A European Criminal Record as a means of combating organised crime

National Report for Denmark

by

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Contents

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1.1. The Danish Central Crime Register

The Danish Central Crime Register (Det centrale Kriminalregister), containing criminal records, is kept by the Ministry of Justice in pursuance of the Act on Processing of Personal Data (APPD)[1] implementing the EU Data Directive.[2] Pursuant to sec. 32 (5), and sec. 72, of the act, the "competent minister may in special cases lay down more detailed rules for processing operations carried out on behalf of the public administration". Provisions governing the use of criminal records did in fact exist prior to the adoption of the Processing of Personal Data Act which did not essentially change the law regarding criminal records.[3] The provisions governing the area have been embodied in a departmental order "Order on Processing of Personal Data in the Central Crime Register", 2001, hereafter called the "Crime Register Regulations", CRR.[4]

Surveillance of registers established by public authorities (and private persons or enterprises) in Denmark, including the "Central Crime Register", is performed by the Data Protection Agency which is an institution under the Ministry of Justice.[5] The Data Protection Agency ensures that the conditions for registration, disclosure and storage of data on individuals – and to a certain extent also on private enterprises – are complied with.

The National Police Commissioner is responsible for the keeping of criminal records and for observing the conditions for registration, disclosure and storage of the data. The Central Crime Register itself consists of two sections: A Register of Judgments and a Register of Investigation. The purpose of the first mentioned is to hold information on criminal judgments, including military criminal cases. The purpose of the latter is to hold information of significance to police investigations. The source of information is mainly the criminal justice system itself.

The breakdown in different parts reflects the main purposes of the criminal records' database:

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[1] Act No. 429 of 31 May 2000.

[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (395L0046).

[3] But for the article numbers, the outline of the Danish National Report: "The use of criminal records as a means of preventing organised crime in the areas of money laundering and public procurement: the need for Europe-wide collaboration" (Falcone Project JHA/1999/FAL/197) is still to be considered valid.

[4] The Crime Register Regulations have been issued according to section 72 of the APPD: "Bekendtgørelse om behandling af personoplysninger i Det Centrale Kriminalregister", No. 218 of 27 March, 2001. See: http://147.29.40.90/DELFIN/HTML/B2001/0021805.htm

[5] The Danish Data Protection Agency exercises surveillance over processing of data to which the act applies. The Agency mainly deals with specific cases on the basis of inquiries from public authorities or private individuals, or cases taken up by the Agency on its own initiative. Persons domiciled abroad may also obtain assistance from The Danish Data Protection . http://www.datatilsynet.dk

a) The Register of Judgments is used for the production of transcripts of criminal records reflecting the pasts of the convicted persons, and
b) the Register of Investigation, containing information on criminals, charges, deprivation of liberty etc., is used by the police and the prosecution in the administration of justice.
c) A third purpose of the criminal records is that of forming the basis of the national crime statistics which are prepared each year by Statistics Denmark, pursuant to CRR sec. 35.

1.2. The contents of the Central Crime Register

The Crime Register Regulations consist of 9 chapters and 6 annexes. The most important contents concern rules of disclosure which are found in the chapters 3 through 6: Ch. 3 (data access for the registered person him or herself), ch. 4 (data access for private persons), ch. 5 (data access for research purposes), ch. 6 (data access for public authorities). Access to criminal records by the data subject and by private persons with the explicit consent of the data subject which is commonly used in connection with job applications is subject to time limits specified by individual sections of the CRR – not to be confounded with deletion of criminal records from the register, provisions on which are placed in the annexes 3 and 4 of the CRR.

1.2.1 The data types contained in the Register of Judgments, Annex 1

The information contained in the Annex 1 of the Register of Judgments consists of the following:

Convictions regarding violation of the Criminal Code; acquittals only being admitted in cases where the perpetrator is found not guilty due to insanity.
Convictions regarding infringements of criminal provisions in legislation other than the Criminal Code, on condition that the punishment consists of deprivation of liberty or of rights, or special conditions are attached to the sanctions, including sanctions for mentally disabled offenders.
Judgments in military criminal cases involving use of deprivation of liberty.
Withdrawal of charges, unless they have been dropped unconditionally.
Judgments of appeal.
Release from imprisonment.
Free pardon.
Decisions on reimprisonment of persons on parole.
Orders of execution made in another European country than the country of jurisdiction.
Transfer of supervision orders regarding conditional imprisonment and release on parole to another Nordic country.
Change or repeal of court orders regarding treatment due to mental disorders or deprivation of rights.
Other kinds of change or repeal of judgments or orders registered.

The international rules regarding criminal law orders or sentences passed in a country other than Denmark are the following:

Judgments made in the Nordic and in the European Council member countries regarding Danish citizens or other people domiciled in Denmark at the time of the crime will be registered just like Danish judgments, provided they have been made known to the Danish authorities. Whereas judgments made in other countries than the above mentioned are registered only, in case it is comparable to Danish administrative decisions or court orders in the opinion of the National Police Commissioner.

