

Major “minor” Progress under the Third Pillar: EU Institution Building in the Sharing of Criminal Record Information

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Introduction

European Union (EU) integration under the “third pillar,”¹ police and judicial cooperation in criminal matters, is progressing rapidly. The 2004 implementation of the EU arrest warrant framework decision gave a significant boost to “major” European mutual assistance in criminal matters. It requires each national judicial authority to recognize, “ipso facto, and with a minimum of formalities,” requests in regard to the surrender of a person made by the issuing judicial authority of another Member State.² Formal extradition requests and proceedings are no longer necessary.

An equivalently important development in “minor”³ European mutual assistance in criminal matters are two European Council Framework Decisions that 1) require Member States’ courts to give the same weight to criminal convictions in other Member States as they would to convictions in their own country and 2) create a system that

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would collect every EU citizen's EU-wide criminal record in that citizen's home country's criminal register.⁴ The Framework Decision on the Organization and Content of the Exchange of Information Extracted from Criminal Records Between Member States (FDOCEIECR) and the Framework Decision on Taking into Account Criminal Convictions in the Member States of the European Union in the Course of New Criminal Proceedings (PTACOMS) will both likely be adopted in 2008.⁵ In this article, we review the steps leading up to the 2008 Framework Decisions, explain their key provisions and point to ambiguities and implementation difficulties that will have to be resolved in order to achieve the proponents' goals.

Background

Prior to 1959, if a court wanted to find out about a defendant's prior criminal record in another country it had to rely on bilateral treaties and diplomatic channels. The 1959 *Council of Europe's* *Convention on Mutual Assistance in Criminal Matters*, the first multilateral European convention (47 signatories including both EU and non-EU states)⁷ on minor mutual assistance, included a provision committing the member states' judicial authorities to exchange judicial records with each other.⁸ Upon a request for criminal history information on a particular individual from another signatory country's judicial authorities, the requested party's "appropriate authorities" (usually the national criminal register or the Ministry of Justice) were required to respond to the requesting judicial authorities just as they would respond to their own judicial authorities.⁹ The Convention also required that, at least once a year, every Ministry of Justice notify its counterparts of any convictions of their nationals.¹⁰ If there were full compliance, every European¹¹ citizen's complete criminal record would be recorded in his or her home country's

criminal register, so that any European court or prosecutor could obtain a defendant's European-wide criminal record by sending a request to that defendant's home country.¹²

In practice, however, the Convention (which still governs certain criminal record exchanges) worked imperfectly for several reasons.¹³ First, Member States did not consistently notify defendants' home states.¹⁴ Second, language barriers, differences in the information contained in criminal registers, and lack of a uniform format for recording and transmitting conviction information made it difficult to understand and use conviction information from other countries.¹⁵ Third, the transmission of conviction information through bureaucratic channels was typically slow. Fourth, the Convention did not require signatories to store the information that they received, thereby undermining the goal of creating a record of a European citizen's Europe-wide criminal record in his or her home country's criminal register.¹⁶

While the Convention continues to cover criminal record sharing between EU Member States and between EU Member States and non-EU countries, it has been superseded by a series of important legal developments. The ensuing decades saw impressive EU expansion (27 Member States) and economic and political integration.¹⁷ These changes, as well as diverse social, economic, and technological developments, stimulated and facilitated a huge increase in the movement of persons and businesses within the EU. Greater movement and economic activity inevitably led to more crimes being committed by citizens of one EU Member State while visiting, living, or working in another EU Member State.

Judicial and law enforcement cooperation lagged behind political and economic cooperation, but it was not ignored. The 1990 Schengen Implementation Convention's¹⁸

chapter on mutual assistance in criminal matters introduced procedures for direct communication between judicial authorities.¹⁹ Subsequently, the 1993 Maastricht Treaty²⁰ divided EU policies into “three pillars”: the European Communities pillar, the Common Foreign and Security Policy pillar, and the Justice and Home Affairs pillar. Over the next ten years, a stream of conventions and other instruments strengthened and broadened cooperation under the third pillar.²¹

The 1997 Treaty of Amsterdam, which entered into force in 1999, committed the signatories to creating an “area of freedom, security and justice.”²² Toward that end, they pledged to improve mutual assistance in criminal matters. The Treaty transferred some of Maastricht’s third pillar fields into the Community sphere.²³ The third pillar was renamed Police and Judicial Cooperation in Criminal Matters (PJCC).

The 2000 *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union* (MLA) marked an important third pillar achievement.²⁴ Among other things, it called for direct communication between different countries’ judicial authorities with respect to requesting information on individuals’ criminal convictions.²⁵ This Convention recognized that requests for mutual legal assistance often originate at a local court in country A, while the necessary criminal record information is located in a local court in country B.

The MLA also required Member States to designate ‘*central authorities*’ to transmit, at least once a year, to their EU counterparts notification of convictions of their nationals. In other words, each Member State could assign its Justice Ministry or any other government agency this responsibility.²⁶ These central authorities would search out all the judicial activity in their country involving criminal convictions of other EU

countries' citizens and transmit that information to the relevant home countries. Of course, they would also receive other countries' notifications about convictions of their own nationals.

In October 1999, the Tampere European Council declared that mutual recognition, whereby a decision taken by a judicial authority in one Member State of the European Union is recognized and enforced by other Member States, is the "corner stone" of judicial cooperation.²⁷ The EU Council for Justice and Home Affairs of November 2000 adopted a Mutual Recognition Plan (MRP) that affirmed this principle.²⁸ It recommended, among other measures, the creation of a central EU register of criminal convictions in EU Member States in order to a) promote the individualization of sanctioning (i.e. taking previous EU convictions into account in sentencing), b) promote the mutual recognition of disqualifications, and c) prevent double prosecution.²⁹

As a step toward implementing the MRP, the EU commissioned the Institute for International Research on Criminal Policy (IRCP) to carry out a feasibility study to determine how best to ensure the dissemination of conviction information within the EU.³⁰ The MRP recommended the consideration of three options: (1) facilitating bilateral information exchanges, (2) networking national criminal records offices, and (3) setting up a European central criminal records office. The IRCP favored a combination of the second and third alternatives, a network of national registers using a common index system of labels for common criminal offences.³¹

The European Council³² of 25-26 March 2004 gave priority to facilitating the exchange of criminal conviction information among Member States.³³ That same year, the notorious Fourniret serial murder case generated a chorus of demand for improving

criminal record sharing within the EU.³⁴ After being convicted in France for rape and indecent assault of minors, Michel Fourniret obtained employment as a school supervisor in Belgium. Years later, the Belgian police linked him to multiple sexual offences and murders.³⁵ In November 2004 Belgium submitted to the European Council a Proposal for a Framework Decision on Mutual Recognition of Disqualifications from Working with Children as a Result of Convictions for Sexual Offences Committed Against Children.³⁶

On 25 January 2005, the Commission³⁷ issued a White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union.³⁸ The White Paper recommended the creation of an EU Offenders Index, a database of personal identification information of individuals convicted in every EU Member State.³⁹ The Index would inform requesting officials which Member States, if any, hold conviction records for the individual of interest. The requesting officials would then request the desired information from the appropriate authorities. Each Member State's central authorities would determine whether the requesting official had authority under national law to request the criminal record information. If so, the central authority would transmit the information. During stage one, requests and answers could be electronically transmitted rapidly and securely. Under stage two, information would be transmitted in standardized format and in the language of the requesting Member State.⁴⁰

The Councils of 28 January and 14 April 2005 expressed reservations over the creation of a central European index of convicted criminal offenders. Instead, the Member States endorsed the creation of a central index only of conviction information on non-EU nationals convicted in an EU country.⁴¹ With respect to EU nationals, the Council Decision⁴² of 21 November 2005 2005/876/JHA on the Exchange of Information

Extracted from the Criminal Record (EIECR) opted for recording all EU conviction information in the defendant's home state's criminal register. When an EU Member State wanted to find out whether a foreign EU national had a criminal record in another EU Member State, it would need to request that information from the foreign national's home country's criminal register.

The EIECR improved the efficiency and speed of the criminal records exchange system established by the 1959 and MLA 2000 Conventions⁴³ by requiring Member States to designate a central authority⁴⁴ to request criminal background information from other countries, reply to other countries' requests, and "without delay" to send conviction notifications to the convicted person's home country.⁴⁵ (If the person is also a national of the convicting Member State no notification is required.⁴⁶) The requested central authority must reply within 10 working days (or within 20 days if the request is on behalf of the record subject).⁴⁷

In order to assist Member States to better understand each others' criminal records information, the EIECR provided paper forms for requesting conviction information and for replying. The requesting Member State must identify itself (e.g. central authority, contact person, telephone, etc.), the subject of the request (e.g. name, sex, nationality, data and place of birth, etc.), and a contact if additional information is needed. It must also designate the purpose of the requested criminal record information as 1) criminal proceedings, 2) request from a judicial or administrative authority for a non-criminal proceeding, or 3) request initiated by the record subject.⁴⁸ (There is no common form for sending notification of convictions to the defendant's home state.)

The requested Member State shall reply to a request for conviction information according to its national law, regulations, or practice. The form for replying to a request has two parts. Part I supplies information relating to the person of concern (e.g. the undersigned authority confirms whether there are (no) convictions in the register or whether information may not, under national law, be revealed if the purpose is other than criminal proceedings). Part II supplies contact details in the event that additional information is needed.⁴⁹ A list of the defendant's convictions is attached to the reply form. Information transmitted for use in criminal proceedings may only be used for that purpose. If the information is requested for purposes other than criminal proceedings (e.g. employment purposes), the requested Member State may deny the request on account of its national law or honor the request but with conditions and restrictions on use and retransmission of the criminal record information.⁵⁰

As with the 1959 Convention, the EIECR's main weakness was the absence of a requirement that Member States record the conviction information about their nationals that is transmitted by other Member States. Obviously, if the home country's criminal register was incomplete, then that country's response to criminal record requests from other Member States would also be incomplete. Moreover, the EIECR only bound the convicting Member State to send "as soon as possible" notification of convictions handed down after the implementation of the EIECR (i.e. 2006). In addition, the EIECR required that in response to a Member State's request for criminal record information, the requested Member State send foreign conviction records that it received and recorded in its register after the implementation of the EIECR.⁵¹ There is no requirement that Member States search out and transmit information concerning pre-2006 convictions.⁵²

Clearly, the EIECR failed to assure that Member States could obtain an individual's comprehensive EU-wide conviction record.⁵³

At the JHA Council of April 2005,⁵⁴ France, Germany, Spain and Belgium, expressed a preference for networking their national criminal records. In spring 2006, they implemented a pilot project, the Network of Judicial Registers on the Electronic Exchange of Conviction Information (NJR). The Czech Republic and Luxembourg joined the NJR in 2006. Slovakia, U.K., Poland, Italy, and Slovenia joined in 2007. Portugal recently joined the project. In June 2008, the Netherlands will join as a partner and Austria, Bulgaria, Romania and Sweden will join as observers.⁵⁵

Like the EIECR, this joint project builds on the model for sharing individual criminal history records established by the 1959 Convention, but it is more technologically advanced than the EIECR. It allows Member States' criminal registers to request and receive information from each other over TESTA, the European Community's secure private IP electronic network. A request for information must be for criminal justice purposes. Only national *judicial authorities* (e.g. courts, magistrates, prosecutors, and not police) can use the NJR.

