



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.10.2004
COM(2004) 664 final

2004/0238 (CNS)

Proposal for a

COUNCIL DECISION

on the exchange of information extracted from the criminal record

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. Introduction

In all Member States criminal convictions are recorded by a variety of procedures in specific registers. There are exchange mechanisms to facilitate the transmission of this information between Member States, in particular under the European Convention on Mutual Assistance in Criminal Matters of 1959.¹ But an analysis of their operation reveals that they contain gaps and function randomly and slowly, no longer meeting the needs for judicial cooperation in a frontier-free area such as the European Union. Recent tragic paedophilia cases have also highlighted the serious malfunctioning of systems for the exchange of information on convictions between Member States. Likewise, the demands of the fight against terrorism are such that the quality of these exchanges must be improved quickly.²

The aim of this proposal is to improve the operation of existing mechanisms pending the adoption of a computerised system of information exchanges on criminal convictions between Member States. The Commission will shortly be presenting proposals for such a system, but its establishment will require major technical and legal work and it will be several years before it can become operational. This proposal accordingly does not set out to amend the nature of the obligations imposed on the Member States but only to make practical improvements to the current system, without prejudging the results of future work. That is, moreover, the reason why the Commission considers that recourse to a Decision, which does not involve approximation of national legal provisions, is the most effective means of achieving a rapid improvement of current practices.

The proposal provides for each Member State to designate a central authority and contains two major elements supplementing Articles 22 and 13 of the 1959 Convention.

The first part of the proposal aims to ensure that the criminal record in the Member State of the person's nationality is as complete as possible at the earliest opportunity, so that exhaustive information is quickly available on a Community national's criminal convictions in the territory of the European Union. The 1959 Convention already establishes an obligation for the Contracting Parties to the Convention to inform each other of convictions of their nationals, but the information is transmitted only once a year. This proposal would require the information to be transmitted without delay, as soon as it reaches the competent authorities of the convicting Member State. For the reasons given above, it does not change the nature of the obligations imposed on the Member States, and in particular it does not provide for any obligation for the convicting State also to inform the State of residence, which would have been conceivable for non-Community nationals or for Community nationals who reside in a State other than the State of their nationality. These situations will be addressed when the computerised information exchange system referred to above is set up.

The second part concerns requests for information extracted from the judicial record, currently governed by Article 13 of the 1959 Convention, and replies to these requests. The

¹ Council of Europe, European Treaties Series, No 30.

² See on this point the conclusions of the European Council of 25 March 2004 and the Commission communication to the Council and Parliament of 29 March 2004 on measures to be taken to combat terrorism and other forms of serious crime, in particular to improve exchanges of information (COM 2004 (221)).

proposal pursues several objectives. Since the 1959 Convention specifies no deadline for transmitting the information requested, the proposal supplements it by providing that a request for information extracted from the criminal record must be satisfied within a maximum of five days. To facilitate the exchange of information, it provides for standardised request and answer forms. These forms, available in all the languages of the European Union, should considerably lighten the burden of translation work.

In an area where persons enjoy freedom of movement, the improvement of the quality of information exchanges between Member States, in particular on criminal convictions, makes for a general increase in the level of security throughout the territory of the European Union. This objective can be achieved only by coordinated action in the European Union. This proposal merely seeks to improve the current convention-based mechanisms without fundamentally calling them into question. In that respect it complies strictly with the principles of proportionality and subsidiarity provided for by Article 2 of the Union Treaty and Article 5 of the EC Treaty.

2. Legal basis

The legal basis for this proposal is Article 31 of the Treaty on European Union, as amended by the Nice Treaty, which deals with joint action in the field of judicial cooperation in criminal matters, and Article 34(2)(c).

3. Financial statement

The implementation of the proposed Decision would entail no additional operational expenditure to be charged to the budgets of the Member States or to the budget of the European Union.

4. Comments on the articles

Article 1 - Definitions

This Article contains the definitions of “criminal record” and “conviction”. The definition of “convictions” takes account of the concept of offence under Article 51 of the Convention implementing the Schengen Agreement of 1990, taken over in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000.¹ It is consistent with the traditional scope of mutual judicial assistance.

