) the offence does not exist in its own national law; (b) if its enforcement of the request would go against the ne bis in idem principle; (c) the financial penalty is statute-barred by limitation under its law; or (d) if the offender would have been granted an amnesty or a pardon if the offence had occurred in the state of residence.

In 2006, the (Third) Directive on driving licences was adopted, replacing and repealing the Directive 91/439/EEC (from 19 January 2013 onwards). As in the 1991 Directive, this directive incorporates the principle of mutual recognition with respect to driving licences (Art. 2). In terms of driving disqualifications, provisions of the Article 11 are of particular importance. The second paragraph grants the member state of normal residence the right to apply its national provisions on the restriction, suspension, withdrawal or cancellation of the right to drive to the person holding the driving licence issued by another member state and, if necessary, exchange the licence for this purpose. The fourth paragraph, on the other hand, stipulated that a member state “shall refuse” to issue a driving licence (point 1), or refuse to recognise the validity of a driving licence issued in another member state (point 2), to an applicant whose driving licence is restricted, suspended or withdrawn in another member state. These

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250 http://ec.europa.eu/transport/road_safety/behavior/driving_licence_en.htm
two cases look like the exception to the Art. 2 (mutual recognition of driving licences), but in effect they seem to amount to the EU-wide recognition of another member state’s driving disqualification, i.e. restriction, suspension or withdrawal of driving licence. The decision of a member state to e.g. withdraw the licence can be applied directly – no special recognition or conversion of the foreign decision into a national decision is necessary. Art. 11, par. 4, point 3 further stipulates that a member state “may also refuse” to issue a driving licence to an applicant whose licence is cancelled in another member state. The Explanatory Memorandum to the directive emphasises that member states may not issue a new driving licence to a person whose driving licence has been withdrawn and who thus indirectly is still the holder of another driving licence, as the aim of the Directive is to eliminate the so-called driving licence tourism. It was designed to “complement the Convention on the mutual recognition of withdrawal of driving licences,\textsuperscript{251} which deals with the same matter for persons in international traffic, a matter dealt with by the Geneva\textsuperscript{252} and Vienna\textsuperscript{253} Conventions.”\textsuperscript{254} The Third Driving Licence Directive addresses also the question of mutual assistance (Art. 15) between member states with respect to the implementation of this directive and the exchange of information on the licences that have been issued, exchanged, replaced, renewed or revoked. A reference is made to the EU driving licence network, which was envisaged to be set up in the future, as the network to be used for the purposes of the described exchange of information. This network, called RESPER, is still in the development stage; however, it is said to become operational by 19 January 2013.

The Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the member states of the European Union in the course of new criminal proceedings (hereafter: FD Prior Convictions) is relevant for our purposes to the extent that driving ban had been imposed in another member state. It does not aim at execution of judicial decisions in some other member state, but rather at enabling consequences to be attached to a previous conviction handed down in one member state in the course of new criminal proceedings in another member state. This decision relies on the “equivalence principle”, i.e. the principle, which requires from the state conducting the proceedings to merely “take into account” previous criminal judgements rendered by the courts in other member states,

and attach to them “equivalent legal effects” as it would to previous national convictions, in accordance with national law. The obligation put on the state conducting new criminal proceedings is thus minimal.

The Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (hereafter: FD Alternatives) is, on the other hand, an example of the implementation of the mutual recognition principle. This extends to disqualifications, as e.g. disqualifications can also be an alternative sanction or alternative penalty.255

The Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between member states of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (hereafter: FD Supervision), adopted in 2009, has many similarities with the previous Framework Decision, as it, too, foresees the mutual recognition mechanism and contains the same list of 32 offences (Art. 14), where there is no dual criminality requirement to be verified prior to the recognition of the decision (on condition that the offence is punishable by custodial sentence or a measure involving deprivation of liberty for a minimum of three years). Insofar the driving disqualifications are concerned, it explicitly mentions the obligation not to drive a vehicle as a type of a supervision measure (Art. 8, par. 2b). Driving disqualifications are perhaps not very likely to arise from the list of 32 offences, although they might (one can, for example, imagine a case of trafficking in human beings, where the victims were smuggled into the country in a truck with double walls, in which the driver receives (in addition) the prohibition to drive certain vehicles, e.g. trucks of certain characteristics or modified in any way). For other offences, which are not on the list (Art. 14, par. 3), the country that is to monitor the supervision measures may require the decision to relate to acts that are also an offence under its law in order to recognise the decision. Under certain circumstances (Art. 15), this country may refuse to recognise the decision on supervision measures altogether. When the supervision measures are incompatible with the law of the monitoring State, its competent authority may adapt them in line with the types of supervision measures that apply, under the law of the executing State, to equivalent offences.

255 COM(2006)73 recognises that a disqualification can in different ways result from a criminal conviction and lists a few examples: (a) the disqualification can be a penalty ordered by the court, either as an addition to the principal penalty or as an alternative penalty if it is ordered in place of one or more principal penalties; (b) it can be an additional penalty, automatically imposed as a consequence of the principal penalty, even if not ordered by the court; (c) it can be ordered in administrative or disciplinary proceedings arising as a result of a criminal conviction.
The adapted supervision measure shall correspond as far as possible, and may in no case be more severe than, the original measures imposed (Art.13).

6.3.4 Access to, and exchange of, information on driving disqualifications

The disqualification issued in the State of the offence would of course be difficult to execute in another member state if the latter is not aware of the disqualification being issued. In other words, prior to execution, a system of exchange of information between member states, granting access to the data on issued disqualifications, needs to be in place. Creating a register or database of imposed (driving) disqualifications is a logical step in this direction.

The 2000 Commission plan for the mutual recognition in criminal matters envisaged a “true central European Criminal Registry”, which was intended to also “contribute enormously to the EU-wide enforcement of disqualification decisions”\(^{256}\). The Commission Recommendation on Enforcement in the Field of Road Safety in 2004 recommended that every member state designates an enforcement coordination point and provide each other and the Commission with the coordinates of this coordination point to simplify information exchange and consequently contribute to improving road safety in Europe. It also highlighted the need for “serious or repeated offences jeopardising road safety committed by a non-resident driver” to be reported to the competent authorities in the member state in which the vehicle is registered, through the enforcement coordination point.\(^{257}\)

On the basis of these documents and the subsequent development, several options for data exchange are or could potentially be made available:

6.3.4.1 National criminal records and ECRIS

The current mechanism for the exchange of data on criminal convictions is based on Framework Decision 2009/315/JHA (hereafter: FD Crim. Rec.)\(^{258}\) and is insufficient as regards the exchange of data on disqualifications. As the listing of disqualifications arising from the conviction is only “optional” information (Art. 11, par. 1, b, iv), this system is not a very reliable source of information on this topic. An additional problem, already addressed in this Study,\(^{259}\) is the problem


\(^{259}\) Cf. supra Chapter 5.
with the lack of consent and insufficient safeguards against abuse (e.g. insufficient purpose limitation).

The European Criminal Records Information System, established by the Framework Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS), is the implementation of the Art. 11 FD Crim. Rec. It foresees the retrieval of information via central authorities of EU member states. The latter should implement the system by 7 April 2012. ECRIS is a decentralised system, meaning it does not represent an EU-wide records database; the criminal records information is stored in national databases alone and exchanged electronically between the central authorities of EU member states upon request. The system is meant to give judges and prosecutors easy access to comprehensive information on the offending history of any EU citizen, regardless of which EU country he or she may have been convicted in the past.

ECRIS incorporates, among others, the following disqualifications: prohibition of a specific right or capacity; cancellation of the driving licence; suspension of driving licence; prohibition to drive certain vehicles. It hosts, however, only the information on those disqualifications which result from criminal-law convictions, i.e. the information contained in the criminal records, therefore not providing the whole view as regards the disqualifications issued (since they may be pronounced in administrative procedures as well). The question also arises as to the (extent of) access of police to this database. To be effective, the traffic police who stops a driver should have access to the information on whether the driver has e.g. a driving ban imposed on him; however, effectiveness alone is not sufficient ground for granting data access. Moreover, any access should be limited to their seeing only the relevant, necessary, driving disqualification-related information and not also other information (e.g. on (other) crimes) that may be there. Various types of limits should be thus carefully considered and technologically supported.

6.3.4.2 EUCARIS

The Directive on facilitating cross-border exchange of information (2011) was adopted in order to facilitate the exchange of information between the member states by, specifically, setting out procedure to be followed for the exchange of information between member states (Art. 4), including provisions on the information letters on the road safety related traffic offence, informing the owner, the holder of the vehicle or some otherwise identified person suspected of committing the road traffic offence, of the initiation of proceedings against

him (Art. 5), by demanding comprehensive reports from member states on the number of automated searches of the offence, types of offence and number of failed requests (Art. 6), data protection measures (Art. 7) and by demanding that member states provide road users with information on the applicable rules, NGOs, road safety bodies and automobile clubs in their territory as well as obliging the Commission to publish the mentioned rules, as provided by each member state, in all official languages on its website.

The Directive does not provide any new mechanisms for data exchange; it relies on the existing software applications. It mentions in particular the European Vehicle and Driving Licence Information System software application (EUCARIS), which is a data exchange system that traffic police authorities are to use in order to pursue offences in their own home country, and has been operational since 1994. In 2006/2007 EUCARIS expanded with new functionality regarding the exchange of vehicle owner/holder information as described by the Prüm Treaty. Since the Prüm Decision, incorporating the provision of the Prüm Treaty into the EU legal framework, EUCARIS has become part of the legal framework of the European Union and mandatory for member states under the Prüm Decisions as concerns the vehicle registration data (VRD). The EUCARIS Treaty entered into force on 1 May 2009, almost nine years after signing.

At the moment, EUCARIS can be used for various inquiries, one being the Driving licence Inquiry on licence number or on name and date of birth. The aim of this inquiry is to check whether a person already has a driving licence in another state, which has to be exchanged, and also to check whether he has a sanction or (medical) restriction in another country. Therefore, it already contains some driving disqualifications. Inquiries can be performed either on vehicles or on a name, and sent to all countries in one request.

As the EUCARIS is that software application, which, according to the Directive (recital 10), should be taken advantage of for enabling data exchange and facilitating the reporting to the Commission on the part of the member state, it seems to be the most likely candidate to offer support to member states regarding the exchange of information in the area of road traffic disqualifications. According to the Directive, member states are obliged to allow other member states’ national contact points to access the national vehicle registration data relating to (a) vehicles and (b) owners or holders of the vehicle.

263 https://www.eucaris.net/use-of-eucaris
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in order to establish who is personally liable for the selected\textsuperscript{264} road safety related traffic offences. It obliges member states, however, to ensure that the exchange of information is carried out by interoperable electronic means without the exchange of data involving other databases. The exchange should, moreover, be cost efficient and secured, ensuring the security and protection of the transmitted data.

6.3.4.3 RESPER

The Art. 15 of the Directive 2006 on driving licences (Third Driving Licence Directive) announced that the EU driving licence network to be set up for the purpose of exchange of information on the licences that have been issued, exchanged, replaced, renewed or revoked by member states. This ICT network, currently called RESPER by the European Commission, should become operational by 19 January 2013 (the date when the Directive 2006 on driving licences will replace the older Directive on driving licences from 1991).

It is envisaged that RESPER will use either EUCARIS or TACHOnet exchange mechanism.\textsuperscript{265} In the press release, accompanying the Directive, the Commission stated that the aim of the setting up of a network to allow member states to exchange information on the licences they have issued, exchanged, replaced, renewed and revoked, is to uphold the principle of "one person - one licence" and to prevent "licence tourism".\textsuperscript{266} Member states will thus be obliged, from 19 January 2013 onwards, to exchange this information. In those countries where some of such data, e.g. forfeiture of the right to drive or an immediate withdrawal of the driving licence (a police measure), are part of their criminal or other registers and managed e.g. by the Ministry of Justice (rather than that of Transport), this will probably mean that the relevant information will have to be forwarded to the relevant national point, which will gather all data on driving disqualifications in order to enable the exchange, stipulated by the Directive.

\textsuperscript{264} It should be noted, however, that this directive foresees the cross-border exchange of information for eight specified traffic offences only, although other offences may be added in the future. Art. 11 namely stipulates that an assessment will be conducted, and submitted by 7 November 2016, on whether other road safety related traffic offences should be added to the scope of this directive.

\textsuperscript{265} https://www.ereg-association.eu/actualities/archive.php?action=show_article&news_id=119

\textsuperscript{266} http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/06/370&format=HTML&aged=1&language=en&guiLanguage=en
6.3.4.4 Microchip

Solely in terms of technical solutions, there is also a possibility of including the information on the imposed driving disqualification on the microchip that is installed in the plastic card model driving licence, as envisaged by the Third Driving Licence Directive. However, the incorporation of the microchip in the driving licence is currently facultative (Art. 1, par. 2). Moreover, this may not be the best solution as the access to this information would be dependent on the driver carrying the driving licence with him. If the driver does not have it with him, he may e.g. get off with a fine, yet his driving licence, in fact, includes information on this prohibition to drive for a certain period. An additional central system, independent of the physical driving licence, would therefore have to be provided in any case, in order to avoid such cases. Furthermore, the danger of potential abuse could be here even greater. Disqualified drivers may be tempted to fiddle with the licence, to destroy information on it etc. This has been recognised in the Directive itself, which states that the EC type-approval of the requirements concerning the microchip shall only be granted when the ability to resist attempts to tamper or alter data is demonstrated. As the relevant info cannot be loaded on the licence remotely, problems might also arise due to the time lapse between the issued disqualification and its inscription onto the microchip/card. Still, in terms of storage of information alone, the microchip as a storage medium would provide another option, providing that EU rules on data protection are fully respected.

6.3.5 Future policy recommendations for driving disqualifications

We shall now inspect how the above-proposed and detailed types of disqualification regimes\textsuperscript{267} may regulate different road traffic disqualifications.

6.3.5.1 Approximated disqualifications for approximated offences

Regime 1 deals with serious offences in the vulnerable sector, thereby excluding most of the road traffic offences. The majority of offences involving vehicles namely significantly differ from e.g. offences against children. Road transport is thus not a sector one would easily think of as "vulnerable". However, it is not inconceivable – should the number of fatalities due to e.g. drink-driving significantly rise in the future – that victims of drunk drivers are, too, designated as "vulnerable" in the above sense, and consequently perhaps the whole sector. Still, one should, in general, be cautious with the word. Due to its emotive dimension it can be namely too quickly abused for furthering various

\textsuperscript{267} Cf. supra Chapter 6.
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agendas, with little or no factual support behind it. Moreover, if the “vulnerable sector” is defined as a sector in which professional positions lend themselves easily to abuse of profession, then road transport cannot automatically be entirely excluded either. Some offences, related to the road transport, e.g. smuggling of people, may lead to some driving disqualification, possibly as an additional penalty, imposed by the court, or as a disciplinary measure, imposed by an administrative body.

The application of the Regime 1 in the area of road traffic should, however, be generally limited to offences which are severe, e.g. a death resulting from drink-driving or drug-driving when the amount of illegitimate substance or alcohol in the blood was truly high and significantly exceeding the prescribed limit, i.e. where harm or risk to harm is great. Looking at the existing lists of road traffic offences that have been selected by various legal instruments as deserving special treatment, it can be observed that some fit this description better than others. The list made of eight offences from the Directive, facilitating the cross-border exchange of information is perhaps not an entirely appropriate candidate; many of those offences listed should not be understood as “core offences”, which would in any way overlap with the “core offences” envisaged by this study under the proposed Regime 1. The latter are reserved for the most severe offences in a vulnerable sector, whereas the offences, listed in the Directive do not reflect the same logic behind it, for in the Directive we can see anything from truly dangerous and potentially harmful-to-others behaviour, such as “drink driving” or “driving under the influence of drugs”, to merely harmful-to-self behaviour such as a “non-use of a seat belt” or “failure to wear a safety helmet”. The criminalisation of the latter two offences is not entirely unproblematic; in fact, many dispute it on the grounds that it is based on legal

268 Various persons, groups, sectors and even vehicles have been labelled “vulnerable” when support has been sought for some unusual decisions. One example can be found in the Explanatory memorandum on Third Driving Licences Directive, which inter alia stipulated a requirement that drivers of mopeds, too, should from thereon take a driving exam and obtain a driving licence before they can legally drive. While it is not particularly surprising that the language of risk (e.g. risky young drivers) was substituted with a more diplomatic or politically-correct language of vulnerability, it may have come as a bit of surprise that it is not the category of people, but rather that of inanimate objects which was (to be) considered “vulnerable”. Mopeds were namely described as “one of the most vulnerable categories of vehicles”. EUROPEAN COMMISSION (2003), “Explanatory memorandum of the Proposal for a Directive EC of the European Parliament and of the Council on driving licences (Recasting)”, COM(2003) 621 final, 21.10.2003, p. 5.


270 In this, it differs from the European Convention no. 52 on the Punishment of Road Traffic Offences. The latter also includes (in Annex I) a list of offences to which the Convention applies; among them are, however, just the more serious road traffic infringements.
paternalism, which is not widely considered as a legitimate basis for criminal-law intervention into the individual’s autonomy in a modern criminal legal system.\footnote{See e.g. FEINBERG, J. (1986), *Harm to Self - The Moral Limits of the Criminal Law*. Oxford, Oxford University Press; VON HIRSCH, A., NEUMANN, U. and SEELMANN, K. (eds.) (2010), *Paternalismus im Strafrecht. Paternalismus im Strafrecht: die Kriminalisierung von selbstschädigendem Verhalten*, Baden-Baden, Nomos.} However, this Directive is not penal in its nature, but rather stems from a road safety perspective and as such gives little consideration to the justifiability of the prohibited offences in the first place. Its long-term aim is to reduce fatalities (not endorse criminalisations) by focusing on the most common Europe-wide offences that are, moreover, important in the causal chain between one’s behaviour on the road and his involvement in the road traffic accident. Of course, not wearing a seat-belt is not the cause of the accident (and, certainly, more effort should be put on reducing the real causes of such events), but wearing one may significantly increase one’s chances of survival or reduce the injuries encountered thereby reducing the overall number of fatalities and injuries the Europeans encounter every year. As with any other safety/security discourse, however, careful consideration should be paid to its usage and possible spill-over effects to other areas of legislation, particularly those with a more punitive, censoring nature and therefore with a bigger impact on fundamental rights.

With this in mind, the six types of offences, listed in the 1998 Convention on driving disqualifications seem somewhat better suited for the purpose of harmonising offences as envisaged in Regime 1, as they focus on truly serious offences, most of them criminal offences. In other words, only truly serious, significantly harmful (or seriously threatening the essential interest which is the object of protection) and intentional (or at least grossly negligent) conduct that amounts to a criminal offence would, in this context, seem to be a good candidate for an introduction of an EU-wide disqualification obligation, after undergoing thorough political negotiations.

This being said, however, the legitimate concerns regarding the scope of legitimate intervention into the individual’s rights with respect to driving could be fine-tuned with considerations relevant in the context of professional road transport. In relation to the latter, less severe offences could be considered when discussing the scope of Regime 1. The option of having stricter standards for those who are professionally involved in passenger transport, however, may be justifiably argued for. It may be argued that employers should be given the possibility to be informed about and allowed to choose not to employ (at least temporarily or before some other conditions, e.g. a proof of not drinking for a certain number of years, have been fulfilled) drivers who have been convicted for e.g. heavy drink driving. The project team is not taking a stance on what the threshold for such offences should be; it merely wishes to suggest that the needs
and requirements of employers to subscribe to more stringent employment standards for professional drivers in the area of road transport, particularly passenger transport, based on some legitimate reasons, such as passenger (human) safety, should and could legitimately be taken into account. This would also be very much in line with the increasingly prominent position road safety is taking in the EU policy making.\textsuperscript{272}

6.3.5.2 Traditional mutual recognition with transitivity

Regime 2, namely the application of the traditional mutual recognition system in the sense of FD Alternatives\textsuperscript{273} – which follows the pattern of one member state requesting another member state to subject a person who has his normal residence in that latter member state, to a disqualifying measure –, is particularly relevant in the context of driving disqualifications. A person who, for example, received a temporary driving ban in Bulgaria (for e.g. drink driving) and moves to Belgium, could then be subjected to that driving ban in Belgium if Bulgaria issued a mutual recognition order to Belgium. One legitimate objection to such a direct recognition of a disqualification that is shared among several member states can be that the underlying offences, which lead to the issued disqualification, can vary significantly in the member states, resulting in unfair and unequal results. Let us assume that state X considers drink-driving as highly morally wrong and consequently has a very low maximum authorised blood alcohol level (e.g. 0.2 g/l) and sanctions even the slightest violation with a temporary driving ban, whereas member state Y permits a higher maximum value (e.g. 0.8 g/l) and sanctions even the slightest violations of this limit as something that deserves more than a fine. A driver, who receives a temporary driving ban in country X, then finds himself in his home country Y. When country Y gets a request for the execution of the driving ban, a refusal ground based on dual or double criminality might be in order. Whether or not the rationale for Y wanting to rely on the double criminality exception is linked to discrimination concerns\textsuperscript{274} or a mere matter of

\textsuperscript{272} See EUROPEAN COMMISSION (2001), “White Paper - European transport policy for 2010: time to decide”. COM(2001) 370 final of 12.9.2001. In this communication, the Commission noted that “of all modes of transport, transport by road is the most dangerous and the most costly in terms of human lives” and referred to road safety as “a major concern of the people of Europe” and to the halving of the number of people killed on the roads between in the next decade as one of the goals of the EU (pp. 65 and 67).