1.2.2 The data types contained in the Register of Investigation, Annex 2

In the Annex 2 of the register is listed a large number of different kinds of information, the overall purpose being facilitating police investigation. This information is subdivided into 15 different groups:

1. Identity of the person or legal person: Identity numbers, adresses, residence or whereabouts, description, etc.
2. "Actuality markings", in the sense that the police takes an interest in the person, notwithstanding he or she is involved in a pending case.
   Information of this kind may consist in information regarding possession of arms, disposition of violence, abuse of alcohol, narcotic addiction, confiscation of passport, terrorism, etc.
3. The file: Record No., reference of the case to another authority, etc.
4. Searches: Date, authority, warrant, etc.
5. Charges: type of crime, date, scene of crime, etc.
6. Information regarding imprisonment.
7. Administrative criminal law judgments and court orders
8. Special kinds of reports: warnings, protective orders, bans or commands.
9. Lost identity papers, except passports and driving licenses.
10. Information regards prison leave.
11. Children under 15 years of age.
12. Special registration warranted by the Public Prosecutor for Serious Economic Crime of especially hard criminals or of currently interesting photos of persons, registration warranted by the National Commissioner's National Centre of Investigative Support or warranted by the National Commissioner's DNA Centre.
13. Notes of special interest.
14. False identity information
15. Other serious police matters, in case the recording is necessary in order to fulfil the tasks of the Register.

Are crimes committed by foreigners in your country or crimes committed by nationals of your country abroad included in your national criminal records?

2. Recording of foreign judgments in the Central Crime Register

As mentioned above under 1.2.1 – Annex 1 – information on criminal law orders or sentences passed outside Denmark is contained in the Central Crime Register.

As can be seen, judgments originating from the other Nordic countries occupy a special position, reflecting the extensive cooperation in criminal matters which has developed between the five Nordic countries Denmark, Finland, Iceland, Norway, and Sweden after the Second World War, covering many aspects of criminal justice e.g. extradition, transfer of sentenced persons, collection of fines, and transfer of proceedings between the Nordic countries. During the same period of time Denmark signed and ratified practically all of the Council of Europe conventions in criminal matters.

The following rules apply to Danish judgments as well as to judgments originating from the above mentioned countries, provided the judgments in question have been announced to the Danish authorities: Sentences passed in the Nordic countries and in the Council of Europe member countries on Danish citizens or persons domiciled in Denmark at the time of the crime will be recorded just like Danish sentences.

Sentences passed in countries other than the above mentioned are likewise to be recorded, in case the National Police Commissioner considers the sentence to be comparable to a Danish one.

What mechanisms of collaboration with foreign authorities are there for exchange of information included in criminal records (Interpol, Europol, bilateral agreements etc.)? Do you consider the current collaboration amongst national authorities on the exchange of data included in national criminal records adequate for the prevention of organised crime?

3.1. Rules of disclosure in the Act on Processing of Personal Data

3.1.1 Transfer of personal data to third countries

Pursuant to sec. 27 (1) of the Act on Processing of Personal Data transfer of personal data to third countries may take place only if the third country in question ensures an adequate level of protection. "Third countries" are defined in sec. 3 (9) of the act as being any state which is not a member of the EC and which has not implemented agreements entered into with the EC containing rules corresponding to those laid down in Data Directive 95/46/EC. The Nordic countries Iceland and Norway which are not EC member countries have entered into agreements of this kind and implemented the

necessary data legislation, hence they are not to be considered to be – and treated like – third countries. Third countries, momentarily recognized by Denmark to fulfil the protection level requirements, are Canada, Hungary, and Switzerland

Even though the third country does not fulfil the protection level requirements listed in subsection 1, transfer of information is made possible by sec. 27 (3) stipulating 8 further situations which may allow transfer. Regarding the criminal justice area, the numbers 7 and 8 attract special attention:

APPD sec. 27 (3):

No.7 the transfer is necessary for the prevention, investigation and prosecution of criminal offences and the execution of sentences or the protection of persons charged, witnesses or any other persons in criminal proceedings; or

No.8 the transfer is necessary to safeguard public security, the defence of the Realm, and national security.

Outside the scope of the transfers referred to in subsec. 3, the Data Protection Agency may authorise a transfer of personal data to a third country which does not comply with the provisions laid down in subsec. 1, where the controller adduces adequate safeguards with respect to the protection of the rights of the data subject. More detailed conditions may be laid down for the transfer. The Data Protection Agency shall inform the European Commission and the other Member States of the authorisations that it grants pursuant to this provision (sec. 27 (4) of the APPD).

3.1.2 Transfer of personal data to the EC countries

Pursuant to section 1 (1) of the APPD, the act applies to the processing of personal data by automatic means as well as to the manual processing of data filing systems. Unlike the preceding data legislation the act does not limit itself organisationally, which means that it is not limited to data processing on behalf of Danish authorities. Thus, Danish data may be processed by/transferred to foreign processors provided that the processing is otherwise allowed, subject to current rules of disclosure.

In the field of criminal justice special rules apply to these undoubtedly sensitive data. The provision in section 8 (1) of the APPD constitutes the general rule governing this area. It delimits the processing of sensitive data, including criminal records, by public administration to

APPD sec. 8 (1):

> **cases where such processing is necessary for the performance of the tasks of the administration.**

Section 8 (2) further stipulates that disclosure of such data may take place where:

1. the data subject has given his explicit consent to such disclosure; or
2. disclosure takes place for the purpose of pursuing private or public interests which clearly override the interests of secrecy, including the interests of the person to whom the data relate; or
3. disclosure is necessary for the performance of the activities of an authority or required for a decision to be made by that authority; or
4. disclosure is necessary for the performance of tasks for an official authority by a person or a company.