The “criminal record” is the national register recording these convictions. Certain Member States may have several registers.

Article 2 - Central authority

This Article requires each Member State to designate a central authority for the purposes of the Decision.

¹ OJ C 197, 12.7.2000, p. 1.

Article 3 – Own-initiative information on convictions

This Article, combined with Article 2, specifies detailed rules for the application of Article 6(8)(b) of the Convention of 29 May 2000 with regard to the competent central authorities. It takes over the obligation contained in Article 22 of the 1959 Convention but specifies that information must be transmitted without delay.

Article 4 - Request for information on convictions

This Article concerns information requests and replies to them. It supplements Article 13 of the 1959 Convention. It does not replace the possibility available to the judicial authorities of transmitting information concerning criminal records direct to each other under Article 6(1) of the Convention of 29 May 2000. The judicial authorities may therefore obtain this information either by approaching their counterparts in the relevant Member State direct or by applying to the designated central authority.

The request is made on the basis of the form annexed to the Decision and is sent by the central authority of the requesting Member State to that of the requested Member State. The requested Member State must reply immediately, and in any event within a period not exceeding five days, using the reply form provided for. The reply must include any information transmitted under Article 3 and be accompanied by a statement of convictions.

Article 5 - Conditions for the use of personal data

This Article specifies the conditions for the use of data transmitted under Article 4. Data may be used for the purposes of criminal proceedings. Use for other purposes is governed both by the limits specified by the requested Member State and by national rules governing access to the information contained in the criminal record in the requesting Member State. Where information was transmitted for other purposes, the requested Member State may ask the requesting Member State to inform it of the use made of it. In accordance with the usual rules on data protection, the limitations on use do not apply to data obtained by a Member State and coming from that Member State.

Article 6 - Languages

This Article aims to facilitate exchanges of information as far as possible by providing in particular that the request must be sent by the requesting State to the requested State in one of the official languages of the requested State.

Article 7 – Relation to other legal instruments

This Decision supplements existing conventions and does not constitute an information exchange mechanism separate from them. But the proper functioning of the envisaged mechanism means that Member States must waive their reservations to Article 13 of the 1959 Convention.

Article 8 - Implementation

This Article requires the Member States to take any necessary measures to bring their national laws into line with this Decision no later than 30 June 2005.

Article 9 – Entry into force

This Article specifies that the Decision takes effect on the day of its publication in the Official Journal of the European Union.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 31 and 34(2)(c) thereof,

Having regard to the proposal from the Commission,¹

Having regard to the opinion of the European Parliament,²

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice. This objective presupposes the movement between the competent authorities of the Member States of information concerning criminal convictions of persons who reside in the territory of the Member States.
- (2) On 29 November 2000 the Council, in accordance with the conclusions of the Tampere European Council, adopted a programme of measures to implement the principle of mutual recognition in criminal matters.³ This Decision contributes to achieving the goals provided for by measure 3 of the programme, which calls for the establishment of a standard form like that drawn up for the Schengen bodies, translated into all the official Union languages, for criminal records applications.
- (3) Articles 13 and 22 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959⁴ provide for systems for the transmission of information on convictions between the Contracting Parties, but they are too slow to meet the demands of judicial cooperation in an area such as the European Union.
- (4) The final report on the first evaluation exercise – mutual legal assistance in criminal matters⁵ called on the Member States to simplify the procedures for transferring documents between States, using, if necessary, standard forms to facilitate mutual judicial assistance.

¹ OJ C [...] [...], p.[...]

² OJ C [...] [...], p.[...]

³ OJ C 12, 15.1.2001, p. 10.

⁴ Council of Europe, European Treaties Series, No 30.

⁵ OJ C 216, 1.8.2001, p. 14.

