TOWARDS A

European Criminal Record

EDITED BY

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TOWARDS A EUROPEAN CRIMINAL RECORD

The success of the four core freedoms of the EU has created fertile ground for transnational organised crime. Innovative, transnational legal weapons are therefore required by national authorities. The availability of data on criminal convictions is at the forefront of the debate. But which mechanism for availability can be used effectively while at the same time respecting an increasingly higher level of data protection at national level?

In the fluid, post-'Reform Treaty' environment, the EU is moving towards the creation of a European Criminal Record which will ultimately secure availability of criminal data beyond the weaknesses of Mutual Legal Assistance mechanisms. Examining the concept of a European Criminal Record in its legal, political and data protection dimensions, this multidisciplinary study is an indispensable exploration of a major initiative in European Criminal Law which is set to monopolise the debate on EU judicial cooperation and enforcement.

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PREFACE AND ACKNOWLEDGEMENTS

EU criminal law is often misunderstood as an avant garde area of legal integration that lacks legal basis, consistency and legitimacy. This is not necessarily untrue. But any criticisms of that nature should be laid before the EU and national actors who have devised the relevant instruments in the manner observed so far. There is nothing 'strange', inconsistent or illegitimate about EU criminal law as a field of legal integration.

Consequently, research and analysis of aspects of EU criminal law is often presented as a risky business. This is true but again it must be attributed to the scattered, unimaginative and often borderline legitimacy of EU instruments. In an area where unanimity in decision making is often seen as a sanctification of any political and legal position that manages to reach consensus, commentators struggle with requirements of adherence to competence and data protection issues. The European Criminal Record is a paradigm of this state of affairs.

The Reform Treaty may contribute to the unlocking of this vicious circle. The abolition, finally, of the third pillar may, and in a way inevitably will, bring with it increased subsidiarity and proportionality tests and increased controls of competence and legitimacy issues. This is a very fluid, yet incredibly exciting time, for those promoting the EU ideal on a solid basis even in the field of EU criminal law.

This is a time when competencies in the field of criminal law will have to be revisited and defined clearly and concretely. We live in hope.

In view of this environment, the book presented difficulties beyond those commonly faced by academic writers. The balance of academic and practitioner authors is evident in the selection of contributors, as indeed is the editors' success in recruiting authors of exceptional calibre from the majority of EU Member States. Without the difficult questions posed by the authors and the frequent challenge of the editors' initial ideas, the intellectual process toward the completion of this book would have been boring and uninviting; the result would have been mundane and unimaginative. Similarly, without the limitless sources and support

of staff of the IALS library awareness of the rather esoteric field studied in the book would have been impossible. The completion of this publication would have been equally impossible without the immense encouragement and support of Professor Avrom Sherr who has the charisma to attribute value even in the darkest intellectual corners of distorted academic minds. The book could not have been conceived, let alone completed, without the immense assistance of Eleni Kouzoupi, Legal Fonctionnaire of the Republic of Cyprus, whose relentless updates on the current state of affairs helped motivate and update the editors further. Last but not least, thanks are due to Mr Anastasios Papaligouras, Minister of Justice of the Hellenic Republic, and his staff for allowing the editors access to legal documentation and national decision-making processes in relation to the European Criminal Record. The editors wish to thank especially the Minister's Legal Counsel, Dr Maria Gavouneli, for that purpose.

1

Introduction: How did the idea of a European Criminal Record come about?

CONSTANTIN STEFANOU AND HELEN XANTHAKI

1. The necessity of a European Criminal Record: gaps in national criminal records

The concept of a European Criminal Record (ECR) was put forward to the Commission by Dr Constantin Stefanou, serving as the political reviser and horizontal expert in the study on the use of criminal records as a means of preventing organised crime in the areas of money laundering and public procurement funded by the Commission as a Falcone study in 1999.[1] Over a period of two years a multidisciplinary group of fifteen national and three horizontal/comparative experts joined forces to examine and comparatively evaluate the laws on national criminal records in the then fifteen Member States of the European Union (EU) as a means of assessing whether national criminal records are effective and adequate solutions to the problem of increased mobility of persons, services and, consequently, crime in the EU.[2] This multinational, multidisciplinary research revealed that all older Member States maintain databases of convictions imposed on own nationals by national judicial and, at times, administrative authorities; however, the use of national criminal records for the purposes of adhering to the money laundering and public procurement provisions envisaged by the EU in the relevant Directives is not undertaken in a number of countries,[3] including Spain and

[1] H. Xanthaki and C. Stefanou, 'The Use of Criminal Records as a Means of Preventing Organised Crime in the Areas of Money-laundering and Public Procurement: the EU Approach', European Commission FALCONE Study, Ref. No. 1999/FAL/197, IALS, 1999.

[2] H. Xanthaki, 'Cooperation in Justice and Home Affairs', in J. Gower (ed.), *European Union Handbook* (London–Chicago: Fitzroy Dearborn Publishers, 2002), pp. 234–242, at 239.

[3] See H. Xanthaki, 'First Pillar Analysis', in S. White (ed.), *Procurement and Organised Crime* (London: IALS, 2000), pp. 49–71; also see H. Xanthaki, 'Money Laundering in Greece', *CCH Anti-Money Laundering Loose-leaf* (London: CCH, 1999), paras. 90-000–94-000.

Sweden.[4] More crucially, the study reveals discrepancies in national criminal records with reference to three main points: the level of information available in the records, the types of persons with entries in national criminal records and the ground covered in these records.[5]

First, the level of information available in national criminal records varies within Member States as a result of the dramatic differences in the provisions on erasure: in view of the lack of harmonisation in national criminal laws,[6] crimes are punished by diverse levels of sanctions and, therefore, erasure from national criminal records takes place at different time periods. Moreover, the period of time that must elapse after serving a sentence and before the erasure of that sentence from the national records varies between Member States, with very individual and at times even eccentric approaches to criminal punishment and the rehabilitation of ex-offenders. Consequently, erasure and, therefore, the level of data remaining in national criminal records differs between Member States, thus creating a direct discrimination amongst EU citizens based solely on the relevant provisions in their country of origin. Second, the type of persons included in national criminal records varies as a large number of Member States fail to recognise criminal liability for legal persons: crucially, legal persons are not included in criminal records thus preventing their exclusion from further activity, which is often linked to their infiltration by terrorism and organised crime.[7] A similar level of variation in national criminal laws affects the entry of administrative sanctions of a criminal law nature in national criminal records (prominent mainly in the German, Austrian and Polish legal traditions) and disqualifications (whose legal value and equivalence amongst Member States is a rather complex matter). Third, the ground covered by criminal records has important variations in Member States with reference to the data on convictions of own nationals imposed by foreign courts or convictions of foreign nationals imposed by own courts. In other words, where nationality of the convicted and the

[4] H. Xanthaki and C. Stefanou, 'National Criminal Records as Means of Combating Organised Crime in the EU', EU Criminal Law Conference, Brussels, 1–3 December 2000.

[5] H. Xanthaki, 'National Criminal Records and Organised Crime: A Comparative Analysis', in C. Stefanou and H. Xanthaki (eds.), *Financial Crime in the EU: Criminal Records as Effective Tools or Missed Opportunities* (The Hague: Kluwer Law International, 2005), pp. 15–42, at 40–41.

[6] A. Cadoppi, 'Towards a European Criminal Code?' (1996) *European Journal of Crime, Criminal Law and Criminal Justice* 4–7.