To understand how the NJR works, imagine that a German prosecutor wants to find out whether X, a French national, has a criminal record in France. His or her request for information would have to go through the German criminal register, TESTA and the French criminal register (if necessary it would ultimately arrive at a French judicial authority). A reply would have to work its way in reverse over the same path. The convicting Member State must send (electronically) immediate notification of conviction(s) to the defendant's home state. The same principle applies to replies to

information requests.⁵⁶ The home state is required to store information transmitted by the convicting Member State.

The NJR partners agreed on a common data format for exchanging information.⁵⁷ In addition, they committed themselves to developing an automatic translating system, based on tables and codes, families and subfamilies of offences, that makes the received information more comprehensible.⁵⁸ At the June 2007 plenary session in Bratislava Slovakia, the participant delegations approved this goal. Since September 1, 2007, Germany, Spain, France, and Belgium have been sharing translated criminal record information. By spring 2008, the Czech Republic and Luxemburg will be completely integrated in the electronic exchange of data. Poland is likely to achieve integration by the end of 2008.

The Council Framework Decision on Taking into Account Criminal Convictions in the Member States of the European Union in the Course of New Criminal Proceedings

Currently, Member States' national laws differ on whether prior foreign convictions, from EU or third country courts, may be taken into account in criminal proceedings before their national courts. In many cases, even if national law provides for this possibility, in practice no account is taken because the sentencing court does not have information on previous foreign convictions. There are several reasons for this. Sometimes convicting Member States did not inform the defendant's home state of prior convictions, and sometimes the home state did not request the information. Even when the conviction information was requested and transmitted, it sometimes arrived too late or was not understood or not properly recorded.⁵⁹

In 2005, the Commission of the European Communities presented a Proposal for a Council Framework Decision On Taking Account of Convictions in Other Member States in the Course of Criminal Proceedings (PTACOMS).⁶⁰ This Framework Decision would further the goal of the mutual recognition principle⁶¹ by requiring Member States to give “equivalent effects” to prior convictions handed down by courts in other Member States⁶² as they give to prior convictions handed down by their own national courts.⁶³ The Proposal applies to the pre-trial stage, the trial stage, and the sentencing stage (e.g. applicable rules of procedure and provisional detention, definition of the offence, type and level of sentence, and rules on the execution of the decision).⁶⁴ It would also further the aims of the EIECR (and of the FDOCEIECR) by promoting Member States’ use of conviction records from other EU countries.⁶⁵

To implement the PTACOMS successfully, significant obstacles will have to be overcome. EU courts need a reliable way to obtain and understand a defendant’s EU-wide criminal record.⁶⁶ Therefore, PTACOMS’s success depends on the implementation of the FDOCEIECR. Likewise for the FDOCEIECR to achieve its full potential, Member States’ judicial authorities must treat criminal convictions handed down in other Member States’ courts as equivalent to criminal convictions in their own courts. In addition, as prior EU convictions may relate to third country nationals, PTACOMS also depends on the creation of a central index for non-EU offenders convicted within the EU.

Under PTACOMS, Member States should regard courts in other EU countries as “sister courts” whose procedures and fact finding are fair and reliable, the hallmark of a single country or a well integrated political entity. They may not interfere with, revoke, or review convictions of other EU countries.⁶⁷ However, in order to give

proper effect to a prior foreign EU conviction, each country's courts will have to determine what another EU country's conviction and sentence mean, i.e. what the foreign conviction/sentence would correspond to in its own penal code.⁶⁸

For example, in taking into account a prior German conviction for "exhibitionist acts" (Section 183 of German Penal Code),⁶⁹ a Greek court, by examining the elements of the offence, would have to determine the Greek equivalent to the German offence.⁷⁰

Under the PTACOMS, a Member State need not take into account a previous conviction if the conduct underlying the foreign conviction would not have been a criminal offence under its own penal law or if the sanction imposed on the defendant is unknown to the national legal system. Moreover, the sentencing court is not required to take account of a foreign conviction where the information available to the sentencing court is not sufficient under applicable instruments. But what instruments are "applicable" and what counts as "sufficient?" There are likely to be cases where the foreign offence criminalizes more conduct than is criminalized by the corresponding domestic offence. Should the sentencing judge seek more information about the facts underlying that particular prior conviction? If so, under what applicable instruments?

Member States could seek to obtain further information, such as the judicial file, under Article 4 of the Additional Protocol to the 1959 Convention. But that would be time consuming. It also raises a number of difficult issues. While the defendant cannot challenge the fact of the foreign EU conviction, could he ask the current court to look behind the name of the conviction offence in order to determine whether the conduct for which he was found guilty would have been a particular offence or any

offence under the penal code of the current sentencing court? Could the court look at foreign trial testimony, witness dispositions, or even police reports? If so, how would those get translated? What opportunity would the defendant have to challenge evidence from a case that might have occurred years earlier?⁷¹

The Framework Decision on the Organization and Content of the Exchange of Information Extracted from Criminal Records Between Member States

The Framework Decision's (FDOCEIECR)⁷² adoption and implementation, probably occurring in 2008 and 2011 respectively, will mark important steps toward an efficient system for EU Member States to exchange individual criminal history records.⁷³ Therefore, we need to take a close look at what this Framework Decision actually provides.

Article 3 restates the Council Decision's requirement that the Member States designate a central authority that will facilitate the exchange of criminal records with other EU nations (as well as with non-EU nations).

Articles 4 and 5 obligate the convicting Member State to ensure that all convictions recorded in its national criminal register indicate the nationality (or nationalities) of the convicted person. Additionally, the convicting Member State's central authority must notify the defendant's home country's central authority of new convictions as soon as possible. If the convicted person is a national of several Member States, each of those Member States must be notified. (In contrast to the 2005 Council Decision, this applies even if one of the defendant's nationalities is that of the convicting state.)

Having been notified, the central authority of the defendant's home country must record the defendant's conviction in its criminal register. If the convicting Member State later alters or deletes the information about the defendant or his or her conviction, its central authority must inform the home state's central authority. The home state must ensure that its criminal register is updated so that conviction information subsequently passed on to other Member States will be accurate.

Article 11(1) categorizes the information to be sent with a notification of conviction. "Obligatory information" that should always be transmitted includes the convicted person's personal information (e.g. full name, date of birth, place of birth, gender, nationality, previous names), information concerning the nature of the conviction (e.g. date of conviction, identity of court, date of final judgment), information on the underlying offence (e.g. date of the offence, name or legal classification, reference to the applicable legal provisions), and information on the contents of the conviction, sentence, supplementary measures, and subsequent decisions. "Optional information" must be transmitted if it has been entered into the criminal records (e.g. parents' names, reference number of conviction, place of offence, disqualifications arising from the criminal conviction). "Additional information" must be transmitted if available to the central authority (e.g. identity number, fingerprints, pseudonyms and/or aliases). "Any other information" that the central authority in the convicting state wishes to transmit can, of course, be transmitted. The home country's central authority is obligated to store only transmitted information that falls into the first two categories.

According to Article 6, a Member State's central authority may request from another state's central authority, by means of a special form, and in accordance with

national law, an individual's criminal history information. As with the EIECR common form, the information that must be provided includes information with respect to the requesting state, the identity of the record subject, the purpose of the request, and contact information. The requesting central authority may identify the purpose of the request as related to criminal proceedings (by checking off box number one). The authority before which the proceeding is pending and a reference number, if available, are required. Alternatively, the requesting central authority may identify the purpose of the request as other than a criminal proceeding (box two) originating from a judicial authority, a competent administrative authority, or from the record subject. The authority before which the proceeding is pending and a case reference number, if available, are required. If box two is applicable, the central authority must further specify the purpose for which information is sought (e.g. employment vetting, firearms permit for hunting, etc.). As with the EIECR, when a person asks for information about his or her own criminal record, the queried central authority may submit a request for conviction information to another Member State, provided that the person is or has been a resident of the requesting or requested state. Moreover, according to Article 6(2b), when (i.e. by 2014, assuming the Framework Decision's adoption in 2008) Member States have upgraded their IT systems to enable the electronic exchange of information, the queried central authority must submit a request for conviction information to the individual's home state's central authority in order to be able to include such information in the extract to be issued.

Article 7 includes rules for replying to requests depending on which is the requested and/or the requesting state and/or the purpose of the request. For example, when a Member State requests information from the Member State of nationality for the

purpose of criminal proceedings, the home state must transmit information on national convictions, convictions handed down in other Member States transmitted before the implementation of the FDOCEIECR and entered in its criminal register, convictions from other Member States transmitted after FDOCEIECR's implementation and stored in the criminal register, and convictions handed down in non-EU countries, if entered in the home state's criminal register. If information is requested for a purpose other than criminal proceedings, the Member State of nationality shall transmit the above information in accordance with its national law.⁷⁴

The FDOCEIECR's common form for replying to criminal records requests is similar to the EIECR's form. However, the requested authority must select one of the following responses: (1) "there is (no) information recorded in the criminal register on the person concerned;" (2) "there is information on convictions recorded in the criminal record of the person concerned; a list of convictions is attached;" (3) "there is other information recorded in the criminal register on the person concerned; such information is attached (optional);" (4) there is information recorded in the criminal register on the person concerned, but the convicting Member State restricts retransmission of this information to use in criminal proceedings [in that case, the convicting state is identified so that the requesting state can pursue its requests directly if it wishes]; or (5) "in accordance with the national law of the requested Member State, requests made for purposes other than that of criminal proceedings may not be dealt with." Contact information is provided. Other information, in particular the requested state's restrictions on the use of the transmitted information for purposes other than criminal proceedings, may be noted on the form. Article 8 commits the signatories to respond to the request

within 10 working days via a common form. If the request was initiated by the record subject, the requested state has 20 working days to reply.

Article 9 provides that criminal record information data transmitted to the requesting state for the purpose of criminal proceedings may be used by the requesting Member State only for the purpose for which they were requested. If personal data are transmitted for purposes other than criminal proceedings, the requesting state may use the information in accordance with its national law, but only for the purpose for which it has been requested and in accordance with whatever restrictions specified by the requested state.⁷⁵

Article 10 repeats the provisions of the EIECR regarding the language that should be used to request criminal record information and to reply to such requests. It requires the requesting Member State to send the common request form in an official language of the requested state. The requested state shall reply either in one of its official languages or in another language acceptable to both states. Alternatively, EU countries may, at the time of the adoption of the Framework Decision or later, indicate which official languages of the European Communities they accept.

Article 11(3) commits Member States, within three years after the adoption of the FDOCEIECR (i.e. 2011), to have established a standardized format for sending notifications and for sending and replying to requests as well as any other ways of organizing and facilitating exchanges of conviction information. 'Other ways' include all ways for improving understanding and automatically translating transmitted information, defining how to transmit information electronically, and possible alterations to the form attached to the FDOCEIECR. After adopting the format and the ways in which

conviction information may be exchanged electronically, Member States will have an additional three years (i.e. at least until 2014) to solve technical problems. Until the standardized and electronic forms are adopted, all the criminal record information sharing among the EU Member States, except among the NJR Project participants, will be carried on using paper forms.