- (5) On 25 March 2004 the European Council instructed the Council to examine the possibility of a European register on convictions and disqualifications, and the Commission in its communication on measures to be taken to combat terrorism and other forms of serious crime, in particular to improve exchanges of information,¹ stressed the importance of an effective mechanism for transmission of information on convictions and disqualifications.
- (6) This Decision respects the principle of subsidiarity referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community since the improvement of systems for the transmission of information on convictions between Member States cannot be carried out adequately by the Member States unilaterally and requires coordinated action in the European Union. In accordance with the principle of proportionality, as set out in the latter Article, this Decision does not go beyond what is necessary in order to achieve that objective.
- (7) The improvement of systems for the transmission of information on convictions depends on convictions pronounced in a Member State against nationals of another Member State being known about as soon as possible and on each Member State being able to obtain the information contained in national registers which they need from other Member States within a very short time.
- (8) This Decision supplements existing conventions and does not constitute an information exchange mechanism separate from them. In particular, the provisions concerning requests for information extracted from the criminal record do not replace the possibility available to the judicial authorities of transmitting information concerning criminal records direct to each other under Article 6(1) of the Convention of 29 May 2000. It provides, however, for a specific right for the central authority of a Member State to send a request for information extracted from the criminal record to the central authority of another Member State, in the circumstances determined by national law.
- (9) The personal data processed under this Decision will be protected in accordance with the principles enacted in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data. In addition, since this Decision falls within the context of the current convention-based law on mutual judicial assistance, they will enjoy the protection of Article 23 of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union as regards the use made of the data exchanged.
- (10) Under Council of Europe Recommendation No R (84) 10 on the criminal record and rehabilitation of convicted persons, the main aim of establishment of the criminal record is to inform the authorities responsible for the criminal justice system on the background of a person subject to legal proceedings with a view to adapting the decision to be taken to the individual situation. Since all other use of the criminal record that might compromise the chances of social rehabilitation of the convicted person must be as limited as possible, the use of information transmitted under this Decision for use otherwise than in the course of criminal proceedings can be limited in accordance with the national legislation of the requested State and the requesting State.

¹ COM(2004)221.

- (11) This Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and restated by the Charter of Fundamental Rights of the European Union,

HAS DECIDED AS FOLLOWS:

Article 1
Definitions

For the purposes of this Decision, the following definitions shall apply:

- a) “criminal record”: the national register or registers recording convictions in accordance with national law;
- b) “conviction”: any final decision of a criminal court or of an administrative authority whose decision can be appealed against in the criminal courts establishing guilt of a criminal offence or an act punishable in accordance with national law as an offence against the law.

Article 2
Central authority

1. For the purposes of this Decision, each Member State shall designate a central authority.
2. Each Member State shall inform the General Secretariat of the Council and the Commission of the authority designated in accordance with paragraph 1. The General Secretariat of the Council shall notify the Member States and Eurojust of this information.

Article 3
Own-initiative information on convictions

Each central authority shall without delay inform the central authorities of the other Member States of convictions of nationals of those Member States registered in the national criminal record and of relevant subsequent entries in the criminal record.

Article 4
Request for information on convictions

1. Where information from the criminal record of a Member State is requested, the central authority may, in accordance with national law, send a request for information to the central authority of another Member State. All information requests shall be sent on the basis of request form A annexed hereto.
2. The reply shall be sent immediately and in any event within a period not exceeding five working days from the receipt of the request, under the conditions provided for by national law, by the central authority of the requested Member State to the central

authority of the requesting Member State on the basis of reply form B annexed hereto. It shall include the information transmitted in accordance with Article 3.

3. The reply form shall be accompanied by a statement of convictions.

Article 5

Conditions for the use of personal data

1. Personal data communicated under Article 4 may be used by the requesting Member State:
 - a) for the purpose of criminal proceedings;
 - b) for other purposes within the limits specified by the requested Member State and in accordance with national law of the requesting Member State.
2. Where personal data is transmitted under paragraph 1(b) of this Article, the requested Member State may ask the requesting Member State to inform it of the use made of it.
3. This Article does not apply to personal data obtained by a Member State under this Decision and originating from that Member State.

Article 6

Languages

1. Form A shall be sent by the requesting Member State in the official language or one of the official languages of the requested Member State. Any Member State may, at the time of the adoption of this Decision or at a later date, indicate, in a statement to the General Secretariat of the Council, what are the official languages of the institutions of the European Communities that it accepts.
2. Form B shall be sent by the requested Member State to the requesting Member State in the official language or languages of the requested Member State or in any other official language of the institutions of the European Communities that it wishes to use.

