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

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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


Sweden. 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.

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, 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. 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

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.  

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. 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, evident in current criminal trends, by use of mutual legal assistance (MLA) mechanisms. National judicial and investigation
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

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 Conventions24 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 agreements26 plague mutual legal assistance with inherent, and to a degree

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unavoidable, problems. 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

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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 and the multitude of grounds for refusal of mutual legal assistance under each international Convention present further impediments in obtaining accurate information from

criminal records in other Member States.\textsuperscript{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,\textsuperscript{32} substantive criminal provisions are still notoriously difficult to juxtapose,\textsuperscript{33} especially with the variety in the nature and regulation of offences which are not purely criminal.\textsuperscript{34} Administrative offences which may lead to criminal prosecution in one Member State may be purely criminal offences in another.\textsuperscript{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.\textsuperscript{36}

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...


Luxembourg. The Protocol to the Convention has not been ratified by Estonia, Greece, Ireland, Italy, Luxembourg, Malta and Portugal.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{46} the acquisition of data on prior convictions


\textsuperscript{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