[7] C. Stefanou and H. Xanthaki, 'Methods of Preventing the Infiltration of Legal Entities by Organised Crime and Terrorism (study)', European Commission JHA closed tender, Ref. No. DG JAI-B2/2003/01, March 2003.

imposing court varies gaps in data appear with alarming frequency. This is crucial in the combat of transnational crime where variations of nationality of the accused and location of conviction are rather common.[8]

The conclusions that can be drawn from an in-depth comparative analysis of national provisions concerning criminal records are rather useful for the identification of effective and realistic weapons in the fight against transnational organised crime.[9] First, all Member States have already established databases for convictions. The national legislative and administrative structures are already in place and have been tested by judicial and enforcement practices at the national level. Second, national criminal records are, at least in principle, adequate sources of information for convictions imposed by national courts on own nationals. Third, when national criminal records are set against transnational criminals and criminal organisations, they lag behind because of existing discrepancies in substantive and procedural provisions in the national criminal laws of the twenty-seven Member States.

2. Mutual legal assistance: solution or disappointment?

The question is whether national criminal records can stand the test of transnationality,[10] evident in current criminal trends,[11] by use of mutual legal assistance (MLA) mechanisms. National judicial and investigation

[8] C. Stefanou and H. Xanthaki, 'National Criminal Records and the Combat against Organised Crime', 21st International Symposium of Economic Crime: Financial Crime, Terror and Subversion, 7–14 September 2003, Cambridge.

[9] L. Sheeley, 'Transnational Organized Crime: An Imminent Threat to the Nation-State' 48 (1995) *Journal of International Affairs* 463–490, at 484; L. Shelley, J. Picarelli and C. Corpora, 'Global Crime', in M. Cusimano Love (ed.), *Beyond Sovereignty: Issues for a Global Agenda* (Thomson, Wadsworth, 2003), pp. 143–166; National Security Council, 'International Crime Threat Assessment', www.terrorism.com/documents/pub45270/pub45270chapl.html; UN General Assembly, 'Convention against Transnational Organized Crime' (NY: UN Publications, 2001), pp. 25–26.

[10] F. Gazan, 'Commitments and Undertakings under European and International Legal Instruments regarding Trafficking in Human Beings and their Incorporation in National Legislation' in LARA Final Regional Seminar on Criminal Law Reform to Prevent and Combat Trafficking in Human Beings in South-eastern Europe, Proceedings of the Regional Seminar and Final Report, Durrës, Albania, 30 October–1 November 2003, www.coe.int/t/e/legal_affairs/legal_cooperation/combating_economic_crime/3_technical_cooperation/LARA/lara(2003)45.pdf, pp. 95–98, at 96.

[11] C. Resta Nestares and F. Reinares, 'Transnational Organized Crime as an Increasing Threat to the National Security of Democratic Regimes: Assessing Political Impacts and Evaluating State Responses' (1999) *NATO Working Papers Collection* 2.

authorities may be able to complete the data available in the national criminal record with the aid of information received from the national criminal records of other Member States via mutual legal assistance requests. If the reliability of MLA mechanisms can be proven, the search for a transnational solution ends there.

In the EU mutual legal assistance takes place at three levels: the national level, the bilateral/international level and the EU level.[12] A comparative analysis of the legal framework of mutual legal assistance at the national level demonstrates a lack of harmonisation in national approaches.[13] The value of international agreements in the national laws of the Member States remains diverse.[14] Some Member States place international agreements above the Constitution in the hierarchy of sources of national law, some place them below the Constitution and above national laws, whereas others lack any concept of hierarchy in relation to international agreements altogether.[15] Moreover, some Member States require ratification of international agreements whereas others introduce direct and automatic application.[16] Furthermore, some Member States have opted for the introduction of framework laws regulating the issue of legal assistance in a single legal text, whereas other Member States have left the regulation of the matter to a set of scattered provisions found in a number of national legal instruments. However, it must be accepted that gradually more Member States opt for the framework law option. A small number of national laws do not introduce national provisions on mutual legal assistance, leaving this to regulation via international agreements.[17] The picture painted here is

[12] F. E. Dowrick, 'Overlapping International and European Laws' (1982) 31 *International and Comparative Law Quarterly* 59–98.

[13] H. Xanthaki, 'Assessment of the Existing Legislation and Practice for the Promotion of Judicial Cooperation and the Fight against Criminality', in Public Prosecutor's Office of the Court of First Instance of Athens (ed.), *Euro-Joint: The Role of Eurojust against Crime* (Athens: Nomiki Vivliothiki, 2003), pp. 68–79 and 209–218.

[14] J. H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) *The American Journal of International Law* 310–340.

[15] L. Wildhaber, 'The European Convention on Human Rights and International Law' (2007) *International and Comparative Law Quarterly* 217–232, at 218.

[16] On monism and dualism, see J. P. Miller and L. Wildhaber, *Praxis des Völkerrechts* (Bern: Stämpfli, 2001), p. 153.

[17] H. Xanthaki, 'The Present Legal Framework of Mutual Legal Assistance within the EU' (2003) 56 *Revue Hellenique de Droit International* 53–90, at 55–56; also see Council of the EU, 'Evaluation Report on Mutual Legal Assistance and Urgent Requests for the Tracing and Restraint of Property': Report on Austria, 14911/00, CRIMORG 170, 22 December 2000; Report on Belgium, 7704/00, CRIMORG 60, 16 May 2000; Report

one of great diversity, obscurity and ambiguity in the provisions on mutual legal assistance at the national level.

At the international level, all Member States are signatories to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters,[18] the Additional Protocol of 17 March 1978 to the European Convention on Mutual Assistance in Criminal Matters,[19] the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at Common Borders,[20] the Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,[21] the United Nations Convention of 19 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[22] and the 2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.[23] Moreover, a cluster of Member States are also signatories to the Benelux Conventions[24] and the Nordic Conventions on legal assistance. Figure 1 offers a bird's eye view of the various MLA agreements in Europe.[25]

The complex, often overlapping, provisions of these international agreements[26] plague mutual legal assistance with inherent, and to a degree

on Denmark, 10860/99, CRIMORG 128, 9 September 1999; Report on Finland, 9392/00, CRIMORG 94, 7 July 2000; Report on France, 12000/00, CRIMORG 131, 10 October 2000; Report on Germany, 13365/00, CRIMORG 153, 11 December 2000; Report on Greece, 10596/99, CRIMORG 125, 23 August 1999; Report on Italy, 7254/00, CRIMORG 52, 22 March 2000; Report on Ireland, 9079/99, CRIMORG 70, 18 August 1999; Report on Luxembourg, 5932/99, CRIMORG 21, 15 February 1999; Report on the Netherlands, 10595/99, CRIMORG 124, 18 August 1999; Report on Portugal, 7251/01, CRIMORG 33, 2 April 2001; Report on Spain, 5819/00, CRIMORG 16, 22 March 2000; Report on Sweden, 7250/01, CRIMORG 32, 27 March 2001; Report on Sweden', 7249/01, CRIMORG 31, 26 March 2001; 'Summary Reports on mutual legal assistance', 9501/4/04 REV4 LIMITE CRIMORG 43 and 7917/2/05 REV2 LIMITE CRIMORG 34.

[18] http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG; CETS 030.

[19] http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=099&CM=8&DF=5/9/2007&CL=ENG; CETS 099.

[20] OJ L 239, 22 September 2000, pp. 63–68.

[21] http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=141&CM=8&DF=5/9/2007&CL=ENG; CETS 141.

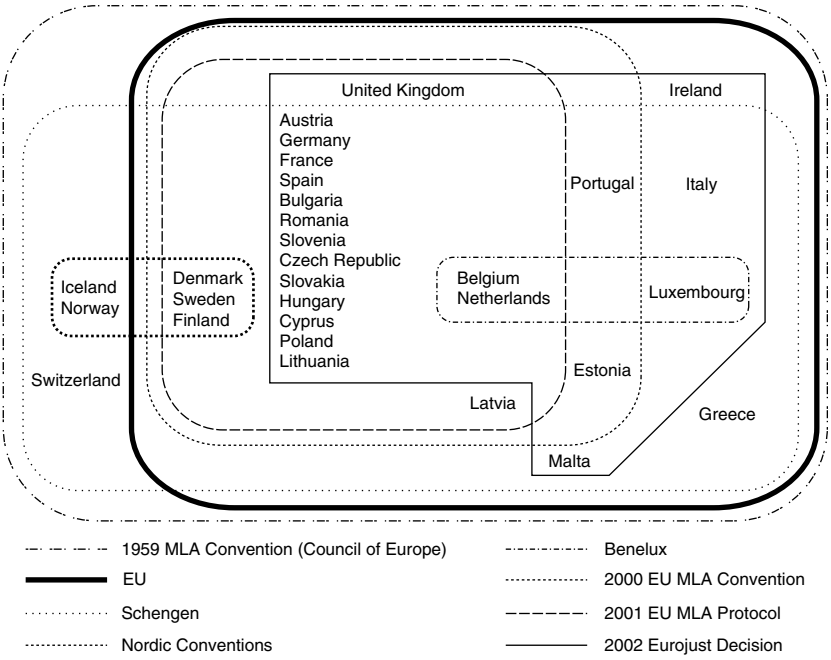
[22] http://www.unodc.org/pdf/convention_1988_en.pdf

[23] http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=182&CM=8&DF=5/9/2007&CL=ENG; CETS 182.

[24] Bart de Schutter, 'International Criminal Law in Evolution: Mutual Assistance in Criminal Matters between the Benelux Countries' (1967) 14 *Nederlands Tijdschrift Voor Internationaal Recht* 382–410.

[25] Correct on 1 May 2007.

[26] C. Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *European Journal of International Law* 447–471, at 461.



Graph 1: Mutual Legal Assistance for Member States

unavoidable, problems.[27] The correlation of the requested state with the field of application of each of the numerous conventions on mutual legal assistance is the initial hurdle faced by the national authorities of the requesting state. Even when referring to the main international instrument in this area, the 1959 Council of Europe Convention, the identification of the date from which it applies in each Member State and the specific provisions applicable to each Member State after all individual reservations and declarations require a lengthy and detailed study of the law of the requested state. This is rarely possible, especially under the conditions of urgency in mutual legal assistance.

Another hurdle for the requesting state refers to the selection of the international agreement that is applicable in the case of specific

[27] See C. Stefanou, 'Organised Crime and the Use of EU-wide Databases', in I. Bantekas and G. Keramidas (eds.), *International and European Financial Law* (Lexis Nexis Butterworths, 2006), pp. 219–221.

offences.[28] Although the 1959 Convention excludes fiscal, military and political offences, these are covered by the 1972 Protocol and the Schengen Convention. Such offences are not excluded by the 1990 Council of Europe and the 1988 Vienna Conventions. Thus, in the UK, fiscal, political and military offences are not covered by agreements on mutual assistance unless otherwise provided in bilateral agreements with specific Member States. For third countries, and subject to reservations and bilateral agreements, fiscal offences are covered to the extent introduced by the 1972 Protocol and the Schengen Convention which apply in parallel. Political and military offences may afford legal assistance under the Schengen Convention but not under the 1959 Convention. Bilateral agreements complicate things further. In the case of requests related to drug offences, the 1959 and 1988 Council of Europe Convention apply in parallel. As there is no clear hierarchical classification between these two instruments, Member States may pick and choose the Convention which is most useful to them in each particular case. Since it is not necessary to declare under which international Convention one seeks assistance, the execution of the letter rogatory may well be undertaken on the basis of the discretion of the receiving state. In that case, one may pick and choose the field of application, the list of possible actions and the grounds for refusal one prefers. Conflicting provisions as to the use of the dual criminality principle or as to the permissible grounds for refusal complicate the net of provisions that both the requesting and the receiving authorities will have to apply. This situation is further obscured by the common determination of the same central authority for cooperation under most international Conventions in a large number of Member States.

The requirement of dual criminality[29] and the multitude of grounds for refusal of mutual legal assistance[30] under each international Convention present further impediments in obtaining accurate information from

[28] H. G. Nilsson, 'From Classical Judicial Cooperation to Mutual Recognition' (2006) 77 *Revue internationale de droit pénal* 53–58.

[29] S. Murphy, *Principles of International Law* (Thomson West, 2006), p. 408; A. Moore and M. Chiavario (eds.), *Police and Judicial Co-operation in the European Union: FIDE 2004 National Reports* (Cambridge: Cambridge University Press, 2004), p. 24; G. Corstens, *European Criminal Law* (The Hague: Kluwer Law International, 2002), p. 130; M. Joutsen, 'International Instruments on Cooperation in Responding to Transnational Crime', in P. Reichel (ed.), *Handbook of Transnational Crime and Justice* (Sage Publications, 2004), p. 260.

[30] D. McLean, *International Cooperation in Civil and Criminal Matters* (Oxford: Oxford University Press, 2005), pp. 63, 194, 350, 360.

criminal records in other Member States.[31] In order to acquire such data, the offence to which the request refers must be considered a criminal offence in both the requesting and the requested state. Despite convergence in the national criminal laws of Member States,[32] substantive criminal provisions are still notoriously difficult to juxtapose,[33] especially with the variety in the nature and regulation of offences which are not purely criminal.[34] Administrative offences which may lead to criminal prosecution in one Member State may be purely criminal offences in another.[35] With the immense fragmentation in the applicability of the Conventions in this area, dual criminality may well be a more common reason for refusal than one would expect. For example, even when dual criminality is not put forward as a general principle, exemptions as to letters rogatory in relation to the search and seizure of property still apply. Moreover, the wide interpretation of the common grounds for refusal of harm to the sovereignty, security or *ordre public* of the receiving state jeopardises the effectiveness of mutual assistance requests.

There is a final set of practical hurdles to the provision of mutual legal assistance, at the international level that renders its request a tricky exercise. Understanding the request and responding in an adequate manner requires knowledge of the language of both the requesting and requested country. Perhaps more importantly, the provision of data from criminal records via mutual legal assistance mechanisms must be offered in a manner that complies with the national criminal procedural laws of the requesting Member State. Should the procedure for offering data from foreign criminal records clash with the requesting state's national procedural criminal laws then the data kindly offered by the requested state may prove inadmissible, and therefore useless, in criminal proceedings before the requesting state's national courts.[36]

[31] 'Final Report on the First Evaluation Exercise – Mutual Legal Assistance in Criminal Matters', OJ C 216, 1 August 2001, p. 14 points 17 and 19.

[32] H. Askola, *Legal Responses to Trafficking Women for Sexual Exploitation in the EU* (Oxford: Hart Publishing, 2007), p. 12.

[33] For an example of divergent definitions, see A. Wright, *Organized Crime* (Willan Publishing, 2006), p. 13.

[34] C. Harding, P. Fennel, N. Jorg and B. Swart, *Criminal Justice in Europe: A Comparative Study* (Oxford: Oxford University Press, 2002).

[35] K. Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, 2004), at p. 127; H. Schneider, *The German Stock Corporation Act* (The Hague: Kluwer Law International, 2000), p. 221.