Article 7

Relation to other legal instruments

1. This Decision supplements and facilitates the implementation of Articles 13 and 22 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, its additional Protocols of 17 March 1978¹ and 8 November 2001,² the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders, the Convention on Mutual

¹ Council of Europe, European Treaty Series, No 99.

² Council of Europe, European Treaty Series, No 182.

Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000¹ and its Protocol of 16 October 2001.²

2. Member States shall waive the right to rely among themselves on their reservations to Article 13 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

Article 8
Implementation

Member States shall implement this Decision as soon as possible and in any event no later than 30 June 2005.

Article 9
Entry into force

This Decision shall take effect on the day of its publication *in the Official Journal of the European Union*.

Done at Brussels,

For the Council
The President

¹ OJ C 197, 12.7.2000, p. 1.

² OJ C 326, 21.11.2001, p.1.

Form A: Request for information extracted from the criminal record¹

a) Information relating to the requesting State:

Member State:

Central authority:

Contact person:

Telephone (with STD code):

Fax (with STD code):

E-mail:

b) Information relating to the identity of the person concerned by the request:

Name:

First name(s):

Maiden name, if appropriate:

Alias, if appropriate:

Sex:

Nationality:

Date of birth:

Place of birth:

Father's name (optional):

Mother's name (optional):

Residence or known address (optional):

c) Purpose of request:

criminal proceedings

other

¹ All the fields on this form are mandatory unless otherwise specified.

- request from a judicial authority outside the context of criminal proceedings
- request from a competent administrative authority
- request from the person concerned

Done at,

on

Signature and official stamp (if available):

Name and position:

Form B: Reply to a request for information extracted from the criminal record

a) Identification of request

Member State:

Central authority:

Date of request:

Name and first name(s) of person concerned:

Purpose of request:

- criminal proceedings
- other
 - request from a judicial authority outside the context of criminal proceedings
 - request from a competent administrative authority
 - request from the person concerned

b) Limits on the use of information

Use of form

- the form may be given to the person concerned
- the form may be given to a competent administrative or judicial authority
- the form may not be forwarded
- other limits: (specify)

Use of statement of convictions

- the statement may be given to the person concerned
- the statement may be given to a competent administrative authority
- the statement may not be forwarded
- other limits: (specify)

c) Reply

The undersigned authority confirms

- that there are no convictions recorded in the criminal record of the above-mentioned person
- that there are convictions recorded in the criminal record of the person concerned; these convictions are for offences in the following categories (reply **mandatory** – please tick the relevant categories)
- participation in a criminal organisation;
- terrorism
- trafficking in human beings
- sexual exploitation of children and child pornography
- trafficking in narcotic drugs and psychotropic substances
- trafficking in weapons, munitions and explosives
- corruption
- fraud, including fraud affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests
- laundering the proceeds of crime
- counterfeiting currency, including the euro
- computer-related crime
- environmental crime, including trafficking in endangered animal species and in endangered plant species and varieties
- facilitation of unauthorised entry and residence
- murder, grievous bodily harm
- illicit trade in human organs and tissue
- kidnapping, illegal restraint and hostage-taking
- racism and xenophobia
- organised or armed robbery

- illicit trafficking in cultural goods, including antiques and works of art
- swindling
- racketeering and extortion
- counterfeiting and piracy of products
- forgery of administrative documents and trafficking therein
- forgery of means of payment
- trafficking in hormonal substances and other growth promoters
- trafficking in nuclear or radioactive materials
- trafficking in stolen vehicles
- rape
- arson
- crimes within the jurisdiction of the International Criminal Court
- unlawful seizure of aircraft/ships
- sabotage
- conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods
- smuggling of goods
- infringements of intellectual property rights
- threats and acts of violence against persons, including during sports events
- criminal damage
- theft
- offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the Treaty establishing the European Community or under Title VI of the Treaty on European Union
- other

If necessary, whether the conviction was accompanied by the following sentence or sentences (please tick the relevant categories):

- total imprisonment:
 - number of years:
 - number of months:
 - firm
 - suspended
- fine (amount):
- prohibition or disqualification from engaging in an activity
 - activity concerned:
 - period (years):
- other (specify)

Done at,

on

Signature and official stamp (if available):

Name and position: