

# PAEDOPHILES, EMPLOYMENT DISQUALIFICATION, AND EUROPEAN INTEGRATION

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## 1. INTRODUCTION

Perhaps no crime generates as much anger, social anxiety and demand for political action as sexual violence by strangers against a child. In the 1990s and 2000s, a number of such crimes on both sides of the Atlantic set off shock waves that will have lasting consequences for criminal justice policy. In the US (New Jersey), the 1994 rape and murder of seven year old Megan Kanka by a paroled paedophile ignited a nationwide political movement that ultimately obtained passage of sex offender registration and community notification laws (“Megan’s laws”) in every state.<sup>1</sup> Ultimately, the federal government imposed a national version of Megan’s law by threatening to withhold criminal justice funds from non-complying states.

In Belgium, Marc Dutroux’s 1995–96 serial rapes and murders shook the country’s confidence in the competence and integrity of the police and courts.<sup>2</sup> In 2002, England was rocked by the arrest of Ian Huntley for the murder of two 10 year old girls who attended the school where he worked as a school caretaker. When the media revealed that the police had investigated Huntley for several previous sex offences, the government created the violent sex offender register (ViSOR), an on-line database of information on sex offenders registered with the

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<sup>1</sup> K. Terry and J. Furlong, *Sex Offender Registration and Community notification: A “Megan’s Law” Sourcebook*. (Kingston NJ, Civic Reseach Institute Inc., 2008, 2<sup>nd</sup> edition).

<sup>2</sup> C. Fijnaut, *Nota met vraagpunten betreffende het onderzoek in de zaak Julie en Melissa*. Brussel, 1997, Nr. 713/6–96/97, pp. 288–310, 713/6–96/97); S. Snacken, ‘Penal Policy and Practice in Belgium’, in: M. Tonry (ed.), *Crime, Punishment and Politics in Comparative Perspective, Crime and Justice, A Review of Research*. (Chicago, Chicago University Press, 2007), pp. 127–216.

police.<sup>3</sup> The home secretary commissioned an inquiry to determine whether, and if so how, that information about Huntley should have been transmitted to the school.<sup>4</sup> The Bichard Inquiry's 2004 report led to establishment of an Independent Safeguarding Authority responsible for vetting persons who apply for positions in public or private organizations that require close contact with children; sex offenders are screened out of such positions.<sup>5</sup> The Bichard Inquiry also urged that steps be taken to prevent individuals convicted of sex offences in other countries obtaining work with children in the UK.

In 2003, Michel Fourniret was arrested for attempting to kidnap a Belgian girl. The police then connected him to a series of previous rapes and murders. Although in 1987, a French court had convicted him of rape and indecent assault of minors, upon release Fourniret had been able to obtain a job in Belgium as a school supervisor, committed murders and avoided capture for years. In the wake of the Fourniret case, France established a national sex offender register.<sup>6</sup> Belgium increased punishments and controls over serious sex offenders and launched a number of innovative treatment initiatives.<sup>7</sup> Some Belgians and other Europeans urged supra-national action to prevent paedophiles, after serving a sentence in one E.U. country, moving to another E.U. member state where their identity and prior offending is not known. In short, the horrific sex crimes of the 1990s and 2000s became an occasion for improving access to criminal record information and enhancing integration of diverse criminal jurisdictions on both sides of the Atlantic.

## 2. DEVELOPMENTS IN THE US

While each US state has its own criminal laws and criminal justice system, the states' criminal record registers are linked together in a national system that allows law enforcement and judicial personnel to almost instantly determine whether an arrestee or investigative target has a criminal record (including arrests) in any state or the federal jurisdiction. However, when child sex offending became a high profile issue Congress, by means of its spending power, mandated rules for state-level sex offender registries and established a national sex offender database. (Quite quickly, however, the "problem" came to be defined as "sex crime generally".) Neither federalism nor privacy concerns slowed down or modified these developments.

<sup>3</sup> See <[www.legislation.gov.uk/ukpga/2003/42/contents](http://www.legislation.gov.uk/ukpga/2003/42/contents)> (Accessed 11 June 2011).

<sup>4</sup> See <<http://media.education.gov.uk/assets/files/pdf/b/bichard%20inquiry%w20report.pdf>> (Accessed 11 June 2011).

<sup>5</sup> See <[www.isa.homeoffice.gov.uk/Default.aspx?page=6](http://www.isa.homeoffice.gov.uk/Default.aspx?page=6)> (Accessed 11 June 2011).

<sup>6</sup> See: <[www.justice.gouv.fr/bulletin-officiel/dacg99a.htm#5](http://www.justice.gouv.fr/bulletin-officiel/dacg99a.htm#5)>.

<sup>7</sup> S. Snacken (2007).

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the Wetterling Act) requiring states to comply with federal standards for registering and monitoring persons convicted of violent sex offences.<sup>8</sup> A 1996 amendment required states to provide public access to certain sex offender information. That same year, the Pam Lychner Sexual Offender Tracking and Identification Act required states to impose a lifetime registration requirement on repeat sex offenders and on individuals convicted of aggravated sex offences.<sup>9</sup>

Two years later, Congress established a National Sex Offender Registry (NSOR) and mandated the registration of several additional categories of sex offenders. In 2006, after another brutal sex crime, Congress passed the Adam Walsh Child Protection and Safety Act which provides that, in order for a state to continue receiving a full federal criminal justice grant, it must conform its law and practice to federal sex offender registration guidelines.<sup>10</sup> Among other things, the Act requires states to assign convicted sex offenders to one of three tiers. Tier 3 offenders, the highest risks, for the rest of their lives must regularly update information on residence and place of work. Tier 2 offenders must update their whereabouts every six months for 25 years. Tier 1 offenders must, for 15 years, update their registration annually. Failure to comply with the registration requirements constitutes a felony. The Adam Walsh Act also established the Dru Sjodin National Sex Offender Public Website; it enables any member of the public to search on-line for information about a particular sex offenders or to search for the names of all sex offenders who live in their county or in any US county.<sup>11</sup>