[36] F. Wettner, 'Das allgemeine Verfahrensrecht der gemeinschaftlichen Amtshilfe', in E. Schmidt-Aßmann and B. Schöndorf-Haubold (eds.), *Der Europäische*

Collisions between national legal orders are rather frequent in mutual legal assistance.[37]

As a result, the current picture of legal assistance amongst Member States at the international level is far from satisfactory. Although the example of Italy – which provides favourable assistance to other Member States – is indeed a commendable one, the EU needs a binding legal instrument applicable uniformly in all Member States. The 2000 MLA Convention and its Protocol[38] is the main mechanism for the request and provision of judicial assistance in criminal matters by use of Eurojust.[39] The Convention introduces precise procedures and guidelines to be followed by Member States when sending and servicing procedural documents, transmitting requests of mutual legal assistance, exchanging information spontaneously, transferring persons held in custody for the purposes of investigations, organising joint investigations teams, conducting covert investigations and intercepting communications. The Convention is supplemented by its Protocol of 16 October 2001[40] which introduces mechanisms for dealing with fiscal offences, political offences, requests related to bank accounts and transactions. The two instruments provide a legal basis for requests in most fields of criminal activity as well as a detailed guide for legitimacy in transnational operations against organised crime. However, practice is often not as rosy as theory mainly because of the national legislator's 'removal from European reality'[41] which prevents the prompt and complete implementation of EU law.[42] The 2000 MLA Convention has not been ratified by five Member States: Greece, Ireland, Italy, Latvia and

Verwaltungsverbund – Formen und Verfahren der Verwaltungszusammenarbeit in der EU (Berlin: Mohr Siebeck, 2005), pp. 132–133; A. van Hoek and M. Luchtman, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights' (2005) *Utrecht Law Journal* 1–39, at 14.

[37] E. Jõks, 'Some Problems of International Judicial Assistance from an Estonian Perspective' (1999) *Juridica International* 80–85, at 80–81.

[38] Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States, OJ C 197, 12 July 2000, p. 1.

[39] See C. Stefanou and H. Xanthaki (2004), 'Memorandum by Dr Constantin Stefanou and Dr Helen Xanthaki', House of Lords, European Union Committee, 23rd Report of Session 2003–04, *Judicial Cooperation in the EU: The Role of Eurojust*, Minutes of Evidence taken before the European Union Committee (Sub-Committee F) 16 June 2004, p. 96.

[40] OJ C 326, 21 November 2001, at 2.

[41] See M. Jimeno-Bulnes, 'European Judicial Cooperation in Criminal Matters' 9:5 (2003) *European Law Journal* 614–630, at 629.

[42] See H. Xanthaki, 'Quality and Transposition of EU Legislation: A Tool for Accession and Membership to the EU' 4 (2006) *European Journal of Law Reform* 89–110.

Luxembourg. The Protocol to the Convention has not been ratified by Estonia, Greece, Ireland, Italy, Luxembourg, Malta and Portugal.[43] In other words, the Convention and the Protocol are not binding on twenty per cent of the Member States – and by extension their national authorities and their investigations and prosecutors.[44] It is disquieting to know that, only in 2005, 155 requests for mutual legal assistance were not addressed by the directness, speed and relative effectiveness provided for in the 2000 MLA Convention and its Protocol, simply because the requesting Member States have refused or omitted to ratify and implement these two instruments. Perhaps it is even more upsetting to know that in the 205 cases of requests reported to have been made to these Member States via Eurojust, the Convention and its Protocol have not been utilised due to the failure or omission of these Member States to ratify them. The effect that non-ratification has on the Member States themselves and on the rest of the EU is pronounced and evident.[45] A further, albeit murkier, debilitating effect of this situation lies with the inevitable fragmentation in the mechanisms for the granting of mutual legal assistance even at the EU level. This leads to a de facto introduction of two speeds in an agency designed to eradicate fragmentation in mutual legal assistance within the EU as a means of enhancing and facilitating cooperation of national authorities. The irony in this case is that these two speeds have not been imposed from above, i.e. the EU, but have been created by the Member States themselves.

3. The Commission proposes

As a result of weaknesses in mutual legal assistance at the national, international and EU levels,[46] the acquisition of data on prior convictions

[43] Council of the EU, 'Addendum to the 'I' Item Note – Implementation of the Strategy and Action Plan to Combat Terrorism', Document No.15266/06 ADD1 REV1, 24 November 2006.

[44] See H. Xanthaki, 'Eurojust: Fulfilled or Empty Promises in EU Criminal Law?' (2006) 8 *European Journal of Law Reform* 175–197.

[45] See H. Xanthaki, 'Drafting for Transposition of EU Criminal Laws: The EU Perspective' (2003) *European Current Law Review* xi–15; also see Helen Xanthaki, 'Assessment of the Existing Legislation and Practice for the Promotion of Judicial Cooperation and the Fight against Criminality', in Public Prosecutor's Office of the Court of First Instance of Athens (ed.), *Euro-Joint: The Role of Eurojust against Crime* (Athens: Nomiki Vivliothiki, 2003), pp. 68–79 and 209–218.

[46] Council of the EU, Third Round of Mutual Evaluation, 'Exchange of Information and Intelligence between Europol and the Member States and among the Member States

imposed either in other Member States or on foreign nationals seems rather difficult to achieve. This was established in a second multinational, multidisciplinary study coordinated by Dr Helen Xanthaki and Dr Constantin Stefanou and funded once again by the European Commission.[47] The study, which constituted the basis of the Institute of Advanced Legal Studies (IALS) ECR study and the proposals on an ECR put forward to the Council and the European Parliament by the Commission,[48] examined the effectiveness of national criminal records in the then twenty-five Member States with specific reference to transnational crime and assessed the feasibility of a centralised database of criminal convictions within the EU. The study also formed the basis of a subsequent research project at Ghent University, which examined the format for an ECR and analysed the competing scenario for the development of a network for existing national records as opposed to the establishment of a centralised unified database.[49] The IALS study started a heated debate on the feasibility of the ECR which continues to the present day and has developed even further than the editors of this book could ever have imagined. It is the feasibility of this concept that constitutes the topic of the book.

The Commission took to the idea of an ECR and presented the concept in its Communication on mutual recognition of final judgments in criminal matters[50] and in measures 2–4 of the Council and Commission programme of measures to give effect to the principle of mutual recognition of decisions in criminal matters.[51] The mutual recognition programme identifies the central role of prior convictions imposed by other Member States in the calculation of sentences in criminal trials and proposes routes for the availability of data on prior

respectively – Report on the Evaluation Visits to 15 Member States (Sweden, Portugal, Germany, Finland, Belgium, France, United Kingdom, Luxembourg, Netherlands, Ireland, Italy, Denmark, Austria, Greece and Spain)', 14292/2/05 Rev 2, CRIMORG 132, 17 January 2006, p. 5.

[47] See H. Xanthaki and C. Stefanou, 'A European Criminal Record as a Means of Combating Organised Crime' (study), 2000/FAL/168.

[48] See Commission of the EC, 'Communication from the Commission to the Council and the European Parliament on Measures to be Taken to Combat Terrorism and other Forms of Serious Crime, in particular to Improve Exchanges of Information, Proposal for a Council Decision on the Exchange of Information and Cooperation concerning Terrorist Offences', COM(2004) 221 final, 2004/0069 (CNS), 29 March 2004, footnotes 30–31 at 12 and footnote 32, p. 13.

[49] See G. Vermeulen and T. Vander Beken, 'Blueprint for an EU Criminal Records Database: Legal, Politico-institutional & Practical Feasibility', Grotius project 2001/GRP/024.

[50] See COM (2000) 495 final, 26 July 2000 section 5.

[51] See OJ C 12, 15 January 2001, at 10.

convictions to all judicial authorities in the Member States for that purpose. Measure 3 urges the introduction of a unified format for applications for data from criminal records. The programme takes the debate one step forward and pinpoints three possible options for the improvement of data exchanges on convictions, namely facilitation of bilateral information exchanges, networking of existing national criminal records and the establishment of a 'genuine European central criminal records office'.[52]

In 2003 the Italian Presidency conducted a detailed survey of current information systems used by national authorities in investigations and prosecutions as a means of coordinating national technical specifications for effective speedy information exchange and cooperation against organised crime.[53] In the wake of the terrible terrorist attacks in Madrid the Commission called upon the Council for urgent coordination and strengthened cooperation amongst existing national, international and EU networks of information on terrorism, rather than 'losing time destroying existing and creating new procedurally time-consuming institutions and bodies'.[54]

Ten days later the Commission presented a draft Council Decision[55] which aimed to facilitate information exchange against terrorism based on the three IALS studies on national criminal records, on the European Criminal Record and on the infiltration of terrorism in legitimate corporations.[56] In their analysis the Commission linked terrorism with organised crime and presented a holistic approach to the phenomenon of increased transnational criminal activity that flourishes in an enlarged EU plagued by diversities and inefficiencies in mutual legal assistance. The only way to secure accurate, timely and usable data related to investigations, prosecutions and criminal proceedings within the EU is to bypass the process of mutual legal assistance altogether by allowing national authorities direct and automatic access to such information. However, the manner in which this aim can be balanced with data

[52] Ibid.

[53] Council of the EU, 'Answers to the Questionnaire on Information Systems for Fighting against Organised Crime', 9725/03, 12 November 2003, p. 3.

[54] Commission of the EC, 'Commission Paper to the Council on Terrorism providing Input for the European Council', SEC (2004) 348, 18 March 2004, p. 8.

[55] 'Proposal for a Council Decision on the Exchange of Information and Cooperation concerning Terrorist Offences', 8200/04, 5 April 2004.

[56] C. Stefanou and H. Xanthaki, 'IALS Study on Measures in the Member States to Prevent Organised Crime and Terrorist Groups from Infiltrating Legitimate Entities', Study No DG.JAI-B2/2003/01.

protection requirements and proportionality concerns merits further analysis.[57] The window of opportunity provided by the still raw threat of international terrorism pushed the Commission's initiative to fruition, albeit a full eighteen months later.[58] The Council Decision requires the appointment of a specialist law enforcement unit in each Member State, which coordinates transfer of data on terrorist-related prosecutions and convictions to Europol, Eurojust and other Member States via the specially appointed contact point in Eurojust.

4. Competing legislative approaches

In March 2004 Commissioner Vitorino revealed the vision of the Commission in justice and home affairs by announcing legislative proposals for a 'European court record' before the end of 2004.[59] The Commission's proposal for a Council Decision came in October 2004 with a call for urgent measures justified by reference to the terrorist attacks in New York and Madrid and the Belgian paedophilia cases.[60] The basis of additional measures was the gaps and inefficiencies in data exchange mechanisms which function 'randomly and slowly',[61] as demonstrated by the first round of evaluations of mutual legal assistance.[62] The proposal was put forward as the first part of a coordinated policy which would be supplemented by a harmonisation of national criminal records, without prejudice to the Commission's future response to the call of the European Council on 25 March 2004 for a European database of convictions and disqualifications. Own initiative transfer of data on convictions of own nationals to other Member States

[57] Commission of the EC, 'Communication from the Commission to the Council and the European Parliament on Measures to be Taken to Combat Terrorism and other Forms of Serious Crime, in particular to Improve Exchanges of Information; Proposal for a Council Decision on the Exchange of Information and Cooperation concerning Terrorist Offences', COM(2004)221 final; 2004/0069 (CNS), 29 March 2004, pp. 12–14.

[58] Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, OJ L 253/22, 29 September 2005.

[59] 'The Fight against Terrorism: The Commission Proposes Measures on the Exchange of Information and on the European Criminal Record', Press Release IP/04/425, 30 March 2004.

[60] Proposal for a Council Decision on the exchange of information extracted from the criminal record (presented by the Commission), COM(2004) 664 final, 2004/0238 (CNS), 13 October 2004.

[61] Proposal for a Council Decision on the exchange of information from the criminal record, at 2.

[62] OJ C 216, 1 August 2001, at 14.

and standardised forms for transfer of requested data on convictions were the main elements of the Council Decision,[63] which was envisaged to be replaced with a future initiative on a computerised mechanism for transfer of data on convictions. At the same time the Belgian delegation announced their proposal for an ECR.[64] However, in July 2006 the Council Decision was supplemented with a Manual of Procedure,[65] which attempted to address the continuing problem of delays and useless responses to requests for data on convictions undertaken by reference to the Council Decision. For this purpose the Council requested work at two levels: adaptation of internal structures to serious international crime and increasingly intensive discussion of the methods to be put in place for better exchange, sharing and use of existing databases within and between the various existing structures.[66]

Despite the Commission's intention to proceed with the ECR, Member States began to offer alternative solutions. Sweden with the support of the UK presented to the Council a draft Framework Decision viewing the issue of data exchange in a holistic manner that proposed facilitation of information exchange across the boundaries of judicial and police cooperation.[67] Following this trend and within days of the publication of the Council Decision in the *Official Journal*, the Commission presented its proposal for a Council Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States, which was introduced as a means of achieving a thorough reform of the national systems of data exchange.[68] Despite the clear focus of the proposal on

[63] Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, OJ L 322, 9 December 2005.

[64] Proposal for a Council Decision on the exchange of information extracted from the criminal record, 13994/04, 4 November 2004, p. 2.

[65] Council Decision on the exchange of information extracted from criminal records – Manual of Procedure, 6397/3/06 REV 3, 12 July 2006 and 6397/4/06, 28 September 2006.

[66] Council of the EU, 'Third Round of Mutual Evaluation Exchange of Information and Intelligence between Europol and the Member States and among the Member States respectively' – Report on the evaluation visits to 15 Member States (Sweden, Portugal, Germany, Finland, Belgium, France, United Kingdom, Luxembourg, Netherlands, Ireland, Italy, Denmark, Austria, Greece and Spain), 14292/2/05 Rev 2, CRIMORG 132, 17 January 2006, p. 6.

[67] Council of the EU, 'Draft Framework Decision on Simplifying the Exchange of Information and Intelligence between Law Enforcement Authorities of the Member States of the EU', 6888/3/05, 27 July 2005.

[68] COM(2005) 690 final, 2005/0267 (CNS), 22 December 2005.

national criminal records, the Commission made clear reference to the two IALS studies on national criminal records and the ECR,[69] but favoured the approach of a standard European format for conviction records.

In his Opinion on the proposal Peter Hustinx, the European Data Protection Supervisor (EDPS),[70] identified the change of approach from the ECR to the strengthening of data exchanges and commented on the need for additional measures to address the problems on data exchange resulting from differences in language and the technological and legal framework of the Member States. The EDPS articulated the obvious coexistence of competing parallel trends and initiatives that first presented themselves as early as 2004: strengthening bilateral exchanges,[71] introducing a genuine ECR as favoured by the Commission[72] and linking national criminal records in the model realised by the coalition of France, Germany and Spain, now joined by a total of nine additional member states.[73] The coalition now has further countries on board as Belgium, the Czech Republic and Luxembourg have joined the group.[74] Of course, there are those who reject all centralised solutions.[75] At its core the debate concerns the tussle between approximation of legislation and mutual recognition.[76] In fact, the choice of one approach over another is often interpreted as a two-stage approach, where facilitated exchange of data

[69] COM(2005) 690 final, p. 3.

[70] Opinion of the European Data Protection Supervisor on the 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), 29 May 2006.

[71] 'Roadmap' 2004/JLS/116, http://www.dti.gov.uk/files/file25605.pdf; Commission of the EC, 'White Paper on Exchanges of Information on Convictions and the Effect of such Convictions in the EU', COM(2005) 10 final, 25 January 2005, p. 6.

[72] 'EU rules out Central Criminal Register' *DW-World.DE*, 19 July 2004.

[73] 'EU to Consider Creation of an ECR', e-Government News, 21 July 2004, *IDABC*, EC, 2004; 'Cross-border Paedophile Case boosts EU Cooperation on Criminal Records' *EurActive.com*, 30 October 2006.

[74] J. Macke, 'Exchange of Information on Criminal Records' 3–4 (2006) *Eurcrim* 76–81, at 76–77.

[75] JUSTICE, 'EU Co-operation in Criminal Matters, Response to Specific Proposals', February 2001, para. 5.2.

[76] Luxembourg Presidency Press Release, 'Internal JHA: Strengthening Justice', 28 January 2005, www.eu2005.lu/en/ectualites/communiques/2005/01/2801frieden-justice/index.html; C. Morgan and J. Bateman, 'The EU and the Criminal' (2006) *The Journal of the Law Society of Scotland*, at 34.

constitutes a 'precursor'[77] of a 'computerised database of all criminal records in all EU countries'.[78]

The Commission analysed in detail the advantages and disadvantages of all three scenarios and admitted that bilateral exchanges and a network of national records present major disadvantages, especially with reference to the incredible amount of possible channels and access capacities and the continued problems in use and time of current mutual assistance responses.[79] Further disadvantages of networking, identified by the Council as problems in devising a system of overall project control, were continuing problems with gaps in convictions of non-EU nationals and EU nationals who are not entered in the national criminal records, and the need for multiple consultations for information not filtered by the law of the Member State of origin. The Council balanced its evaluation of this solution with advantages of networking: acceleration and improvement of information exchange, based on existing Council of Europe systems, obviating the need to establish and add to an index with, eventually, the creation of a standardised and comprehensible form of data exchange.[80]

As far as the Commission was concerned, the ECR avoided all disadvantages of bilateral exchanges and a network of national registers but suffered from disproportionality. The doubtful basis of this evaluation was the duplication of effort in entering the same data in both the national and EU record and data protection concerns. Instead, the Commission favoured a hybrid index of convicted persons rather than a proper ECR.[81] The advantages of the index compared to the linkage of national criminal records were identified as acceleration of data

[77] 'Parliament Approves European Criminal Record Swap', *EurActiv.com*, 30 October 2006; also see 'EU: Four Countries Sign Deal to Exchange Records', e-Government News, 7 April 2005.

[78] H. Billings, 'MEPs Back EU Criminal Record Shake-up', *Theparliament.com*, 22 February 2005; also H. Xanthaki and C. Stefanou, 'Initiatives Against Organised Crime: The Use of National Criminal Records as a Means of Combating Organised Crime', The 21st Cambridge International Symposium on Economic Crime, Cambridge 7–14 September 2003.

[79] Commission of the EC, 'White Paper on the Exchange of Information on Convictions and the Effect of such Convictions in the EU', COM(2005) 10 final, 25 January 2005, p. 6.

[80] Council of the EU, 'Policy Debate on the Exchange of Information Extracted from the Criminal Record', 7198/05, 22 March 2005.

[81] Council of the EU, 'Council and Commission Action Plan Implementing the Hague Programme on Strengthening Freedom, Security and Justice in the EU', 9246/1/05 REV 1, 30 May 2005.

exchange, easy identification of Member States where convictions were imposed, use of existing and proven infrastructures (SIS and Eurodac), facilitation of internal operational rules and the possibility of expansion to third-country nationals. Disadvantages of the index are compulsory inclusion in the index without consultation, volume of initial entries in the index and of daily movements and the additional burden for sentencing states.[82]

The Commission's proposal can be viewed as a soothing compromise to Member States that favoured the networking of existing criminal records as maintenance of a shred of sovereignty in the field. In a meeting of experts, which included a closed-doors discussion on the options presented by the Commission before Member States' delegations and experts from the IALS and Ghent University, the Commission presented the index in some detail.[83] The index would only include personal identification data for EU citizens with entries on the Member State where a conviction has been recorded. The idea was that national judicial authorities would access the index, key in the name of the person and acquire a list of countries where an entry in the national criminal record is currently live. The national judicial authority could then contact the relevant countries and seek a copy of the criminal record of that person via the normal channels of communication. Even within the meeting it became evident that the Commission's proposal could not be successful: the concerns of Member States opposing a centralised database were not alleviated by the introduction of a version of a centralised database, whereas Member States supporting or not objecting to a centralised database could not see the added value of the proposal. Indeed, it is difficult to justify the need for an additional legislative and technical burden upon national legislatures and administrations that would be called to make a double entry in the national record and the database with the mere benefit of 'awareness' of a criminal conviction elsewhere for which details could only be received by the generally accepted problematic mutual legal assistance mechanisms. Discontent was expressed by most national delegations and this seemed to put an end to the Commission's index approach. The question is, whether

[82] Council of the EU, 'Policy Debate on the Exchange of Information Extracted from the Criminal Record', 7198/05, 22 March 2005, p. 22.

[83] 'A European Criminal Record: The Future', Experts' Meeting on a European Registry for Disqualifications and Convictions, European Commission, DG Justice and Home Affaires, Directorate D, Internal Security and Criminal Justice, Unit D3/Criminal Justice, 27–28 September 2004.

this terminated discussions on the ECR whose necessity has not been doubted by many.

5. Further EU legislative initiatives

The timid presentation of the index of convictions by the Commission, its discouraging reception by Member States and the split of Member States over a proper ECR seem to have put the Commission's work on a centralised criminal record on hold. However, subsequent measures related to criminal records reveal intense movement in the field and predisposal for further Commission initiatives to be presented when the 'policy window' presents itself at a more opportune time. This tactic is far from unknown to the Commission, especially in cases where the desired core measure stumbles against clashing national legal traditions amongst Member States:

> policy entrepreneurs, such as the Commission, can and do bide their time until they can identify the optimum timing of a proposal. 'Optimum timing' is usually translated to either the removal of a particularly difficult specific hurdle, e.g. another institution or a Member State, or simply the identification of opportunities for political agreement. This 'policy window' is an important element of policy-making and often on it rests the successful or unsuccessful pursuit of a particular Draft.[84]

A measure standardising and recognising disqualifications amongst Member States was sought for a few years in parallel with the ECR,[85] but never came to fruition. For example, the relevant Danish initiative did not flourish, whereas the EU Convention on driving disqualifications has not been ratified by a handful of Member States.[86] This was due to the fact that a number of Member States were unfamiliar with the concept and resented its introduction via an EU legislative measure.

The Commission realised that in the area of the third pillar where unanimity is required, a head-on approach for an express measure on

[84] C. Stefanou and H. Xanthaki, (2000), 'The EU Draft Money Laundering Directive: A Case of Inter-institutional Synergy' (2000) 3 *Journal of Money Laundering Control*, at 337.

[85] The Hague programme adopted on 4–5 November 2004 recognised the crucial importance of disqualifications as sanctions; OJ C 53, 3 March 2005, at 1.

[86] Danish initiative 'with a view to adopting a Council Decision on increasing cooperation between European Union Member States with regard to disqualifications', OJ C 223, 19 September 2002 at 17; EU Convention of 1998 concerning driving disqualifications, OJ C 216, 10 July 1998 at 1 and OJ C 211, 23 July 1999, at 1.

disqualifications would not be successful. The Commission methodically proceeded with the introduction of numerous legislative proposals referring to disqualifications, while refraining from requiring harmonisation at that point. Thus, the Framework Decision on child pornography introduces disqualification of convicted persons from professional activities related to the supervision of children.[87] Similar professional disqualification is introduced in the Framework Decision on corruption.[88] The public procurement Directives demand exclusion from public tendering procedures for natural and legal persons convicted by final judgment for participation in a criminal organisation, corruption, fraud to the detriment of the financial interests of the Communities or money laundering.[89] Under the banking Directive credit institutions that are not of sufficiently good repute are not authorised to perform their duties.[90] The same applies to investment firms, trade in securities, statutory auditing of accounting documents and insurance.[91] A cluster of Directives already settle the issue of mutual recognition of disqualifications imposed by other Member States in the cases of the exercise of the right to vote and stand for election

[87] Article 5(3) Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography, OJ L 13, 20 January 2004, at 44.