\textsuperscript{274} The project team does not wish to take a stance on this matter, as there might very well be legitimate interests involved, which would justify different treatments. The fact that a different
policy, the project team maintains that the double criminality requirement must be retained. The application of mutual recognition without dual criminality could be problematic, which is why the mutual recognition approach, as set out by the project team, is to apply a system analogous to the FD Alternatives, which – outside of the list of 32 offences, in fact, stipulates the double criminality requirement. Moreover, a gradual, step-by-step approach towards the approximation of offences (and possibly also some common minimum standards regarding procedures) may be advocated in this area as well. This echoes, albeit in a more concrete field of application, a general policy finding of the project team that some mutual recognition instruments are often inapplicable due to the problems linked with the abandonment of the double criminality condition. In this Study, some country experts queried whether it is possible – in the light if the fact that the basis for disqualification in one member state may be totally different from the basis of disqualification in another – for this second member state to impose a sanction without breaching its national law.

In the Communication COM(2006)73 the European Commission itself recognised that it would be reasonable to give priority to mutual recognition of disqualifications in the fields for which a common basis between member states already exists and acknowledged that this presupposes a sufficient degree of homogeneity as regards sanctions, e.g. a common disqualification already existing in all member states or a legal instrument specifically requiring this type of penalty to be imposed in all member states for certain types of offence. If, however, disqualifications are “just one out of a possible range of penalties for the conduct that the legal instrument requires to be criminalised, without requiring the member states to provide for this type of penalty, there is no guarantee that a common basis will exist.” This does not mean, however, that the mutual recognition mechanism is ruled out in its entirety; it remains a valid

(see e.g. Art. 10 of the FD Alternative, i.e. the regime that is applied in the case of 32 offences.)

See e.g. Art. 10 of the FD Alternative, i.e. the regime that is applied in the case of 32 offences. For an analysis of the double criminality requirement in the disqualifications context, see the text supra on refusal grounds.
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option, provided that there is an optional refusal ground based on double criminality.

An additional question is, how far should procedures (not only the offence) in the state of the offence be checked by the state of residence, e.g. whether the offender had the opportunity for to defend himself and other procedural safeguards. The 1998 Convention on driving disqualifications (which is not in force, yet applied between UK and Ireland) lists the lack of adequate opportunity for the person concerned to defend himself as one of the grounds upon which the State of Residence can refuse to give effect to disqualification issued in the State of the offence. Similar provisions are included in the Council of Europe Convention no. 52 on the punishment of road traffic offences, which states as a fundamental principle that “when a judgment or administrative decision has become enforceable in the State of the offence after the offender has been given an opportunity to present his defence, that State may request the State of residence to enforce such judgment or decision.” Perhaps in this area, too – similar to recent ECJ case law on asylum –, any presumption that the procedure, during which the disqualification was imposed, was conducted in a manner consistent with the fundamental rights, should be rebuttable, i.e. not conclusive. A rebuttable presumption, in accordance with which the respect for fundamental rights is presumed but can always be rebutted in a concrete case, is the most in line with the mutual trust between member states – the idea upon which the principle of mutual recognition has been founded.

Mutual recognition in the area of road traffic, however, already exists. The 2006 Driving Licence Directive (and the 1991 Driving Licence Directive before it) namely stipulates that driving licences are mutually recognised. Driving licences issued in one member state are accepted by other member states as a valid licence to drive in their territory. Moreover, the directive also stipulates (Art. 11, par. 4) a EU-wide recognition of certain driving disqualifications (restriction, suspension or withdrawal of driving licence). Whereas the previous, 1991 Directive (Art. 8, par. 4) only granted the option (“may refuse”) to the member state to refuse to recognise the validity of any driving licence issued by another member state to a person whose driving licence was restricted, suspended or withdrawn, the new 2006 Directive obliges (“shall refuse”) the member state to refuse to recognise the validity (or issue a driving licence to an applicant) in these cases. From 19 Jan 2013 onwards, when the 2006 Directive replaces the old driving licence directive, the state of residence will thus in effect be required to directly recognise the withdrawal, restriction or suspension of driving licence. A driver whose licence is suspended in the country where it was issued will not

277 See the ECJ judgement in the case N.S. v Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner of 21 December 2011. A similar case was previously before ECHR: M.S.S. v. Belgium and Greece.

only be not allowed to drive in that member state, but in any other member state as well.

Moreover, as said above, the mutual recognition regime is already applied to those disqualifications, to which the FD Alternatives and FD Supervision would apply. As regards the mutual recognition of financial penalties for road traffic offences, more concretely, for the “conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods”, this has already been provided for by the Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties.279

6.3.5.3 Attaching equivalent effects

In the event that no explicit request was made from one member state to another, Regime 3 or the equivalence principle is suggested. The executing member state should take the imposed disqualification into account and, if possible, attach to the decision effects that would be equivalent to those attached to a conviction, pronounced by its own national courts in accordance with its own national law (cf. Art. 2 FD Prior Convictions).

However, there should not be too much stretching involved to find some similar disqualification (as the “equivalent effect”). In the absence of some equivalent disqualifying effect, the member state should have an option not to enforce the imposed disqualification at all. This would be in line with the essence of the equivalence principle, attaching a mere minimal obligation to the member states to take account of convictions passed in other member states (see Recital 3 of the FD Prior Convictions) and allowing member states themselves to define the conditions in which equivalent effects will be attached to the existing conviction imposed elsewhere.280 This principle is, furthermore, akin to the Art. 49 of the European Convention on the International Validity of Criminal Judgments, which states that “a request for enforcement of a disqualification may be given effect in the requested State only if the law of the latter State allows for disqualification for the offence in question”.

This should not be understood, however, as precluding the possibility for a member state to attach a disqualifying effect to the offence, which has been committed in another member state that did not issue a disqualification (or does not envisage a disqualification for such an offence) but which would, if committed at home, give rise to a disqualification according to its national law. The application of the equivalence principle should not hinder the employer of

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this member state not to hire a driver who was convicted of a certain road traffic offence, which would, if committed in this country, result in a e.g. driving ban or some other driving disqualification. In other words, the equivalence-based rules regarding the enforcement of existing disqualifications need not directly translate into rules regarding the imposition of the disqualifying effect (in another member state, in accordance with its law) to offences that did not lead to the issuing of a disqualification in the state, where the offence was committed.

6.3.6 Summary of the recommendations in the area of road traffic disqualifications

Prevention/road safety

- In terms of prevention or road safety, a more knowledge-based approach, taking into account the most risky groups, different national procedures and the knowledge on cultures of driving, should be advanced, based on the awareness of the plethora of different types of disqualifications as reactions to particular situations in member states, and that the topic is sensitive from the perspective of fundamental rights.
- When one moves from the area of road safety into criminal policy area, sufficient attention should also be paid to the nuances that govern both fields of policy – differences in terms of aims or objectives and general underlying principles and justifications for policy making in respective fields. When it comes to criminalisation or criminal policy, any selection of (traffic) offences to merit special treatment (e.g. enforcement on the basis of the principle of mutual recognition) should be justified on normative grounds, not (alone) on the basis of e.g. effectiveness. The automatic spillage of road safety measures into the field of disqualifications and even more in the field of criminal law, i.e. disqualifications linked to a criminal conviction, should be avoided. If a certain group of driving-related disqualifications should be selected for EU-wide enforcement, then their special treatment must be justified on the basis of the severity or seriousness of harm the underlying offence inflicts upon others.281

281 In other words, the conduct that is “causing actual harm or seriously threatening the right or essential interest which is the object of protection”. See COUNCIL OF THE EUROPEAN UNION, “Council’s Conclusions on model provisions, guiding the Council’s criminal law negotiations”, 2979th JUSTICE and HOME AFFAIRS Council meeting Brussels, 30.11.2009, par. 5.
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Cross-border execution of disqualifications

- Regime 1, leading to EU-wide mandatory disqualification, is recommended to be generally applied in the case of most severe road traffic offences, which are significantly harmful (or seriously threatening the essential interest which is the object of protection) and committed with high degree of culpability. In the area of road transport, specifically passenger transport, some less severe offences may additionally be deserving of Regime 1, based on legitimate reasons for stricter standards to be used for the category of professional drivers who are regularly involved in passenger transport.

- The mutual recognition regime (Regime 2) has already been applied in some parts of the road traffic sector (e.g. driving licences). Regarding other parts, not yet covered by the mutual recognition mechanism, certain approximation of rules and of enforcement/sanctions that could serve as a “common basis” is highly advised before contemplating the application of the principle of mutual recognition. Recently highlighted problems with the issue of (violation of) fundamental rights and ECJ’s and ECtHR judgements in this matter, highlight the importance of taking a moderate, reasoned and gradual approach in the areas where fundamental rights are at stake and ensuring some basic common standards (in terms of offences, procedures and sanctions, in our case disqualifications or disqualifying effects) are in place prior to adopting a strict mutual-recognition approach. This is even more pertinent in the case of disqualifications, due to their variety, the variety of procedures and authorities who issue and enforce them across member states.

- With respect to the mutual recognition, the approach, retaining the requirement of double criminality (at least as a refusal ground) is recommended. In the cases when there has been no explicit request for enforcement sent, however, the application of Regime 3 (the equivalence principle) is preferred. Attaching an equivalent effect to the essentially same offence may be easier to achieve and justify, still some sentencing guidelines on what could be considered “equivalent” would be welcome, in order to avoid the problem of alike not be treated alike.

- Convention 1998 could be ratified by all member states or, more appropriately, a new Directive with similar contents proposed, based primarily on the equivalence principle (as proposed in this study). Some enthusiasm for the adoption of the 1998 Convention is there: in 2005 (17 years after the member states’ signature) only 3 states have ratified it, today the number of countries who ratified the Convention amounts to 7. Moreover, two countries, UK and Ireland, have taken advantage of the Convention provision allowing member states to go ahead and use it before it enters into force, and applied it in their respective countries. However, at this point
(with the Treaty of Lisbon having come into force) and in the light of the evolution of EU policy in this area, it is probably more likely and advisable that a new Directive be adopted, regulating the cross-border enforcement of driving disqualifications – those that are not already covered by the 2006 Driving Licence Directive.

- Better explanation and clarity with regards to concepts and terminology in this area are recommended. As regards the execution, various legal instruments currently mention mechanisms, such as adaptation, conversion, substitution etc., without clearly delineating between the concepts.
- It is advisable that distinction be made between a (cross-border enforcement of a) disqualification that was pronounced as a sanction for e.g. drink driving, and a (cross-border enforcement of a) disqualification, e.g. driving ban, that resulted out of sufficiently accrued points, i.e. driver reaching the statutorily defined maximum number of permitted penalty points. In terms of road safety and quite aside from the inherent problems of the execution of disqualifications resulting from accrued points, it is much more important (and dangerous, if left unattended) that a driver who cannot and should not be allowed to drive due to his state (e.g. his drug or alcohol addiction which impede his driving capabilities) is prohibited from driving in other EU member states as well (not just in the state of the offence), whereas this may not necessarily or even regularly be the case with a driver who received a disqualification on the basis of the accumulation of penalty points (handed out e.g. for several minor or different infractions). There seems to be a normative difference between the two cases, which should be taken into account – at least on the level of the prioritising of EU policy and legislative interventions in this field.

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282 Special problems namely arise where member states operate a system of penalty points (demerit system), which may – when a driver reaches a certain amount – result in the driving disqualification. Not only that not all member states have such a system in place, the ways in which points-related penalties are applied vary as well. In some states (e.g. UK) points are accumulated up to a threshold, after which a further penalty is imposed; in other states (e.g. in France), points are deducted from a certain initial value and a further penalty in imposed when the driver has zero points remaining. Where points systems are not used or are not comparable or where different thresholds exist, the problems with enforcement may arise. See EREG (2011). “The Vehicle Chain in Europe 2011: A Survey of Vehicle and Driving Licence Procedures”, Part One. Zoetemeer: EReg, p. 24; CAPTIVE, p. 43, 44.
**ROAD TRAFFIC**

Data exchange

− In terms of (careful) operationalization, i.e. of systems for data exchange, one way would be to look into the possibility of granting (limited) access of police force to ECRIS provided that the principle of proportionality (between the burdensomeness of the measure and the purpose it aims to achieve) is respected, rules on data protection observed and an in-depth impact assessment on necessity completed beforehand. As regards ECRIS: in order to be useful for either traffic police officers in the field or member states contemplating enforcement of a disqualification issues in another member state, it would need to include the information on (driving) disqualifications. At the moment, the inclusion on information on disqualifications is only optional, which naturally limits the usefulness of ECRIS for our purposes.

− Another option is to use EUCARIS. This is a system that is already tailored-made for the area of road traffic and enables searches to be conducted as regards sanctions and medical restrictions imposed on a driver. For the purpose of the exchange of information on driving disqualifications, the list of “restrictions” should be extended, while respecting rules on data protection and following and in-depth impact assessment on necessity, to incorporate suspension, withdrawal, revocation, cancellation etc. of driving licence and other driving disqualifications.

− Should new databases be created or the functionality of existing databases extended, this has to adhere to the principle of proportionality and include sufficient safeguards to prevent abuse and secure data protection in line with the EU rules on data protection.
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8 Annexes

8.1 Overview of the disqualification *acquis*

As clarified when reviewing the gaps and inconsistencies in the current legal framework, references to disqualifications appear both in approximation as well as in instruments regulating international cooperation in criminal matters.

“Approximation instruments” are not only those instruments which contain an obligation for EU countries (be it sometimes through the Council of Europe) to foresee a certain disqualification, but also the instruments which assume the existence of certain disqualifying measures. The first table below contains an overview of instruments containing obligations for member states to foresee in specific disqualifications, or instruments containing targets which should be met in terms of foreseeing disqualifying effects, without necessarily containing which specific measures are to be taken, or instruments containing the assumption that certain disqualifications exist in (some) member states.

Apart from this category, another set of instruments has an effect on disqualifications, namely instruments which specifically regulate cooperation between member states, containing provisions relevant to disqualifications. In order to avoid repetition in the tables, the second table below will only contain those cooperation related instruments which can under no circumstances be categorised as falling under the first table. In other words, some instruments from the first table (approximation) could also be brought under the second table (cooperation), but not vice versa.

<table>
<thead>
<tr>
<th>Approximation instruments(^{283}) referring to disqualifications as a sanction or consequence of having been convicted</th>
<th>WITHDRAWAL OF LICENCES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Driving Licence</strong></td>
<td></td>
</tr>
<tr>
<td>Convention 98/C 216/01 drawn up on the basis of Article K.3 of the Treaty on European Union on Driving Disqualifications(^{284})</td>
<td>Convention on Driving Disqualifications</td>
</tr>
<tr>
<td>Directive 2006/126/EC of The European Parliament and of the Council of 20 Art 11.4 a Member state shall refuse to issue a driving licence to an applicant</td>
<td></td>
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</tbody>
</table>

\(^{283}\) To be understood as explained above the tables.

Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Approximation Instruments</th>
</tr>
</thead>
<tbody>
<tr>
<td>December 2006 on driving licences (Recast)(^{285}) whose driving licence is restricted, suspended or withdrawn in another Member state.</td>
</tr>
<tr>
<td>Art. 25.3 [The sanctions may include]: (d) temporary immobilisation of the vessel; (e) suspension of the licence; (f) withdrawal of the licence.</td>
</tr>
<tr>
<td>3017 Withdrawal of a hunting/fishing licence</td>
</tr>
<tr>
<td>3016 Prohibition to hold or to carry</td>
</tr>
</tbody>
</table>


Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA</td>
<td></td>
</tr>
<tr>
<td></td>
<td>weapons 3020 Prohibition to possess or use certain items other than weapons</td>
<td></td>
</tr>
</tbody>
</table>

**ECONOMIC AND COMMERCIAL ACTIVITIES**

**Commercial Activities In General**

<table>
<thead>
<tr>
<th>Framework Decision</th>
<th>Art</th>
<th>Description</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro</td>
<td>09.1.b</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 8(1) is punishable by [...] sanctions, which may include: (b) temporary or permanent disqualification from the practice of commercial activities</td>
<td>COUNCIL OF THE EUROPEAN UNION (2000), “Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro,” OJ L 140 of 14.6.2000.</td>
</tr>
<tr>
<td>2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment</td>
<td>8.1.b</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7(1) is punishable by [...] sanctions, which may include: (b) temporary or permanent disqualification from the practice of commercial activities</td>
<td>COUNCIL OF THE EUROPEAN UNION (2001), “Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, OJ L 149/1 of 2.6.2001.</td>
</tr>
</tbody>
</table>
Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Framework decision</th>
<th>Article</th>
<th>Text</th>
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</thead>
<tbody>
<tr>
<td>2002/629/JHA of 19 July 2002 on combating trafficking in human beings (repealed)</td>
<td>5.b</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 4 is punishable by […] sanctions, which may include: (b) temporary or permanent disqualification from the practice of commercial activities</td>
</tr>
<tr>
<td>2002/946/JHA of 28 November 2002 on strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence</td>
<td>3.1.b</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 2(1) is punishable by […] sanctions, which shall include […]: (b) temporary or permanent disqualification from the practice of commercial activities</td>
</tr>
<tr>
<td>2003/80/JHA on the protection of the environment through criminal law – annulled</td>
<td>7.b</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is punishable by […] sanctions, which may include: (b) temporary or permanent disqualification from the practice of industrial or commercial activities</td>
</tr>
<tr>
<td>2003/568/JHA of 22 July 2003 on combating corruption in the private sector</td>
<td>6.1.b</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5 is punishable by […] sanctions, which may include: (b) temporary or permanent disqualification from the practice of commercial activities</td>
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<thead>
<tr>
<th>Approximation instruments(^{295}) referring to disqualifications as a sanction or consequence of having been convicted</th>
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</thead>
<tbody>
<tr>
<td>Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking(^{295})</td>
</tr>
<tr>
<td>Framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (repealed)(^{296})</td>
</tr>
<tr>
<td>Framework decision 2005/222/JHA of 24 February 2005 on attacks against information systems(^{297})</td>
</tr>
<tr>
<td>Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime(^{298})</td>
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</tbody>
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## ANNEXES

### Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
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<tbody>
<tr>
<td>Proposal of 30 September 2010 for a directive on attacks against information systems and repealing Council Framework decision 2005/222/JHA on attacks against information systems</td>
<td>Art 12.1.b Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 11(1) is punishable by […] sanctions, [which may include]: (b) temporary or permanent disqualification from the practice of commercial activities</td>
</tr>
<tr>
<td>Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA</td>
<td>Art. 13.1.b. [Member States shall take measures to ensure that a legal person held liable pursuant to Art. 12 is punishable by sentences which may include:] (b) temporary or permanent disqualification from the practice of commercial activities</td>
</tr>
<tr>
<td>Directive of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA</td>
<td>Art 6.b [Member States shall take measures to ensure that a legal person held liable pursuant to Art. 5(1) or (2) is punishable by sentences which may include] (b) temporary or permanent disqualification from the practice of commercial activities</td>
</tr>
</tbody>
</table>

### Specific Professions Or Functions

| Managing, Directing Or Leading A Company |

Framework Decision 2003/80/JHA of | Art 5.2 [Each Member State shall take|

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Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Date</th>
<th>Instrument Description</th>
<th>Measures</th>
</tr>
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<tbody>
<tr>
<td>27 January 2003</td>
<td>on the protection of the environment through criminal law</td>
<td>measures to ensure that the conduct from articles 2 and 3 is punished; those measures may be accompanied by other measures, in particular disqualification for a natural person from […] managing or directing a company or a foundation</td>
</tr>
<tr>
<td>Framework decision 2003/568/JHA of 22 July 2003</td>
<td>on combating corruption in the private sector</td>
<td>Art 4.3 [Each Member State shall take measures to ensure that, when a natural person was convicted for the conduct from article, that person may] where appropriate, at least in cases where he or she had a leading position in a company within the business concerned, be temporarily prohibited from carrying on this particular or comparable business activity in a similar position or capacity</td>
</tr>
<tr>
<td>Framework decision 2004/68/JHA of 22 December 2003</td>
<td>on combating the sexual exploitation of children and child pornography</td>
<td>Art 5.3 Each Member State shall take the necessary measures […] to ensure that where a natural person in relation to a certain business activity has been convicted of the conduct referred to in Article 2, that person may, where appropriate, at least in cases where he or she had a leading position in a company within the business, be temporarily or permanently prevented from exercising professional activities related to the supervision of children</td>
</tr>
<tr>
<td>Council Decision 2009/316/JHA of 6 April 2009</td>
<td>on the establishment of the European Criminal Records Information System (ECRIS)</td>
<td>3014 Prohibition from working or activity with Minors</td>
</tr>
</tbody>
</table>

### Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Directive/Decision</th>
<th>Art</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive 2011/92/EU of 13 December 2012 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA</td>
<td>10.1</td>
<td>[Member States must ensure that a natural person who was convicted for one of the offences listed in the directive], may be temporarily or permanently prevented from exercising at least professional activities involving regular contacts with children.</td>
</tr>
<tr>
<td>Directives of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained</td>
<td>7.6</td>
<td>Although it is not a prerequisite for the decision of the competent authority in the host Member State, the temporary or permanent withdrawal by the competent authority in the home Member State of the authorization to practise the profession shall automatically lead to the lawyer concerned being temporarily or permanently prohibited from practising under his home-country professional title in the host Member State.</td>
</tr>
<tr>
<td>Framework Decision 2002/946/JHA of 28 November 2002 on strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence</td>
<td>1</td>
<td>Prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed,</td>
</tr>
<tr>
<td>Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law</td>
<td>5.2</td>
<td>[Each Member State shall take measures to ensure that the conduct from articles 2 and 3 is punished; those measures may be accompanied by other measures, in particular]</td>
</tr>
</tbody>
</table>

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Approximation instruments\textsuperscript{283} referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive 2005/36/EC of The European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications\textsuperscript{307}</td>
<td>Disqualification for a natural person from engaging in an activity requiring official authorisation. Art 56.2. The competent authorities of the host and home Member states shall exchange information regarding disciplinary action or criminal sanctions taken or any other serious, specific circumstances which are likely to have consequences for the pursuit of activities under this Directive, respecting personal data protection legislation provided for in Directives 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). The home Member state shall examine the veracity of the circumstances and its authorities shall decide on the nature and scope of the investigations which need to be carried out and shall inform the host Member state of the conclusions which it draws from the information available to it.</td>
</tr>
</tbody>
</table>

## ANNEXES

<table>
<thead>
<tr>
<th>Approximation instruments&lt;sup&gt;208&lt;/sup&gt; referring to disqualifications as a sanction or consequence of having been convicted</th>
</tr>
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<tbody>
<tr>
<td>Specific (Commercial) Acts</td>
</tr>
<tr>
<td>Decision 2009/315/JHA</td>
</tr>
<tr>
<td>Public Benefits Or Aid</td>
</tr>
<tr>
<td>Framework decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro&lt;sup&gt;208&lt;/sup&gt;</td>
</tr>
<tr>
<td>Art 9.1.a Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 8(1) is punishable by […] sanctions, [which may include]: (a) an exclusion from entitlement to public benefits or aid;</td>
</tr>
<tr>
<td>Framework decision 2001/413/JHA of 28 May 2001-combating fraud and counterfeiting of non-cash means of payment&lt;sup&gt;209&lt;/sup&gt;</td>
</tr>
<tr>
<td>Art 8.1.a: Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7(1) is punishable by […] sanctions, [which may include]: (a) exclusion from entitlement to public benefits or aid</td>
</tr>
<tr>
<td>Framework Decision of 13 June 2002 on combating terrorism (as amended by Council Framework Decision 2008/919/JHA of 28 November 2008)&lt;sup&gt;310&lt;/sup&gt;</td>
</tr>
<tr>
<td>Art 8.a Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7(1) is punishable by […] sanctions, [which may include]: exclusion from entitlement to public benefits or aid</td>
</tr>
</tbody>
</table>

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Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Article</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>Framework decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (replaced)(^{311})</td>
<td>Art 5.a</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7(1) is punishable by […] sanctions, [which may include]: (a) exclusion from entitlement to public benefits or aid</td>
</tr>
<tr>
<td>Framework decision 2002/946/JHA of 28 November 2002-strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence(^{312})</td>
<td>Art 3.1.a</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 2(1) is punishable by […] sanctions, [which may include]: (a) exclusion from entitlement to public benefits or aid</td>
</tr>
<tr>
<td>Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (annulled)(^{313})</td>
<td>Art 7.a</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is punishable by […] sanctions, [which may include]: (a) exclusion from entitlement to public benefits or aid</td>
</tr>
<tr>
<td>Framework decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector(^{314})</td>
<td>Art 6.1.a</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by […] sanctions, [which may include]: (a) exclusion from entitlement to public benefits or aid</td>
</tr>
<tr>
<td>Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts</td>
<td>Art 7.1.a</td>
<td>Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) is punishable by […]</td>
</tr>
</tbody>
</table>


Approximation instruments\textsuperscript{281} referring to disqualifications as a sanction or consequence of having been convicted and penalties in the field of illicit drug trafficking\textsuperscript{283}

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>Framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (repealed)</td>
<td>Article 7.1.a Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) is punishable by […] sanctions, [which may include]: (a) exclusion from entitlement to tax relief or other benefits or public aid</td>
</tr>
<tr>
<td>Framework decision 2005/222/JHA of 24 February 2005 on attacks against information systems (repealed)</td>
<td>Article 9.1.a Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 8(1) is punishable by […] sanctions, [which may include]: (a) exclusion from entitlement to public benefits or aid</td>
</tr>
<tr>
<td>Council Decision 2009/315/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA</td>
<td>Article 12.1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 11 is punishable by […] sanctions, [which may include]: (a) an exclusion from entitlement to public benefits or aid</td>
</tr>
</tbody>
</table>


### Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Directive of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA</th>
<th>[Member States shall take measures to ensure that a legal person held liable pursuant to Art. 12 is punishable by sentences which may include:] (a) exclusion from entitlement to public benefits or aid;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA</td>
<td>Art. 6.a [Member States shall take measures to ensure that a legal person held liable pursuant to Art. 5(1) or (2) is punishable by sentences which may include:] (a) exclusion from entitlement to public benefits or aid;</td>
</tr>
</tbody>
</table>

### Incapacity To Contract

| Directive 2004/18/EC - coordination of procedures for the award of public works contracts, public supply contracts and public service contracts | Art. 45.1 Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract |
| Council Decision 2009/316/JHA OF 6 April 2009 on the establishment of the 3004 Incapacity to contract with public administration |  |

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### ANNEXES

| Approximation instruments\(^\text{283}\) referring to disqualifications as a sanction or consequence of having been convicted |
|-----------------|--------------------------------------------------------------|
| European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA |

| Winding Up |
|-----------------|--------------------------------------------------------------|
| Framework decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro\(^\text{19}\) | Art 9.1.d judicial winding-up order. |
| Framework decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment\(^\text{20}\) | Art 8.1.d judicial winding-up order |
| Framework Decision of 13 June 2002 on combating terrorism (as amended by Council Framework Decision 2008/919/JHA of 28 November 2008)\(^\text{21}\) | Art 8.d judicial winding-up order |
| Framework decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (replaced)\(^\text{22}\) | Art 5.d judicial winding-up order, |
| Framework decision 2002/946/JHA of 28 November 2002 strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence\(^\text{23}\) | Art 3.1.d judicial winding-up order |


<table>
<thead>
<tr>
<th>Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (annulled)</strong></td>
<td>Art 7.d judicial winding-up order</td>
</tr>
<tr>
<td><strong>Framework decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector</strong></td>
<td>Art 6.1.d judicial winding-up order.</td>
</tr>
<tr>
<td><strong>Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking</strong></td>
<td>Art 7.1.d judicial winding-up order</td>
</tr>
<tr>
<td><strong>Framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography repealed</strong></td>
<td>Art 7.1.d judicial winding-up order;</td>
</tr>
<tr>
<td><strong>Framework decision 2005/222/JHA of 24 February 2005 on attacks against information systems (repealed)</strong></td>
<td>Art 9.1.b judicial winding-up order.</td>
</tr>
<tr>
<td><strong>Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime</strong></td>
<td>Art 6.1.d judicial winding-up;</td>
</tr>
</tbody>
</table>

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## ANNEXES

<table>
<thead>
<tr>
<th>Approximation instruments(^{280}) referring to disqualifications as a sanction or consequence of having been convicted</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (^{280})</td>
<td>Art 6.d [Member States shall take measures to ensure that a legal person held liable pursuant to Art. 5(1) or (2) is punishable by sentences which may include]: (d) judicial winding-up</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Closure Of The Establishment</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Framework decision 2001/413/JHA of 28 May 2001-combating fraud and counterfeiting of non-cash means of payment(^{282})</td>
<td>Art 8.e temporary or permanent closure of establishments which have been used for committing the offence.</td>
</tr>
<tr>
<td>Framework Decision of 13 June 2002 on combating terrorism (as amended by Council Framework Decision 2008/919/JHA of 28 November 2008)(^{330})</td>
<td>Art 8.e temporary or permanent closure of establishments which have been used for committing the offence.</td>
</tr>
<tr>
<td>Framework decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (repealed)(^{331})</td>
<td>Art 5.e temporary or permanent closure of establishments which have been used for committing the offence.</td>
</tr>
</tbody>
</table>

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### Disqualification Acquis

<table>
<thead>
<tr>
<th>Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td>and penalties in the field of illicit drug trafficking</td>
</tr>
<tr>
<td>Framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (repealed)</td>
</tr>
<tr>
<td>Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime</td>
</tr>
<tr>
<td>Proposal of 30 September 2010 for a directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA (COM(2010) 517 final-30 09 2010 )</td>
</tr>
<tr>
<td>Directive of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA</td>
</tr>
<tr>
<td>Directive of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA</td>
</tr>
</tbody>
</table>

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Approximation instruments\textsuperscript{335} referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Prohibition To Go Somewhere</th>
<th>Free Movement</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Without prejudice to the obligations arising from Article 23 and to the application of Article 96 of the Convention implementing the Schengen Agreement of 14 June 1985, signed at Schengen on 19 June 1990, hereinafter referred to as the ‘Schengen Convention’, the purpose of this Directive is to make possible the recognition of an expulsion decision issued by a competent authority in one Member state, hereinafter referred to as the ‘issuing Member state’, against a third country national present within the territory of another Member state, hereinafter referred to as the ‘enforcing Member state’.</td>
<td></td>
</tr>
<tr>
<td>2. Any decision taken pursuant to paragraph 1 shall be implemented according to the applicable legislation of the enforcing Member state.</td>
<td></td>
</tr>
<tr>
<td>3. This Directive shall not apply to family members of citizens of the Union who have exercised their right of free movement</td>
<td></td>
</tr>
<tr>
<td>2003 Prohibition to stay in some places</td>
<td></td>
</tr>
<tr>
<td>2004 Prohibition from entry to a mass event</td>
<td></td>
</tr>
<tr>
<td>2005 Prohibition to enter in contact with certain persons through whatever means</td>
<td></td>
</tr>
</tbody>
</table>

Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Prohibition To Leave Area</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002 Restriction to travel abroad</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Civil And Political Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>3002 Loss/suspension of capacity to hold or to be appointed to public office</td>
</tr>
<tr>
<td>3010 Loss/suspension of right to be an expert in court proceedings /witness under oath/juror</td>
</tr>
<tr>
<td>3012 Loss/suspension of right of decoration or title</td>
</tr>
<tr>
<td>10001 Loss of military rank</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Right To Vote/ To Be Elected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member state of which they are not nationals</td>
</tr>
<tr>
<td>Art 3 Any person [...] shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member state of residence unless deprived of those rights pursuant to Articles 6 and 7.</td>
</tr>
<tr>
<td>Art 6.1 Any citizen of the Union who resides in a Member state of which he is not a national and who, through an individual criminal law or civil law decision, has been deprived of his right to stand as a candidate under either the law of the Member state of residence or the law of his home Member state, shall be precluded from exercising that right in the Member state of residence in elections to the European Parliament</td>
</tr>
<tr>
<td>Art 7</td>
</tr>
</tbody>
</table>

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Approximation instruments\textsuperscript{283} referring to disqualifications as a sanction or consequence of having been convicted

1. The Member state of residence may check whether the citizens of the Union who have expressed a desire to exercise their right to vote there have not been deprived of that right in the home Member state through an individual civil law or criminal law decision.

Art. 10.2. When he submits his application to stand as a candidate a Community national must also produce an attestation from the competent administrative authorities of his home Member state certifying that he has not been deprived of the right to stand as a candidate in that Member state or that no such disqualification is known to those authorities.

Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member state of which they are not nationals\textsuperscript{337}

Art. 5.1. Member states of residence may provide that any citizen of the Union who, through an individual decision under civil law or a criminal law decision, has been deprived of his right to stand as a candidate under the law of his home Member state, shall be precluded from exercising that right in municipal elections.

Art. 9.2. The Member state of residence may also require a person entitled to stand as a candidate within the scope of Article 3 to:
(a) state in the formal declaration which he produces in accordance with paragraph 1 when submitting his

Approximation instruments referring to disqualifications as a sanction or consequence of having been convicted

<table>
<thead>
<tr>
<th>Position Within The Family</th>
<th>Animals/Sport</th>
</tr>
</thead>
<tbody>
<tr>
<td>3003 Loss/suspension of the right to vote or to be elected</td>
<td>3019 Prohibition to keep animals</td>
</tr>
<tr>
<td>(b) in case of doubt regarding the content of the declaration pursuant to (a), or where required under the legal provisions of a Member state, to produce before or after the election an attestation from the competent administrative authorities in his home Member state certifying that he has not been deprived of the right to stand as a candidate in that State or that no such disqualification is known to those authorities;</td>
<td>3021 Prohibition to play certain games/sports</td>
</tr>
</tbody>
</table>
### International effect and validity of disqualification

| European Convention of 28 May 1970 on the international validity of criminal judgments | Art 1.e “Disqualification” means any loss or suspension of a right or any prohibition or loss of legal capacity |
| European Convention of 28 May 1970 on the international validity of criminal judgments | Art 2.–This part is applicable to: a) sanctions involving deprivation of liberty; b) fines or confiscation; c) disqualifications |
| European Convention of 28 May 1970 on the international validity of criminal judgments | Art 49-52 Clauses relating specifically to enforcement of disqualification |
| European Convention of 28 May 1970 on the international validity of criminal judgments | Art 57 Each Contracting State shall legislate as it deems appropriate to allow the taking into consideration of any European criminal judgment rendered after a hearing of the accused so as to enable application of all or part of a disqualification attached by its law to judgments rendered in its territory. It shall determine the conditions in which this judgment is taken into consideration. |
| Convention Implementing The Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders – Joint Declaration By the Ministers and State Secretaries Meeting in Schengen on 19 June 1990, third hyphen: arrangements for the mutual recognition of disqualifications from driving motor vehicles | International validity of driving disqualifications |
| Council Resolution of 9 June 1997 on preventing and restraining football hooliganism through the exchange of experience, exclusion from stadiums and media policy | 1. The responsible Ministers invite their national sports associations to examine, in accordance with national law, how stadium exclusions imposed under civil law could also apply to football matches in a European context. |
| Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters | 3.4. Disqualifications and similar sanctions |
| Council Resolution of 17 November 2003 on the use by Member states of bans on access to venues of football matches with an international dimension | 1. The Member states are invited to examine the possibility of introducing provisions establishing a means of banning individuals previously guilty of violent conduct at football matches from stadiums at which |
International effect and validity of disqualification

<table>
<thead>
<tr>
<th>Football matches are to be held.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. In order to ensure compliance with orders imposing stadium bans, Member states should supplement them with provision for penalties in the event of non-compliance.</td>
</tr>
<tr>
<td>3. Each Member state in which stadium bans as referred to in paragraph 1 are in force is furthermore invited to consider the possibility of taking appropriate steps to ensure that orders imposing them issued domestically may also be extended to cover certain football matches held in other Member states and take into account orders issued by other Member states.</td>
</tr>
<tr>
<td>4. If there are stadium bans in a Member state imposed by sports organisations, the competent authorities of this Member state are invited, where appropriate, to contact these organisations to examine whether such stadium bans issued domestically could be applicable to football matches which are to be held in other countries. Member states, where appropriate, will invite the sports organisations to exchange the information between themselves.</td>
</tr>
</tbody>
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<table>
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<tbody>
<tr>
<td>2.1. Approximation of sanctions</td>
</tr>
<tr>
<td>2.1.7. Disqualification</td>
</tr>
<tr>
<td>2.1.9. Sanctions for legal persons</td>
</tr>
<tr>
<td>2.1.10. Alternative sanctions</td>
</tr>
<tr>
<td>2.2. Mutual recognition and enforcement of criminal penalties in another Member State</td>
</tr>
<tr>
<td>2.2.4. Recognition of decisions regarding disqualification</td>
</tr>
<tr>
<td>3.1.1. General rules of criminal law</td>
</tr>
<tr>
<td>3.1.4. Disqualification</td>
</tr>
<tr>
<td>3.2. An incomplete range of mutual recognition instruments</td>
</tr>
<tr>
<td>3.2.3. Recognition of disqualification decisions</td>
</tr>
<tr>
<td>4.1. Approximation of custodial penalties and alternative sanctions</td>
</tr>
<tr>
<td>4.1.4. Disqualification</td>
</tr>
</tbody>
</table>
## International effect and validity of disqualification

<table>
<thead>
<tr>
<th>Annexes</th>
<th>4.2. Recognition and enforcement of custodial penalties and alternative sanctions in another Member state</th>
</tr>
</thead>
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<tr>
<td></td>
<td>4.2.1. Scope of possible European Union rules</td>
</tr>
<tr>
<td></td>
<td>4.2.1.2. Material scope</td>
</tr>
<tr>
<td>4/5 November 2004- the Hague programme strengthening freedom, security and justice in the European Union</td>
<td>3.3.1 Mutual recognition</td>
</tr>
<tr>
<td></td>
<td>The Commission is invited to present its proposals on enhancing the exchange of information from national records of convictions and disqualifications, in particular of sex offenders, by December 2004 with a view to their adoption by the Council by the end of 2005. This should be followed in March 2005 by a further proposal on a computerised system of exchange of information.</td>
</tr>
<tr>
<td>10 May 2005 Action Plan (Communication from the Commission to the Council and the European Parliament The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice)</td>
<td>4.2. Judicial cooperation in criminal matters</td>
</tr>
<tr>
<td></td>
<td>Communication on disqualification (2005)</td>
</tr>
<tr>
<td>Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions338</td>
<td></td>
</tr>
<tr>
<td>Political Agreement on the European Protection Order339</td>
<td></td>
</tr>
<tr>
<td>Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member states of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention340</td>
<td></td>
</tr>
</tbody>
</table>


### International effect and validity of disqualification

| The Stockholm Programme adopted on 1 December 2009 – An open and secure Europe serving and protecting the citizen |
| 3.1.1 criminal law |
| (…)The Union should aim for the systematic exchange of information and, as a long term goal, mutual recognition of judgments imposing certain types of disqualification. The European Council invites the Commission to |
| - study the use of disqualification in the Member states and propose to the Council a programme of measures, including exchange of information on certain types of disqualifications and, by adopting a long term step-by-step approach, which accords priority to cases where disqualification is most likely to affect personal safety or business life. |

| 5.3. Exclusion of "unsound" bidders |

principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention”, OJ L 294/20, 11.11.2009.
8.2 Preparation for Impact Assessment

8.2.1 Objective and approach

In the Terms of Reference the European Commission requested to include a preparation for impact assessment in the Study. Traditionally, in an impact assessment, a distinction is made between the expected impact of (1) a status quo, (2) non-legislative policy options and (3) legislative policy options. Non-legislative policy options usually comprise measures such as awareness raising, monitoring & training seminars. Given that the applicable instruments are relatively young and that, consequently, the training is currently happening under the auspices of the Europäische Rechtsakademie (ERA), in cooperation with the judicial academies.

This impact assessment will thus not comprise an assessment of the non-legislative policy options, considering that their efficiency and expected impact are well-known: there is a default package of non-legislative measures and regarding disqualifications, no specific additional measures which would warrant additional explanations, are identified.

This impact assessment will contain the policy options of (1) status quo and (2) introduction of legislative measures.

This impact assessment will reveal that the combination of three different approaches which were put forward by the project team are intertwined and complementary: they can only function adequately when developed and implemented in a complementary manner. This is the reason why they have been labelled “disqualification triad”.