Future Challenges

While the FDOCEIECR is an important step toward effective EU third pillar integration, the German Presidency acknowledged that “it is only a first albeit important step to substantially improving the exchange of information on criminal convictions handed down against nationals of EU Member States.”⁷⁶ In the next few years, an array of questions will need to be answered.

First, the FDCOEIECR does not cover third country nationals who commit crimes in EU states.⁷⁷ Until there is a central index of convicted non-EU nationals, Member States will not be able to determine whether a non-EU national has previously been convicted in an EU country. This, of course, will also impede the implementation of the PTACOMS.

Second, the FDOCEIECR does not provide a way for Member States to obtain pre-implementation foreign conviction information on their nationals that was not previously recorded in their criminal register. Notification of a pre-2006 conviction may not have been forwarded to the defendant’s home country’s criminal registry under the 1959 Convention,⁷⁸ and, in any event, that Convention did not require the home state’s criminal register to store such information. The 2005 EIECR obligates the convicting Member State to notify the defendant’s home state of post-implementation (2006)

criminal convictions, but it does not obligate the home state to store the information in its criminal register. The FDCOEIECR obligates the convicting Member State to notify the convicted person's home country of post-implementation (2011) convictions and finally imposes a recording obligation on the home state, but only with respect to post-2011 convictions. Thus, even if everything works smoothly, it is likely that many Member States will not have the life-time EU-wide criminal records of their nationals. At best, they will have only a comprehensive record of post-2011 convictions.

Third, the FDOCEIECR's provisions on how long criminal records must be kept are already controversial. Some states believe this question should be considered a matter of national policy because it is relevant to offenders' rehabilitation and public safety. The FDCOEIECR embodies a compromise solution.⁷⁹ For the purpose of retransmitting criminal record information to other Member States, the Member State of nationality is required to abide by the convicting Member State's time frame for deleting or altering conviction information.⁸⁰ However, after the Member State of nationality has transmitted the information, it has no on-going obligation to report to that recipient country any subsequent alteration of the defendant's record. When using other EU countries' conviction information for its own purposes, the home country need not abide by the convicting country's durational limit on criminal records.

Fourth, it is not clear whether the FDOCEIECR is meant to provide a way for police authorities to obtain criminal record information from other EU Member States. The end users of the FDOCEIECR's system for exchanging conviction information for the purpose of criminal proceedings will primarily be judicial authorities, including courts, judges, investigating magistrates and prosecutors. Some Member States' central

authorities believe that a request on behalf of their country's police for investigative purposes comes within the meaning of "for use in criminal proceedings" and have been processing such requests under the 2005 Council Decision.⁸¹ Others take the position that the Framework Decision does not apply to police requests for individual criminal history information. This is likely to cause confusion and controversy.

Fifth, the FDOCEIECR does not currently authorize information sharing between Member States' central authorities and Europol⁸² or Eurojust.⁸³ This might seem anomalous since Europol has authority to coordinate and disseminate criminal intelligence among the 27 EU Member States in order to prevent and combat serious international organized crime and terrorism affecting two or more Member States. However, the EUROPOL Convention strictly limits Europol's jurisdiction. Moreover, Europol deals with police investigations and intelligence gathering, not with judicial cooperation. In addition, access to Europol's records is sharply limited. Because they are "judicial representatives," the national representatives to Eurojust do have access to their own countries' criminal registers. (However, Eurojust also operates according to a very strict data protection regime.)

Sixth, the FDOCEIECR does little to further the exchange of criminal records for purposes other than criminal proceedings. With respect to use of criminal records in non-criminal proceedings, the FDOCEIECR substantially defers to the Member States' laws. Member States differ on whether and how criminal record information should be disclosed to administrative agencies, but typically such disclosure is limited.⁸⁴ Furthermore, they provide varying degrees of access to citizens who wish to find out

about their own criminal records.⁸⁵ EU Member States mostly prohibit private individuals' or entities' (e.g. employers) access to other individuals' criminal records.⁸⁶

Seventh, the Framework Decision only allows a Member State's central authority to request from its counterparts criminal record information for use in non-criminal proceedings if the request emanates from a judicial or administrative authority or from the record subject himself.⁸⁷ The FDOCEIECR does not provide a mechanism for employers to obtain criminal background information on employees, job applicants, customers or potential business partners.⁸⁸ Except in exceptional situations, Member States do not permit employers to obtain criminal record information from their criminal register. National law determines when an employer can obtain criminal record information indirectly by, for example, requiring a job applicant to produce a criminal record extract or a certificate of good conduct.⁸⁹ This may prove problematic if citizen anxiety about sex offenders and other recidivists grows as it has in the United States. The IRCP study proposed that for applicants for jobs in "vulnerable professions," national authorities should issue to the job applicant an EU-wide certificate of non-conviction. The FDOCEIECR takes no position on this matter.⁹⁰

Eighth, the FDOCEIECR implements only some elements of the 2004 Belgian Proposal for a Framework Decision on Mutual Recognition of Disqualifications from Working with Children as a Result of Convictions for Sexual Offences Committed Against Children (MRD), leaving other concerns still unresolved. The original Belgian proposal would have required a Member State that had imposed an employment prohibition on an individual, resulting from a conviction for a sexual offence against children, to make the prohibition known when responding to a criminal background

request from another Member State or when sending a conviction notification to the defendant's home state.⁹¹ The Member State that imposed the prohibition, as well as any EU country that was notified about it, would have to record this information in its criminal register. The MRD would also have required the Member State in which the previously adjudicated sex offender resides to enforce any collateral employment prohibitions imposed by the convicting state.

The FDOCEIECR requires that the convicting Member State transmit to the Member State of nationality information on any disqualification arising from a criminal conviction, *if its criminal register has a record of such disqualification*. If transmitted, the home state must store this disqualification information and pass it on to any other Member State that requests criminal background information on the person subject to the employment disqualification.⁹² The FDOCEIECR does not address whether a convicting Member State that receives a request for criminal background information should disclose disqualification information or whether the requesting state shall record it. Moreover, the FDOCEIECR does not cover enforcement of employment prohibitions handed down in an EU Member State other than in the state where the disqualified person resides. This is left to national law.

Ninth, Article 11 does not *require* the convicting Member State to send the defendant's fingerprints, pseudonyms, aliases, and identity number, unless available.⁹³ The Member State of nationality is not required to store such data for retransmission purposes. A Member State is not required to send fingerprints with its request for criminal background information. Most European criminal registers do not utilize fingerprints and lack the capacity to store them.⁹⁴ This undermines the reliability of the

whole project. Without fingerprints, if Country S's criminal register receives notice that Country W has recently convicted Mr. A, one of its nationals, of robbery, Country S may not realize that Mr. A already has a criminal record under a different name.⁹⁵ If Country R's criminal register is queried about the criminal record of Mr. P, one of its nationals, it may fail to uncover a prior criminal record if Mr. P used a different name while living and offending in Country R. Potential for error is multiplied by the fact that EU countries use a variety of alphabets, and that misspellings are also common. False positive errors are also more likely in the absence of fingerprints. For example, in response to a request from Country X, Country Y's criminal register may state that Mr. Smith does indeed have a criminal record in Country Y. In fact, this record may belong to a different Smith.⁹⁶ The introduction of fingerprints or other biometric data into the Member States' criminal registers would improve accuracy, but the financial cost would probably be substantial.

Tenth, the FDOCEIECR's interim procedures for sending hard copy criminal records, until the standardized EU format is implemented (i.e. 2014), leave much room for confusion. The FDOCEIECR categorizes criminal record notification information as "obligatory," "optional," and "additional," but it does not provide a common notification form. In addition, a list of convictions (including 'obligatory' and 'optional' information sent by another convicting state) and other information included in the criminal record must be attached to the reply form. Thus, even if Member States are able provide to each other commonly agreed upon types of criminal record information when sending a notification of convictions or replying to a requesting Member State, there is no common format for sending such conviction information. This might make it difficult for Member

States to fully understand the nature of prior foreign EU convictions and sometimes to identify the convicted person.

Eleventh, the FDOCEIECR imposes on the Member States, some more than others, the costs of adapting their criminal registers to new recording requirements. There is considerable diversity in the level of detail included in the Member States' national criminal registers. Some Member States do not send 'obligatory' (e.g. date of offense) information because it is not recorded in their criminal register. Likewise, some Member States do not record certain 'optional' (e.g. parents' names) information about their nationals' foreign convictions.⁹⁷

Twelfth, another Council Framework Decision will be needed to establish a system for the electronic transmission of information using a standardized EU format that will fulfill the commitment to achieve readily understandable, recordable, and usable information by 2011. An EU committee will need to be created in order to reach agreement on the standardized format and functional specifications of the criminal records sharing network. A parallel committee of national technical experts will be necessary in order to work out the project's design.⁹⁸ After the adoption of the format, Member States will have three years in order to develop the capacity to start transmitting information electronically using the standardized format.⁹⁹

It is not yet clear what the standardized format will look like. A UNISYS study identified several challenges: differences in types of information contained in EU criminal registers,¹⁰⁰ Member States' limited knowledge of each others' criminal records information requirements, language and translation issues, differences in the method for storing criminal records information,¹⁰¹ varying rules for expiration and deletion of

information, different rules on access to criminal record information, and the existence of a few decentralized and non-computerized national criminal records systems.

The study calls for a format that will introduce a standard set of fields for four categories of information (i.e. identity of the record subject, offence, sanction, and decision),¹⁰² inspired by the standardization of data achieved by the NJR project. For example, under the NJR project, a reply to a request for information takes the following standard electronic format: *Allgemeine Angaben* (BZR-interne ID, ID der Auskunft (identification information), ID der Anfrage (identity of the requester), Erstellungszeit (time of issue), Erstellt von (issued by), Anfragende Stelle (requesting agency), Anzahl der Entscheidungen (number of decisions)), *Angaben zur Person* (Geschlecht (sex), Geburtsname (name), Vorname (last name), Geburtsdatum (birth date), Geburtsort (birth place), Geburtsland (country of birth)), *Tatdetails* (judgment date, court that rendered the verdict, details of the offence), *Erkennende Stelle* (Offence details -- offence name, Angewendete Rechtsvorschriften, offence family), and *Weitere Einzelheiten zur Entscheidung* (further details regarding the decision).¹⁰³ The most frequent offences have been divided into 44 families and 176 subfamilies. The UNISYS study opts for a short version of a common format with few fields and more text fields.¹⁰⁴ The offence and sanction fields should also be divided into main families and sub-families, but the study favors a family structure different from that of the pilot project.¹⁰⁵

Thirteenth, the FDOCEIECR leaves to a future date the development of software that translates criminal records information from the language of the sending state to the language of the receiving state. Until then, the goal is to adapt off-the-shelf software that can provide rough translations, perhaps via a multi-language glossary of the most

common criminal offenses. The NJR has made a good start. Each of the 44 families and subfamilies of offenses is assigned a code.¹⁰⁶ The codes are translated into the language of the receiving state. For example, a French reply to a German request would include fields such as the ‘Offence name,’ the ‘Criminal Law Reference,’ and the ‘Offence Family.’ The first two information fields would appear in French (e.g. Vol en Reunion, Art.311-1 C. Penal). The ‘offence family’ would appear in German (e.g. Eigentums und Vermögensdelikte (ausser Betrugsdelikte, Diebstahl in organisierter Form oder mit Waffen und Betrug)).¹⁰⁷ The translation system applies to offences, but not to the “Allgemeine Angaben” and “Angaben zur Person” fields as the information for those fields does not need to be translated (e.g. ID-number, name, date and place of birth, etc.). The NJR is developing another translating system for foreign judgments (“table of decisions”). The automatic translating system prescribed by the FDOCEIECR will likely be based on this model. Still, a comprehensive solution by 2011 cannot be guaranteed. In order to implement the FDOCEIECR, some Member States, particularly the EU newcomers, would have to make extensive computer software adaptations, probably requiring EU technical and financial support.¹⁰⁸

Fourteenth, there is no enforcement mechanism to ensure compliance with the FDOCEIECR or an authority responsible for implementing the Framework Decisions under the third pillar. Each Member State is responsible for its own compliance. The EU can resort to exhortations or naming and shaming, but that is notoriously inadequate. Ultimately, some kind of financial incentives or disincentives may be necessary for the EU to achieve the kind of well-functioning EU-wide exchange of criminal records that has been a goal for almost fifty years.

Conclusion

The two new Framework Decisions mark major progress in “minor” European mutual assistance in criminal matters. European nations historically regarded criminal procedure as a core function of national sovereignty. Countries tended to be suspicious of the criminal procedures of their neighbors. Slowly, over the last half century, there has been movement toward the Europeanization of criminal justice. When each Member State’s courts treat a conviction in another EU Member State the same way they would treat a conviction by their own courts, a major step toward a European area of freedom, justice, and security will have been achieved. Just as important will be an efficiently operating IT system that will enable judicial authorities to find out the EU-wide criminal records of defendants who come before their courts.

NOTES

¹ EU policies are allocated into three pillars: “the Community pillar, corresponding to the three Communities: the European Community, the European Atomic Energy Community (Euratom) and the former European Coal and Steel Community (ECSC)(first pillar); the pillar devoted to the common foreign and security policy, which comes under Title V of the EU Treaty (second pillar); [and] the pillar devoted to police and judicial cooperation in criminal matters, which comes under Title VI of the EU Treaty (third pillar).” EUROPA – Glossary – Pillars of the European Union, http://europa.eu/scadplus/glossary/eu_pillars_en.htm.

² Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. *See* <http://europa.eu/scadplus/leg/en/lvb/l33167.htm>.

³ “Major judicial cooperation” originally referred to extradition. The European arrest warrant replaced traditional extradition procedures. “Minor judicial cooperation” refers to other forms of cooperation in criminal matters. The Council of Europe Convention of 20 April 1959 defined the basic rules of mutual assistance. *See* http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/12_en.htm.

⁴ *See, e.g.*, Jan Grijpink, “Criminal Records in the European Union,” <http://64.233.169.104/search?q=cache:mHrA62hZtl8J:people.cs.uu.nl/grijpink/docs/Criminal%2520records%2520in%2520the%2520EU.doc+Dutch+Criminal+register&hl=en&ct=clnk&cd=4&gl=us>; STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW (2nd ed. 2006).

There is no EU equivalent to the U.S. Interstate Identification Index, which electronically links the 50 states and the federal criminal records and identification databases and allows police, prosecutors, and courts to find out instantly whether any suspect or defendant has a prior criminal record in any U.S. state or in the federal criminal justice system. The U.S. criminal records system is based upon arrests; fingerprints are taken and an arrest record created when the suspect is “booked.” Traditionally, **most** EU countries’ criminal registers record only criminal convictions. Most registers operate under the jurisdiction of the Ministry of Justice. However, a few countries assign jurisdiction to the Ministry of Interior or the police. National police agencies

maintain their own files and records. A few registers record fingerprints, but the large majority does not. As of January 2007, only 8 EU countries asked for fingerprints to be included, when possible, with requests for individual criminal history information. Council Decision on the Exchange of Information Extracted from Criminal Records - Manual of Procedure COM(2004) 664 final (13742/04 COPEN 128).

⁵ On June 13, 2007 EU Justice and Interior Ministers agreed on a general approach to the Proposal for a Council Framework Decision on the Organization and Content of the Exchange of Information Extracted from Criminal Records Between Member States. *See* <http://www.statewatch.org/news/2007/jun/jha-12-13-june-07-prov-prel.pdf>; http://www.eu2007.de/en/News/Press_Releases/June/0613BMJStrafregister.html.

On May 5, 2008, the Civil Liberties Committee of the European Parliament is scheduled to discuss and vote on proposed amendments to the Proposal for a Council Framework Decision on the Organization and Content of the Exchange of Information Extracted from Criminal Records Between Member States COM(2005) 690 final/2 (5463/1/06 REV 1 COPEN 1), 31 January 2008. The vote in the plenary session of the European parliament will probably take place in the coming months. After the subsequent European Parliament vote, the Council of the European Union will make the ultimate decision whether to approve the amendments adopted by the Parliament.

The Framework Decision on Taking into Account Criminal Convictions in the Member States of the European Union in the Course of New Criminal Proceedings will be adopted after all parliamentary reservations are lifted. *See*

<http://www.vn.fi/ajankohtaista/tiedotteet/tiedote/fi.jsp?oid=176670>;
<http://www.statewatch.org/news/2006/dec/jha-back-4-5-dec.pdf>;
http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/91997.pdf.

⁶ The Council of Europe seeks to develop common and democratic principles based on the European Convention on Human Rights and other texts on protecting individuals. There are 47 member states in the Council of Europe, one applicant country and five observer countries. *See* http://www.coe.int/T/e/Com/about_coe/.

⁷ 46 members of the Council of Europe plus Israel. *See*

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=030&CM=1&DF=9/4/2007&CL=ENG>.

⁸ The 1959 Convention entered into force in 1962. It was supplemented in 1978 and 2001 by additional protocols. *See* <http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>.

⁹ According to article 13: “A requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case.” Article 15(3) provides “Requests provided for in paragraph 1 of Article 13 may be addressed directly by the judicial authorities concerned to the appropriate authorities of the requested Party, and the replies may be returned directly by those authorities. Requests provided for in paragraph 2 of Article 13 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party.” *See also* Article 4 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, <http://conventions.coe.int/Treaty/EN/Treaties/Html/182.htm>, providing that “Requests provided for in paragraph 1 of Article 13 of this Convention may be addressed directly by the judicial authorities concerned to the appropriate authorities of the requested Party, and the replies may be returned directly by those authorities. Requests provided for in paragraph 2 of Article 13 of this Convention shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party.”

¹⁰ Article 22 of the 1959 Convention provides “Each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other Contracting Parties, the information shall be given to each of these Parties, unless the person is a national of the Party in the territory of which he was convicted.” *See also* Article 4 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, <http://conventions.coe.int/Treaty/en/Treaties/Word/099.doc>, providing “Article 22 of the Convention shall be supplemented by the following text, the original Article 22 of the Convention becoming paragraph 1 and the below-mentioned provisions becoming paragraph 2: Furthermore, any Contracting Party which has supplied the above-mentioned information shall communicate to

the Party concerned, on the latter's request in individual cases, a copy of the convictions and measures in question as well as any other information relevant thereto in order to enable it to consider whether they necessitate any measures at national level. This communication shall take place between the Ministries of Justice concerned.” According to article 4 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, <http://conventions.coe.int/Treaty/EN/Treaties/Html/182.htm>, “Requests for copies of convictions and measures as referred to in Article 4 of the Additional Protocol to the Convention may be made directly to the competent authorities. Any Contracting State may, at any time, by a declaration addressed to the Secretary General of the Council of Europe, define what authorities it will, for the purpose of this paragraph, deem competent authorities.”

¹¹ The 1959 Convention includes signatories that do not belong to the EU, such as Turkey and Israel.

¹² According to article 1 of the Second Protocol to the European Convention on Mutual Assistance in Criminal Matters, <http://conventions.coe.int/Treaty/EN/Treaties/Html/182.htm>, “Mutual assistance may also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Party by virtue of being infringements of the rules of law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.”

¹³ For some of the 1959 Convention’s limitations, *see* the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union COM(2005) 10 final, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>; and GERT VERMEULEN, TOM VANDER BEKEN, ELS DE BUSSEER, ARNE DORMAELS, BLUEPRINT FOR AN EU CRIMINAL RECORDS DATABASE: LEGAL, POLITICO-INSTITUTIONAL & PRACTICAL FEASIBILITY 67-68 (Institute for International Research on Criminal Policy, Ghent University, Maklu, Antwerpen/Apeldoorn 2002).

¹⁴ According to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union COM(2005)10 final, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>, the notification procedure was inadequate. Convicting Member States often could not identify the

convicted person's nationality either because it was not entered in the criminal register or because of a dual nationality of which the convicting authorities were not aware. (Under the 1959 Convention, if the person had dual nationality, the convicting Member State was required to notify both home states unless the person was also a national of the convicting state.) Lack of resources also contributed to the failure of convicting Member States to notify the home Member State. Additionally, many Member States reserved the right to limit their obligation to notify based on the capacity of their records.

¹⁵ The usefulness of foreign criminal record information was undermined by a) translating problems, b) different legal concepts between the sending and the receiving state, and c) incomplete information sent by the convicting state. Member States encountered problems processing the information due to a) lack of resources, b) lack of incentives, or c) lack of complete and updated information. *See* Elsa Garcia-Maltras, *Too Many Shortcomings in the Previous System? Exchanging Criminal Records under the European Convention on Mutual Assistance in Criminal Matters*, ERA, Trier, Sept. 13, 2007.

¹⁶ Probably, Member States would apply their own rules with respect to the recording and deletion of data on foreign convictions. As a result, the same conviction could be subject to different laws, in the convicting state and in the offender's home state. This could be confusing. *See* the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union COM(2005)10 final, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>.

¹⁷ For the history of the European Union, *see* http://europa.eu/abc/history/index_en.htm.

¹⁸ At first, several states sought to build on judicial cooperation outside the framework of both the Council of Europe and the European Community, but these initiatives never entered into force. For the evolution of European judicial cooperation, *see* http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/12_en.htm.

¹⁹ *See* Title III, Chapter 2 of the Schengen Convention, [http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):EN:HTML](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML).

²⁰ The 1993 Treaty of Maastricht created the European Union's three pillars. *See* http://europa.eu/scadplus/treaties/maastricht_en.htm.

²¹ These included: Convention on the Protection of the EC's Financial Interests (July 26, 1995); the Joint Action on a framework for the exchange of liaison magistrates to improve judicial cooperation (April 22, 1996) and Joint Action of July 15, 1996 by the Council concerning action to combat racism and xenophobia (July 15, 1996); two Joint Actions of 29 June 1998 aimed at promoting best practice between Member States and establishing the European Judicial Network, http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/12_en.htm. Subsequently, these actions were followed by the Tampere conclusions (Oct. 15-16, 1999); the Framework Decision on the European Arrest Warrant (June 13, 2002); and the Hague Program (2005).