Below the more specific situations will be outlined, where disclosure of criminal records is provided for by the Crime Register Regulations. Still, the above mentioned conditions in section 8 of the APPD must be observed at all times.

3.2 Transfer of criminal records pursuant to the Crime Register Regulations

Chapter 6, sections 19-35 of the Crime Register Regulations outline the rules of disclosure regarding transfer of information to public administrations. The main principle being that full transcripts of criminal records are issued on request of institutions belonging to the criminal justice system itself for the purposes of criminal prosecution and hiring of personnel (sec. 21).

Access to criminal records in the Register of Investigation is admitted in pursuance of section 21 (1) no. 9 to the police, the prosecution and the courts of the Nordic countries and of the Council of Europe member states for the purpose of criminal proceedings abroad. The information is communicated with no reservations just like information transferred to Danish authorities. On condition that it is found advisable in the individual case according to the estimation of the Police Commissioner,[6] criminal records may likewise be transferred to prosecution authorities and courts in foreign countries which are neither Nordic nor Council of Europe members.

Criminal records may also be disclosed to relevant authorities in a Nordic country with a view to cases of application for citizenship and for driver's licences, section 21 (1) no. 8.

In isolated cases other than the above mentioned it is stipulated, that the police is entitled to communicate criminal records, provided that the disclosure takes place with a view to situations like those described in section 8 (2) nos. 2 and 3, of the APPD (pursuit of private or public interests which clearly override the interests of secrecy, including the interests of the person to whom the data relate; or disclosure necessary for

[6] Crime Register Regulations section 21 (1) no. 10.

the performance of the activities of an authority or required for a decision to be made by that authority).

3.3 Transfer of crime data pursuant to the Europol and Schengen Conventions

The Schengen Convention of 1990 as well as the Europol Convention of 1995 was accessed to and implemented by Denmark in 1997.[7] The Schengen Agreement does not, however, permit transfer of criminal records as such to foreign authorities; the purposes of the Schengen cooperation are of an investigative nature which is reflected in the interchange of information. Pursuant to article 94, subsection 3, the contents of the Schengen Information System (SIS) mainly consist in information on identity, plus information on the fact that the wanted person can be expected to be armed or violent.

The objects of the Europol Information System (EIS) are much wider. According to the articles 6 through 8 of the Europol Convention information on identity and criminal records etc. is to be stored in special Europol databases, e. g. information coming from the Register of Judgments as well as the Register of Investigation of the Central Crime Register, on condition, of course, that the objects of investigation lie within the purposes of the Europol. Thus, the Europol Agreement permits transfer of criminal records within the framework of the cooperation.

The purposes of Europol have been widened during the last couple of years in order to strengthen the cooperation between the EC member countries with a view to the struggle against different forms of international organized crime. Recently its mandate has been extended to deal with the serious forms of international crime listed in the Annex to the Europol Convention, effective from January 1st, 2002.[8] As the list of crimes in the Annex comprises property offences which constitute the greater part of ordinary crime, it is safe to say that practically everyone with a crime record risks showing up in the Europol Information System database.

Disclosure of sensitive data to the organs of the above mentioned organisations, the SIS and the EIS, is not being mentioned by the Danish Processing of Personal Data Act, let alone the Crime Register Regulations. The disclosure derives its justification directly from the Acts by means of which the Schengen and the Europol conventions were implemented; the purpose of the disclosure consisting in the fulfilling of the tasks which have been assigned to the administrative public bodies, instituted by the conventions. Danish law does, however, apply to the Danish part of the Schengen and Europol Information Systems. The security for the individual against illegal disclosure consists in the fact that all the EC member countries have implemented similar data security legislation with a view to the EC data directive, and in the fact that great efforts have

[7] The Danish Act of Accession to the Schengen Convention, No. 418, and the Act on Implementation of the Europol Convention No. 415, both of June 10, 1997.
[8] Official Journal of the European Communities 2001/C 362/01

been put into establishing control and supervision boards of the Europol and Schengen systems and into the appointing of a European Data Protection Supervisor.[9]

3.4 Adequacy of current collaboration regarding exchange of data included in national criminal records in the combat against organised crime in the European Union

The shortcomings of traditional methods of collaboration in the field of criminal justice have recently been described and exemplified in detail in the Green Paper on criminal-law protection of the financial interest of the Community and the establishment of a European Prosecutor.[10] It stands to reason that cross-border cooperation between national public procecutions needs improvement which would be beneficial to law enforcement.

However, pursuant to section 21 (1) no. 9 of the Danish Crime Register Regulations[11] criminal records are disclosed to the police, prosecution and the courts of the Nordic countries as well as to the authorities of the Council of Europe member states for the purpose of criminal proceedings abroad. It is not a problem to gain access to this information by means of mutual assistance in criminal matters. Moreover, an EC convention to this end has been agreed to.[12]

The framework supplied by the Europol and by the plans for the Eurojust are to a great extent intended to enhance the prevention of organised crime. Easy access to criminal records is an integral part of the Europol as well as the proposed Eurojust organisation.[13]

Criminal records play a role outside the criminal justice administration in a narrow sense, e.g. forming a part of the pre-qualification process in the area of public procurement.[14] In this area disclosure of a criminal record requires the acceptance of the data subject according to Danish law.

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[9] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (301R0045).

[10] Commission of the European Communities, European Anti-Fraud Office (Olaf), Brussels, 11.12.2001: COM(2001)715 Draft Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor.

[11] See the above paragraph 3.2.

[12] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01)

[13] The European Council decided on creating Eurojust on December 6th, 2001. See sec. 7 no 4 of the proposal regarding the immediate access to criminal records of the national members of the Eurojust. (14766-r1dk1.pdf)

[14] See article 46 of the Commission proposal for a Directive on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (500PC0275; 2000/0115).

Would the creation of a European Criminal Record containing data on all convictions of all EU citizens be in clash with privacy legislation and human rights within your jurisdiction?

4. The Danish Central Crime Register is kept in Denmark

One of the main purposes of the EU Data Directive and of national legislation on data processing is protection of the privacy and family life of the individual. The main principles of privacy protection are found e.g. in the article 8 of the Human Rights Convention[15] as well as in criminal law, like in chapter 27 of the Danish Criminal Code.[16]

It is commonly held that human rights do not prevent public administration from keeping criminal records altogether. Out of consideration for the rights of the individual, privacy safeguards have been introduced into the law like e.g. the disclosure provisions of the APPD (sec. 8), mentioned above under paragraph 3.1.21.

However, in Danish law it is also being held that the functions of the Central Crime Register as a whole cannot be performed by a processor situated outside the borders of Denmark. The rule also applies to EC member countries.[17] This opinion which is referred to as the "rule of war" has been deduced from section 41 (4) of the APPD:

> As regards data which are processed for the public administration and which are of special interest to foreign powers, measures shall be taken to ensure that they can be disposed of or destroyed in the event of war or similar conditions.

Thus, it would be inconsistent with Danish law to transfer all criminal records contained in the Central Crime Register to a register of European Criminal Records. Thus, a possible European Criminal Record database can not include exhaustive information on all crimes committed by the Danish people. On the other hand, Denmark has in fact joined the Europol cooperation entailing transfer of records regarding Danish criminals to the Europol. One could argue that the establishment of a European Criminal Record ought to serve important needs; otherwise the emergence of a strong opposition in the population against transfer of sensitive data could be envisaged.

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[15] Council of Europe: Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no.: 005, Rome 1950.

[16] Chapter 27 of the Criminal Code: Offences Against Personal Honour and Certain Individual Rights : Section 264 d punishes "Any person who unlawfully passes on information or pictures concerning another person's private life …". Similar actions are punished by section 152, when they are carried out by a public servant: "Any person who is exercising or who has exercised a public office or function and who unlawfully passes on or exploits confidential information which he has obtained in connection with his office or function shall be liable …".

[17] This issue was thoroughly discussed during the parliamentary reading. See http://www.folketinget.dk : Ft. 1998-99 L44, bil. 73. Kristian Korfits Nielsen & Henrik Waaben: Lov om behandling af personoplysninger med kommentarer, Jurist- og Økonomforbundets Forlag 2001, p. 367.

The fact, that the Central Crime Register can not be moved physically to a foreign country in its entirety, makes it questionable, whether a European Criminal Record could be established under Danish law. Certainly, establishment must be conditional to the requirement that the register does not include all Danish convictions in which case the European Criminal Record could be seen as inconsistent with APPD section 41 (4).

Would a European Criminal Record containing data on crimes with an international dimension, such as those included in the Corpus Juris, be more acceptable? Which specific crimes would you envisage that the European Criminal Record may include?

5. The need for a European criminal record: unification or approximation

The expediency of creating a European criminal record in order to help combat organised cross-border crime varies according to the future level of cooperation in criminal matters envisaged in the European communities. On the assumption of a complete harmonisation or rather unification of criminal law in the EC member countries, there would be no question of the need for a European criminal record. The political realities are, however, at present not in favour of such prospects, and may be they never will be. As a preliminary approach to the question, one might take a look at three different scenarios:

a) Adoption of the Commission proposals for Eurojust and the European prosecutor and introduction of the Corpus Juris.[18]
b) Adoption of the Commission proposal for Eurojust.
c) Continuation of the existing cooperation within the European Judical Network (EJN).

Assuming a), a common area of justice will exist regarding community fraud, corruption etc. justifying the establishment of a European criminal record which appears to be a natural part of the administration of justice within the EC, at least regarding offences against EC property and institutions.

In situation b) the criminal justice collaboration between the EC member countries is kept safely within the third pillar area, where Denmark participates fully observing the Danish opt-outs to the Maastrict Treaty.[19] The Eurojust convention may be anticipated

[18] RE Eurojust, see note 12; RE the European Prosecutor, see the Green Paper mentioned in note 9. RE Corpus Juris, see *The Implementation of the Corpus Juris in the Member State*s, M. Delmas-Marty / J.A.E. Vervaele, Intersentia, Utrecht, 2000.
[19] The Danish opt-out to the treaty of the European Union regarding Justice and Home affairs: "Denmark will participate fully in cooperation on Justice and Home Affairs on the basis of the provisions of title VI of the Treaty on European Union." http://www.eu-oplysningen.dk/english/denmark/edinburgh/

to bring about an increase as well as a facilitation of everyday cross-border cooperation.[20]

The attitude of this author towards the expediency of a European criminal record is the following:

While the idea of having a criminal record covering offences against the EC seems attractive, it must be considered whether a need for a specific EC register does in fact exist. Bearing in mind that cooperation between the national prosecutions supposedly will be greatly improved in the future within the framework of Eurojust, making exchange of information coming from the national criminal records much easier, it could be argued that a double system of criminal records is not called for. A convicted person will have his or her sentence recorded in the country where the judgment has been made according to national law. What is needed is really easy access to this information.

It is obvious from the notion of cross-border crime that a person guilty of offences committed in more than one EC member country may have received previous convictions in other member countries. It follows from the Danish Crime Register Regulations that sentences passed in the Nordic countries and in the Council of Europe member countries on Danish citizens or persons domiciled in Denmark at the time of the crime will be recorded just like Danish judgments, provided the sentences in question have been announced to the Danish authorities.[21] **This means that the recording in Denmark of a particular sentence passed on a Danish citizen by a foreign court will only take place if the judge of the foreign court remembers to give notice of the conviction to the Danish Central Crime Register. Leaving the recording of foreign sentences on nationals to chance in this way, seems to be inappropriate.**

The above mentioned leads to the conclusion that a sentence should be recorded in the country where it has been passed. If the convicted person is a not a national or if he or she is domiciled in another country, it ought to be mandatory for either the court or the prosecution to give notice to the authority responsible for the keeping of criminal records in the place where the person is domiciled or the country whose citizen he or she is. In Denmark a duty of this kind is most suitably placed with the Commissioner of Police who authorizes the sentence for execution when the time-limit for making an appeal has run out.[22]

[20] According to the proposal, Eurojust is to be established pursuant to article 34 (2) litra C of the Amsterdan Treaty: "decisions for any other purpose … excluding any approximation of the laws and regulations of the Member States".
[21] See above paragraph 2.1: Recording of foreign judgments in the Central Crime Register.
[22] Article 997 of the Administration of Justice Act.

A procedure like the one outlined above is suited for ensuring that information on convictions in different countries is made available to the prosecution in case new charges emerge against the person in question. It seems to be an obvious conclusion that the issue of placing a duty of information on the authorities of EC member countries with a view to the objectives mentioned in article 29 of the EU Treaty calls for action by the EU Council.

Which national authority within your jurisdiction could undertake the task of transferring the relevant data to a central EU department in charge of the European Criminal Record?

6. Authority responsible for transferring criminal records

The National Police Commissioner has been entrusted with the keeping of criminal records under supervision of "Datatilsynet", the Danish Data Protection Agency. The National Police Commissioner is likewise responsible for the collaboration carried out within the Europol framework which makes him the most likely choice when deciding which authority could untertake the transfer of relevant data to a hypothetical EU department in charge of a European Criminal Record.

In some Member States national legislation prohibits the transfer of data included in criminal records to unauthorised persons or departments. What mechanisms could ensure that the transfer of data from your national authorities to a European Criminal Record authority is not in clash with your national laws? – Would direct transfer from authority to authority be a good solution? Or, would transfer via the subject be more appropriate?

7. Authorization of the transfer of criminal records

National authorities transferring sentive personal data to foreign authorities carry out their functions subject to Danish law, while transfer of data to the SIS or EIS take place according to the Schengen and the Europol conventions. But also in the last mentioned instance will the Danish authority be subject to national data protection law under supervision by the Danish Data Protection Agency.

Thus, transfer by Danish authorities does not seem to present a problem; what could rather be seen as questionable, would be transfer of sentive data regarding Danish citizens from a community autority to other EC member countries or third countries. Again, reference must be made to the fact that all EC member countries are subject to the provisions of the Data directive which likewise decides the requirements for disclosure of data to third countries.

According to Danish law, the question of transfer of personal data is determined by the provisions of the Act on Processing of Personal Data. Pursuant to section 8 of this Act,

disclosure is allowed in a number of instances.[23] In connection with criminal proceedings, sensitive data may usually be disclosed without the consent of the data subject. As a principal rule, however, disclosure can not take place in cases of application, e.g. tenders submitted for public procurement, or banking. In cases of this kind, Danish law makes the consent of the data subject inevitable, unless disclosure has been specifically enabled, e.g. by law.

Which department or agency at the EU level is best suited to the task of keeping and maintaining a European Criminal Record? Do you consider Europol a realistic option?

8. European Criminal Record authority

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Which national and EU persons may have access to the European Criminal Record? Could national judicial or prosecution authorities, tendering authorities, professional associations of the vulnerable professions and banking institutions be given access to such a record?

9. Admission of access

See above under paragraph 7.

Could an EU Directive establishing a European Criminal Record that includes convictions of EU citizens for crimes included in the Corpus Juris and kept by Europol be received by your national legal orders? What problems, if any, would you foresee and how could they be resolved? Which specific issues should the Directive cover in order to ensure good implementation within your jurisdiction?

10. Problems in connection with a EU directive establishing a European Criminal Record

As shown above by paragraph 4, data on all convictions of Danish citizens can not be moved entirely to a foreign country. And as shown by paragraph 5, Denmark has prevented itself from entering into a criminal law and procedure cooperation placed within the area of the first pillar in the EU. A directive on a European Criminal Record would therefore not be relevant for Denmark.

That does not necessarily mean, that common provisions in the EU regarding criminal records would not be expedient. It has, for instance, been outlined in paragraph 5 that a need exists to place a duty on a public authority in the administration of justice to inform the authorities of a foreign country of convictions concerning citizens of that state and persons domiciled there. Likewise, one could imagine, that common provisions could be made regarding all databases containing criminal records of citizens and domiciled person within a EU member country, like e.g. the SIS, EIS etc.

[23] See above paragraph 3.1.2 Transfer of personal data to the EC countries.

In view of the free movement of persons within the EU and the increase in organised crime, would such a Directive constitute an effective weapon against organised crime?

11. Efficiency of the struggle against organised crime

In the opinion of this author, the idea of a directive covering the subject of a European Criminal Record can not be separated from the manner in which the collaboration between member countries is envisaged to take place in the coming years. Bearing in mind the Danish reservations regarding first pillar collaboration in the field of criminal justice, it could be mentioned that Denmark has experienced close collaboration, based on traditional international cooperation, with the other Nordic countries during the last thirty years, and that the experiences with it have been predominantly positive.

The Swedish professor Träskman, who is an expert of international criminal law, has described the Nordic system of collaboration in the field of criminal justice like this:

> "As early as in the 1960'ties and 70'ties a unique system of international cooperation developed between the Nordic countries. The most important of its characteristics was respect for certain national differences combined with a demand for effiency. The cooperation is founded on the traditional forms of mutual assistance in criminal matters, making it possible to transfer the institutioning of proceedings for criminal offences from one Nordic country to another. It is also possible to extradite a suspect to another Nordic country without having to observe the double criminality requirement, regardless whether the extradited person were one's own national; access to necessary documents are granted as well as assistance in the procurement of legal proof, etc. Furthermore, transfer of execution of sentences from one Nordic country to another is possible, not only prison but also collection of fines or seizure. – This cooperation usually takes place through contact established directly between the authorities with no need for diplomatic channels or intervention by central legal authorities."[24]

Professor Träskman goes on stating that the experiences with the collaboration have been good. In addition, one can point to the fact that the importance of the Nordic cooperation in criminal matters is demonstrated by the fact that the Nordic EC member countries: Denmark, Sweden and Finland, have all made reservations e.g. to the Schengen and the EC extradition conventions to the benefit of preserving the Nordic cooperation systems untouched.

[24] Prof. P. O. Träskman, University of Lund, Sweden: "Corpus Juris" in Nordisk Tidsskrift for Kriminalvidenskab 1997, p. 270.

The procedural system of the Corpus Juris is much criticized by professor Träskman. His most important objection to the proposal is, however, aimed at the institutioning of two parallel systems: The European public prosecution service and the national prosecutor, both working in a national court system. This critizism corresponds to the comments to the Corpus Juris proposal made by a group of Nordic criminal law scholars, stating that

> "Although the aims of the proposal are commendable the approach chosen is not likely to result in greater efficiency than a less ambitious scheme of establishing specialized national agencies and reforming the law of international legal assistance. The proposal might be counterproductive in that it can draw the attention away from politically more attractive programmes."[25]

Thus, it can be said that the Corpus Juris may solve some problems arising in the international collaboration, but it certainly risks creating new ones in individual member countries.

Do you foresee political opposition, in your country, to a move for the creation of a European Criminal Record either by political parties or by human rights groups?

12. **Political attitudes towards the creation of a European Criminal Record**

Following the general election to the Danish Parliament in November 2001, the non-socialist parties formed a new government consisting of Liberals and Conservatives, representing a total of 41 % of the votes. With support from the ultra nationalist party, Danish People's Party (12 %), the government possesses the majority of 53 % of the votes.

The opposition are mainly made up by Social Democrats (29 %), Socialist People's Party (7 %), and Social Liberals (5 %), plus some additional small left wing parties.

The non-socialist parties forming the government want to abolish the Danish opt-outs to the Mastrich Treaty as soon as possible, while the smaller supporting nationalist party is of another opinion. Part of the opposition likewise want to abolish the reservations; how many is hard to tell.

[25] Conclusion drawn by the participating criminal law scholars and practicians in a Nordic Seminar on criminal law protection of the financial interests of the EC, held at the Department of Law, University of Uppsala, Sweden, in November 1996.

Left wing, socialist parties tend to be concerned with data security, and will most likely be against a European Criminal Record. Individual Members of Parliament from other parties would surely also be against it for the same reasons.

As stated above, it is hard to see the European Criminal Record as an isolated issue without combining it with the ideas of introducing the Corpus Juris and the European prosecutor within a first pillar set up. From an overall point of view, it must be anticipated that large groups of people will be against the notion of a European Criminal Record which might cause a revival of the political discussions which were led at the time Denmark entered into the Schengen and the Europol conventions.

In Denmark, the large parties: Liberals, Social Democrats, and Conservatives, all expect the Danish opt-outs to the Maastricht Treaty to be repealed some time, in order for the country to participate fully in the European Community cooperation, as long as, however, it does not entail further waivering of sovereignty. The left wing parties and the nationalist right wing party, however, are predominantly Eurosceptics, making it a reasonable assumption that these groups will resist a European Criminal Record.

