

# Criminal records and taking account of convictions & disqualifications

Summer Course on European Criminal Justice  
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Prof. Dr. Gert Vermeulen

t. +32 9 264 69 43

f. +32 9 264 84 94

Gert.Vermeulen@UGent.be

# Structure

26 June 2019 | Criminal records and taking account of convictions & disqualifications

acquis (pre-Amsterdam)

relevant EU initiatives

- context
- overview – state of affairs
  - FD 2009/315/JHA
  - D 2009/316 (ECRIS + classification)
  - FD 2008/765/JHA taking account of convictions
  - EULOCS
  - further remaining questions and challenges
  - Third Country Nationals (TCN)
- disqualifications

questions & discussion

research

publications

consultancy

conferences

# Acquis (pre-A'dam)

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## CoE treaties, chiefly

- 1959 MLA (Articles 13 & 22)
- 1960ies Road Traffic
- 1970 Int'l Validity Criminal Judgements
  - =MR *avant-la-lettre*

unsuccessful EPC-Convention 1991

Schengen (road traffic)

EU (Maastricht): 1996 driving licenses

...

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# Context EU initiatives (1)

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## Mutual Recognition (MR) Plan November 2000

- individualisation of sanctioning
  - take account of previous EU convictions in sentencing for newly committed offences
  - already earlier introduced for EUR fraud/counterfeiting
- give effect to disqualifications in MS of residence (e.g. driving license withdrawal) or all MS (e.g. working with children)
- mutual recognition of decisions to prosecute
  - link with avoiding 'double prosecution' (extended ne bis)
  - feasibility study requested re EU criminal records system and register of disqualifications
  - IRCP-initiated; co-financed by EC (Grotius)
  - Vermeulen et al (2002), Blueprint for an EU criminal records database

# Context EU initiatives (2)

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## Fourniret case 2004 (B-F)

- what? challenge (real, perceived)
- recalling Dutroux case 1996 (B), having triggered studies (IRCP) & policy initiatives re EU data collection sexual offences against children

## initiative European Commission

- White Paper 2005 (+ annex)
- building strongly on proposals Vermeulen et al
  - searchable central index system
  - detailed (folio) info remains in individual MS

## JHA Council April 2005: political 'dual track' scenario

- convictions against EU citizens
  - centralisation in MS of nationality
  - triggered by 'interconnection' pilot network (B-F-D-E) (expanded)
- convictions against 3rd country nationals (TCN)?

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# Overview – State of affairs

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Decision November 2005/876/JHA (abrogated from by)

FD 2009/315/JHA organisation & content

- centralisation info in MS of nationality
- “develop standardised European format for criminal records infoex in a uniform, electronic & easily machine-translatable way”
  - Unisys & IRCP – led to D 2009/316/JHA (ECRIS+ classification)
- improve application CoE 1959 MLA Convention
  - render Article 22 (more) performant
  - especially relevant for ministries/central authorities
- facilitate/accelerate crimrec-related MLA requests Article 13
  - especially relevant for decentral, competent authorities

FD 2008/765/JHA on taking account of earlier EU convictions

- addresses decentral, competent judicial authorities

study on disqualifications (IRCP 2012)

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# FD 2009/315/JHA

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implementation deadline: April 2012 | ECRIS operational since  
framework for a computerised system of crim rec infoex to MS nationality

obligations convicting MS and MS of nationality

request for info on convictions + reply 10 days

- updates Article 13 CoE 1959 MLA Convention

critiques

- no full generic EU data structure (infra)
- applying to natural persons only
  - contrary to our suggestions, and denying
    - EU obligation of corporate liability for offences (administrative, civil or penal) & EU hard law acquis re MR confiscations/fines
  - breakthrough following EU study?
    - IRCP 2011: JUST/2010/JPEN/PR/1009 Study on the liability of legal persons for offences in the MS' national legal systems

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Institute for  
International Research on Criminal Policy  
Ghent University

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# D 2009/316 (ECRIS + classification)

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implementation deadline/operational since: April 2012

ECRIS classification, partially transposing Unisys/IRCP study

- generic EU data structure/single interface/“criminal justice Esperanto”
  - offender-related fields
  - offence-related fields
    - encompassing EAW categories, pilot network families and classifications Europol IS & Eurojust CMS, etc
    - idea of EU classification of offences officially supported
      - DG JLS/D3 (crim records) + Unisys/IRCP (crime statistics)
      - EULOCS (enhancing internal coherence EU criminal policy)
  - decision-related fields
  - sanction/measure-related fields
- making most of info machine-translatable
- providing end-user useful interpretative info
  - not enough: cfr EULOCS



# FD 2008/765/JHA taking account of convictions

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implementation deadline: August 2010

In the course of new proceedings, MS must take account of previous convictions of the same person in other MS for different facts ...

- info on previous convictions in EU MS through MLA or crim rec infoex instruments (systematic)
- applicability to legal persons? (Y but)
- not only for typical 32 MR offences, but for any

... in that they must attach “equivalent” legal effects to them as to previous national convictions, in accordance with national law

- dual criminality required? (Y)
- loads of problems, both for general and specific reoffending (examples)
- need for full generic EU data structure, with enhanced offence interpretability (and limitation applicability to jointly identified offences throughout EU (EULOCS) and EU sanction scales
- ideally through double legal qualification (national + EU) (extra work)

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# The EU Level Offence Classification System

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bench-mark for enhanced internal coherence of the EU's criminal policy