[88] Article 4(3), Framework Decision 2003/568/JHA on combating corruption in the private sector, OJ L 192, 31 July 2003, at 54.

[89] Article 45(1), Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30 April 2004, at 114.

[90] Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, OJ L 126, 26 May 2000, at 1.

[91] Article 9, Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, OJ L 145, 30 April 2004, p. 1; Articles 5 a and 5 b, Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 375, 31 December 1985, p. 3; Article 3, Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents, OJ L 126, 12 May 1984, p 20; Articles 6(1)(a) and 8, Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, OJ L 345, 19 December 2002, p. 1 and Article 8, Directive 73/239/EC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, OJ L 228, 16 August 1973, p. 3, as amended by Directive 92/49/EC, OJ L 228, 11 August 1992, p. 1.

at municipal and European elections[92] and professional qualifications.[93] Where binding acts could not be agreed upon, resolutions have been put forward as a strong declaration of the need for further legally binding legislative solutions, should self-regulation and common approaches not work. A representative example of this can be traced in the Council Resolution on stadium exclusions which called for the recognition of stadium disqualifications imposed by other Member States.[94] On the basis of these numerous yet fragmented existing legal instruments, the Commission has recently returned to the issue of disqualifications seeking the introduction of a holistic new piece of legislation on the basis of the very strong argument that all relevant measures already passed by the Council have proved ineffective due to the lack of harmonisation of disqualifications.[95]

A similar approach seems to be on the cards for the ECR. This is evident from a number of relevant Commission proposals, some of which are already bearing fruit. First, the Commission's Communication on disqualifications presents fresh initiatives on acquiring data on convictions as a necessary prerequisite for any new proposals on disqualifications. Most crucially, the Commission presented a proposal for a Framework Decision (agreed by Parliament and Council without major difficulties and within just one year) requiring that in the pre-trial, trial and execution stage national authorities take into account convictions for criminal or, where required by national laws, administrative offences imposed in other

[92] Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, OJ L 368, 31 December 1994, p. 38, as amended by Council Directive 96/30/EC of 13 May 1996, OJ L 122, 22 May 1996, p. 14; Council Directive 93/109/EC of 6 December laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ L 329, 30 December 1993, p. 34.

[93] Article 56, para 2, OJ L 255, 30 September 2005, p. 22.

[94] Council Resolution of 9 June 1997 on preventing and restraining football hooliganism through the exchange of experience, exclusion from stadiums and media policy, OJ C 193, 24 June 1997, p. 1; Council Resolution of 17 November 2003 on the use by Member States of bans on access to venues of football matches with an international dimension, OJ C 281, 22 November 2003, p. 1.

[95] Commission of the EC, 'Communication from the Commission to the Council and the European Parliament; Disqualifications arising from criminal convictions in the EU', COM(2006) 73 final, 21 February 2006.

Member States.[96] The Framework Decision is crucial in the ECR debate because it is capable of making Member States appreciate the volume of data required as well as the difficulty of acquiring such data between the time of prosecution and sentencing. As soon as the Framework Decision is received by the national legal orders of the Member States, supporters of a centralised ECR can argue that disproportionality of the ECR – the only argument against it so far – is no longer an issue: in fact, the need for immediately accessible data on prior convictions in all twenty-seven Member States cannot really be fulfilled without the facility of a centralised database of convictions available upon demand from national authorities. The main focus of future debates will, therefore, revolve around the specific elements of the ECR which can guarantee feasibility, legality and proportionality of the instrument, in view of course of the new reality of urgency and necessity.

A number of relevant instruments are also being discussed. In its relevant multinational (twenty Member States), multidisciplinary feasibility study the IALS identified a lacuna in the access of national investigating and prosecuting authorities to foreign databases and recommended the establishment of an EU archive for investigations and prosecutions thus offering quick, accurate and unhindered access to data on investigations and prosecutions in all Member States. This archive could be introduced in two phases: in phase one a European network of national databases for investigations and prosecutions can allow the linkage of national databases in a system comparable to SIS; in the second stage a proper EU database for investigations and prosecutions can serve as the ultimate effective tool for the prevention and combat of serious, organised and transnational crime in the EU.[97] Phase one is currently being put forward to the Council by the Commission, albeit in a reserved and cautious manner.[98]

The second element of the Commission's 2004 strategy on the ECR has already been put into place. The then Commissioner Vitorino linked

[96] Draft Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, 15445/1/06 REV 1, 24 November 2006; also, COM(2005) 91 final (7645/05 COPEN 60).

[97] H. Xanthaki and C. Stefanou, 'Feasibility Study on the Creation of a Database on Prosecutions and Investigations: The EU Approach', European Commission AGIS Programme Study, Ref. No. JAI/AGIS/ 2003/002, 2003.

[98] Communication from the Commission to the Council and the European Parliament – Towards enhancing access to information by law enforcement agencies, 10745/04, 22 June 2004.

the creation of the ECR with the mutual recognition of judgments in criminal matters.[99] The relevant Council Framework Decision is already in place.[100] The link between the two initiatives is not difficult to identify. The creation of the ECR would inevitably bear the legal question of the value of prior convictions imposed by other EU legal orders for the purposes of sentencing and execution. Recognition of criminal judgments clarifies beyond doubt that the value of foreign criminal judgments is equivalent to that of criminal judgments imposed by the national courts. The Framework Decision on taking into account prior convictions completes the picture by clarifying the purpose and use of these recognised foreign criminal judgments.

In the meantime the Commission extends the debate on the ECR even further. Thus, the creation of a database for third-country nationals is being put into place. In the initial Roadmap the Commission based its proposal once again on the two IALS studies on national criminal records and the ECR and suggested the hybrid solution of the index.[101] Options proposed by the Commission in its recent Working Document[102] include an index of convictions for all crimes, an index of convictions for some crimes and an index of biometrical data at several levels. Moreover, the Commission extends availability of data beyond disqualifications and convictions. On 12 October 2005 the Commission adopted a proposal for a Framework Decision on exchange of information under the principle of availability.[103] The proposal involves the availability of data, such as DNA profiles, fingerprints, ballistic reports, vehicle registration information, telephone numbers and other communication data via online access or by transfer based on an information demand after matching solicited information with index data provided by Member States in respect of information that is not accessible online.

[99] 'EU to Consider Creation of an ECR', e-Government News, 21 July 2004, *IDABC*, EC, 2004.

[100] Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, 14040/06, 18 October 2006; also, OJ L 76, 22 March 2005, p. 16–30.

[101] Proposal for a Council Decision on the creation of an index of non-EU nationals convicted in an EU Member State, 2004/JLS/116.

[102] Commission Working Document on the feasibility of an index of third-country nationals convicted in the European Union, COM(2006) 359 final, 4 July 2006.

[103] Proposal for a Council Framework Decision on the exchange of information under the principle of availability, COM (2005) 490 of 12 October 2006.

Furthermore, exchange of data on short-term visas has been proposed recently.[104]

6. Conclusions

The inefficiencies of mutual legal assistance mechanisms have been identified by a number of studies and EU documents. However, the debate on the best possible solution for bypassing the problems of mutual legal assistance at a time of increased demand for accurate information of convictions for EU and third-country nationals is still heated. The IALS proposal for an ECR has been left aside, for now, and the Commission has tried to sell an index of convictions including solely entries of countries where the convictions have been imposed upon EU and third-country nationals. However, the index has proven an unpopular idea mainly due to its inability to bypass the very problems that it is trying to address: inherent hurdles in effective provision of data via a multitude of national databases.

The principle of mutual recognition and a number of recent instruments render the need for immediate access to data available in other Member States more urgent than ever. This has already created an environment that is more receptive towards effective, efficient and proportionate solutions. The ECR debate has not ended. The crucial question is which elements the proposal for an ECR should possess in order to maintain its supporters while alleviating the concerns of its opponents. In the exciting times for EU criminal law that lie ahead, the EU must be ready to respond to this question adequately and persuasively.