²² “The gradual creation of an area of freedom, security and justice (AFSJ) was introduced by the Treaty of Amsterdam. It replaces the concept of justice and home affairs introduced by the Treaty of Maastricht. The aim is to reconcile the right to move freely throughout the Union with a high degree of protection and legal guarantees for all.” *See* http://www.europarl.europa.eu/facts/4_11_1_en.htm; http://ec.europa.eu/justice_home/fsj/intro/fsj_intro_en.htm; <http://www.jeanmonnetprogram.org/papers/98/98-2--I.html>.

For the text of the Treaty of Amsterdam amending the Treaty of the European Union, the treaties establishing the European Communities and related acts, *see* <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html>.

²³ There was “massive transfer of powers to the Community resulting from the creation of a new Title IIIa in Part Three of the EC Treaty (Articles 73i to 73q) dealing with internal and external frontiers, policies on visas, asylum and immigration, and judicial cooperation in civil matters.” *See* <http://www.jeanmonnetprogram.org/papers/98/98-2--I.html>.

²⁴ The MLA 2000 Convention aimed to modernize cooperation between judicial, police and customs authorities within the Union as well as with Norway and Iceland by supplementing provisions in existing legal instruments and facilitating their application, such as the 1959 Council of Europe Convention and its 1978 Protocol on Mutual Assistance in Criminal Matters, the Benelux Treaty of 1962 and the 1990 Schengen implementation Convention. *See* http://ec.europa.eu/justice_home/fsj/criminal/assistance/fsj_criminal_assistance_en.htm.

²⁵ See MLA 2000 Convention art. 6, [http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712\(01\)&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712(01)&model=guichett).

²⁶ According to Article 6, paragraph 8: “The following requests or communications shall be made through the central authorities of the Member States: (a)... (b) notices of information from judicial records as referred to in Article 22 of the European Mutual Assistance Convention and Article 43 of the Benelux Treaty. However, requests for copies of convictions and measures as referred to in Article 4 of the Additional Protocol to the European Mutual Assistance Convention may be made directly to the competent authorities.” See [http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712\(01\)&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712(01)&model=guichett).

²⁷ For the Tampere European Council and the principle of mutual recognition of judicial decisions, *see* http://ec.europa.eu/justice_home/fsj/criminal/recognition/fsj_criminal_recognition_en.htm; http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/doc_criminal_recognition_en.htm; http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/12_en.htm; “The Hague European Council of 4-5 November 2004 adopted the Hague programme, which aims to build upon the work achieved during the now-expired Tampere programme,” http://www.europarl.europa.eu/facts/4_11_1_en.htm.

²⁸ See <http://europa.eu/scadplus/leg/en/lvb/l33131.htm>.

²⁹ See GERT VERMEULEN, TOM VANDER BEKEN, ELS DE BUSSEER, ARNE DORMAELS, BLUEPRINT FOR AN EU CRIMINAL RECORDS DATABASE: LEGAL, POLITICO-INSTITUTIONAL & PRACTICAL FEASIBILITY (Institute for International Research on Criminal Policy, Ghent University, Maklu, Antwerpen/Apeldoorn 2002).

³⁰ The third reason for creating an EU register of convictions, identified by the MRP, was not a purpose of the feasibility study. *Id.*

³¹ This would require electronically linking national registers. Searches would be centralized through a common index of codes or labels. Every Member State would then have to use the

same labels, which would refer to common aspects of a cluster of criminal acts. The system would be able to recognize characters from all Member States' languages.

Information from the European database could be retrieved by names, date of birth, date and place of court judgment. Searches for categories of criminal acts would utilize the labeling system. *See* GERT VERMEULEN, TOM VANDER BEKEN, ELS DE BUSSEER, ARNE DORMAELS, BLUEPRINT FOR AN EU CRIMINAL RECORDS DATABASE: LEGAL, POLITICO-INSTITUTIONAL & PRACTICAL FEASIBILITY (Institute for International Research on Criminal Policy, Ghent University, Maklu, Antwerpen/Apeldoorn 2002).

See also the White Paper on Exchanges of Information on Convictions and the effect of Such Convictions in the European Union COM(2005)10 final,

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>.

³² The Council of the European Union is the main decision making body of the EU. The ministers of the Member States meet within the Council of the European Union. Depending on the agenda, each country is represented by the minister responsible for that area (e.g. foreign affairs, finance, social affairs, transport, agriculture, etc.). The Council presidency is held for six months by each Member State on a rotational basis. Among other responsibilities, the Council passes laws, usually legislating jointly with the European Parliament. *See*

http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=242&lang=EN&mode=g;

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/79696.pdf.

³³ *See* http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/12_en.htm.

³⁴ *See* <http://www.dw-world.de/dw/article/0,1433,1262357,00.html>. The case surfaced shortly after a Belgian national, Marc Dutroux, was sentenced to prison for multiple sexual offences against young girls. His case triggered recommendations for an EU sexual offenders database. *See* Prof. Dr. Gert Vermeulen, *Exchanging Criminal Records in the EU*, ERA, Trier, Sept. 13, 2007; Prof. Dr. Gert Vermeulen, *European Data Collection on Sexual Offences against Minors*, EU Forum on the Prevention of Organised Crime, 'EU Actions against Child Trafficking and Related Forms of Exploitation,' Brussels, May 26, 2004, <http://www.ircp.org/uploaded/2004-05-26%20European%20data%20collection%20sexual%20offences%20minors%20Vermeulen.pdf>; GERT VERMEULEN, TOM VANDER BEKEN, ELS DE BUSSEER, ARNE DORMAELS, BLUEPRINT FOR AN EU CRIMINAL RECORDS DATABASE: LEGAL, POLITICO-INSTITUTIONAL & PRACTICAL

FEASIBILITY (Institute for International Research on Criminal Policy, Ghent University, Maklu, Antwerpen/Apeldoorn 2002).

³⁵ See <http://news.bbc.co.uk/2/low/europe/3875987.stm>. Fourniret's trial began in March, 2008 and is ongoing at the time this article goes to press. See also <http://www.timesonline.co.uk/tol/news/world/europe/article3632441.ece>.

³⁶ See <http://register.consilium.europa.eu/pdf/en/04/st14/st14207.en04.pdf>;
<http://register.consilium.europa.eu/pdf/en/04/st14/st14207-ad01.en04.pdf>;
<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20060531&secondRef=ITEM-022&language=EN>.

³⁷The European Commission or the Commission of the European Communities “drafts proposals for new European laws, which it presents to the European Parliament and the Council. It manages the day-to-day business of implementing EU policies and spending EU funds.” The Commission also monitors compliance with European treaties and laws. It can act against rule-breakers, taking them to the Court of Justice if necessary. The Commission consists of 27 women and men — one from each EU country. The President of the Commission is chosen by EU governments and endorsed by the European Parliament. The other commissioners are nominated by their national governments in consultation with the in-coming President, and must be approved by the Parliament. The President and members of the Commission are appointed for five year terms, coinciding with the period for which the European Parliament is elected.” See http://europa.eu/abc/panorama/howorganised/index_en.htm#commission;
http://ec.europa.eu/atwork/synthesis/doc/governance_statement_20070530_en.pdf.

³⁸ See the White Paper on Exchanges of Information on Convictions and the effect of Such Convictions in the European Union COM(2005)10 final, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>. According to its introduction “Establishing an area of freedom, security and justice entails the efficient circulation of information between the relevant authorities of the Member States on convictions or disqualifications of Community and non-Community nationals residing on the territory of the Member States and the possibility of consequences being attached to such convictions or disqualifications outside the sentencing Member State. This problem has arisen on several occasions in the work of the European Union in connection with exchanges of

information on convictions and the consequences that should be attached to them. The issues are dealt with in measures 2, 3, 4, 14, 20, 22 and 23 of the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. The need to improve the quality of information exchanged on criminal records was prioritised in the European Council Declaration on Combating Terrorism of 25 and 26 March 2004 and was reiterated at the Council meeting (Justice and Home Affairs) on 19 July of that year. The Hague Programme called on the Commission to put forward proposals with a view to stepping up exchanges of information on the contents of national registers of convictions and disqualifications, particularly on sex offenders, so that the Council could adopt them by the end of 2005. This White Paper is designed to achieve that objective.”

³⁹ This would amount to a hybrid system combining elements of a network of national criminal records registers and the creation of a European central criminal records database. The index would only contain personal identification data (name, place and date of birth, nationality, etc.) and the EU state of conviction. Neither details of the offence nor the sentence would be included. Further details could be obtained by contacting the convicting Member State. *See* the White Paper on Exchanges of Information on Convictions and the effect of Such Convictions in the European Union COM(2005)10 final, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>.

⁴⁰ The format would include: “data on the individual concerned by the decision (name, first names, date and place of birth, pseudonym or alias where applicable, sex and nationality, or legal status and head office for legal persons, etc.); information relating to the form of the decision (date and place, name and status of the relevant authority, type of decision: final judgment, decision by public prosecutor not subject to appeal, etc.); information on the acts which gave rise to the decision (date, place, type, legal definition, legal provision, etc.); information on the contents of the decision (judgment, sentence, accessory penalties, security measures, length of sentence or measure, subsequent decisions affecting enforcement of the sentence, disqualification, etc.). To facilitate data transmission, each item of information must be carefully defined and, if possible, be coded to facilitate translation. Once the “standard European format” has been set up, the requesting authority will receive information in its own language within a very short time frame. To tackle the problem of the different legal concepts used, the mechanism could incorporate a “dictionary” explaining the nature and significance of terms. Whilst this mechanism would not resolve the problems associated with differences in

the type of sentences, it would at least ensure effective transparency and an acceptable level of mutual understanding for final users.” *See* the White Paper on Exchanges of Information on Convictions and the effect of Such Convictions in the European Union COM(2005)10 final, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>.

⁴¹ *See* the Proposal for a Council Framework Decision on a Computerized System of Exchange of Information on Criminal Convictions (third-countries nationals)-2004/JLS/116, <http://www.berr.gov.uk/files/file25605.pdf>; the Commission Working Document on the Feasibility of an Index of Third-Country Nationals Convicted in the European Union COM(2006) 359, final <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0359:FIN:EN:HTML>. “Asking for and providing criminal records information is something that Council of Europe member states (and EU Member States) have been doing for years, and so the EIECR and the FDOCEIECR do not require very giant steps. In the case of a central index of third country offenders, several new elements have to be considered at the same time. States have to develop a system to identify criminal records that pertain specifically to third country offenders. States have to agree on who, exactly, would set up the proposed central index. States have to agree on who pays the cost of this central index. Someone has to sketch out the architecture of the central index - not easy, because while the people negotiating the proposed FD are lawyers, designing the architecture requires people with technical skills. The technical people from different countries, in turn, often have different ideas as to the best way to go forward - some want to use available solutions, others think that we should wait until promised new solutions can be utilized, and some may even want to have an active input into the design of these new solutions. And finally, once the location of files on third country offenders has been identified through the central index, there has to be a procedure for obtaining this information.” Matti Joutsen, Finnish Ministry of Justice, Personal Correspondence, October 2007.

⁴² “Framework Decisions are used to approximate [align] the laws and regulations of the member states. Proposals are made on the initiative of the Commission or a member state and they have to be adopted unanimously. They are binding on the Member States as to the result to be achieved but leave the choice of form and methods to the national authorities. Decisions are used for any purpose other than approximating the laws and regulations of the member states. They are binding and any measures required to implement them at Union level are adopted by the Council,

acting by a qualified majority.” *See*

http://europa.eu/scadplus/glossary/framework_decisions_en.htm.

⁴³ The Council Decision supplements the provisions of Articles 13 and 22 of the 1959 Convention, its additional Protocols of 17 March 1978 and 8 November 2001, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 and its additional Protocol of 16 October 2001.

⁴⁴ Examples of central authorities designated by Member States: Germany-Bundesamt für Justiz-Bundeszentralregister; Estonia-Ministry of Justice; France-Casier Judiciaire National; Greece-Department of Criminal Records of Ministry of Justice; Spain-Registro Central de Penados y Rebeldes, Ministerio de Justicia; Italy-Ministero della Giustizia-Ufficio del Casellario Centrale; Cyprus-Criminal Registry Office, Criminal Investigation Department, Police Headquarters; Latvia-The Information Centre of Ministry of Interior of the Republic of Latvia; Lithuania-Information Technology and Communication Department under the Ministry of Interior; Malta-Criminal Investigation Department, Police General Headquarters; Finland-Ministry of Justice; UK-UK Central Authority. *See* Council Decision on the Exchange of Information Extracted from Criminal Records - Manual of Procedure COM(2004)0664 final (13742/04 COPEN 128), <http://www.statewatch.org/news/2007/jan/eu-crim-records-manual.pdf>.

⁴⁵ **Chronological Development of EU Policy on Exchange of Criminal Records:**

	Requests for conviction information and replies	Notification of convictions to the home state
1959 Convention	*Requesting authority = national judicial authorities, requested authority = ‘appropriate’ national authorities *No time frame for responding to a request for information	*Communication via the convicting and home states’ Ministries of Justice *At least once a year
2000 MLA Convention	Direct communication between national judicial authorities	Communication via the convicting and home states’ ‘central authorities’

2005 EIECR	*Communication via national 'central authorities' * Reply no later than 10 working days	*Communication via national 'central authorities' * Without delay
2008 FDOCEIECR	*Communication via national 'central authorities' * Reply no later than 10 working days	*Communication via national 'central authorities' * As soon as possible
2006-2007 NJR	*Electronic communication via TESTA (French judicial authority, French criminal register, TESTA, German criminal register, German judicial authority) *Immediately	* Electronic communication via TESTA *Immediately

⁴⁶ “In the case of the EIECR and the FDOCEIECR, the original request probably comes from a local court, but the response to the request will come from a central authority, that is, the Criminal Records Office. Similarly, when information is sent on convictions handed down on foreign nationals, the authority supplying the information would tend to be a central authority, once again the Criminal Records Office. The EIECR and the FDOCEIECR do thus not in any way represent a retrograde step, a requirement that requests and responses to requests be centralized. The EIECR and the FDOCEIECR simply recognize the fact that in many cases, it is the central authority (the Criminal Records Office) that is the one doing the work.” Matti Joutsen, Finnish Ministry of Justice, Personal correspondence, October 2007.

⁴⁷ This introduction of common forms for requesting and transmitting conviction information contributes to achieving the goals set out in the Programme of measures to implement the principle of Mutual Recognition in Criminal Matters of November 2000. The requesting form is divided into four parts: 1) information relating to the requesting state (e.g. member state, central authority, contact person, email etc); 2) information relating to the identity of the subject of the request (e.g. name, birth name, aliases where applicable, sex, nationality, date of birth, place of birth, father’s name (if required by the requested state), mother’s name (if required by the requested state), residence or known address (optional), fingerprints (optional), other identification data like national register number, social security number, etc. (optional)); 3)

purpose of the request (e.g. criminal proceedings, request from a judicial authority outside the context of criminal proceedings, or request from a competent administrative authority. Request from the person concerned); 4) contact person information if additional information is required. *See also* Council Decision on the Exchange of Information Extracted from Criminal Records - Manual of Procedure COM(2004)0664 final (13742/04 COPEN 128), <http://www.statewatch.org/news/2007/jan/eu-crim-records-manual.pdf>.

⁴⁸ Article 3(1) provides “When a person requests information, on his or her criminal record, the central authority of the member state where this request is made, may in accordance with national law send a request for extracts from, and information relating to, criminal records to the central authority of another member state if the person concerned is or has been a resident or a national of the requesting or the requested member state.”

⁴⁹ The reply form is short. The requested authority chooses one of the following options: a) there are no convictions for the above mentioned person; b) there are convictions recorded in the criminal register for the above mentioned person (a statement of convictions is annexed hereto); c) the request is made for purposes other than criminal proceedings and cannot be complied with under the law, regulations or practice of the requested member state. This answer is followed by the declaration that “the transmitted data may only be used for the purpose for which it has been requested.”

⁵⁰ *See* Article 4 for the rules on use of personal data (e.g. identification and conviction information).

⁵¹ *See* Articles 3(2)&(4).

⁵² There is no recording/storing obligation under the 1959 Convention and the EIECR.

⁵³ We address the most obvious drawbacks of the EIECR. Other drawbacks are referred to in our discussion of drawbacks of the FDOCEIECR.

⁵⁴ *See* http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/12_en.htm.

⁵⁵ Germany, Spain, Belgium and France have been able to request information from each other since March 2006 and to send conviction notifications since April 2006. From the beginning the

project sought to include as many EU members as possible. An issue to be decided is whether the project will be used to request criminal background information on non-EU nationals. See Wilfried Bernhardt, *Network of Judicial Registers*, ERA, Trier, Sept. 13 2007, http://www.mj.gov.pt/sections/o-ministerio/instituto-das/anexos/sebastian-von-levetzon/downloadFile/file/NJR_Presentation_Lisbon.pdf.

⁵⁶ The legal basis for Networking of Judicial Registers is found in articles 13 and 22 of the 1959 Convention. It is the first large scale EU IT project. Information exchange is divided into four categories: 1) notifications of convictions; 2) requests for conviction information; 3) information; and 4) error messages. Between 1 January 2007 and 31 July 2007 Germany sent 327 requests and received “positive” information in 84 cases. It has received 1028 requests from other registers with 201 cases of “positive” information, and has sent 2884 notifications to other registers. The German Register received 1320 notifications. Minimum time for replying to a request is a few minutes; average time is approximately three hours. See Wilfried Bernhardt, *Network of Judicial Registers*, ERA, Trier, Sept. 13, 2007. See also “Cross-border Cooperation in the European Union to Prevent Sex Offenders from Working with Children” (February 2007), http://www.nspcc.org.uk/Inform/PolicyAndPublicAffairs/Europe/Briefings/EUSexOffenders_gf43335.pdf; <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmhaff/76/7606.htm>; http://www.eu2007.de/en/News/Press_Releases/June/0613BMJStrafregister.html.

⁵⁷ A request should include: information on the requesting authority, and information related to the person who is the subject of the request. See Wilfried Bernhardt, *Network of Judicial Registers*, ERA, Trier, Sept. 13, 2007.

⁵⁸ At the plenary session in Bratislava in June 2007, “the national heads of delegations approved the linguistic assistance in the form of the categories with families and subfamilies with the most frequent offences contained in each criminal register. This instrument, consisting of all languages of the partners, will ensure the proper and reliable understanding of the criminal past of the person concerned for the national judicial and police authorities. This table will be incorporated technically into the project by national programming teams mutually to ensure the technical compatibility of the codes. Currently, the legal working group of national experts is developing the second step of the common understanding assistance, now in relation to the categories of sanctions, protective measures and types of decision of national judicial authorities.” See Denisa

Fikarova, *A Network of National Criminal Registers: The Joint Project of France, Germany, Spain, Belgium, the Czech Republic, and Luxemburg*, ERA, Trier, Sept. 13, 2007.

⁵⁹ Anna Lipska, *Putting Flesh on the Bones: Taking into Account of Convictions in the EU-Member States in the Course of New Criminal Proceedings*, ERA, Trier, Sept. 13, 2007.

⁶⁰ Proposal for a Council Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings COM(2005)0018 (CNS).

⁶¹ The mutual recognition principle, presented as the “cornerstone” of judicial cooperation at the Tampere European Council is the basis of a program of measures adopted by the Council in December 2000. “Measure 2 of the program provides for the ‘adoption of one or more instruments establishing the principle that a court in one member state must be able to take account of final criminal judgments rendered by the courts in other member states for the purposes of assessing the offender’s criminal record and establishing whether he has re-offended, and in order to determine the type of sentence applicable and the arrangements for enforcing it.’ The purpose of this Framework Decision is to establish a minimum obligation for member states to take into account convictions handed down in other member states.” *See* Council Framework Decision on taking account of convictions in the Member States of the European Union in the Course of New Criminal Proceedings COM(2005)91 final.

⁶² “Each member state shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other member states, in respect of which information has been obtained under applicable instruments on mutual assistance or on the exchange of information extracted from criminal records, 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.” Council Framework Decision on taking account of convictions in the Member States of the European Union in the Course of New Criminal Proceedings 2005/0018 (CNS), 2 July 2007.

⁶³ The obligation to take into account previous convictions handed down in one Member State exists only to the extent such consequences are attached to previous national convictions under the sentencing court’s national law. The legal consequences of prior EU convictions may vary from state to state depending upon whether the existence of a previous conviction is a matter left

to the discretion of judicial authorities or is covered by statutory provisions on repeat offending. Moreover, the PTACOMS requires member states to treat prior EU Member State convictions the same as previous national convictions. That is also the case in the U.S. where judges give the same weight to prior convictions no matter the state where the conviction was adjudicated. However, even though American states have fairly similar criminal codes, there is still a good deal of variation in the definition and grading of substantive offences. Questions often arise regarding what offence in the sentencing court's state is equivalent to a prior conviction in a different state. *See, e.g., Washington v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999)(prosecutor successful in proving comparability of grand theft in California to theft in Washington state).

⁶⁴ The PTACOMS does not apply to criminal convictions in non-EU countries. With regard to those convictions, each member state is free to adopt its own policy.

⁶⁵ The PTACOMS is a part of a larger project on criminal record sharing among EU Member States. Possibly, PTACOMS will ensure compliance with employment disqualifications, based on certain convictions, throughout the EU.

⁶⁶ Related difficulties include: identifying the member state where the person has been convicted; variation in information received from other Member States; additional requests are needed; problems in effectively using the information received. Anna Lipska, *Putting Flesh on the Bones: Taking into Account of Convictions in the EU-Member States in the Course of New Criminal Proceedings*, ERA, Trier, Sept. 13-14, 2007.

⁶⁷ Member states are not required to take into account a conviction from another member state if: 1) information obtained under applicable instruments is not sufficient; 2) a national conviction would not have been possible for the same conduct; or 3) the sanction is unknown to the national legal system. The defendant should not be treated less favorably than if the prior foreign EU conviction had been a national conviction. *See* Council Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings COM(2005/0018 (CNS), 2 July 2007.