- including in the area of criminal records infoex

improved ECRIS classification

- exclusive categories
- incorporating/centered around EU approximation acquis
  - clustering of common denominator underneath “jointly identified parts of offences”
  - i.e. much wider acquis than 32 MR list, for which dual criminality test can be omitted
  - i.e. joint acquis = trust-building
  - = also tool for delineating Europol/Eurojust access (mandated offences incorporated)
- including definitions (usually from binding EU acquis) for interpretability in application FD 2008/675/JHA

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# EULOCS - illustrated

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<b>0906 00</b>	<b>MONEY LAUNDERING</b>
<b>0906 01</b>	<b>Offences jointly identified as Money Laundering</b>
0906 01 01	The conversion or transfer of property
0906 01 02	The illicit concealment or disguise of property related information
0906 01 03	The illicit acquisition, possession or use of laundered property
0906 02	<b>Other forms of Money Laundering</b>

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

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# Remaining questions and challenges

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limited/no involvement end users (judicial & police authorities | explain)

use common format (generic structure?) also for

- direct exchange under Article 13 1959 Convention

maximize investigative/prosecutorial value criminal records infoex system

- make offence-/other fields searchable
  - currently searchable on name/id fields, in case of known EU nationality
- link in with Europol information system
- establishment ne bis in idem situation (+ Eurojust access/CMS)

role Eurojust in hosting index-system (a.o. for 3rd states' access)?

additional EU legislation based on MR concept

- regarding legal effect inclusion following notification
  - currently no added value for Fourniret-like cases ☹️
- limited introduction EU-certificates non-prior conviction (see infra)

extension to legal persons (open access hereafter)

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## Liability of legal persons for offences in the EU

G. Vermeulen  
W. De Bondt  
C. Ryckman

Principal  
European Commission  
DG Justice  
(JLS/2010/JPEN/PR/0009/E4)



# Third Country Nationals (TCN) | 1

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Vermeulen et al (2002), Blueprint for an EU Criminal Records Database

- centralized searchable index (for EU nationals and TCN), hit/no hit based working doc COM(2006)359 | Unisys study ECRIS-TCN

COM(2016) 7 final (January 2016): Proposal for a directive amending FD 2009/315/JHA, as regards the exchange of information on TCN and as regards ECRIS, and replacing Council Decision 2009/316/JHA (decentralized automated storage and exchange of both fingerprints and alphanumeric data of convicted TCN)

**Directive (EU) of 17 April 2019** amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA [[link](#)]

- transposition: due end of June 2022
- continued declarations-based application with (only) Denmark of D 2009/316

# Third Country Nationals (TCN) | 2

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April 2016: additional study on the feasibility and costs of a centralised automated system for fingerprints combined with decentralized automated system for alphanumeric data

May 2016: yet another study on a centralized automated system for both fingerprints and alphanumeric data | JHA Council 9-10 June 2016: choice for such centralized system

February 2017: debate on crime categories for which fingerprints can be exchanged

COM(2017) 344 final (29 June 2017): Proposal for a regulation

lengthy dialogue

**Regulation (EU) 2019/816 of 17 April 2019** establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726 ([link](#))

- centralized ECRIS-TCN system to identify which MS holds information of TCN, with actual exchange of TCN information through ECRIS (FDecision 2009/315/JHA as amended by the Directive)
- managed by eu-LISA and supervised by EDPS
- part of the Interoperability proposals (linked to a European search portal, a shared biometric matching service and a common identity repository) and ETIAS
- with access for Europol and Eurojust, the latter also acting as central contact point for 3rd states, as well as for EPPO
- also facial images
- dual EU-non-EU nationality included in ECRIS-TCN

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# Disqualifications

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no breakthrough notwithstanding EU study

- IRCP 2012: JUST/2010/JPEN/PR/1010 Study on disqualifications as a sanctioning measure in the national systems of the Member States

preliminary EC/IRCP approach

- policy focus on children, road traffic, procurement - global approach
- extension to legal persons important
- distinction between
  - disqualifying effect of certain convictions
  - disqualifications expressly pronounced
  - effect of convictions/disqualifications in that they bar certificate(s) non-prior conviction, required for certain (professional, leisure, ...) settings
- transborder/EU effect
  - no more negative impact than in sentencing MS (lex mitior)
  - equality before the law in internal market
  - EU vertical (harmonised minimum) approach in tender procedures etc

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The  
disqualification  
triad

Approximating  
legislation  
Executing requests  
Ensuring equivalence

Gert Vermeulen  
Wendy De Bondt  
Charlotte Ryckman  
Nina Peršak

Principal  
European Commission  
DG Justice  
(JUST/2010/JPEN/PR/0010/E4)

# Disqualifications | The triad

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## flexible system

### approximating legislation

- certain behaviour (approximated) may be required to prompt a certain disqualification in all MS
- can be made trackable in ECRIS/EULOCS

### executing requests

- MS to where a person moves, may be required to recognize a disqualification imposed in a MS where it is no longer felt by the person concerned, if the latter MS requires so
- = mutual recognition as in FD probation orders and alternative sanctions

### ensuring equivalence

- quite comparable with FD taking account of prior convictions
- in that MS would be required to give at least equivalent disqualifying effects to foreign convictions and disqualifications
- being allowed to go further if they choose to do so in their domestic legislation (examples)
- by requiring certificates of non prior conviction or disqualification in both public and private (employment) settings

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# Questions and discussion

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## Contact

Prof. Dr. Gert Vermeulen

t. +32 9 264 69 43

f. +32 9 264 84 94

Gert.Vermeulen@UGent.be

[in http://www.linkedin.com/in/gert-vermeulen-42b00068](http://www.linkedin.com/in/gert-vermeulen-42b00068)

## IRCP

Ghent University  
Universiteitstraat 4  
B – 9000 Ghent