![Image of diagram](attachment:wp5_diagram.png)
8.2.2 Status Quo

This option would entail leaving the existing rules on disqualifications as sanction measures unchanged. All instruments in this area would continue to exist without any alteration – and no additional instruments would be issued.

Currently, in relation to disqualifications, there are already several instruments at EU level. In the field of cooperation in criminal matters, the most prominent relevant instruments are the FD Alternatives,\textsuperscript{341} the FD Probation,\textsuperscript{342} and the European Protection Order.\textsuperscript{343} Many other instruments exist, however, and are contained in the table comprised in Annex II of this Study.

In terms of information exchange, as followed from the European Commission’s White Paper,\textsuperscript{344} and as was confirmed by the results of the Study, far from all countries include disqualifications in their criminal records. The most important EU instruments are the FD Crim Rec and the ECRIS Decision.\textsuperscript{345} The latter does not create an EU-wide criminal records database; rather, it aims at installing a common communication infrastructure and an interconnection software. This Study revealed that the tandem FD Crim Rec – ECRIS lacks sufficiently stringent information exchange mechanisms: no authority or person can ask for criminal records information without going through the central authority of their own member state (Art. 6, par. 1 FD Crim Rec). Additionally, Art. 7, par. 2 FD Crim Rec foresees that when the request is made for purposes other than that of criminal proceedings (i.e. amongst others disqualifications), the member state of which the person has the nationality shall merely share that information in accordance with its national law. The said member state is thus not obliged to share information. Furthermore, it is only optional for the


\textsuperscript{343}\text{COUNCIL OF THE EUROPEAN UNION, 24 November 2011, 2010/0802 (COD), Political Agreement on the European Protection Order.}


ANNEXES

convicting member state to share information related to any disqualification arising from the conviction (Art. 11, par. 1, b, iv FD Crim Rec).

The classification of disqualifying measures as included in the ECRIS Decision is as follows:

2000 open category - Restriction of personal freedom
  2001 Prohibition from frequenting some places
  2002 Restriction to travel abroad
  2003 Prohibition to stay in some places
  2004 Prohibition from entry to a mass event
  2005 Prohibition to enter in contact with certain persons through whatever means
  2007 Obligation to report at specified times to a specific authority
  2008 Obligation to stay/reside in a certain place
  2009 Obligation to be at the place of residence on the set time
  2010 Obligation to comply with the probation measures ordered by the court, including the obligation to remain under supervision

3000 open category - Prohibition of a specific right or capacity
  3001 Disqualification from function
  3002 Loss/suspension of capacity to hold or to be appointed to public office
  3003 Loss/suspension of the right to vote or to be elected
  3004 Incapacity to contract with public administration
  3005 Ineligibility to obtain public subsidies
  3006 Cancellation of the driving licence
  3007 Suspension of driving licence
  3008 Prohibition to drive certain vehicles
  3009 Loss/suspension of the parental authority
  3010 Loss/suspension of right to be an expert in court proceedings/witness under oath/juror
  3011 Loss/suspension of right to be a legal guardian
  3012 Loss/suspension of right of decoration or title
  3013 Prohibition to exercise professional, commercial or social activity
  3014 Prohibition from working or activity with minors
  3015 Obligation to close an establishment
  3016 Prohibition to hold or to carry weapons
  3017 Withdrawal of a hunting/fishing licence
  3018 Prohibition to issue cheques or to use payment/credit cards
  3019 Prohibition to keep animals
  3020 Prohibition to possess or use certain items other than weapons
  3021 Prohibition to play certain games/sports
4000 open category Prohibition or expulsion from territory
4001 Prohibition from national territory
10000 open category Military penalty
10001 Loss of military rank
10002 Expulsion from professional military service

The impact assessment for the status quo is made based on the assumption that all the said EU instruments are (or, depending, will be) implemented correctly and timely.

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clarifying the scope of disqualifications</td>
<td>-1</td>
</tr>
<tr>
<td>Gradually extending the effect of disqualifications</td>
<td>-1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Explanation of the score for anticipated impact</th>
<th>Achieving the policy objectives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Currently considerable confusion exists</td>
<td></td>
</tr>
<tr>
<td>regarding the scope and definitions of a</td>
<td></td>
</tr>
<tr>
<td>disqualification. In this Study, the wide range</td>
<td></td>
</tr>
<tr>
<td>of legal instruments which deal primarily with</td>
<td></td>
</tr>
<tr>
<td>as well as those briefly touching upon the</td>
<td></td>
</tr>
<tr>
<td>issue of disqualifications were listed, and the</td>
<td></td>
</tr>
<tr>
<td>wide variety between member states (particularly</td>
<td></td>
</tr>
<tr>
<td>the variety <em>ratione poenae</em>, <em>ratione auctoritatis</em> and</td>
<td></td>
</tr>
<tr>
<td><em>ratione personae</em>) was examined.</td>
<td></td>
</tr>
<tr>
<td>This policy option is scored -1 because there</td>
<td></td>
</tr>
<tr>
<td>is an urgent need for clarification and a</td>
<td></td>
</tr>
<tr>
<td>decision not to intervene cannot but lead to</td>
<td></td>
</tr>
<tr>
<td>an accumulation of frustration and confusion.</td>
<td></td>
</tr>
<tr>
<td>Given that the Programme of measures[^348]</td>
<td></td>
</tr>
<tr>
<td>literally foresees the commitment to extend the</td>
<td></td>
</tr>
<tr>
<td>effect of disqualifications, doing nothing per</td>
<td></td>
</tr>
</tbody>
</table>

[^346]: In the grid, expected impacts will be assessed based on a rating scale, ranging from -4 (very negative impact on objectives) to +4 (very positive impact on objectives). Please note that even when the project team assesses a certain policy option as answering to most if not all current problems, it will never be scored as a +4 but rather attain a maximum of a +3 score. This choice was made considering the high probability that, if followed, the concerned policy options will still be subject to changes and nuances resulting from the political debate held between 27 different countries.

[^347]: “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001, p. 1

**Annexes**

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>in the EU (i.e. to complete the current instruments regulating the disqualifications in the EU)</td>
<td>346</td>
<td>definition implies that that commitment is not lived by. Unless there are good, substantive reasons to retain the current situation and thus change the policy objective included in the Programme of Measures (<em>quo d non</em>), doing so is harmful both for the internal functioning and for the external outlook of the EU.</td>
</tr>
<tr>
<td>Applying the principle of mutual recognition to disqualifications as a sanction measure</td>
<td>0</td>
<td>A status quo would result in a mere limited possibility of mutual recognition for disqualifications: the FD Alternatives and – to a lesser extent – the FD Supervision apply mutual recognition to certain disqualifying measures. Given that they only cover certain measure, their application is automatically limited. A status quo would mean that the present situation, where only certain disqualifying measures can be enforced through the mutual recognition mechanism, would stay the same.</td>
</tr>
<tr>
<td>Ensuring efficient (criminal records) information exchange on disqualifications</td>
<td>0</td>
<td>The shortcomings of the current system (primarily existing of the FD Crim Records – ECRIS tandem) will remain and will keep encroaching on the efficiency of information exchange. Indeed, the following flaws in the current rules entail that the cross-border info exchange is not such that it can efficiently lead to a cross-border enforcement of disqualifications. No authority or person can ask for criminal records information without going through the central authority of their own member state (Art. 6, par. 1 FD Crim Rec). Additionally, Art. 7, par. 2 FD Crim Rec foresees that when the request is made for purposes other than that of criminal proceedings (i.e. amongst others disqualifications), the member state of which the person has the nationality shall merely share that information in accordance with its national law. The said member state is thus not obliged to share information. Furthermore, it is</td>
</tr>
<tr>
<td>Impact and effects</td>
<td>Score</td>
<td>Explanation of the score for anticipated impact</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>-------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Status Quo</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impact and effects</td>
<td>Score</td>
<td>Explanation of the score for anticipated impact</td>
</tr>
<tr>
<td>only optional for the convicting member state to share information related to any disqualification arising from the conviction (Art. 11, par. 1, b, iv FD Crim Rec).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extending the protection vulnerable sectors</td>
<td>0</td>
<td>The vulnerable sectors as identified by the project team, being certain public sectors (e.g., sensitive positions within the police), education, medical sector, finance, transport and telecom, are dealt with to some extent in the current status questionis, unquestionably not in a sufficiently elaborated and/or detailed manner. Even though there is much room for improvement (as will be apparent from the tables below), the project team still decided to award a 0 instead of a -1 score. The reason for this is the undeniable leap forward taken in the Directive against child exploitation, especially in terms of the mentality change regarding the possibility for private actors to receive information on the applicants’ criminal records. Even though certain provision could have gone and should go much further (especially in relation to cross-border exchange of information and in relation to agreeing on the specific disqualifying effects that should follow from the concerned offences), the Directive is unquestionably a step in the right direction.</td>
</tr>
<tr>
<td>Regulating the taking account of foreign disqualifications and/or taking account of convictions that would/should result to disqualifications</td>
<td>0</td>
<td>As of now, the only relevant EU instrument in this regard is the FD Prior Conviction. This instrument does not contain any specific provisions related to disqualifications. Additionally, as the survey from this Study revealed, considerable differences exist regarding (1) whether or not disqualifications are included in the conviction or appear at a later stage, (2) regarding the inclusion of</td>
</tr>
</tbody>
</table>

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### Status Quo

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>disqualifications in the criminal (or other) records; this in combination with the fact that the cross-border exchange of information in relation to disqualifications has not yet been efficiently regulated, means that a status quo is dissatisfying for the purpose of obtaining the policy objective of taking account of foreign disqualifications of convictions that would/should result in disqualifications.</td>
</tr>
</tbody>
</table>

### Social & human rights impact

| Shared sense of justice | 0 | There is progressively large societal support to grant cross-border effect to disqualifications. This evolution is translated in the EU legislative action, oa. the Directive against sexual exploitation of minors.\(^{351}\) Tragedies such as the Belgian *Fourniret* case\(^{351}\) could have been avoided if only sufficient information exchange would have taken place concerning his previous French convictions and if there would have been a mechanism whereby such convictions could legally give rise to the exclusion from working with children in Belgium. No EU legislative action in this regard would unquestionably create the possibility for repetition of such tragedies, which would of course be detrimental to the credibility of EU criminal policy. Again, given the commendable measures included in the Directive the project team did not score a -1 but a mere 0 for this segment of the impact assessment: these developments do not *harm* the shared sense of justice. However, given that they are not going far enough for the |

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351 Whereby a French citizen who had repeatedly been convicted for sexual offences against minors in France, was allowed to work in a school in Belgium, and is known to have killed at least ten victims between 1987 and 2000).
## Impact Assessment

### Status Quo

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>reasons mentioned higher in this table, a status quo would not improve the shared sense of justice, either.</td>
</tr>
</tbody>
</table>

### Feasibility

<table>
<thead>
<tr>
<th>Feasibility</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Political feasibility</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Legal feasibility</td>
<td>Not applicable</td>
</tr>
</tbody>
</table>

| Economic feasibility & cost-effectiveness | -1 | Even though through the FD Crim Rec and ECRIS Decision the means to be informed about foreign disqualifications has been slightly improved, it remains very difficult (even for the person involved to obtain the desired information). No authority or person can ask for criminal records information without going through the central authority of their own member state (Art. 6, par. 1 FD Crim Rec). Additionally, Art. 7, par. 2 FD Crim Rec foresees that when the request is made for purposes other than that of criminal proceedings (i.e. amongst others disqualifications), the member state of which the person has the nationality shall merely share that information in accordance with its national law. The said member state is thus not obliged to share information. Consequently, gathering such information is both time-consuming and costly. Only a decisive EU policy with alterations of this situation could alleviate these concerns. |

### 8.2.3 Automatic disqualifying effect through approximation

As indicated in the figure inserted above, approximation constitutes the first branch of the disqualification triad. The Study examined the question whether there is a need for a category of offences for which the member states agree that it is necessary – in light of certain vulnerable sectors – to introduce an EU wide disqualification obligation. This would entail that it would be agreed upon which specific offences are targeted and to which disqualifications they should give rise.
8.2.3.1 Identifying offences and sectors

For certain offences it is vital to ensure that convictions give rise to an effect in the entire European Union, so that it should be advised that all member states agree on exact definitions of such offences, and on the disqualifications they can give rise to. Though it may seem far-reaching, this recommendation mirrors the line of reasoning in the Programme of Measures\textsuperscript{352} it which measure 20 suggested the compilation of a list of disqualifications common to all member states. Or, as was said in the Commission’s 2006 Communication “there would accordingly be merit in recognising the effect of certain disqualifications throughout the entire territory of the Union”.\textsuperscript{353}

The selection of offences should be done carefully and taking due account of the specific needs of a number of identified vulnerable sectors. In a study conducted in 2002, a vulnerable sector is to be understood as a sector in which professional positions lend themselves easily to abuse of profession.\textsuperscript{354} Examples given are certain public sectors (e.g. sensitive positions within the police), education, medical sector, finance, transport and telecom. Apart from agreeing on offence definitions, it is advised that not only the definitions of the selected offences be agreed upon, but also the disqualifications to which they would give rise. This is the only way of guaranteeing an efficient approach regarding the cross-border execution of disqualifications in the most sensitive sectors.

Considering the relevance for the public interest in all member states, it can be expected to be politically feasible, and a harmonisation of both offences and disqualifications carries the potential of making information exchange and efficient EU-wide enforcement of those disqualifications far more efficient than it is today. Whereas for the majority of cases, only extensive political debate can define which specific characteristics of behaviour might give rise to certain agreed upon disqualifications, for certain specific cases no more political debate should have to be required anymore because this mechanism already exists. In relation to central European procurement procedures the applicable instruments already introduce mandatory exclusion grounds for candidates that have been convicted for any of the listed and defined offences.


\textsuperscript{353} EUROPEAN COMMISSION (2006), Communication \textit{op.cit}.

8.2.3.2 Ensuring adequate availability of information

Severe practical problems exist on the level of information exchange and disparities in disqualifying measures.

In terms of access to the criminal records, the authors submit that there is only one option to make the effort of offence and disqualification codification worthwhile: direct access to criminal records information, be it national or belonging to other EU member states. However, given that it is not desirable to grant authorities which are not concerned with criminal investigations access to criminal records information, strict conditions should apply: the authors repeat that the selected severe offences would concern a limited set of offences which are commonly agreed upon by the member states, thus implying that anyone convicted for such offence in any member state would justify a disqualification in any other member state. The only way to act swiftly and efficiently to indeed enforce those “EU disqualifications” is to grant all public authorities in the EU direct access, in relation to these clearly defined offences. Crucial however, are the requirements of consent and functionality. First, regarding the consent condition, applicants for functions, tenders, certificates and the like, have to be required to give their consent. Different options for such consent are to either require it explicitly or to include it in a clause in the application procedure. In the latter case, the future negotiations should grant considerable attention to requirements of visibility and clarity of such clauses. The only exception to the consent requirement justifiable is when authorities involved in national security matters need to screen the full profile of for example a potential employee. Second, regarding the functionality requirement it seems clear that only information functional to the reason for inquiry (e.g. drunk driving for the transport section rather than whether or not the person has ever been caught surfing on illegal websites) should be disclosed.

The matter is more complex when it comes to private authorities, given the traditional and understandable reluctance to grant such authorities access to criminal records (let alone to grant such foreign authorities access to the records). However, the authors submit that, in the limited amount of sectors for which a number of selected severe offences would be agreed upon, and subject to the conditions of consent and functionality, the debate on granting private employers active in those sectors access to criminal records should be opened.


What then, when there is no political will amongst member states to grant private entities access to their criminal records, even if it concerns core crimes and despite the conditions of consent of the person involved and the functionality requirement? As was already suggested in a study conducted in 2002, the authors recommend to develop a system of European certificates of non-prior convictions. Not every criminal justice system allows for the practice of such certificates. Consequently, it should be considered to limit the certificate to vulnerable professions. An EU certificate of non-conviction could be made available for all EU citizens through the national criminal records authorities. In this regard the authors’ position is very clear: the person involved should request it from its national central criminal records authority.

As to the content of the certificate, it should at least mention which offence it concerns. If a member state convicts a person of a select of severe offence, then both the offence and the obligatory disqualification which follows from it should be transmitted through the ECRIS system. This entails that the corresponding code needs to be attributed to the offence and that the central criminal records authority of the member state of nationality of the person concerned must be notified.

<table>
<thead>
<tr>
<th>Approximation = Automatic disqualifying effect</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clarifying the scope of disqualifications</td>
<td>+2</td>
<td>In the context of certain vulnerable sectors (examples being certain public sectors (e.g. sensitive positions within the police), education, medical sector, finance, transport and telecom), the scope of disqualifications will be clarified through the limited set of offences that will be...</td>
</tr>
</tbody>
</table>

357 VERMEULEN, G., VANDER BEKEN, T., DE BUSSER, E. op. cit.
358 Ibid.
359 Alternatively, the potential employer should acquire his/her consent before asking such information, provided that the potential employer is allowed to ask for the certificate directly from the foreign criminal records authority. Not doing so would again imply administrative burden and loss of time.
360 In the grid, expected impacts will be assessed based on a rating scale, ranging from -4 (very negative impact on objectives) to +4 (very positive impact on objectives). Please note that even when the project team assesses a certain policy option as answering to most if not all current problems, it will never be scored as a +4 but rather attain a maximum of a +3 score. This choice was made considering the high probability that, if followed, the concerned policy options will still be subject to changes and nuances resulting from the political debate held between 27 different countries.
361 “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001, p. 1
### Impact and Effects

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approximation = Automatic disqualifying effect</td>
<td></td>
<td>identified at EU level; a group of offences for which the specific definition would be agreed upon and for which the member states would agree to what type of disqualification such offences should give rise. Naturally, it would only do so for the disqualifications attached to these specific offences. Consequently, this segment of the impact assessment gets a mere +2 code: indeed, purely in terms of scope demarcation, it would be advisable to draft one over-arching document dealing with disqualifications, and to then, within that document, unambiguously set the boundaries of what the specific disqualifications entail. This policy option was not retained, however, for several reasons: first, it does not seem useful to recast and replace all current relevant instruments. Secondly, the domain of disqualifications is very broad in that it can contain a wide range of measures, and it varies greatly throughout the member states. This variation is so prominent that a nuanced approach taking account of differences of several kinds is an absolute necessity: in this field, different offences, measures, sensitivities and legal traditions are involved, which simply cannot be dealt with through one single mechanism (apart from the limited set of offences and measures to be agreed upon). A +3 would stem from the combination of this policy recommendation and the two approaches below (1.4 and 1.5), but obtaining a +3 score within one of the three approaches is per definition impossible.</td>
</tr>
</tbody>
</table>

Gradually extending the effect of | 3 | The Programme of measures\(^{362}\) literally foresees the commitment to extend the effect of disqualifications. |

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### Approximation = Automatic disqualifying effect

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>disqualifications in the EU (i.e. to complete the current instruments regulating the disqualifications in the EU)</td>
<td></td>
<td>Agreeing on a set of offences which would give rise to the same disqualifying effect in every single EU member state, especially in combination with tangible measures to improve the info exchange system and the ways to obtain relevant information, per definition extends the effect of disqualifications and implies that this commitment is lived upto. Meeting set policy objectives is beneficial both for the internal functioning and for the external outlook of the EU.</td>
</tr>
<tr>
<td>Applying the principle of mutual recognition to disqualifications as a sanction measure</td>
<td>+1</td>
<td>This policy recommendation does not entail the application of the principle of mutual recognition to the concerned disqualifications: indeed, the mechanism is not that certain measures imposed in one country, are executed in another. Rather, within every national system, certain convictions would automatically give rise to agreed disqualifying effects. Caution is advised to avoid terminological confusion: after all, this mechanism could be explained as convictions being automatically ‘recognized’ as giving rise to certain measures. Doing so, however, entails a very different meaning of the word recognition than ‘mutual recognition’ and is therefore to be avoided. However, this segment of the impact assessment is still receives a +1 score. Even though the policy option of granting an automatic effect to certain offences in all EU member states cannot be seen as the application of mutual recognition, it makes mutual recognition redundant as it guarantees an even smoother and quicker application of certain disqualifications throughout the European Union.</td>
</tr>
<tr>
<td>Ensuring efficient (criminal records) information exchange on disqualifications</td>
<td>+2</td>
<td>The theory of the automatic disqualifying effect parts from the very philosophy of “recognize and execute”: indeed, it installs a system whereby every member state agrees that a certain offence will resort a disqualifying effect.</td>
</tr>
</tbody>
</table>
**Approximation = Automatic disqualifying effect**