⁶⁸ According to Council Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings COM(2005)91 final, http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0091en01.pdf, "member states

will have to specify the conditions in which equivalent effects are attached to the existence of a conviction handed down in another member state. National legal rules applying to repeat offending are often very directly connected with the national structure of offences and penalties, for example in all the cases where there are special systems applicable to repeat offending.” *See also* Council Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings 2005/0018 (CNS), 2 July 2007. “Where, in the course of criminal proceedings in a member state, information is available on a previous conviction in another member state, it should as far as possible be avoided that the person concerned is treated less favorably than if the previous conviction had been a national conviction.” “If the national court in the new criminal proceedings, when taking into account a previously imposed sentence handed down in another member state, is of the opinion that imposing a certain level of sentence within the limits of national law would be disproportionately harsh on the offender, considering his or her circumstances, and if the purpose of the punishment can be achieved by a lower sentence, it may reduce the level of sentence accordingly, if doing so would have been possible in purely domestic cases.”

⁶⁹ According to Section 183 ‘Exhibitionist Acts’: “(1) A man who annoys another person by an exhibitionist act shall be punished with imprisonment for not more than one year or a fine. (2) The act shall only be prosecuted upon complaint, unless the prosecuting authority considers ex officio that it is required to enter the case because of the special public interest therein. (3) The court may suspend the execution of imprisonment and impose probation if it can be expected that the perpetrator will only cease to commit exhibitionist acts after lengthy curative treatment. (4) Subsection (3) shall also apply if a man or a woman is punished because of an exhibitionist act: 1. under another provision, which is punishable by a maximum term of imprisonment of no more than one year; or 2. under Sections 174 subsection (2), no. 1, or 176 subsection (3), no. 1.”

According to section 183a ‘Creating a Public Nuisance’: “Whoever publicly commits sexual acts and thereby intentionally or knowingly creates a nuisance, shall be punished with imprisonment for not more than one year or a fine, if the act is not punishable under Section 183.” *See* <http://www.iuscomp.org/gla/statutes/StGB.htm#177>.

⁷⁰ Suppose a U.K. national is convicted in the U.K. for burglary and is standing trial for a new offence in Greece. Burglary is defined as an unlawful entry with an intention to commit a felony. There is no equivalent crime in the Greek Penal Code. However, under the code, unlawful entry to another’s residence is punishable under Article 334 as trespass. Had the individual intended to

commit a further crime such as theft, he or she could also be convicted of attempted theft. *Cf. Shepherd v. U.S.*, 544 US 13 (2005).

⁷¹ Is information “available” if it would take one month, five months or more to be disclosed?

⁷² The FDOCEIERCR proposal was first available in March 2005 even before the adoption of the EIECR. The Proposal was considered to be a necessary second step after the EIECR. Since 2005, the Proposal has been revised. This Article is based upon the June 2007 version of the FDOCEIERCR. But see Proposal for a Council Framework decision on the Organisation and Content of the Exchange of Information Extracted from Criminal Records between Member States COM(2005) 690 final/2 (5463/1/06 REV 1 COPEN 1), 31 January 2008.

⁷³ See the Proposal for a Council Framework Decision on the Organization and Content of the Exchange of Information Extracted from Criminal Records Between Member States COM(2005/00267 (CNS).

⁷⁴ The convicting member state may instruct the home state that the transmitted information may be retransmitted only for use in criminal proceedings. See article 7(2). When the requester is a non-EU state, the home EU state may only retransmit information received from another member state subject to the limitations applicable to the transmission of information to an EU member state. When information is requested by a member state other than that of the person’s nationality, the requested state shall transmit information on national convictions, convictions of third country nationals and stateless persons contained in its register according to the 1959 Convention. For example, if the member state of nationality has not been informed about a conviction of a national handed down before the implementation of the EIECR or if it failed to record conviction information, it may request information from the convicting member state. The 1959 Convention would govern this request.

⁷⁵ Notwithstanding these limitations, personal data may be used by the requesting member state to prevent an immediate and serious threat to public security. The requesting member state shall as soon as possible inform the convicting member state of this use.

⁷⁶ According to the text of the Council Framework Decision COM(2005) 690 final 2005/00267(CNS) “The Presidency acknowledges that this draft Framework Decision is only a first, but important step to achieve the aim of substantially improving the exchange of

information on criminal convictions handed down against nationals of the EU Member States. The Framework Decision will lay the basic rules for the transmission of information on convictions to the Member State of the person's nationality as well as for the storage of such information by that Member State and for the retransmission, upon request, to other Member States.”

⁷⁷ A non-EU national residing in the EU, though, could request an extract of his or her criminal record from the criminal register of his or her country of residence. *See also* article 6(2).

⁷⁸ Until 2006, when Council Decision 2005/876/JHA came into force, EU Member States that were signatories of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters were required to inform other parties to the Convention, at least once a year, of criminal convictions of their nationals. However, compliance was spotty. Even if the country of nationality learned about foreign convictions of its nationals by sending a request for information to other parties to the Convention, there was no mandatory recording requirement.

⁷⁹ In Austria, life in prison sentences are not erased from the criminal register. The general period of retaining information can be 3, 5, 10 or 15 years depending on the gravity of the offence. Special rules apply for several convictions. Erasure takes place two years after the period of retention has expired. In Finland, the period of retention can be 5, 10 or 20 years depending on the gravity of the offence. Upon the death of the person or when the person reaches 90 years of age, his or her criminal record is erased. In some cases, records are never erased. In Germany, the period of retention depends on the gravity and severity of the offence and the sentence. The criminal records of individuals sentenced to life long imprisonment, treated in a mental hospital or considered dangerous are not erased. In Malta, criminal records are never erased for judicial purposes. For other purposes, they are erased depending on the severity of sentence. *See* Annex to the White Paper on Exchanges of Information and the Effect of Such Convictions in the European Union COM(2005)10 final SEC (2005)63, 8-13 (2005).

⁸⁰ Suppose France keeps a conviction for five years, Germany for four and Greece for six. If France receives a conviction from Germany, it must keep it for four years. It must keep the Greek conviction for six years.

⁸¹ Many EU countries make a distinction between judicial (e.g. magistrates, prosecutors) and law enforcement authorities (e.g. police). The Council Decision and the Framework Decision do not

specify what constitutes ‘criminal proceedings’. Rather, the central authority of the requesting state specifies the purpose of its request depending on its ultimate purpose (e.g. criminal proceedings, non-criminal proceedings, request by the record subject). A central authority forwarding a request originating from the police might label the request as related to a criminal proceeding. For example, the U.K. central authority sends requests from police forces in England, Wales, Scotland and Northern Ireland as well as from the Crown Prosecution Service and HM Revenue and Customs.

⁸² Europol’s (European police office) jurisdiction covers terrorism, trafficking in drugs, human beings and nuclear and radioactive substances, motor vehicle crime, counterfeiting, forgery and money laundering. Europol’s database for intelligence sharing has three main components; the Information System (IS), the Analysis Work Files’ (AWF) and the Index System. The IS includes information on individuals who have been convicted of, are suspected of having committed, or are believed to pose a high risk of committing an offence within Europol’s jurisdiction. Such information includes identification data as well as details on criminal offences, suspected membership in a criminal organization, and convictions related to crimes within Europol’s jurisdiction. Europol National Units (ENUs) in each member state are responsible for introducing data directly into the IS. Europol itself may input information supplied by non-EU member countries and organizations. The IS can be accessed by the ENUs, liaison officers and designated Europol officials. Member States’ law enforcement authorities have limited access to the IS; they can obtain additional information via their ENU. *See* <http://www.europol.europa.eu/index.asp?page=faq>; <http://europa.eu/scadplus/leg/en/lvb/114005b.htm>; <http://www.europol.europa.eu/index.asp?page=faq>.

⁸³ Eurojust was created in 2002 to enhance the effectiveness of national authorities in dealing with the investigation and prosecution of serious cross-border and organized crime. *See* <http://eurojust.europa.eu/>.

⁸⁴ *See* GERT VERMEULEN, TOM VANDER BEKEN, ELS DE BUSSEER, ARNE DORMAELS, BLUEPRINT FOR AN EU CRIMINAL RECORDS DATABASE: LEGAL, POLITICO-INSTITUTIONAL & PRACTICAL FEASIBILITY 69-79 (Institute for International Research on Criminal Policy, Ghent University, Maklu, Antwerpen/Apeldoorn 2002); White Paper on Exchanges of Information

on Convictions and the effect of Such Convictions in the European Union COM(2005)10 final, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>.

⁸⁵ The record subject may obtain the information recorded under his or her name. The procedure differs from country to country. Depending upon the Member State, individuals may request some information/extract of their criminal record, a certificate of good conduct or an oral statement regarding their criminal record. Some countries' criminal registers do not require the individual to identify the reason why he/she is requesting the information, but others do (e.g. check the accuracy of information held by the register, employment purposes, hunting permits etc.). White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union COM(2005)10 final SEC (2005), 63 (2005), <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>; Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union SEC(2005) 63, 3-7 http://ec.europa.eu/justice_home/doc_centre/criminal/doc/sec_2005_0063_en.pdf; Council Decision on the Exchange of Information Extracted from Criminal Records - Manual of Procedure COM(2004)0664 final (13742/04 COPEN 128), <http://www.statewatch.org/news/2007/jan/eu-crim-records-manual.pdf>; GERT VERMEULEN, TOM VANDER BEKEN, ELS DE BUSSEER, ARNE DORMAELS, BLUEPRINT FOR AN EU CRIMINAL RECORDS DATABASE: LEGAL, POLITICO-INSTITUTIONAL & PRACTICAL FEASIBILITY 76-79 (Institute for International Research on Criminal Policy, Ghent University, Maklu, Antwerpen/Apeldoorn 2002).

For example, in Portugal access to a criminal record by the person concerned "is limited to the information legally relevant for the purpose of the demand. This means that a certificate of criminal record for the purposes of a job, or related to any kind of professional effects, can only have information classified by law as prohibiting the exercise of that job, or hindering that particular professional effect. If the purpose of the request is a job that does not impose any kind of legal restrictions with regard to prior criminal convictions, no information is given." Jorge Pires, Portuguese Criminal Register, Personal Communication, July 17, 2007.

⁸⁶ In some cases, a criminal background check is mandatory if an individual applies for a position involving close contact with children. For example, in Finland a criminal record extract must accompany an application for a job that requires working with children. According to the

Criminal History of Persons Working with Children (504/2002), the extract is to be presented to the employer or relevant authority. Council Decision on the Exchange of Information Extracted From Criminal Records - Manual of procedure COM(2004) 664 final (13742/04 COPEN 128), <http://www.statewatch.org/news/2007/jan/eu-crim-records-manual.pdf>. In Sweden, “private employers have a right to obtain extracts from the criminal records regarding individuals that they have an intention to employ [and who would] take decisions on employment of staff in psychiatric compulsory care, care of mentally retarded individuals or care of children and young people. The law also directs controls of personnel in registers with regulations regarding nursery school activities, schools and child care regarding individuals who are offered employment in nursery school activities or care of school children, arranged by the community or in nursery schools, nine-year compulsory schools, compulsory special schools for mentally handicapped children, special schools. Individuals who are offered employment in the above mentioned activities must submit an extract from the criminal records to the employer. From the 1st of July 2007 individuals, who are offered employment in homes that care for children at the request of the social services must also provide the employer an extract from the criminal records. Individuals who did not submit any extract from the criminal records cannot be employed.” Aimee Jillger, Legal Advisor, National Police Board, Personal Communication, July 6, 2007. A Swedish criminal record extract issued for the purpose of employment at a school or childcare, will only note convictions for certain crimes. Council Decision on the Exchange of Information Extracted from Criminal Records - Manual of Procedure COM(2004)664 final (13742/04 COPEN 128), <http://www.statewatch.org/news/2007/jan/eu-crim-records-manual.pdf>.