Is organised crime seen as a serious problem, by the media and the public, in your country?

13. Organised crime – a serious problem?

Organised crime is not dominating the crime picture in Denmark. Without claiming that organised crime, corruption, or community fraud does not exist in Denmark it is safe to say that it is not at all common. On the other hand the public is to a certain degree focusing on crime crossing the borders; one example will be trade in women coming from the Eastern Europe.

Do you consider the creation of European Criminal Record as a positive crime-combating development, a move promoting European integration or merely as an unnecessary intrusion into national law?

14. The creation of a European Criminal Record

The attention has been called to the Nordic cooperation in criminal matters which has developed over the last thirty years. The collaboration is carried out directly between the authorities, and it is generally perceived as well functioning.

With a view to the Nordic collaboration arrangements, to the Danish opt-outs to the Maastricht Treaty, and with a view to the fact that the Central Crime Register is

supposed to be kept in Denmark in its entirety, it is concluded that Denmark probably will not be able to take part in a European Criminal Record. This does not, however, prevent further cooperation in this field between the EC member countries, as long as it takes place within a third pillar, international criminal law framework.

The existing provisions on the Danish Central Crime Register permit registration of convictions made abroad of Danish citizens and person domiciled in Denmark. It seems, however, to be left to chance whether a foreign conviction of a national is announced to the Central Crime Register or not. Easy access to criminal records appears to be vital for the justice administration in order to bring legal proceedings against cross-border offenders. Likewise it appears to be important that all convictions of a person can be found in one register, which preferably could be the Criminal Record of the country of which the person in question is a citizen or the country of domicile. In order to ensure complete registrations, the imposition a duty of information on the country of conviction seems to be a good remedy.

annex 1

Extract from
Act on Processing of Personal Data[1]

Act No. 429 of 31 May 2000

This version is translated for the Danish Data Protection Agency. The official version is published in "Lovtidende" (Official Journal) on 2 June 2000. Only the Danish version of the text has legal validity.

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Rules on processing of data

Part 4
Processing of data

5. - (1) Data shall be processed in accordance with good practices for the processing of data.

(2) The collection of data shall take place for specified explicit and legitimate purposes and they shall not be further processed in a way incompatible with these purposes. Further processing of data which takes place exclusively for historical, statistical or scientific purposes shall not be considered incompatible with the purposes for which the data were collected.

(3) Data which are to be processed shall be adequate, relevant and not excessive in relation to the purposes for which the data are collected and the purposes for which they are subsequently processed.

(4) The processing of data shall be organised in a way which ensures the required up-dating of the data. Furthermore, necessary checks should be made to ensure that no inaccurate or misleading data are processed. Data which turn out to be inaccurate or misleading shall be erased or rectified without delay.

(5) The data collected may not be kept in a form which makes it possible to identify the data subject for a longer period than is necessary for the purposes for which the data are processed.

6. - (1) Personal data may be processed only if:

1. the data subject has given his explicit consent; or
2. processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a con-tract; or
3. processing is necessary for compliance with a legal obligation to which the controller is subject; or
4. processing is necessary in order to protect the vital interests of the data subject; or
5. processing is necessary for the performance of a task carried out in the public interest; or
6. processing is necessary for the performance of a task carried out in the exercise of official authority vested in the controller or a third party to whom the data are disclosed; or
7. processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party to whom the data are disclosed, and these interests are not overridden by the interests of the data subject.

(2) A company may not disclose data concerning a consumer to a third company for the purpose of marketing or use such data on behalf of a third company for this purpose, unless the data subject has given his explicit consent. The consent shall be obtained in accordance with the rules laid down in section 6 (a) of the Danish Marketing Practices Act.

(3) However, the disclosure and use of data as mentioned in subsection (2) may take place without consent in the case of general data on customers which form the basis for classification into customer categories, and if the conditions laid down in subsection (1) 7 are satisfied.

(4) Data of the type mentioned in sections 7 and 8 may not be disclosed or used by virtue of subsection (3). The Minister of Justice may lay down further restrictions in the access to disclose or use special types of data by virtue of subsection (3).

7. - (1) No processing may take place of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, or data concerning health or sex life.

(2) The provision laid down in subsection (1) shall not apply where:

1. the data subject has given his explicit consent to the processing of such data; or
2. processing is necessary to protect the vital interests of the data subject or of another person where the person concerned is physically or legally incapable of giving his consent; or
3. the processing relates to data which have been made public by the data subject; or
4. the processing is necessary for the establishment, exercise or defence of legal claims.

(3) Processing of data concerning trade union affiliation may further take place where the processing is necessary for the controller's compliance with labour law obligations or specific rights.

(4) Processing may be carried out in the course of its legitimate activities by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade- union aim of the data mentioned in subsection (1) relating to the members of the body or to persons who have regular contact with it in connection with its purposes. Disclosure of such data may only take place if the data subject has given his express consent or if the processing is covered by subsection (2) 2 to 4 or subsection (3).

(5) The provision laid down in subsection (1) shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health care services, and where those data are processed by a health professional subject to a statutory obligation of professional secrecy.

(6) Processing of the data mentioned in subsection (1) may take place where the processing is required for the performance by an official authority of its tasks in the area of criminal law.