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score&lt;sup&gt;360&lt;/sup&gt;</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>in its national system, and through its own national law (a strong instrument should be made at EU level, an instrument resorting direct effect within the national law systems, for example a regulation). Through the disconnection from the concept of 'recognizing and executing', problems relating to criminal records information exchange will decrease in the sense that a disqualification will not only be able to resort effect following a mechanism whereby one member state asks another to execute its disqualification: a certain offence will per definition lead to a certain disqualification. Nonetheless, information exchange remains necessary and would be significantly improved if this future policy option would be applied. The current problems whereby certain disqualifications do not feature on the criminal records and are consequently not visible on the latter would vanish because the disqualifying effect in another member state is linked to the offence as opposed to the disqualification that is or is not imposed or automatically added. It could be argued that approximation of the disqualifying effect also entails the approximation of the content of the criminal records databases and therefore the obligation to include the disqualification into the criminal records in spite of it not necessarily being explicitly imposed. However, such an EU intervention is not necessary. After all, if it is approximated that a conviction for a certain offence type leads to a disqualification, technically it is not even necessary any more to see to it that the disqualification is actually imposed let alone included in the national criminal records database. Therefore, to support the practical feasibility of this policy option, it is only necessary that the offences for which an approximated disqualification is introduced are</td>
</tr>
</tbody>
</table>
### Approximation = Automatic disqualifying effect

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Easily identifiable amongst the information on</td>
<td></td>
<td>convictions handed down by any of the member states, made available to the other member states and the relevant parties (with a view to enforcing the disqualification).</td>
</tr>
<tr>
<td>Extending the protection of vulnerable sectors</td>
<td>+3</td>
<td>There is a clear added value regarding the protection of vulnerable sectors; the score for this policy objective is clearly +3. The entire technique of the proposed automatic effect departs from the severity of offences on the one hand and the link with vulnerable sectors on the other.</td>
</tr>
<tr>
<td>Regulating the taking account of foreign disqualifications and/or taking account of convictions that would/should result to disqualifications</td>
<td>+1</td>
<td>To the extent that disqualifications are approximated, the taking account thereof in the course of a new criminal or even non criminal proceeding would be significantly facilitated for it would no longer be necessary to ‘interprete’ and ‘nationalise’ the sanction. With respect to disqualifications that differ amongst the member states, it will not always be self-evident to decide upon the effect it should have in the course of a new proceeding; An adaptation-decision will no longer be necessary in relation to disqualifications that have been subject to approximation for they will be exactly the same in all member states.</td>
</tr>
</tbody>
</table>

### Social & human rights impact

| Impact on fundamental | +3    | This policy objective is also undoubtedly met through the technique of automatic effect: it assures clarity for certain vulnerable sectors the situation regarding disqualifications, throughout the entire European Union. Finally, there will be no longer be any doubt whether or not a certain offence would lead to a disqualification. Additionally, uncertainty regarding whether or not the necessary information would be available for interested parties, is done away with. |

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## Impact Assessment

### Approximation = Automatic disqualifying effect

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>rights</td>
<td></td>
<td>addressed within the framework as developed by the project team, in that a strict functionality requirement applies regarding information-acquisition (with the exception of certain areas touching upon national security) and that consent of the person involved is necessary. Additionally, it is stated that the requirements of proportionality to be met when granting certain authorities an extended access to data bases, and thorough impact assessments are proposed in order to establish the necessity of such wider access.</td>
</tr>
</tbody>
</table>

### Feasibility

<table>
<thead>
<tr>
<th>Feasibility</th>
<th>Value</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political feasibility</td>
<td>+3</td>
<td>The latest EU Directive on combating sexual exploitation is a good example of the willingness of the member states to take the disqualifications matter further: given the societal impact of the concerned sectors put forward by the project team and considering their consequential impact on the shared sense of justice, the likelihood of member states refusing the theory of automatic effect fully, is low. Of course, debate regarding the specific crimes and disqualifying effects will be necessary; however, as an idea, namely creating a legal framework to protect vulnerable sectors from involving people who have committed severe and relevant crimes, it is highly unlikely that member states will refuse to open up a thorough debate on the very proposal.</td>
</tr>
<tr>
<td>Legal feasibility</td>
<td>+3</td>
<td>The policy option entails approximation of offences and sanctions. Consequently, the legal basis is provided by Art. 82(2) and 83(1) TFEU. It be noted that the articles both contain a mechanism allowing member states to hit the ‘emergency breaks’ in case they would fear that certain measures are going against the fundamental principles of their legal systems (Art. 82, par. 3 and Art. 83, par. 3 TFEU)</td>
</tr>
<tr>
<td>Economic</td>
<td>+1</td>
<td>Even though through the FD Crim Rec and</td>
</tr>
<tr>
<td>Impact and effects</td>
<td>Score</td>
<td>Explanation of the score for anticipated impact</td>
</tr>
<tr>
<td>-------------------</td>
<td>-------</td>
<td>-------------------------------------------------</td>
</tr>
<tr>
<td>feasibility &amp; cost-effectiveness</td>
<td>360</td>
<td>ECRIS Decision the means to be informed about foreign disqualifications has been slightly improved, it remains very difficult (even for the person involved to obtain the desired information). No authority or person can ask for criminal records information without going through the central authority of their own member state (Art. 6, par. 1 FD Crim Rec). Additionally, Art. 7, par. 2 FD Crim Rec foresees that when the request is made for purposes other than that of criminal proceedings (i.e. amongst others disqualifications), the member state of which the person has the nationality shall merely share that information in accordance with its national law. The said member state is thus not obliged to share information. Consequently, gathering such information is both time-consuming and costly. Only a decisive EU policy with alterations of this situation could alleviate these concerns.</td>
</tr>
</tbody>
</table>

### 8.2.4 Mutual recognition of disqualifications

As indicated in the figure inserted above, executing mutual recognition requests in relation to disqualification constitutes the second branch of the disqualification triad. This policy option deals with the situation where one member states explicitly asks another member state execute a disqualification; in this case, the project team proposes to apply mutual recognition mechanism. It be stressed that this policy proposal is thus very situation specific: consequently, a general application of the mutual recognition principle to disqualifications is not envisaged.

Because execution of a disqualification can be ineffective outside the member state of the person's residence, it is important that execution of a disqualification can be transferred to the member state of residence, the only member state in which execution of the disqualification would be felt by the person involved.

As identified in the introduction FD Alternatives and FD Supervision cover the execution of a number of measures in the member state of residence, but do not cover the entire scene of disqualifications. For the sake of consistency, it is important to develop a system that is analogous to the existing one. This policy option was explicitly voiced back in 2000: measure 22 of the Programme of
Measures\textsuperscript{363} foresaw the drawing up one or more instruments enabling the listed disqualifications to be enforced in the sentenced person's Member State of residence; the Stockholm Programme explicitly prescribed that the Union should aim for the "mutual recognition of judgments imposing certain types of disqualification"\textsuperscript{364}.

The scope of mutual recognition should be linked to the place of residence lying outside of the member state where the behaviour inflicting the disqualification has occurred. It is suggested to use the definition given in the Third Driving Licence Directive\textsuperscript{365} (Art. 12): "'normal residence' means the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal an occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living".\textsuperscript{366}

A detailed debate is needed on the scope \textit{ratione auctoritatis} of a future mutual recognition decision on disqualifications. It is advised to broaden (in the spirit of amongst others Art. 3 EU MLA) the scope to decisions of administrative authorities which are competent to take measures in "in the course of criminal investigations which present the characteristics of being an investigation following the commission of a specific criminal offence […] in order to identify and arrest, charge, prosecute or deliver judgment on those responsible."\textsuperscript{367} Even though the measures were taken with a criminal justice finality, the measures themselves are not necessarily of a criminal law nature. Broadening the scope of future MR instruments guarantees that situations are covered; such as the situation where a person was convicted of a fraud offence (criminal law), but where according to the national law the disqualification arising from it (e.g. exclusion from certain commercial activities) is not necessarily imposed in the judgment, but rather by the administrative authority in charge of permits concerning those particular activities. (i.e. at a later stage).

An application of the mutual recognition principle would thus entail that when an authority in the convicting state (issuing state) wishes to avoid impunity of the offender, it can issue a 'disqualification order' to the (new) state of residence (executing state). The competent authority of the executing state


\textsuperscript{366} The second paragraph contains more nuances on this definition.

\textsuperscript{367} G. VERMEULEN, W. DE BONDT and C. RYCKMAN (eds.) \textit{Rethinking international cooperation}, Maklu, 2012.
shall recognise the decision and take all necessary measures for the execution of the disqualification, unless it decides to invoke refusal grounds as defined in analogy with Art. 11 FD Alternatives.\textsuperscript{368}

The question arises what happens if the executing member state’s legal system does not contain the particular disqualification measure imposed by the issuing member state. Art. 9 FD Alternatives foresees an optional adaptation system (par. 1), with the specifications that the adapted measure shall correspond as far as possible to that imposed in the issuing state. The authors suggest to use this as a basis for adaptation provisions in a future disqualifications MR instrument.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|l|}
\hline
\textbf{Impact and effects} & \textbf{Score\textsuperscript{369}} & \textbf{Explanation of the score for anticipated impact} \\
\hline
Clarifying the scope of disqualifications & 1 & Within this regime as developed by the project team, the proposed policy options only cover disqualifications which are not covered by the European Protection Order [EPO], and/or the FD Alternatives, and/or the FD Supervision. For those disqualifications, the project team differs to the existing instruments and it suggests an analogue approach for disqualifications which are currently not covered by these instruments. Evidently however, there are several other disqualifications which are not covered by any of these instruments – and which do serve the purpose of protecting (potential) victims. Additionally and evidently, many other types of  \\
\hline
\end{tabular}
\caption{Mutual Recognition of Disqualifications}
\end{table}

\textsuperscript{368} The authors have scrutinized all refusal grounds occurring in the relevant EU instruments. (G. VERMEULEN, W. DE BONDT and C. RYCKMAN (eds.) Rethinking international cooperation, Maklu, 2012). Suggestions made regarding refusal grounds occurring in the FD Alternative of course also apply to the refusal grounds which ought to be included in the future disqualifications regime.

\textsuperscript{369} In the grid, expected impacts will be assessed based on a rating scale, ranging from -4 (very negative impact on objectives) to +4 (very positive impact on objectives). Please note that even when the project team assesses a certain policy option as answering to most if not all current problems, it will never be scored as a +4 but rather attain a maximum of a +3 score. This choice was made considering the high probability that, if followed, the concerned policy options will still be subject to changes and nuances resulting from the political debate held between 27 different countries.

\textsuperscript{370} “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001, p. 1
disqualifications came into being with very
different purposes (e.g. disqualifications related
to procurement). None of the disqualifications
as identified by the project team are *a priori*
excluded from the second regime. Precisely
because of this combination between certain
existing instruments and the need for an overall
application of mutual recognition in case of
explicit request outside the context of these
instruments, it is important that the future
mutual recognition rules in the disqualifications
field would unambiguously indicate which
disqualifying measures are involved and
explanatory memoranda are warranted,
indicated to what extent the different mutual
recognition instruments differ in terms of scope.
Outside the realm of the second regime, the
EPO, the FD Alternatives and the FD
Supervision do not apply, given that no request
from one member state to another is part of any
of the other regimes. Therefore, provided that
the above recommendations to assure a clear
scope of application in relation to mutual
recognition of disqualifications, the combination
of the three regimes will ensure a clarification of
the scope of the overall disqualifications
framework. Regarding the first regime: in the
context of certain vulnerable sectors (examples
being certain public sectors (e.g. sensitive
positions within the police), education, medical
sector, finance, transport and telecom), the
scope of disqualifications will be clarified
through the limited set of offences that will be
identified at EU level; a group of offences for
which the specific definition would be agreed
upon *and* for which the member states would
agree to what type of disqualification such
offences should give rise.

Purely in terms of scope demarcation, it would
be advisable to draft one over-arching

<table>
<thead>
<tr>
<th>Mutual Recognition of Disqualifications</th>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
</table>
| disqualifications came into being with very different purposes (e.g. disqualifications related to procurement). None of the disqualifications as identified by the project team are *a priori* excluded from the second regime. Precisely because of this combination between certain existing instruments and the need for an overall application of mutual recognition in case of explicit request outside the context of these instruments, it is important that the future mutual recognition rules in the disqualifications field would unambiguously indicate which disqualifying measures are involved and explanatory memoranda are warranted, indicated to what extent the different mutual recognition instruments differ in terms of scope. Outside the realm of the second regime, the EPO, the FD Alternatives and the FD Supervision do not apply, given that no request from one member state to another is part of any of the other regimes. Therefore, provided that the above recommendations to assure a clear scope of application in relation to mutual recognition of disqualifications, the combination of the three regimes will ensure a clarification of the scope of the overall disqualifications framework. Regarding the first regime: in the context of certain vulnerable sectors (examples being certain public sectors (e.g. sensitive positions within the police), education, medical sector, finance, transport and telecom), the scope of disqualifications will be clarified through the limited set of offences that will be identified at EU level; a group of offences for which the specific definition would be agreed upon *and* for which the member states would agree to what type of disqualification such offences should give rise. Purely in terms of scope demarcation, it would be advisable to draft one over-arching
**Mutual Recognition of Disqualifications**

<table>
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<tr>
<th>Impact and effects</th>
<th>Score&lt;sup&gt;369&lt;/sup&gt;</th>
<th>Explanation of the score for anticipated impact</th>
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<tbody>
<tr>
<td>Gradually extending the effect of disqualifications in the EU (i.e. to complete the current instruments regulating the disqualifications in the EU)</td>
<td>3</td>
<td>The Programme of measures&lt;sup&gt;371&lt;/sup&gt; literally foresees the commitment to extend the effect of disqualifications. By filling the current gaps in the mutual recognition mechanism, there would automatically be an extension of the effect of disqualifications in the EU.</td>
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<tr>
<td>Applying the principle of</td>
<td>3</td>
<td>The Tampere European Council, the first European Council entirely dedicated to justice</td>
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## Mutual Recognition of Disqualifications

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<th>Impact and effects</th>
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<tr>
<td>Mutual recognition to disqualifications as a sanction measure</td>
<td></td>
<td>and home affairs, presented mutual recognition as the cornerstone of judicial cooperation.(^{372}) From the outset it became clear that there was an interest in applying this technique to disqualifications; yet, a different approach than with “classical” sanctions is warranted, given that disqualifications are often closely intertwined with other techniques and instruments. Consequently, it is crucial to clearly delineate which instruments apply to which situation.</td>
</tr>
<tr>
<td>Ensuring efficient (criminal records) information exchange on disqualifications</td>
<td>1</td>
<td>This aspect of the policy recommendations is less important in this context than in the context of the regimes described in 8.2.3 (automatic disqualifying effect) and 8.2.5 (equivalent effect). Indeed, in this context, given within this regime as proposed by the project team, the cross-border effect is obtained through an explicit request of one member state to another, the first member state will include the information needed by the second member state in that certificate. Nonetheless, here too, there is room for improvement: it is important to ensure that the information templates used by the member states are aligned and as detailed as possible. Alignment between the certificate templates and the information exchange systems (such as ECRIS) should be assured. This is necessary in order to improve the automation and computerization of the information exchange and mutual recognition orders.</td>
</tr>
<tr>
<td>Extending the protection vulnerable sectors</td>
<td>0</td>
<td>Not applicable.</td>
</tr>
<tr>
<td>Regulating the taking account of foreign disqualifications</td>
<td>0</td>
<td>Not applicable.</td>
</tr>
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</table>

\(^{372}\) EUROPEAN COUNCIL, Presidency Conclusions, Tampere, 16-17 October 1999, par. 33.
### Mutual Recognition of Disqualifications

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<tr>
<td>and/or taking account of convictions that would/should result to disqualifications</td>
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#### Social & human rights impact

<table>
<thead>
<tr>
<th>Shared sense of justice</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
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<tbody>
<tr>
<td></td>
<td>3</td>
<td>The societal support and readiness to step up the regulation and effects of disqualifications keeps increasing; it is important to avoid the existence of ‘safe havens’ where people can ‘escape’ certain measures by moving from one member state to another. This is the underlying philosophy of several other mutual recognition instruments, not in the least the FD Financial Penalties, and is particularly important regarding disqualifications, potentially even more so than in relation to other sanctions, given that disqualifications affect the involved person’s position in society. For certain disqualifications, their execution is in the society’s interest (for example working with children), which is not the case with the payment of financial penalties.</td>
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<tr>
<th>Impact on fundamental rights</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
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<tr>
<td></td>
<td>3</td>
<td>In relation to the information exchange, fundamental rights concerns are adequately addressed within the framework as developed by the project team, in that a strict functionality requirement applies regarding information-acquistition (with the exception of certain areas touching upon national security) and that consent of the person involved is necessary. Additionally, it is states that the requirements of proportionality to be met when graning certain authorities an extended access to data bases, and thorough impact assessments are proposed</td>
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<tr>
<th>Impact and effects</th>
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<td>in order to establish the necessity of such wider access.</td>
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**Feasibility**

| Political feasibility | 3 | The societal support and readiness to step up the regulation and effects of disqualifications keeps increasing; it is important to avoid the existence of ‘safe havens’ where people can ‘escape’ certain measures by moving from one member state to another. This is the underlying philosophy of several other mutual recognition instruments, not in the least the FD Financial Penalties, and is particularly important regarding disqualifications, potentially even more so than in relation to other sanctions, given that disqualifications affect the involved person’s position in society. For certain disqualifications, their execution is in the society’s interest (for example working with children), which is not the case with the payment of financial penalties. The fact that it has been politically possible to agree on mutual recognition instruments without an explicit societal relevance means that, *a majore ad minus*, the application of mutual recognition to an extended set of offences has a high political feasibility. |

Legal feasibility | 3 | The 2nd regime does not introduce a new mechanism, it merely entails the elaboration of an existing principle, which has been externalised in several instruments, oa. the FD Alternatives. For the implementation of mutual recognition instruments, many member states use framework law, to which other forms... |

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### Mutual Recognition of Disqualifications

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<tr>
<td>of mutual recognition can be added. These particular laws came into being containing the implementations of instruments such as the FD Financial Penalties and FD Confiscation,(^{376}) to which other implementations, of for example the FD Alternatives, were added. There are no apparent reasons why legally, these instruments could not be completed by a mechanism dealing with other types of disqualifications than the ones contained in the FD Alternatives. Regarding member states without such framework laws, however, the addition of other disqualifications-involving mutual recognition instrument can also be expected to be legally feasible, given that the appropriate legal basis (the relevant framework decision which was in turn an externalisation of the legal basis contained in the Treaty) was also found in the context of the FD Alternatives.</td>
<td>0</td>
<td>No significant impact on the member states’ economic capacity is to be expected. As opposed to for example the FD Financial Penalties, no economic advantage will result directly from this 2nd disqualifications regime as developed by the project team. In the context of the FD Financial Penalties the revenues accrue to the executing member states; an advantage which does not follow from mutual recognition of disqualifications. However, in contrast with the FD Deprivation of Liberties,(^{377}) the execution of a foreign disqualifications will not be capacity burdening, either. Imprisonment is of course far...</td>
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Mutual Recognition of Disqualifications

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<th>Score</th>
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<tr>
<td></td>
<td>369</td>
<td>more costly than prohibiting somebody from entering a certain professional sector, or refusing to grant a licence etc. Additionally, it can be expected that the additional costs of having to recognize and execute disqualifications will be neutralised through the cross-border execution of own disqualifications.</td>
</tr>
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8.2.5 Equivalent effect for prior disqualifications

As indicated in the figure inserted above, supporting the equivalent effect that is attributed to foreign prior convictions, constitutes the third branch of the disqualification triad.

8.2.5.1 Existing equivalence mechanism

According to Art. 2 FD Prior Convictions member states are obliged to attach to a conviction handed down in other member states effects equivalent to those attached to a conviction handed down by their own courts in accordance with national law.

The explanatory memorandum of the proposal for the FD Prior Convictions is brief in explaining the concept of “equivalent effects”. It specifies that it is for the member states to define the conditions in which equivalent effects will be attached to the existence of a conviction handed down in another member state. In the explanatory memorandum, it is described how two different situations are thinkable in the member states: either the existence of previous convictions are factual elements that can be taken into account when deciding on a sentence within the initially foreseen sanction scales, and one where they are governed by complex provisions which can, for example, provide for aggravation of the penalty or of the procedural arrangements applicable to repeat offenders. In this context, it explicitly says that it will be up for the member states to adopt national legislation to assimilate convictions handed down in the other member states to national convictions “and give the same effect to them whatever they may be”. Apart from the prior convictions being either factual elements or giving rise to aggravation, the European Commission made reference to the variety flowing

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from the national structure of offences and penalties. In this context too, it is said that application of the equivalence doctrine entails that “it will be up to the member states to take all necessary measures to ensure that convictions handed down in other member states are taken into account.”

Recital 3 FD Prior Convictions stipulates that the equivalent effect aims at establishing a mere “minimum obligation” for the member states to take account of convictions handed down in other EU countries. It goes on to specify that this does not entail a harmonisation of the consequences attached by the different national legislations to the existence of previous convictions. It stresses the distinction with other framework decisions, in that this one does not aim at the execution in one member state of judicial decisions taken in other member states. Therefore, there is no obligation to take foreign decisions into account when, for example, the information obtained under applicable instruments is not sufficient, where a national conviction would not have been possible regarding the act for which the previous conviction had been imposed or where the previously imposed sanction is unknown to the national legal system. Here lies the main distinction with mutual recognition systems, whereby the executing authorities are under an obligation to execute the measure even if they are not foreseen in their legal systems. Given the considerable differences the member states’ criminal justice systems regarding the effect attached to previous conditions, the authors see merit in this approach.

The European Protection Order contains a system very close to the equivalent effect mechanism applied in Art. 2 FD Prior Convictions. Indeed, the perception that the EPO applies a system of mutual recognition is incorrect. In traditional mutual recognition, the default position is that the executing member state shall recognise the judgment, unless it decides to invoke refusal grounds

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382 COUNCIL OF THE EUROPEAN UNION, 5 October 2011, op. cit.

383 See VAN DER AA, S. and OUWERKERK, J. “The European Protection Order: no time to waste or a waste of time?” 19 European Journal of Crime 2011, 267-287: at p. 268 the authors state that “the EPO would provide a legal basis for EU member states to mutually recognize a victim protection order that was granted in another member state” (emphasis added). However, on p. 269 the authors accurately describe the three steps approach used in the EPO, an approach which differs from the traditional mutual recognition approach, thus suggesting that their terminology used earlier was not meant to claim the usage of a full, traditional mutual recognition effect by the EPO.
IMPACT ASSESSMENT

(e.g. Art. 8 FD Alternatives). In the EPO, the executing state must merely recognize the fact that a certain criminal conviction might indeed lead to the issuing of certain protection measures and then attach the effects it would resort were it to have occurred in national law.

8.2.5.2 Application of the equivalence to disqualifications

With regard to the disqualifications covered by this section, the authors propose to include the equivalence doctrine in the future approach to disqualifications. Broadly speaking, this would come down to the adoption of an instrument containing a provision based on Art. 2(1) FD Prior Convictions. In concrete terms, the provision could read as follows: “Each member state shall ensure that a behaviour, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of criminal records, or following rules regarding certificates of non-prior convictions, resorts disqualifying effects equivalent to the disqualifying effects the behaviour would have resorted in accordance with national law”.

Breaking down the proposed provision in its different components:

- “a behaviour which resorts disqualifying effects”: considering the difference between the member states it is advised not to speak of ‘offences’. Regardless of whether ‘behaviour’ or ‘offence’ is used, it is irrelevant whether or not the country where the behaviour occurred attaches a disqualifying effect to that behaviour. Indeed, only the occurred behaviour is relevant, and whether or not the member state in which the person finds himself now (or in which he is applying for a job/permit and the like) assesses that – after application of the equivalence test – the behaviour should give rise to a disqualification. Member states should be given discretionary powers with regards to the meaning they attach to a “behaviour”:

  On the one hand, if a member state chooses to only disqualify people when they have committed an offence in the sense of a certain provision in their criminal code, then they should be free to do so. In the spirit of the equivalence mechanism, it is then up to the member states to decide whether or not they decide on the result of an application of the equivalence test (after all, it is thinkable that, even if according to its law only an offence as defined in the national law could resort disqualifying effects, the member state still decides that a certain behaviour is equivalent to that offence and can thus give rise to a disqualification).

384 Granted, some ‘traditional’ mutual recognition instruments also contain provisions hinting at deference to the national law of the executing member states (adaptation mechanisms, see above). Yet, this does not change the fact that the default position is different.
On the other hand, the freedom for the member states in applying the equivalence theory also works the other way around: if the policy choice is made to attach a disqualifying effect to any offence in relation to a certain behaviour, then EU law and the application of the equivalence method should not be able to prevent this. The authors opinion that particularly in certain vulnerable sectors member states should be allowed to decide that it is possible within their member states to restrict the access to certain jobs for anyone who was involved in an offence hinting towards them not being qualified for the position. In other words, it should be possible for a member state to state that, for example, anyone convicted for any offence related to (sexual) child abuse/exploitation/intimidation can be disqualified from the right to work with children, in spite of concerns about discrimination which would be overruled by security and public order arguments.

In other words, key concept in the application of the equivalence doctrine to disqualifications is flexibility. There is one important limit: any future legislation in this regard should explicitly state that the disqualifying effect member states impose must stay as close as possible to the disqualifying effect the behaviour would have resorted under national law. It might seem that this obligation implicitly lies in the term ‘equivalent’; however, the authors underline the necessity of this specification: it rules out the risk of member states interpreting the equivalence doctrine as a mere minimum obligation and attaching a disqualifying effect which would for example last much longer than the disqualification an equivalent national offence would have given rise to.

An example might clarify the difference between the equivalence reasoning and the situation when the convicting member state explicitly orders the execution of a disqualification: imagine a person being convicted for a sanction giving rise to a disqualification in Belgium. France however, does not attach a disqualification to that (or an equivalent) offence. The outcome of the equivalence test will most probably be negative: the person will not be subjected to a disqualification in France. In case of an explicit order from the Belgian authorities however, France will have to (be it through adaptation mechanisms of existing disqualification measures) subject the person to a disqualifying measure (unless refusal grounds are in order).

- Given the practical importance of the aspect “in respect of which information has been obtained under applicable instruments on mutual legal assistance or

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385 Especially those identified as justifying the introduction of mandatory disqualifying effects.
386 As was said in the explanatory memorandum on the FD Prior Convictions, see above.
on the exchange of criminal records”, this will be dealt with separately in the following subsection.

8.2.5.3 Ensuring adequate information exchange

It is clear that the system provided for through the FD Crim Rec/ECRIS does not provide with a sufficient way for public nor private entities to obtain criminal records information. Consequently, as was done in 2.1.2. with respect to the availability of information to be able to introduce mandatory disqualifications for certain offences, the authors propose the introduction of European certificates of non-prior conviction: such an instrument, containing convictions in any EU member state which can be relevant to the profession/certificate the concerned person is applying for (functionality requirement), is the only way to provide with a solution for the limited access to ECRIS. Where in relation to core crimes cross-border access of private entities to criminal records information is justifiable, such justification is far less certain beyond core crimes.

Three policy options should be considered regarding the question of obliging private employers/public entities (“interested parties”) to ask for the EU certificates. The first option is to leave it to the member states: whether or not (potentially only in certain sectors) interested parties are allowed to ask for such certificates is left to the member states to decide. The second option is to oblige the member states to make it legally possible for interested parties to require an EU certificate of non-prior conviction. Thirdly, an option is to oblige the member states to oblige interested parties to require an EU certificate of non-prior conviction (potentially only in certain sectors). A general application of the third option should be dismissed, given that it can hardly be aligned with the spirit of the equivalence theory. It might prove useful when limited to certain sectors, however. Such measure however (as is the second policy option) might raise concerns regarding the capacity of the interested parties to conduct the (often complex) equivalence test. Therefore, if these options would be considered, they should include a possibility for the concerned person to have recourse to a judge where the equivalence assessment can be challenged.

387 In relation to core crimes cross-border access of private entities to criminal records information is justifiable (in that context the certificates were a mere alternative to access for private entities); however, such justification is far less certain beyond core crimes.

388 It would concern offences and disqualifications for which strict definitions would be agreed upon by the member states; in other words the offence definitions and disqualifying measures resulting from them would represent common denominators that would be compatible with all member states’ penal law systems. Additionally, the vulnerability of the concerned sectors can generate a sufficiently significant public interest that carries potential to outweigh other concerns if it would come to a balancing exercise.
Equivalent effect to foreign disqualifications

<table>
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<tr>
<td>Clarifying the scope of disqualifications</td>
<td>+1</td>
<td>The equivalent effect approach covers those disqualifications which do not result from the set of offences that qualify under the first regime for which equivalence would already be covered. Given the lenience of the equivalence approach, in which member states are still given considerable freedom whether or not to attach effects to foreign disqualifications beyond what is equivalent (and, where relevant, foreign convictions which do not give rise to disqualifications in the country where they have been committed), there is no pressing need to clarify the scope of these disqualifications. More importantly, given the wide variety of disqualifying measures throughout the member states, particularly ratione personae, ratione poenae and ratione auctoritatis, it does not seem feasible to outline the scope of the 3rd regime. This is not problematic in light of the fact that the three regimes as developed in the Study, should be seen as a whole: indeed, purely in terms of scope demarcation, it would be advisable to draft one over-arching document dealing with disqualifications, and to then, within that document, unambiguously set the boundaries of what the specific disqualifications entail. This policy option was not retained, however, for several reasons:</td>
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389 In the grid, expected impacts will be assessed based on a rating scale, ranging from -4 (very negative impact on objectives) to +4 (very positive impact on objectives). Please note that even when the project team assesses a certain policy option as answering to most if not all current problems, it will never be scored as a +4 but rather attain a maximum of a +3 score. This choice was made considering the high probability that, if followed, the concerned policy options will still be subject to changes and nuances resulting from the political debate held between 27 different countries.

390 “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001, p. 1
Equivalent effect to foreign disqualifications

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<td>first, it does not seem useful to recast and replace all current relevant instruments. Secondly, the domain of disqualifications is very broad in that it can contain a wide range of measures, and it varies greatly throughout the member states. This variation is so prominent that a nuanced approach taking account of differences of several kinds is an absolute necessity: in this field, different offences, measures, sensitivities and legal traditions are involved, which simply cannot be dealt with through one single mechanism (apart from the limited set of offences and measures to be agreed upon). A +3 would stem from the combination of this policy recommendation and the two approaches above (8.2.3 and 8.2.4), but obtaining a +3 score within one of the three approaches is per definition impossible.</td>
<td>+3</td>
<td>By introducing the obligation to grant an equivalent effect to a foreign disqualification, the effect of current disqualifications is undoubtedly extended. Additionally, it guarantees that the effect of disqualifications is not limited to the situation where one member state explicitly requests the execution of a disqualifications: indeed, it allows to grant effects beyond.</td>
</tr>
<tr>
<td>Gradually extending the effect of disqualifications in the EU (i.e. to complete the current instruments regulating the disqualifications in the EU)</td>
<td></td>
<td>The Tampere European Council, the first European Council entirely dedicated to justice and home affairs, presented mutual recognition as the cornerstone of judicial cooperation. Even though the equivalent effect recommendation is not equal to the strict application of mutual recognition, given that no request for execution needs to be made. Naturally, it entails that the concerned foreign decision is recognised and that an</td>
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<tr>
<td>Applying the principle of mutual recognition to disqualifications as a sanction measure</td>
<td>0</td>
<td>The Tampere European Council, the first European Council entirely dedicated to justice and home affairs, presented mutual recognition as the cornerstone of judicial cooperation. Even though the equivalent effect recommendation is not equal to the strict application of mutual recognition, given that no request for execution needs to be made. Naturally, it entails that the concerned foreign decision is recognised and that an</td>
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391 EUROPEAN COUNCIL, Presidency Conclusions, Tampere, 16-17 October 1999, par. 33.
### Equivalent effect to foreign disqualifications

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<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equivalent effect to foreign disqualifications</td>
<td>+3</td>
<td>Considering the gaps in the current information exchange mechanisms, namely the FD Criminal Records and ECRIS, it is advised to keep a clear distinction between the concept of mutual recognition and of equivalent effects.</td>
</tr>
<tr>
<td>Ensuring efficient (criminal records) information exchange on disqualifications</td>
<td>+3</td>
<td>Considering the gaps in the current information exchange mechanisms, namely the FD Criminal Records and ECRIS, there is a need for improvement. The authors propose the introduction of European certificates of non-prior conviction: such an instrument, containing convictions in any EU member state which can be relevant to the profession/certificate the concerned person is applying for (functionality requirement), is the only way to provide with a solution for the limited access to ECRIS. Where in relation to core crimes cross-border access of private entities to criminal records information is justifiable, such justification is far less certain beyond core crimes. Three policy options should be considered regarding the question of obliging private employers/public entities (“interested parties”) to ask for the EU certificates. The first option is to leave it to the member states, the second option is to oblige the member states to make it legally possible for interested parties to require an EU certificate of non-prior conviction, and thirdly, an option is to oblige the member states to oblige interested parties.</td>
</tr>
</tbody>
</table>

---

Cfr. supra

It would concern offences and disqualifications for which strict definitions would be agreed upon by the member states; in other words the offence definitions and disqualifying measures resulting from them would represent common denominators that would be compatible with all member states’ penal law systems. Additionally, the vulnerability of the concerned sectors can generate a sufficiently significant public interest that carries potential to outweigh other concerns if it would come to a balancing exercise.
Impact Assessment

### Equivalent effect to foreign disqualifications

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>to require an EU certificate of non-prior conviction (potentially only in certain sectors). A general application of the third option should be dismissed, given that it can hardly be aligned with the spirit of the equivalence theory; caution is advised, however, considering the possibility of concerns regarding the capacity of the interested parties to conduct the (often complex) equivalence test. Therefore, if these options would be considered, they should include a possibility for the concerned person to have recourse to a judge where the equivalence assessment can be challenged.</td>
<td>+3</td>
<td></td>
</tr>
</tbody>
</table>

### Extending the protection vulnerable sectors

Even though the First part of the disqualification triad (i.e. approximating disqualifications to the extent that they are deemed absolutely necessary for the protection of identified vulnerable sectors) it is still possible that individual member states wish to allow their vulnerable sector actors to extent the number of situations that would lead to disqualification. From that perspective the policy option to support the use of foreign disqualifications to attach equivalent effect to them as would would be done to national disqualifications, would significantly extend the protection of vulnerable sectors.

### Regulating the taking account of foreign disqualifications and/or taking account of convictions that would/should result to disqualifications

This is precisely the policy objective which would be obtained by introducing an obligation to grant an equivalent effect to disqualifications.

### Social & human rights impact

The societal support and readiness to step up the regulation and effects of disqualifications

| Shared sense of justice | +3 |                                                                                                                                                                                                 |
# Equivalent effect to foreign disqualifications

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>keeps increasing; it is important to avoid the existence of ‘safe havens’ where people can ‘escape’ certain measures by moving from one member state to another. This is also the underlying philosophy of the FD Prior Convictions. This ratio is particularly important regarding disqualifications, given that disqualifications affect the involved person’s position in society.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impact on fundamental rights</td>
<td>+3</td>
<td>In relation to the information exchange, fundamental rights concerns are adequately addressed within the framework as developed by the project team, in that a strict functionality requirement applies regarding information acquisition (with the exception of certain areas touching upon national security) and that consent of the person involved is necessary. Additionally, it is states that the requirements of proportionality to be met when granting certain authorities an extended access to data bases, and thorough impact assessments are proposed in order to establish the necessity of such wider access.</td>
</tr>
<tr>
<td>Political feasibility</td>
<td>+3</td>
<td>The societal support and readiness to step up the regulation and effects of disqualifications keeps increasing; it is important to avoid the existence of ‘safe havens’ where people can ‘escape’ certain measures by moving from one member state to another. This is the underlying philosophy of several mutual recognition instruments, not in the least the FD Financial Penalties, and is particularly important regarding disqualifications,</td>
</tr>
</tbody>
</table>

---


Equivalent effect to foreign disqualifications

<table>
<thead>
<tr>
<th>Impact and effects</th>
<th>Score</th>
<th>Explanation of the score for anticipated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>potentially even more so than in relation to other sanctions, given that disqualifications affect the involved person’s position in society. For certain disqualifications, their execution is in the society’s interest (for example working with children), which is not the case with the payment of financial penalties. The fact that it has been politically possible to agree on mutual recognition instruments without an explicit societal relevance means that, \textit{a majore ad minus}, a more ‘loose’ form of cooperation that is the equivalent effect theory is politically feasible.</td>
</tr>
<tr>
<td>Legal feasibility</td>
<td>+3</td>
<td>The 3rd regime does not introduce a new mechanism, it merely entails the elaboration of an existing principle, which is contained in the existing instrument FD Prior Convictions. Given that the existence of a legal basis for the FD Prior Convictions is not disputed, there are no apparent reasons why legally, this instrument could not be completed by a mechanism dealing disqualifications.</td>
</tr>
<tr>
<td>Economic feasibility &amp; cost-effectiveness</td>
<td>0</td>
<td>Bringing the criminal records information exchange mechanisms up to the level required to facilitate the equivalency tests that precede the taking account of foreign disqualifications will undeniably bring about some costs. The main requirement consists of redesigning ECRIS in a way that allows immediate recognition of first the convictions for which the underlying behaviour is equally criminalised in each of the member states and second the type of disqualifications that are equally used throughout the EU. Once a such immediate recognition is possible, the taking account of foreign prior disqualifications will run more smoothly justifying the investment made.</td>
</tr>
</tbody>
</table>
8.3 Member state questionnaire

1 Defining a disqualification

1.1 How would you define ‘disqualification as a sanction measure’ according to your national law?
*Please insert your reply here*

1.2 Which of the listed types of disqualifications appear as sanction measures in your national legislation?

*Please tick all applicable boxes and insert explanations where relevant. Please differentiate between a disqualification that is imposed at the time of the conviction (be it implicit or explicit) and a disqualification that appears at a later stage based on the rules regulating access to – for example – certain activities, professions, financing opportunities.*

<table>
<thead>
<tr>
<th>Offence related / Imposed DQ</th>
<th>Access related / DQ effect in later stage</th>
<th>Typology of the disqualification</th>
<th>Explanation on the duration/ nature where relevant</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td><strong>DRIVING LICENCE</strong></td>
<td></td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Restriction of the driving licence (e.g. not being allowed to drive during the weekends)</td>
<td>Please clarify the nature of the restriction</td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Temporary suspension of the driving licence</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Permanent withdrawal or cancellation of the driving licence</td>
<td></td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Temporary prohibition to drive certain vehicles</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Permanent prohibition to drive certain vehicles</td>
<td></td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td><strong>Other: Insert any other type of disqualification of a driving licence</strong></td>
<td>Please explain</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>HUNTING AND FISHING LICENCE</strong></td>
<td></td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Temporary immobilisation of a vessel</td>
<td>Please explain</td>
</tr>
<tr>
<td>Offence related / Imposed DQ</td>
<td>Access related / DQ effect in later stage</td>
<td>Typology of the disqualification</td>
<td>Explanation on the duration/ nature where relevant</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>--------------------------------------</td>
<td>----------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Temporary suspension of the fishing licence</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Permanent withdrawal of the fishing licence</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Temporary suspension of the hunting licence</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Permanent withdrawal of the hunting licence</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Other: Insert any other type of disqualification of a hunting or fishing licence</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Permanent prohibition to hold or carry weapons</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Permanent prohibition to possess or use certain items other than weapons</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Other: Insert any other type of disqualification related to weapons or other items</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Temporary disqualification from the practice of commercial activities</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Permanent disqualification from the practice of commercial activities</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Temporary disqualification from the practice of industrial activities</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Permanent disqualification from the practice of industrial activities</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Temporary disqualification from the practice of social activities</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Permanent disqualification from the practice of social activities</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td>☐ ☐</td>
<td>Prohibition to issue cheques or to</td>
<td></td>
</tr>
<tr>
<td>Offence related / Imposed DQ</td>
<td>Access related / DQ effect in later stage</td>
<td>Typology of the disqualification</td>
<td>Explanation on the duration/ nature where relevant</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>------------------------------------------</td>
<td>----------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>use payment/credit cards</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Other: Insert any other type of disqualification related to commercial activities</td>
<td>Please explain</td>
</tr>
</tbody>
</table>

**MANAGING, DIRECTING OR LEADING A COMPANY**

| ☐                           | ☐                                       | Temporary prohibition of a natural person with a leading position in a company within a certain concerned business from carrying on that particular or comparable business activity in a similar position or capacity | Please explain |
| ☐                           | ☐                                       | Other: Insert any other type of disqualification related to managing activities | Please explain |

**WORK WITH CHILDREN**

<p>| ☐                           | ☐                                       | Permanent prohibition for a natural person from exercising professional activities related to the supervision of children |                                                |
| ☐                           | ☐                                       | Temporary prohibition for a natural person from exercising professional activities related to the supervision of children | Please explain |
| ☐                           | ☐                                       | Permanent prohibition for a natural person from exercising professional activities involving regular contacts with children |                                                |
| ☐                           | ☐                                       | Temporary prohibition for a natural person from exercising professional activities involving regular contacts with children | Please explain |
| ☐                           | ☐                                       | Other: Insert any other type of disqualification related to working with children | Please explain |</p>
<table>
<thead>
<tr>
<th>Offence related / Imposed DQ</th>
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<th>Typology of the disqualification</th>
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</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>OTHER PROFESSIONS OR FUNCTIONS</strong></td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Temporary prohibition for a lawyer from practicing a legal profession</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Permanent prohibition for a lawyer from practicing a legal profession</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Temporary prohibition to practice (even through an intermediary) occupational activity in the exercise of which an offence was committed</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Permanent prohibition to practice (even through an intermediary) occupational activity in the exercise of which an offence was committed</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Temporary prohibition to practice directly the occupational activity in the exercise of which an offence was committed</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Permanent prohibition to practice directly the occupational activity in the exercise of which an offence was committed</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Other: Insert any other type of disqualification related to professions or functions</td>
<td>Please explain</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>PUBLIC BENEFITS, AID, FUNDING</strong></td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Permanent exclusion from entitlement to public benefits or aid</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Temporary exclusion from entitlement to public benefits or aid</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Permanent exclusion from entitlement to tax relief</td>
<td></td>
</tr>
<tr>
<td>Offence related / Imposed DQ</td>
<td>Access related / DQ effect in later stage</td>
<td>Typology of the disqualification</td>
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<tr>
<td>-------------------------------</td>
<td>------------------------------------------</td>
<td>--------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Temporary exclusion from entitlement to tax relief</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Permanent exclusion from participation in a procurement procedure</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Temporary exclusion from participation in a procurement procedure</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Permanent exclusion from obtaining public subsidies</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Temporary exclusion from obtaining public subsidies</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td>Other: Insert any other type of disqualification related to public benefits, aid or funding</td>
<td>Please explain</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td>CLOSURE OF AN ESTABLISHMENT</td>
<td>Judicial winding-up order</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Temporary closure of establishments which have been used for committing an offence</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐ ☐</td>
<td></td>
<td>Permanent closure of establishments which have been used for committing an offence</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td>Other: Insert any other type of disqualification related to the closure of an establishment</td>
<td>Please explain</td>
<td></td>
</tr>
<tr>
<td>☐ ☐</td>
<td>PROHIBITION TO GO SOMEWHERE</td>
<td>Permanent prohibition from frequenting certain places</td>
<td></td>
</tr>
</tbody>
</table>
## Member State Questionnaire

<table>
<thead>
<tr>
<th>Offence related / Imposed DQ</th>
<th>Access related / DQ effect in later stage</th>
<th>Typology of the disqualification</th>
<th>Explanation on the duration/ nature where relevant</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐</td>
<td>☐</td>
<td>Temporary prohibition from frequenting certain places</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Permanent prohibition to stay in certain places</td>
<td></td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Temporary prohibition to stay in certain places</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Permanent prohibition from entry to a certain mass event</td>
<td></td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Temporary prohibition from entry to a certain mass event</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Permanent prohibition to enter in contact with certain persons through whatever means</td>
<td></td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Temporary prohibition to enter in contact with certain persons through whatever means</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Permanent restriction to travel abroad</td>
<td></td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Temporary restriction to travel abroad</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Permanent placement under electronic surveillance</td>
<td></td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Temporary placement under electronic surveillance</td>
<td>Please explain</td>
</tr>
<tr>
<td>☐</td>
<td>☐</td>
<td>Permanent obligation to report at specified times to a specific authority</td>
<td></td>
</tr>
<tr>
<td>Offence related / Imposed DQ</td>
<td>Access related / DQ effect in later stage</td>
<td>Typology of the disqualification</td>
<td>Explanation on the duration/ nature where relevant</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>------------------------------------------</td>
<td>----------------------------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Temporary obligation to report at specified times to a specific authority</td>
<td>Please explain</td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Permanent obligation to stay/reside in a certain place</td>
<td></td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Temporary obligation to stay/reside in a certain place</td>
<td>Please explain</td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Obligation to be at the place of residence on a set time</td>
<td></td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Other: Insert any other type of disqualification related to the prohibition to go or leave somewhere</td>
<td>Please explain</td>
</tr>
<tr>
<td></td>
<td>CIVIL AND POLITICAL RIGHTS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Permanent loss of capacity to hold or to be appointed to public office</td>
<td></td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Temporary suspension of capacity to hold or to be appointed to public office</td>
<td>Please explain</td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Permanent loss of right to be an expert in court proceedings/ witness under oath/juror</td>
<td></td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Temporary suspension of right to be an expert in court proceedings/ witness under oath/juror</td>
<td>Please explain</td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Permanent loss of right of decoration or title</td>
<td></td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Temporary suspension of right of decoration or title</td>
<td>Please explain</td>
</tr>
<tr>
<td>□</td>
<td></td>
<td>Loss of military rank</td>
<td></td>
</tr>
</tbody>
</table>
### Member State Questionnaire

<table>
<thead>
<tr>
<th>Offence related / Imposed DQ</th>
<th>Access related / DQ effect in later stage</th>
<th>Typology of the disqualification</th>
<th>Explanation on the duration/ nature where relevant</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Other: Insert any other type of disqualification related to civil or political rights</td>
<td>Please explain</td>
</tr>
</tbody>
</table>

### Right to Vote/ To Be Elected

<table>
<thead>
<tr>
<th></th>
<th></th>
<th>Suspension of the right to vote or to be elected</th>
<th>Loss of the right to vote or to be elected</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Other: Insert any other type of disqualification related to the right to vote or be elected</td>
<td>Please explain</td>
</tr>
</tbody>
</table>

### Position Within the Family

<table>
<thead>
<tr>
<th></th>
<th></th>
<th>Suspension of the parental authority</th>
<th>Loss of the parental authority</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Suspension of the right to be a legal guardian</td>
<td>Loss of the right to be a legal guardian</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Obligation to be under the control of the family</td>
<td>Obligation to be under the care of the family</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Other: Insert any other type of disqualification related to the position within the family</td>
<td>Please explain</td>
</tr>
</tbody>
</table>

### Animals / Sports
2

Imposing and executing from a domestic perspective

We will analyse three aspects related to the imposing and executing from a domestic perspective.
Firstly, it is important to consider the scope ratione personae. In other words it is necessary ask whether disqualification can apply either to natural persons either to legal persons. In the project team’s opinion this aspect is important because not all Member States recognize the criminal liability of legal persons.
Secondly, we want to know whether your national law allows for a disqualification to be imposed merely on the basis of a suspicion.
Thirdly, we want to look into the scope ratione auctoritatis of disqualifications and the link this has with the keeping of criminal records.
2.1 Ratione personae

2.1.1 Who can be subject to a disqualification as a sanction measure under your national law?

- Natural persons
- Private legal persons
- Public legal persons

If you have ticked the box for public legal persons, we would like to know which legal persons qualify as being public legal persons:

- State authority
- State controlled bodies
- Other (Please explain)

Please insert your explanation here:
Feel free to insert a general comment with respect to this question:

2.1.2 Is it an acceptable future policy option to introduce an obligation to recognise and execute disqualifications with respect to legal persons, even if legal persons cannot be held liable in such a way according to your national law? Such an obligation would mirror the obligation that currently exists with respect to the mutual recognition of financial penalties.

- Yes
- No (please explain)
- Depending on the case (please explain)

Please insert your explanation here
Feel free to insert a general comment with respect to this question

2.3 Ratione auctoritatatis

2.3.1 What kind of disqualifications can be imposed by which authorities? Is there a link between the deciding authority and the inclusion of the disqualification in a person’s criminal record?

In order to avoid having to ask a similar question twice, we have combined the question on the competent authorities with the question on the inclusion of the information in the criminal record.

Allow us to explain the architecture of the grid below. We have made a distinction between the following situations in which a disqualification can be imposed:
ANNEXES

- Preliminary measure: means the disqualification is imposed in the course of an ongoing procedure, before a final decision is taken
- Main sanction: means the disqualification is imposed as the end result of a procedure
- Explicit additional sanction: means the disqualification is explicitly imposed as the end result of a procedure in addition to another main sanction.
- Implicit additional sanction: means the disqualification is the implicit automatic consequence of another sanction that is explicitly imposed.
- Alternative sanction: means the disqualification is imposed but will only be executed as the alternative sanction when the main sanction could not be enforced.
- Other: if there is another kind of disqualifications that can be imposed, please use the other box to further elaborate on your national situation

For each of these situations, you are asked to indicate how this relates to the competences of the authority and to the inclusion in the criminal record.

- No: means either the authority is not competent to apply this kind of disqualification or this kind of disqualification is not foreseen in your national legislation
- Yes/no: means that the authority can apply this kind of disqualification but it will not be included in the criminal record;
- Yes/yes: Means that the authority can apply this disqualification and it will be included in the criminal record

We have used tick boxes to allow you to tick more than one box if, more than one box applies. We think of the situation where the inclusion in the criminal record is dependent on the typology of the disqualification. If that would be the case, and you feel the need to tick more than one box per row, please explain your choice by inserting a comment.

<table>
<thead>
<tr>
<th>Judicial</th>
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<th>Yes</th>
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### Member State Questionnaire

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<td><strong>Preliminary measure</strong></td>
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</table>
ANNEXES

Feel free to insert a general comment with respect to this question

2.4 How is record keeping of disqualifications registers organised? Who can have access to information about disqualification kept in the criminal (or other) record?

Please use the grid below to provide us with an overview of the organisation of record keeping in your member state. We have listed the same authorities as appear in the previous question in the left column. Please note that we have added ‘Central Register’ as the final option, to allow you to indicate that in your member state a central register is kept of all disqualifications imposed, regardless of the imposing authority.

First, you are asked to indicate whether these authorities hold a record on the disqualifications they impose and at what level this is centralized. When the authority is not competent to impose disqualifications, please indicate that no record is kept. Second, you are asked to provide an overview of the accessibility of the records. If no record is kept, please tick the “not applicable” box.
### Member State Questionnaire

<table>
<thead>
<tr>
<th>Authority</th>
<th>Level of centralization</th>
<th>Accessibility of the record</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>No register</td>
<td>Local register</td>
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<td>Police</td>
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<tr>
<td>Disciplinary</td>
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<td>Commercial</td>
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<td>Administrative</td>
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<td>Judicial</td>
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<td>o o o</td>
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<tr>
<td>Centralised register</td>
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<td>o o o</td>
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<tr>
<td>Other: explain</td>
<td>o o o</td>
<td>o o o</td>
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</tbody>
</table>

*Feel free to insert a general comment with respect to this question:*

**2.5** Do foreign authorities have the same access to your national databases on disqualifications?

- Yes
- No (please explain)  
  *Please explain why you differentiate between national and foreign authorities*

**2.6** Would it be an acceptable future policy option to introduce the obligation to grant foreign authorities the same access to information from your national databases on disqualifications as national authorities?

- Yes
- No (please explain)  
  *Please explain why it would not be acceptable*
3 Imposing and executing from a cross-border perspective

When reviewing the imposing and executing of disqualifications, the project team will also take cross border situations as a second perspective. The question arises to what extent differences in national legislation hinder smooth cross-border cooperation. Additionally, the project team will focus on the possibilities to give a disqualification an EU wide effect. This search for EU wide effects is inspired by the overall feeling that the current situation in which effect is limited to the territory of the member state that imposes the disqualification is insufficient as it will not avoid that subjects escape the effect of the disqualification by leaving the territory of the imposing state. This is particularly relevant in cases where the disqualification is imposed in a member state other than the member state of nationality or residence of the person concerned. A disqualification imposed by the authority of the member state where the subject was on holiday will be totally ineffective if the disqualification cannot have any effect in or be executed in the member state of nationality or residence.

3.1 EU wide effect

There are two options for a disqualification to attain an EU wide effect. The first option allows judges to impose disqualifications with an EU wide effect. Even though it is not uncommon that the verdict of a judge has effect in another member state (e.g. in the context of confiscation it is quite common that objects in another member state are subject to confiscation), this option is very controversial for many member states. It is already controversial when the decision is imposed by a judicial authority, and considering that in most member states disqualifications can also be imposed by non-judicial authorities, this is likely to be unacceptable for a lot of member states. Taking account of the member state sensitivity with respect to the national sovereignty, this is an option that will not be developed by the project team.

3.1.1 To what extent is it an acceptable future policy option to allow competent authorities to impose a disqualification with an EU wide effect? What would be the limitation racione auctoritatis for this policy option to be acceptable for you?

*Please explain your position*

The second option seeks to introduce the concept of mutual recognition in the context of disqualifications. The main obstacle that was identified
by the project team based on a literature review is the possible multiplying effect that mutual recognition brings along. It is true that mutual recognition in the context of disqualifications will have other consequences when compared to mutual recognition in the context of the other forms of execution of sentences that have already been regulated. Whereas the mutual recognition of a custodial sentence in practice leads to the transfer of the execution from one member state to another (meaning that the original member state will not in any way execute the sentence), this is different for disqualifications. Disqualifications can still have an effect in the original member state. After all, when a professional disqualification imposed in one member state is mutually recognised by a second member state, this will mean that the person concerned will not be able to engage in that professional activity in both member states. This is a complicating factor that is specific for disqualifications.

3.1.2 To what extent do you consider that the basic principle that mutual recognition (or any other form of cooperation for that matter) may never have a negative effect for the persons concerned (in terms of losing rights or privileges or aggravation of the situation due to a combination of different legal systems), should also play a role in the mutual recognition of disqualifications?

Please explain your position

The unwanted multiplying effect of mutual recognition of disqualifications reappears in related policy discussions. In this respect, the project team wants to refer to the discussions on “transitivity” as a way to counter the critique that mutual recognition of disqualifications will always lead to a multiplying and therefore unwanted aggravating effect. Transitivity is a concept that is usually referred to when discussing the effects of a transfer of prosecution. When a member state decides to transfer the prosecution to another member state, questions arise as to the “leftovers” in the original member state and more specifically whether the decision to transfer prosecution means that the original member state has lost its competence to initiate prosecutions in the future. If the original member state keeps its competence to initiate prosecutions, then the transfer of prosecution has given rise to a situation where a person can be subject to prosecution in at least two member states. This situation can be avoided by accepting that transfer of prosecution should have the loss of the competence to prosecute as a consequence. This is exactly what
transitivity entails; it means that the competence to prosecute is transferred from one member state to another member state, leaving no “leftovers” in the original member state. In the current discussions on an instrument regulating the transfer of prosecution between EU member states, the question whether or not such a transfer should be linked to transitivity or not, assumes a central position. Exactly the same reasoning and reference to a transitivity principle can counter the critique that mutual recognition of disqualifications will have a multiplying and unwanted aggravating effect. If the convicting member state accepts the effect of the transitivity principle when the execution is transferred to another member state, there is no longer an aggravation problem. This policy option will solve concerns related to disqualifications that cannot be executed effectively because they were imposed by a member state that is not the member state of nationality or residence of the persons concerned. It can work perfectly when the disqualification is related to driving licences, but becomes already a bit more complex when it is related to professional activities. Indeed, besides disqualifications that would best be executed in the country of nationality or residence, there are also disqualifications for which it is desirable that they have an EU wide effect. A reference to the Fourniret case, and thus the disqualification to work with children when having a conviction for certain sexual offences, clarifies that for some disqualifications it makes sense to have an EU wide effect, not limited to the territory of the imposing member state nor to the territory of the member state of nationality or residence. For this situation, the only way to avoid the comments of aggravating effects is to find a way to introduce a new disqualifying effect based on the conviction itself, rather than the execution of the disqualification measure. This means that member states would impose their own new disqualifying measure based on a foreign conviction, which is totally legitimate and not limited by questions of aggravation and multiplication. This is why the project team deemed it of utmost importance to have as a second part of the study, an in-depth review of the functioning of new disqualifying effects based on foreign convictions.
3.2 The legal basis for cooperation

3.2.1 What legal basis do you currently use to seek enforcement of your disqualifications or enforce foreign disqualifications?

☐ The Council of Europe Convention on the International Validity of Criminal Judgements
☐ The Framework Decision on the supervision of probation measures and alternative sanctions
☐ Another multilateral legal instrument (please explain)
☐ A specific bilateral legal instrument (please explain)
☒ We cooperate on the basis of trust and reciprocity in absence of a specific legal basis (please explain)
☐ Other

Please explain
Feel free to insert a general comment with respect to this question

3.2.2 Do you consider there to be a practical need to extent the current legal basis?

☐ Yes (please explain)
☐ No (please explain)

Please insert your explanation here:
Feel free to insert a general comment with respect to this question:

3.3 Flow of information

3.3.1 When you are the issuing member state, do you use ECRIS (the European Criminal Records Information System) to exchange information on your disqualification?

☐ Yes
☐ No (please explain)
☐ Depending on the case (please explain)

Please explain
Feel free to insert a general comment with respect to this question
ANNEXES

3.3.2 When you are the executing member state, does the exchange of information through ECRIS (the European Criminal Records Information System) provide you with sufficient data to be able to properly execute a foreign disqualification?

☐ Yes
☐ No

Please explain
Feel free to insert a general comment with respect to this question

3.3.3 How could ECRIS (the European Criminal Records Information System) be improved to facilitate the information exchange with a view to enforcing foreign disqualifications?

Use this box to insert a reply to this question

3.4 Underlying offence

3.4.1 When you are the issuing member state, do you check prior to contacting another member state whether the act for which the disqualification was imposed also constitutes an offence in the executing member state?

☐ Yes
☐ No
☐ Depending on the case (please explain)

Please explain
Feel free to insert a general comment with respect to this question

3.4.2 When you are contacted as the executing member state, do you enforce a disqualification issued by another member state although the act for which the sanction was imposed does not constitute an offence in your member state?

☐ Yes
☐ Yes, but only if issued by some member states (please explain)
☐ Yes, but only with respect to some disqualifications (please explain)
☐ Yes, but only if issued by some authorities (please explain)
☐ Yes, but only with respect to some offences (e.g. 32 listed offences in mutual recognition instruments, please explain)
☐ No, but we could if we would want to
☐ No, our national legislation does not foresee this possibility (please explainwhether you would have constitutional issues)
☐ Other (please explain)

Please explain
Feel free to insert a general comment with respect to this question

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3.4.3 To what extent would it be an acceptable future policy option to introduce an obligation for member states to enforce foreign disqualifications for the 32 offences currently listed in the mutual recognition instruments?

- Acceptable without a problem. We already execute foreign disqualifications for the 32 listed offences, even when there is no double criminality.
- Acceptable to certain extent. The 32 offences would have to be clearly defined in order to avoid double criminality problems.
- This would be unacceptable. The 32 offence list cannot have any added value.
- Other (please explain)

Please explain
Feel free to insert a general comment with respect to this question

3.4.4 Did you ever encounter difficulties with the enforcement of a disqualification, because the offence for which the sentence was passed, is of a political nature or a purely military one?

- Yes
- Yes, but only with respect to some member states (please explain)
- Yes, but only with respect to some disqualifications (please explain)
- Yes, but only with respect to some authorities (please explain)
- No
- Other (please explain)

Please explain
Feel free to insert a general comment with respect to this question

3.5 Subject of the disqualification

3.5.1 Do you check whether the person on whom the disqualification is imposed can also be held liable in the executing member state?

- Yes
- No
- Depending on the case (please explain)

Please explain
Feel free to insert a general comment with respect to this question
ANNEXES

3.5.2 Do you enforce a disqualification issued by another member state although the person on whom it is imposed cannot be held liable under your national law?

☐ Yes
☐ Yes, but only if issued by some member states (please explain)
☐ Yes, but only with respect to some disqualifications (please explain)
☐ Yes, but only if issued by some authorities (please explain)
☐ Yes, but only with respect to some offences (e.g. 32 listed offences in mutual recognition instruments, please explain)
☐ Yes, only for legal persons
☐ Yes, only for natural persons
☐ No, but we could if we would want to
☐ No, our national legislation does not foresee this possibility (please explain whether you would have constitutional issues)
☐ Other (please explain)
   Please explain
   Feel free to insert a general comment with respect to this question

3.5.3 Do you check whether the person to whom the sanction is imposed is a national and not just an ordinary resident in the executing member state?

☐ Yes
☐ No
☐ Depending on the case (please explain)
   Please explain
   Feel free to insert a general comment with respect to this question

3.5.4 Do you enforce a disqualification issued by another member state if the person to whom the disqualification has to apply is not a national but just ordinarily residing in your state?

☐ Yes
☐ Yes, but only if issued by some member states (please explain)
☐ Yes, but only with respect to some disqualifications (please explain)
☐ Yes, but only if issued by some authorities (please explain)
☐ Yes, but only with respect to some offences (e.g. 32 listed offences in mutual recognition instruments, please explain)
☐ No, but we could if we would want to
MEMBER STATE QUESTIONNAIRE

☐ No, our national legislation does not foresee this possibility (please explain whether you would have constitutional issues)

☐ Other (please explain)

   Please explain

   Feel free to insert a general comment with respect to this question

3.5.5 Did your member state issue a declaration stating that you are willing to accept responsibility for the enforcement of a sanction imposed on one of your nationals?

☐ Yes

☐ No

☐ Other

   Please explain

   Feel free to insert a general comment with respect to this question

3.5.6 To what extent would you consider it to be an acceptable future policy option to be obliged to execute a disqualification imposed on your national or resident?

☐ Acceptable for our nationals, but only when double criminality is met

☐ Acceptable for our nationals, but only if the double criminality is met

☐ Acceptable for our residents, but only when double criminality is met

☐ Acceptable for our residents, regardless of double criminality is met

☐ This is unacceptable (please explain)

☐ Other (please explain)

   Please explain

   Feel free to insert a general comment with respect to this question

3.5.7 When your receive a request to enforce a disqualification, issued by another Member State, do you check if the age of the person sentenced at the time of the offence was such that he could not have been prosecuted in your State?

☐ Yes, and we refused

   ☐ Because it is mandatory

   ☐ But refusal is optional

☐ Yes, and we accepted the request

☐ No

☐ Other

   Please explain

   Feel free to insert a general comment with respect to this question

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3.6  Fundamental principles

3.6.1  Did you ever encounter difficulties with the enforcement of a disqualification you had imposed because of incompatibilities with the fundamental principles of the legal system of the executing State?

☐ Yes
☐ Yes, but only with respect to some member states (please explain)
☐ Yes, but only with respect to some disqualifications (please explain)
☐ Yes, but only with respect to some authorities (please explain)
☐ No, but we could if we would want to
☐ Other (please explain)

Please explain

Feel free to insert a general comment with respect to this question

3.6.2  Have you ever encountered difficulties with the enforcement of a disqualification issued by another member state because the enforcement would run counter to the fundamental principles of your legal system?

☐ Yes
☐ Yes, but only with respect to some member states (please explain)
☐ Yes, but only with respect to some disqualifications (please explain)
☐ Yes, but only with respect to some authorities (please explain)
☐ No
☐ No, our national legislation foresees the refusal for this kind of request
☐ Other (please explain)

Please explain

Feel free to insert a general comment with respect to this question

3.6.3  How do you decide which principles are ‘fundamental’ in the sense of existing refusal grounds?

Please explain

3.6.4  Did you ever encounter difficulties with the enforcement of a disqualification because the sentence was brought about or aggravated by considerations of race, religion, nationality or political opinion?

☐ Yes
☐ Yes, but only with respect to some member states (please explain)
☐ Yes, but only with respect to some disqualifications (please explain)
☐ Yes, but only with respect to some authorities (please explain)
MEMBER STATE QUESTIONNAIRE

☐ No
☐ Other (please explain)

*Please explain*
Feel free to insert a general comment with respect to this question

3.6.5 Have you ever encountered difficulties with the enforcement of a disqualification issued by another member state because you consider that there are substantial grounds for believing that the sentence was brought about or aggravated by considerations of race, religion, nationality or political opinion?

☐ Yes
☐ Yes, but only with respect to some member states (please explain)
☐ Yes, but only with respect to some disqualifications (please explain)
☐ Yes, but only with respect to some authorities (please explain)
☐ No
☐ Other (please explain)

*Please explain*
Feel free to insert a general comment with respect to this question

3.7 Ne bis in idem

3.7.1 Do you check, prior to sending your request for enforcement of a disqualification, whether the act has already been the subject to proceedings in the executing member state?

☐ Yes
☐ No
☐ It depends on the case

*Please explain*
Feel free to insert a general comment with respect to this question

3.7.2 Have you ever been confronted with request for enforcement of a disqualification issued by another member state for which the act has already been the subject to proceedings in your member state?

☐ Yes, we refused and continue our proceedings
☐ We refused and continued our proceedings
☐ We accepted the request and stopped our proceedings
☐ We accepted and continued our own proceedings
☐ Other (please explain)

☐ No
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- Other
  *Please explain*
  *Feel free to insert a general comment with respect to this question*

3.7.3 Do you check, prior to sending your request for enforcement of disqualification, whether the executing member state is deciding to initiate proceedings with respect to the same act?

- Yes
- No
- It depends on the case
  *Please explain*
  *Feel free to insert a general comment with respect to this question*

3.7.4 Have you ever been confronted with a request for enforcement of a disqualification issued by another member state if you had decided to initiate proceedings with respect to the same act?

- Yes
  - We refused and continued our proceedings
  - We accepted the request and stopped our proceedings
  - We accepted and continued our own proceedings
  - Other (please explain)
- No
- Other
  *Please explain*
  *Feel free to insert a general comment with respect to this question*

3.7.5 Do you check, prior to sending your request for enforcement of a disqualification, to another member state, whether the person was acquitted for the same act by a previously rendered criminal judgment?

- Yes
- No
- It depends on the case
  *Please explain*
  *Feel free to insert a general comment with respect to this question*

3.7.6 Have you ever been confronted with request for enforcement a sanction of a disqualifications issued by another member state with respect to a person that was acquitted for the same act by a previously rendered criminal judgment?
MEMBER STATE QUESTIONNAIRE

- Yes and we refused
  - Because it is mandatory
  - But refusal is optional
- Yes, we accepted the request
- No
- Other
  *Please explain*
  *Feel free to insert a general comment with respect to this question*

3.7.7 Do you check, prior to sending your request for enforcement of disqualification to another member state, whether the sanction itself has been completely enforced or is being enforced in the requested state?

- Yes
- No
- It depends on the case
  *Please explain*
  *Feel free to insert a general comment with respect to this question*

3.7.8 Have you ever been confronted with request for enforcement of a disqualification issued by another member with respect to a disqualification that has been completely enforced or is being enforced in your member state?

- Yes and we refused
  - Because it is mandatory
  - But refusal is optional
- Yes, we accepted the request
- No
- Other
  *Please explain*
  *Feel free to insert a general comment with respect to this question*

3.7.9 Do you ask to enforce a disqualification to another Member State, although the court convicted the offender without imposing a sanction?

- Yes
- Yes, but only with respect to some member states (please explain)
- Yes, but only with respect to some disqualifications (please explain)
- Yes, but only with respect to some offences (e.g. 32 listed offences in mutual recognition instruments, please explain)
3.7.10 Do you check, prior to sending your request for enforcement of a sanction of disqualification whether the competent authorities of the executing State have decided not to take proceedings with respect to the same acts?

- Yes
- No
- It depends on the case
  - Please explain
  - Feel free to insert a general comment with respect to this question

3.7.11 Do you enforce disqualifications issued by another member state if the competent authorities of your State have decided not to take proceedings in respect of the same act?

- Yes, we enforce the disqualification
- No, we refuse to enforce the disqualification
- Other
  - Please explain
  - Feel free to insert a general comment with respect to this question

3.8 Territoriality
3.8.1 Do you limit your request for enforcement of a disqualification to another member state to the situation where the offence was committed inside your territory?

- Yes
- No
- It depends on the case
- Other
  - Please explain
  - Feel free to insert a general comment with respect to this question
MEMBER STATE QUESTIONNAIRE

3.8.2 Do you refuse to enforce a disqualifications issued by another member state if the act was committed outside the territory of the requesting Member State?

- [ ] Yes
- [ ] Yes, but only with respect to some member states (please explain)
- [ ] Yes, but only with respect to some disqualifications (please explain)
- [ ] Yes, but only with respect to some authorities (please explain)
- [ ] Yes, but only with respect to some offences (e.g. 32 listed offences in mutual recognition instruments, please explain)
- [ ] Yes, the refusal is mandatory
- [ ] Yes, the refusal is optional
- [ ] No
- [ ] Other (please explain)

Please explain
Feel free to insert a general comment with respect to this question

3.8.3 To what extent is it an acceptable future policy option to link the obligation to execute a foreign disqualification to the territory where the offence was committed?

☐ It is acceptable to oblige a member state to enforce a foreign disqualification, if the offence was committed inside its territory
☐ It is acceptable to oblige a member state to enforce a foreign decision, even if the offence was committed outside its territory
☐ When contacted to enforce a foreign disqualification, it is irrelevant where the underlying offence took place
☐ Other (please explain)

Please explain
Feel free to insert a general comment with respect to this question

3.9 Capacity

3.9.1 Did you ever encounter difficulties with your request for the enforcement of a sanction of disqualification in another member state because the requested state was unable to enforce the sanction?

☐ Yes
☐ Yes, but only with respect to some member states (please explain)
☐ Yes, but only with respect to some disqualifications (please explain)
☐ Yes, but only with respect to some authorities (please explain)
ANNEXES

☐ Yes, but only with respect to some offences (e.g. 32 listed offences in mutual recognition instruments, please explain)
☐ Yes, because of practical problems in the requested state
  ☐ Because of financial problems
  ☐ Because of operational problems
  ☐ Other (please explain)
☐ Other (please explain)

Please explain
Feel free to insert a general comment with respect to this question

3.9.2 Did you ever have to refuse the request for enforcement of a disqualification issued by another member state because you are unable to enforce the sanction?

☐ Yes, because the disqualification was not foreseen for the offence
☐ Yes, because we do not know the kind of disqualification
☐ Yes, because we do not acknowledge the offence for which it was imposed
☐ Yes, because there is not link between offence and disqualification
☐ Yes, because of practical problems
  ☐ Because of our financial capacity
  ☐ Because of our operational capacity
  ☐ Other (please explain)
☐ Other (please explain)

Please explain
Feel free to insert a general comment with respect to this question

3.9.3 Would you ask to enforce a disqualification to another member state although your State is itself able to enforce the sanction?

☐ Yes
☐ Yes, if it would be more effective
☐ Yes, but only with respect to some disqualifications
☐ Other

Please explain
Feel free to insert a general comment with respect to this question
3.9.4 Do you feel that it is necessary to be able to refuse to enforce a foreign disqualification when such enforcement would constitute a burden too high on the enforcement capacity in your member state?

☐ Yes, for financial capacity reasons
☐ Yes, for operational capacity reasons
☐ No
☐ It depends on the case

*Please explain*

*Feel free to insert a general comment with respect to this question*

3.10 Lapse of time

3.10.1 Do you check, before asking to enforce a sanction of disqualification to another Member State, whether under the national law of the executing Member State the sanction imposed can no longer be enforced because of the lapse of time?

☐ Yes
☐ No
☐ It depends on the case

*Please explain*

*Feel free to insert a general comment with respect to this question*

3.10.2 Have you ever been confronted with a request for enforcement of disqualification, issued by another Member State, if under your national law the sanction imposed can no longer be enforced because of the lapse of time?

☐ Yes, and we refused
  ☐ Because it is mandatory
  ☐ But refusal is optional
☐ Yes, and we accepted the request
☐ No
☐ Other

*Please explain*

*Feel free to insert a general comment with respect to this question*
ANNEXES

3.11 Amnesty & pardon

3.11.1 Do you check, before asking another member state to enforce a sanction of disqualification, whether the sanction was subject to a pardon or an amnesty?

- Yes
- No
- It depends on the case

*Please explain*

*Feel free to insert a general comment with respect to this question*

3.11.2 Have you ever been confronted with a request for enforcement of a disqualification, issued by another Member State, if the sanction was subject to a pardon or an amnesty?

- Yes, and we refused
  - Because it is mandatory
  - But refusal is optional
- Yes, and we accepted the request
- No
- Other

*Please explain*

*Feel free to insert a general comment with respect to this question*

4 New disqualifying effect from a domestic perspective

The first perspective will analyse the current domestic situation. Firstly, the sectors where the use of information to support a disqualifying effect is allowed, should be reviewed. The project team believes that it is important to understand to what extent a distinction is made between the public and the private sector in this regulations. Secondly, it is important to analyse the situations that can give rise to a disqualifying effect. In that context, it is relevant to know whether it is necessarily a national conviction or whether it can also be a foreign conviction, and if such effect is foreseen also for suspicions and rumours. The extent to which unverified information is accepted as a source to support disqualifications is an important research question. Thirdly, the way information can be obtained will be reviewed. Two circumstances can occur, for example, in the case of an application for a job the applicant can be required to provide a certificate of non prior conviction, or, on the contrary the relevant information can be autonomously obtained by
MEMBER STATE QUESTIONNAIRE

the employer that will seek them on its own (this solution is unacceptable for the project team unless the applicant has given explicit consent).

4.1.1 To what extent does offence related information have a disqualifying effect in that it limits access to certain activities, sectors? Is it dependant on the public or on the private character of the sector?

<table>
<thead>
<tr>
<th>Sector</th>
<th>Disqualification based on offence related information is</th>
<th>Comment (e.g. not just allowed but mandatory)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>allowed for private actors</td>
<td>allowed for public actors</td>
</tr>
<tr>
<td>Educational</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Transport</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Medico-psychological</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Social</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Contact with children and minors</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Procurement or other ways to obtain funds or financial resources</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Other</td>
<td>□</td>
<td>□</td>
</tr>
</tbody>
</table>

Feel free to insert a general comment with respect to this question.
4.1.2 Do sectors have a specific list of offences for which disqualification is considered functional, or does your national law work with a general list, regardless of the sector?

<table>
<thead>
<tr>
<th>Sector</th>
<th>Disqualification based on offence related information is</th>
<th>Explain the rationale behind your national law (where relevant also elaborate on the offence included in the lists)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Educational</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>Transport</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>Medico-psychological</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>Social</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>Contact with children and minors</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>Procurement or other ways to obtain funds or financial resources</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>☐</td>
<td></td>
</tr>
</tbody>
</table>

*Feel free to insert a general comment with respect to this question*
### 4.1.3 Which situations can give rise to a disqualifying effect under your national law?

<table>
<thead>
<tr>
<th>Can a disqualifying effect be attached?</th>
<th>If yes, does this relate to the imposing authority?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>If issued/delivered by Judicial authority</td>
</tr>
<tr>
<td></td>
<td>If issued/delivered by Administrative authority</td>
</tr>
<tr>
<td></td>
<td>If issued/delivered by Disciplinary authority</td>
</tr>
<tr>
<td></td>
<td>If issued/delivered by Police authority</td>
</tr>
<tr>
<td></td>
<td>If issued/delivered by Commercial authority</td>
</tr>
<tr>
<td></td>
<td>Other authority (please explain)</td>
</tr>
<tr>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Domestic decision/conviction</td>
<td>○</td>
</tr>
<tr>
<td>Foreign decision/conviction</td>
<td>○</td>
</tr>
<tr>
<td>Any domestic verified suspicion</td>
<td>○</td>
</tr>
<tr>
<td>Some domestic verified suspicions (explain)</td>
<td>○</td>
</tr>
<tr>
<td>Any foreign verified suspicion</td>
<td>○</td>
</tr>
<tr>
<td>Some foreign verified suspicions (explain)</td>
<td>○</td>
</tr>
<tr>
<td>Any domestic rumour</td>
<td>○</td>
</tr>
</tbody>
</table>
Can a disqualifying effect be attached?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>If issued/delivered by Judicial authority</strong></td>
<td><strong>If issued/delivered by Administrative authority</strong></td>
</tr>
<tr>
<td>Some domestic rumours (explain)</td>
<td>○</td>
</tr>
<tr>
<td>Any foreign rumour</td>
<td>○</td>
</tr>
<tr>
<td>Some foreign rumours (explain)</td>
<td>○</td>
</tr>
<tr>
<td>Other (explain)</td>
<td>○</td>
</tr>
</tbody>
</table>

*Use this box to insert an explanation in light of the replies above*

*Feel free to insert a general comment with respect to this question*

4.1.4 Is the time span between the decision/conviction/suspicion/rumour and the decision to attach a disqualifying effect of any relevance? Does a decision/conviction/suspicion/rumour lose its disqualifying effect after lapse of time?

- ○ Yes
- ○ No
- ○ It depends on the case
4.1.5 How is the relevant offence related information obtained?

☐ Through a request to provide an official certificate of non-prior conviction
☐ Through the request to provide a self-declaration of non-prior conviction
   ○ The self-declaration is sufficient for all stages
   ○ The self-declaration is sufficient in the first stage but then an official certificate has to be provided upon selection/admission
☐ The vulnerable sector can seek information upon formal prior written consent of the persons involved
☐ The vulnerable sector can seek information on its own

Feel free to insert a general comment with respect to this question

5 New disqualifying effect from a cross-border perspective

5.1 Distinguishing between the public and private sector.
When drafting the future policy options that will be tested on their acceptability in the member states, it is felt to be important to make a distinction between disqualifying effects in the private sector on the one hand and the public sector on the other hand. This distinction is not only inspired by the observation that EU level rules on disqualifications in the public sector already exist, but also by the observation that EU level rules are likely to differ when they are applicable to the private sector.

5.1.1 Should a distinction be made between rules applicable to private sector actors as opposed to public sector actors?
   ○ Yes
   ○ No

Please explain
Feel free to insert a general comment with respect to this question
ANNEXES

5.2 Limits of mutual recognition

5.2.1 Is it an acceptable future policy option to be obliged to check a persons’ record and attach a new disqualifying effect to both national and foreign convictions? Should this obligation be extended to other situations (including e.g. rumours)?

In the following tables we have made a distinction between private sector actors and public sector actors as we have anticipated that your replies may differ accordingly.

<table>
<thead>
<tr>
<th>Authority that is the source of the offence related information</th>
<th>Type of offence related information</th>
<th>Insert a comment if any of the answers are dependent on the case/situation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial</td>
<td>Yes, if only rumours known to them</td>
<td>Yes, even if only suspicion acknowledged by them</td>
</tr>
<tr>
<td>Police</td>
<td>Yes, if only rumours known to them</td>
<td>Yes, even if only suspicion acknowledged by them</td>
</tr>
<tr>
<td>Disciplinary</td>
<td>Yes, if only rumours known to them</td>
<td>Yes, even if only suspicion acknowledged by them</td>
</tr>
<tr>
<td>Admini.</td>
<td>Yes, if only rumours known to them</td>
<td>Yes, even if only suspicion acknowledged by them</td>
</tr>
<tr>
<td>Commercial</td>
<td>Yes, if only rumours known to them</td>
<td>Yes, even if only suspicion acknowledged by them</td>
</tr>
<tr>
<td>Other</td>
<td>Yes, if only rumours known to them</td>
<td>Yes, even if only suspicion acknowledged by them</td>
</tr>
<tr>
<td>Authority that is the source of the offence related information</td>
<td>Type of offence related information</td>
<td>Insert a comment if any of the answers are dependent on the case/situation</td>
</tr>
<tr>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------</td>
<td>------------------------------------------------------------------</td>
</tr>
<tr>
<td>Yes, even if only rumours known to them</td>
<td>Yes, even if only suspicion acknowledged by them</td>
<td>Yes, if issued as preliminary measure by them</td>
</tr>
<tr>
<td>Judicial</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Police</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Disciplinary</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Admini.</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Commercial</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Other</td>
<td>□</td>
<td>□</td>
</tr>
</tbody>
</table>

*Please explain*

Feel free to insert a general comment with respect to this question
ANNEXES

5.2.2 Is it an acceptable future policy option to limit the scope of the offence related information that should give rise to a mandatory disqualification to such offences that have a functional link with the access that is to be limited?

<table>
<thead>
<tr>
<th>Sector</th>
<th>Disqualification based on</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>any offence</td>
</tr>
<tr>
<td></td>
<td>an offence included in a</td>
</tr>
<tr>
<td></td>
<td>general list</td>
</tr>
<tr>
<td></td>
<td>an offence included in a</td>
</tr>
<tr>
<td></td>
<td>sector specific list</td>
</tr>
<tr>
<td></td>
<td>should be M: mandatory; A: allowed; N: not allowed</td>
</tr>
<tr>
<td>Educational</td>
<td>M</td>
</tr>
<tr>
<td>Transport</td>
<td>O</td>
</tr>
<tr>
<td>Medico-psychological</td>
<td>O</td>
</tr>
<tr>
<td>Social</td>
<td>O</td>
</tr>
<tr>
<td>Contact with children and minors</td>
<td>O</td>
</tr>
<tr>
<td>Procurement or other ways to obtain funds or financial resources</td>
<td>O</td>
</tr>
<tr>
<td>Other</td>
<td>O</td>
</tr>
</tbody>
</table>

Please explain
Feel free to insert a general comment with respect to this question

Completed questionnaires are to be returned to Disqualifications@UGent.be by Friday 5 August 2011 at the latest. The project team highly appreciates the time and effort you and your team are putting into the completion of the questionnaire. Without the input from national experts, it would be impossible to gather the necessary information in a such short timeframe. Do not hesitate to contact a member of the team via phone (+32 9 264 97 02) or email (Disqualifications@UGent.be) if there is anything we can do to facilitate your work.
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S. Van Daele  

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