⁸⁷ The IRCP feasibility study did not consider as an option granting employers access to the index. However, it would have enabled job applicants applying for positions in vulnerable professions (e.g. public, educational, medical, financial, transportation and telecommunications) to obtain a certificate of non-conviction. The certificate would be limited to use for those special jobs. It would be limited to a declaration stating that the person has no convictions. *See* GERT VERMEULEN, TOM VANDER BEKEN, ELS DE BUSSER, ARNE DORMAELS, BLUEPRINT FOR AN EU CRIMINAL RECORDS DATABASE: LEGAL, POLITICO-INSTITUTIONAL & PRACTICAL FEASIBILITY (Institute for International Research on Criminal Policy, Ghent University, Maklu, Antwerpen/Apeldoorn 2002).

⁸⁸ The requested state may forward the request while the home state may choose not to reveal EU-wide conviction information, even if it is recorded in its criminal register. Beginning in 2014,

it will be obligatory for the state queried by the record subject to request criminal record information from the record subject's home state. However, whether the requesting state includes this information in the criminal record extract depends on national legislation. When an individual's home state receives a request for information for criminal proceedings purposes from another member state, Article 7(1) requires the home state to disclose all national, EU and third-country convictions recorded in its register.

⁸⁹ Vulnerable professions include jobs in public, educational, medical, financial, transportation and telecommunications. *See* GERT VERMEULEN, TOM VANDER BEKEN, ELS DE BUSSEER, ARNE DORMAELS, BLUEPRINT FOR AN EU CRIMINAL RECORDS DATABASE: LEGAL, POLITICO-INSTITUTIONAL & PRACTICAL FEASIBILITY 69-79 (Institute for International Research on Criminal Policy, Ghent University, Maklu, Antwerpen/Apeldoorn 2002).

⁹⁰ If some Member States decided to issue an EU-wide certificate of non-conviction or an extract of prior criminal record, additional legislation based on the mutual recognition principle would be required to define the legal effects. "The FDOCEIECR is designed to deal with third pillar issues, cooperation in law enforcement and criminal justice. The FDOCEIECR might nonetheless have an unforeseen impact on first pillar issues, in this case competition. Imagine two EU countries, A and B. Country A takes a very restrictive approach to the use of extracts from criminal records for the vetting of potential employees, while in country B, not only do potential employers order such extracts almost as a matter of routine, there are a number of industries where such extracts are in fact required. AA Industries Inc, which is registered in country A, starts doing business in country B, using personnel from country A. The authorities of country B, however, step in and say that they will not allow anyone to work in country B unless either the employees, or the employer on their behalf, produce criminal record extracts. Essentially, this would mean that BB Enterprises Ltd, which is registered in country B, would have at least a slight advantage over AA Industries Inc." Matti Joutsen, Finnish Ministry of Justice, Personal Correspondence, November 2007.

⁹¹ According to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union COM(2005)10 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>, some EU states have laws automatically imposing employment disqualifications on convicted sex offenders. In other states, judges have discretion to impose such disqualifications as part of the

sentence. There are also considerable differences among the member states in what disqualifications may be ordered in civil, administrative or disciplinary proceedings following a conviction, and for which offences. Such disqualifications are not always included in EU countries' criminal registers. According to Council Framework Decision 2004/68/JHA of 22 December 2003 on Combating the Sexual Exploitation of Children and Child Pornography, article 5(3) "Each Member State shall take the necessary measures to ensure that a natural person, who has been convicted of one of the offences referred to in Articles 2, 3 or 4, may, if appropriate, be temporarily or permanently prevented from exercising professional activities related to the supervision of children." 'Prohibition' under the Council Framework Decision on the Recognition and Enforcement in the European Union of Prohibitions Arising from Convictions for Sexual Offences Committed against Children is a temporary or permanent ban on engaging in professional activities related to the supervision of children, referred to in article 5(3) of the Council Framework Decision 2004/68/JHA, arising from a conviction for an offence under article 1(1). <http://register.consilium.europa.eu/pdf/en/04/st14/st14207.en04.pdf>. See also NSPCC, "Cross-border Cooperation in the European Union to Prevent Sex Offenders from Working with Children," http://www.nspcc.org.uk/Inform/policyandpublicaffairs/Europe/Briefings/EUSexOffenders_wdf48517.pdf.

⁹² The MRD requires the member state whose criminal register is queried for a person's criminal record to send a request to that person's home country in order to find out about his or her criminal background and possible disqualifications. Article 6 of the FDOCEIECR provides that when a person asks for information on his or her own criminal record, the queried central authority may submit a request for conviction information to another member state, provided that the person is or has been a resident of either the requesting or requested state. Article 6(2a) provides that once member states have completed technical alterations enabling the exchange of information electronically and in a standardized format, the queried central authority must submit a request for conviction information to the record subject's home state's central authority.

⁹³ See Can Tran, "Self-Confessed Serial Murderer Michel Fourniret to Stand Trial," March 26, 2008, <http://www.groundreport.com/World/Self-Confessed-Serial-Killer-Michel-Fourniret-To-S>.

⁹⁴ Instead, soft identifiers such as name, birth date, gender and sometimes parents' names are used to link suspects/defendants with criminal records. See Council Decision on the Exchange of

Information Extracted from Criminal Records –Manual of Procedure COM(2004) 664 final (13742/04 COPEN 128), <http://www.statewatch.org/news/2007/jan/eu-crim-records-manual.pdf>, Review of National criminal records Systems in the European Union, Bulgaria and Romania with the view to the Development of a Common Format for the Exchange of Information on Criminal Records, Unisys, Final Report (on file with author).

⁹⁵ The exchange of fingerprints and DNA profiles was the subject of the Prüm Convention (2005) signed by seven EU members. The Schengen III Agreement provides for the transmission of DNA profiles, fingerprints, vehicle registrations and other data. *See* <http://www.libertysecurity.org/IMG/pdf/schengenIII-english.pdf>. It provides that the signatories will use ‘contact points,’ automatic access to the national DNA and fingerprint databases of the other signatory countries for the purposes of “prosecuting criminal offences and/or preventing crimes.” However, the suspect’s identity is revealed only when the automated comparison between the transmitted DNA profile or fingerprint produces a ‘hit’ in another member’s national database, and even then only if a formal request for personal data is honored. The seven initial contracting parties were Germany, Austria, Spain, Belgium, Luxemburg, France and the Netherlands. Finland, Bulgaria, Italy, Portugal, Romania, Sweden, Slovenia, Greece and Estonia have formally declared their intention to join to the treaty. In June 2007, the EU Justice and Home Affairs Council reached agreement on a Council Decision on the Stepping up of Cross-Border Cooperation, particularly in Combating Terrorism and Cross-border Crime, integrating elements of the Prüm Convention into EU legislation. Once the Decision is implemented, the automated sharing of national databases containing fingerprints, DNA samples and vehicle registration data will be expanded to contact points designated by member states’ law enforcement agencies. *See* http://www.era.int/web/en/html/nodes_main/4_1649_459/4_2153_462/events_2007/5_1625_424_5.htm; <http://www.euractiv.com/en/justice/eu-adopts-dna-data-sharing-system-crime-crackdown/article-164547?Ref=RSS>; <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20070606IPR07542>; <http://www.statewatch.org/news/2007/jun/jha-12-13-june-07-prov-prel.pdf>; <http://www.iht.com/articles/ap/2007/06/12/europe/EU-GEN-EU-Security.php>.

⁹⁶ Sometimes errors like this can be very difficult to correct, a potentially major problem in an era of increasing identity theft. If Smith uses Jones' stolen identity as an alias, Jones may find himself burdened with a criminal record that is very difficult to have corrected.

⁹⁷ Review of National Criminal Records Systems in the European Union, Bulgaria and Romania with the view to the Development of a Common Format for the Exchange of Information on Criminal Records, Unisys, Final Report.

⁹⁸ *Id.*

⁹⁹ Some countries will probably be unable to comply with that goal.

¹⁰⁰ This is especially true in regard to the record subject's identity, parents' names, national register number, and aliases, which are not always recorded in the criminal registers.

¹⁰¹ E.g., different storage formats and lack of standardization for entering, storing and searching information.

¹⁰² It also calls for a format that will aid in narrowing the gaps between different legal concepts, resolve identification problems, facilitate end-users interpretation of foreign decision, reduce language differences and require modest and proportionate expenditures.

¹⁰³ The offence categories are based on the 32 common offence categories developed by the European Arrest Warrant.

¹⁰⁴ This option does not overload the user and involves limited implementation costs. Processing of information is relatively easy and the data field structure is suited to paper formats now and later to electronic communications.

¹⁰⁵ The 'type of offence' field should be comprised of an alternative family structure from that of the pilot project. This could be achieved in two ways. First, similar offences may be grouped together. Second, the offence structure can be based on the exact order of the 32 European Arrest Warrant offences with the addition of some new offence families. For example, under the first option, the terrorism offence family of offences is coded as 3.0.0. The subcategories of this family are 'directing a criminal organization' (3.1.0), 'knowingly participating in the activities of a terrorist group' (3.2.0), 'offences linked to terrorist activities' (3.3.0), 'not knowingly taking

part in criminal activities of terrorist organization' (3.4.0), 'other' (3.5.0). The alternative family structure model was derived from the needs of the Member States by considering: pilot project's main families , clustering of offences of Member States, European legislation as a basis for subfamilies, Europol's and Eurojust's data models. The study also opts for an alternative family structure in main families and sub-families with respect to the 'type of sanction' field.

¹⁰⁶ The Networking of Judicial Registers that allows the electronic transmission of criminal records information works as follows: Exchanges involve information concerning identity, offences and penalties.. Offences are coded into 44 families and 176 subcategories.

¹⁰⁷ "Tatbezeichnung" and "Angewendete Rechtsvorschriften" is not a part of the XML-dataset, but a preparation of the content of the XML-dataset for the German users, automatically processed by the German register. The category of the offence appears in German because this is the translation system. In other words, the system does not really translate the offence from French to German, but it does enable the user to determine to which offence category a particular conviction offence belongs. Participants in the project started using the translating system on September 1, 2007. Wilfried Bernhardt, *Network of Judicial Registers*, ERA, Trier, Sept. 13 2007, http://www.mj.gov.pt/sections/o-ministerio/instituto-das/anexos/sebastian-von-levetzon/downloadFile/file/NJR_Presentation_Lisbon.pdf.

¹⁰⁸ Several EU countries have reportedly already submitted to the Criminal Justice Programme Committee applications for financial assistance to adapt their criminal record IT systems.