[104] Draft Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, 11632/06, 13 July 2006.

PART I

2

The European Criminal Record: Analysis

HELEN XANTHAKI

1. Introduction

The details of the European Criminal Record are crucial for its legitimacy under EU law and for its acceptance by the national legal orders of the Member States. The aim of this chapter is twofold: firstly, to assess the current level of standardisation in the use of criminal records as a national means of combating organised crime; and secondly, to evaluate the conditions under which an ECR could be possible in EU law. In order to achieve these aims the chapter will assess the effectiveness of the current use of national criminal records with particular emphasis on their use and effectiveness in cases of cross-border crime; it will then explore the reception of the ECR in the structure of bodies in the area of justice and home affairs and it will, finally, assess which EU legislative instrument could be used for its introduction and under which conditions this introduction could be attempted.

2. The current position

2.1. Content, use, access and erasure

The end of 1999 saw extensive reviews of national laws on criminal records in a number of Member States, most notably Belgium, Denmark, Greece, the Netherlands, Sweden and the UK mainly as a result of EU law on data protection and the Schengen agreement. Moreover, many of the then candidate countries made extensive amendments to their relevant legislation as a means of complying with EU data protection laws. Examples of this practice can be traced in Cyprus, Hungary and Poland.[1]

[1] IALS Studies 1999/FALCONE/197 and 2000/FAL/168 cited in footnote 3, 'White Paper on Exchanges of Information on Convictions and the Effect of such Convictions in the European Union', COM(2005) 10 final, p. 4.

National provisions on the content of criminal records in Member States remain diverse.[2] Although all existing Member States have national databases of criminal decisions having the value of *res judicata*, there is diversity as to the number of relevant archives in each country, the host of criminal records, the content of criminal records and the level of access allowed to them by each national law. In Belgium, Finland, Ireland, Italy and the UK the law allows for parallel local or regional criminal records, whereas in Austria, France, Germany, Ireland and the Netherlands archives including information of particular criminal offences are also kept. In Austria, Ireland, Sweden and the UK criminal record archives are kept by police authorities, whereas in Denmark, Finland, France, Germany, Greece and Spain criminal records are placed with the Ministry of Justice. This renders collaboration amongst national authorities and standardisation of treatment amongst EU citizens a rather unrealistic exercise. In Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Hungary, Ireland, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and the UK criminal records include entries on legal persons. In the Czech Republic, Italy, Germany, Greece, Latvia, Lithuania, Malta, Slovakia, Spain and Sweden convictions of legal persons are not included in criminal records. It is worth noting here that Italy and Lithuania recognise criminal liability for legal persons but do not record convictions of legal persons even when imposed by national courts. Thus, even where mutual legal assistance mechanisms are efficient, there is sometimes no information to transfer, even between Member States which recognise criminal liability for legal persons. Further discrepancies arise from erasure. Erasure is unknown in Ireland. In Latvia erasure takes place ten years after the death of the subject. In the other Member States each national law introduces its own period of rehabilitation, ranging from Denmark's ten years running from final discharge to Spain's two years running from the end of the conviction for convictions of up to one year.

Such variations are alarming, when one takes into account the obvious discrimination against EU citizens on the basis of their nationality, as the latter determines the law regulating their rehabilitation. National authorities combating organised crime face the paradoxical obligation of pursuing an EU citizen for a crime that has not yet been erased, while allowing another EU citizen of different nationality sentenced for the same crime at the same time to enjoy a free life in

[2] Commission of the EC, 'Commission Staff Working Paper, Annex to the White Paper on Exchange of Information on Convictions and the Effect of such Convictions in the EU', COM(2005) 10 final, SEC(2005) 63, 25 January 2005, pp. 8–13.

rehabilitation. For example, a German citizen convicted of money laundering acquires a 'blank' criminal record ten years after the imposition of a penalty of one year's imprisonment. In contrast, a Spanish national convicted for the same offence with the same penalty can acquire a 'blank' criminal record two years after the end of conviction, namely seven years before the German citizen. Moreover, German banking institutions would be excused for perceiving the blank criminal record of Spanish job applicants as proof that they have not committed an offence punished by more than one year's imprisonment for at least the last ten years, an assumption which would obviously be untrue under these circumstances. A similar paradox emerges from the real possibility of employment or successful tendering of a convicted Greek money launderer in Spain, where employers and tendering authorities are prevented from access to criminal records of their own and foreign EU nationals.[3]

Unfortunately, these rather depressing conclusions can only be strengthened by reference to the laws on criminal records applicable in the newer Member States. Admittedly, newly passed laws – upon accession – tend to be unanimous in their introduction of a central archive of data on prior convictions imposed on own nationals. However, in Hungary there are five types of archives relevant to criminal convictions, thus placing foreign authorities before a hard 'guestimate' about the most suitable archive for the data sought. In Cyprus, Hungary, the Czech Republic, Poland and Slovenia, there are centralised archives including information on prior criminal convictions. These are commonly kept by the Ministry of Justice, although Cyprus and Hungary differ in that the archive is kept by the Police Crime Record Office and the Ministry of Interior respectively. Thus, in most accession countries approaching the Ministry of Justice for information on criminal records would be a safe, albeit not foolproof, bet. However, the Czech Republic, Latvia and Slovakia do not recognise the criminal liability of legal persons; Lithuania does so, but does not record such convictions. Thus, the problem of lack of information on legal persons remains. The content of criminal records is fairly standard in the new Member States and tends to include full data on convictions, ancillary sentences, suspensions, pardons and sentence expiry. However, in Poland such sentences

[3] H. Xanthaki, 'National Criminal Records and Organised Crime: A Comparative Analysis', in C. Stefanou and H. Xanthaki (eds.), *Financial Crime in the EU: Criminal Records as Effective Tools or Missed Opportunities?* (The Hague: Kluwer Law International, 2005), pp. 15–42, at 19–26.

are only included in the criminal record if the imposing sentence is more than six months' imprisonment, whereas outstanding warrants of arrest are also recorded. Access to data included in criminal records is commonly allowed to the judicial authorities and to the subjects themselves. Apart from this baseline, however, there is a high degree of discrepancy on who is allowed what. In Hungary limited access is offered to the police, the National Judicial Council, and the General Prosecutor for employment purposes. In Poland indirect access is possible but only for reasons of employment in public duty.

2.2. Crimes committed by foreigners

Further discrepancies in the content of national criminal records arise with reference to data recorded on crimes committed abroad or crimes committed by foreigners. As the free movement of natural and legal persons within the EU allows for the unhindered provision of services and establishment in other Member States, it becomes increasingly important for the EU and its Member States to acquire effective weapons in their fight against organised crime. National criminal records, even improved, cannot possibly address the need for updated information on the criminal background of EU citizens, irrespective of where the crimes were committed or where the data is required. Or can they?

The comparative analysis of national laws on the inclusion of entries on convictions of foreign nationals in the host country and on convictions of nationals in other Member States is rather disturbing. All Member States include in their national criminal records all convictions of foreign nationals committed within their jurisdiction. This seems a rather effective weapon for the prevention of organised crime within each Member State, as long as crimes are committed by the same foreign nationals. However, if criminals return to the country of origin or establish themselves in a different Member State, the system offers little protection. In Cyprus, the Czech Republic, Ireland, Poland and the UK national criminal records do not include crimes of their own nationals committed outside their jurisdiction. It is chilling to envisage that criminals may travel abroad, commit serious criminal offences, serve their sentences and then return to their country of origin to resume a life of criminality with a presumption of innocent past behaviour.

Even in Member States, where in principle national criminal records include convictions of own nationals abroad, this exercise is undertaken under sets of conditions that eat into the effectiveness of the system. First,