(7) Exemptions may further be laid down from the provision in subsection (1) where the processing of data takes place for reasons of substantial public interests. The supervisory authority shall give its authorisation in such cases. The processing may be made subject to specific conditions. The supervisory authority shall notify the Commission of any derogation.

(8) No automatic filing systems may be kept on behalf of a public administration containing data on political affiliations which are not open to the public.

8. - (1) No data about criminal records, serious social problems and other purely private data than those mentioned in section 7 (1) may be processed on behalf of a public administration, unless such processing is necessary for the performance of the tasks of the administration.

(2) The data mentioned in subsection (1) may not be disclosed to any third party. Disclosure may, however, take place where:

1. the data subject has given his explicit consent to such disclosure; or

2. disclosure takes place for the purpose of pursuing private or public interests which clearly override the interests of secrecy, including the interests of the person to whom the data relate; or

3. disclosure is necessary for the performance of the activities of an authority or required for a decision to be made by that authority; or

1. disclosure is necessary for the performance of tasks for an official authority by a person or a company.

(3) Administrative authorities performing tasks in the social field may only disclose the data mentioned in subsection (1) and the data mentioned in section 7 (1) if the conditions laid down in subsection (2) 1 or 2 are satisfied, or if the disclosure is a necessary step in the procedure for dealing with the case or necessary for the performance by an authority of its supervision or control function.

(4) Private individuals and bodies may process data about criminal records, serious social problems and other purely private matters than those mentioned in section 7 (1) if the data subject has given his explicit consent. Processing may also take place where necessary for the purpose of pursuing a legitimate interest and this interest clearly overrides the interests of the data subject.

(5) The data mentioned in subsection (4) may not be disclosed without the explicit consent of the data subject. However, disclosure may take place without consent for the purpose of pursuing public or private interests, including the interests of the person concerned, which clearly override the interests of secrecy.

(6) Processing of data in the cases which are regulated by subsections (1), (2), (4) and (5) may otherwise be carried out if the conditions laid down in section 7 are satisfied.

(7) A complete register of criminal convictions may be kept only under the control of an official authority.

9. - (1) Data as mentioned in section 7 (1) or section 8 may be processed where the processing is carried out for the sole purpose of operating legal information systems of significant social importance and the processing is necessary for operating such systems.

(2) The data covered by subsection (1) may not subsequently be proposed for any other purpose. The same shall apply to the processing of other data which is carried out solely for the purpose of operating legal information systems, cf. section 6.

(3) The supervisory authority may lay down more detailed conditions concerning the processing operations mentioned in subsection (1). The same shall apply to the data mentioned in section 6 which are processed solely in connection with the operation of legal information systems.

10. - (1) Data as mentioned in section 7 (1) or section 8 may be processed where the processing is carried out for the sole purpose of carrying out statistical or scientific studies of

significant social importance and where such processing is necessary in order to carry out these studies.

(2) The data covered by subsection (1) may not subsequently be processed for other than statistical or scientific purposes. The same shall apply to processing of other data carried out solely for statistical or scientific purposes, cf. section 6.

(3) The data covered by subsections (1) and (2) may only be disclosed to a third party with prior authorisation from the supervisory authority. The supervisory authority may lay down more detailed conditions concerning the disclosure.

11. - (1) Official authorities may process data concerning civil registration numbers with a view to unambiguous identification or as file numbers.

(2) Private individuals and bodies may process data concerning civil registration numbers where:

1. this follows from law or regulations; or
2. the data subject has given his explicit consent; or
3. the processing is carried out for scientific or statistical purposes or if it is a matter of disclosing a civil registration number where such disclosure is a natural element of the ordinary operation of companies, etc. of the type mentioned and the disclosure is of decisive importance for an unambiguous identification of the data subject or the disclosure was demanded by an official authority.

(3) Irrespective of the provision laid down in subsection (2) 3, no disclosure may take place of a civil registration number without explicit consent.

12. - (1) Controllers who sell lists of groups or persons for marketing purposes or who perform mailing or posting of messages to such groups on behalf of a third party may only process:

1. data concerning name, address, position, occupation, e-mail address, telephone and fax number;
2. data contained in trade registers which according to law or regulations are intended for public information; and
3. other data if the data subject has given his explicit consent. The consent shall be obtained in accordance with section 6 (a) of the Danish Marketing Practices Act.

(2) Processing of data of the type mentioned in section 7 (1), or section 8, may, however, not take place. The Minister of Justice may lay down further restrictions in the access to process special types of data.

13. - (1) Official authorities and private companies, etc. may not carry out any automatic registration of the telephone numbers to which calls are made from their telephones. However, such registration may take place with the prior authorisation from the supervisory authority in cases where important private or public interests speak in favour hereof. The supervisory authority may lay down more detailed conditions for such registration.

(2) The provision laid down in subsection (1) shall not apply where otherwise provided by statute or as regards the registration by suppliers of telecommunications network and by teleservices of numbers called, either for own use or for use in connection with technical control.

14. Data covered by this Act may be transferred to storage in a filing system under the rules laid down in the legislation on files.

annex 1

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1. This Act implements Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Official Journal of the European Communities 1995 L. 281, page 31 ff.).

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Ministry of Justice, file. no. 1997-760-0464

http://www.datatilsynet.dk/lovgivning/index.html