In the US, everybody's criminal record is essentially public information, reflecting very strong commitment to both free speech and individual self defense. Employers, landlords, and others regularly conduct criminal background checks on persons with whom they interact or expect to interact, by searching court files; hiring private sector information vendors to search court records and other public sources, and; in some cases, obtaining criminal background information directly from state and federal governmental databases.<sup>12</sup> Of course, any member of the public can consult the on-line state and federal sex offender databases to obtain names, addresses and photos of convicted sex offenders.

<sup>8</sup> 42 USC. sec. 14071 (2000). See <[www.ojp.usdoj.gov/BJA/what/02ajwactcontents.html](http://www.ojp.usdoj.gov/BJA/what/02ajwactcontents.html)> (Accessed 11 June 2011).

<sup>9</sup> Pub. L. 104-236, 110 STAT 3093 (1996).

<sup>10</sup> See <[www.justice.gov/criminal/ceos/Adam%20Walsh.pdf](http://www.justice.gov/criminal/ceos/Adam%20Walsh.pdf)> (Accessed 11 June 2011).

<sup>11</sup> See <[www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1](http://www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1)> (Accessed 11 June 2011).

<sup>12</sup> J. Jacobs, 'Mass Incarceration and Criminal Records', in: *University of St. Thomas Law Journal*, 387 (6), 2005; J. Jacobs and Dimitra Blitsa, 'Sharing Criminal Records: The United States, the European Union and Interpol Compared', *Loyola International & Comparative Law Review*, 125, 2008.

### 3. EUROPEAN DEVELOPMENTS

European integrationists have long been concerned about increasing exchange of offender information among the E.U. member states.<sup>13</sup> The possibility that a sex offender might complete a prison term in one E.U. member state and subsequently commit a similar crime in another member state has provided an impetus for an enhanced E.U. role in criminal justice.

In October 1999, at a special meeting in Tampere, Finland, the European Council proposed that mutual recognition should be “the cornerstone of judicial cooperation in both civil and criminal matters”.<sup>14</sup> Calling for the “approximation” of national criminal laws, the Council urged member states to agree on common definitions and sanctions for certain serious criminal offences, including sexual exploitation of children.<sup>15</sup> In November 2000, the Council adopted a Programme to implement the principle of mutual recognition of decisions in criminal matters. One aim of this wide-ranging Programme was that each member state’s courts take into account criminal convictions imposed by other member states’ courts. To accomplish this goal, which implies knowledge of foreign decisions, greater exchange of criminal record information is required. Another and quite ambitious aim of the Programme was that certain employment disqualifications following criminal conviction should be recognised and enforced throughout the Union. This requires that member states be informed of employment disqualifications imposed in another member state.<sup>16</sup>

Currently, three E.U. strategies relate, directly or indirectly, to preventing convicted sex offenders from obtaining employment in positions affording close contacts with children: 1) improving exchange of criminal record information among member states, 2) establishing minimum and common offence definitions, charges and sanctions with respect to sexual exploitation of children, and 3) mutual enforcement of member states’ employment disqualifications with respect to sex offenders working with children.<sup>17</sup>

<sup>13</sup> J. Jacobs and Dimitra Blitsa, ‘Major ‘minor’ Progress Under the Third Pillar: EU Institution Building in the Sharing of Criminal Records’, *Chicago-Kent Journal of International and Comparative Law*, 111, 2008.

<sup>14</sup> See generally, J. Ouwerkerk, *Quid Pro Quo?: A Comparative Law Perspective on the Mutual Recognition of Judicial Decisions in Criminal Matters*. (Antwerp, Intersentia, 2011).

<sup>15</sup> See <[www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)> (Accessed 11 June 2011); <[http://ec.europa.eu/justice/policies/criminal/policies\\_criminal\\_intro\\_en.htm](http://ec.europa.eu/justice/policies/criminal/policies_criminal_intro_en.htm)> (Accessed 11 June 2011).

<sup>16</sup> Official Journal of the European Communities, *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, Introduction*. 15 January 2001. (2001/C 12/02).

<sup>17</sup> Briefing from the NSPCC, *Cross-border Cooperation in the European Union to Prevent Sex Offenders from Working with Children* (2007). See <[www.nspcc.org.uk](http://www.nspcc.org.uk)> (Accessed 11 June 2011).

In 2004, the Council of the European Union adopted Framework Decision 2004/68/JHA on Combating Sexual Exploitation of Children and Child Pornography.<sup>18</sup> It requires member states to: 1) criminalize various forms of sexual abuse of children, and; 2) take necessary measures to ensure that a person convicted of a sex offence against a child “may, if appropriate, be temporarily or permanently prevented from exercising professional activities related to supervision of children”. In other words, member states must provide for the possibility of prohibiting the convicted sex offender from supervising children. Whether to impose the disqualification in any particular case or category of cases is left to each member state. The words *if appropriate* give decision makers freedom not to impose an employment disqualification.

In November 2004, in the wake of the Fourniret case, Belgium offered a Proposal for a Framework Decision on Mutual Recognition of Disqualifications from Working with Children as a Result of Convictions for Sexual Offences Committed Against Children.<sup>19</sup> In order to prevent a convicted defendant, after completing a sentence for a child sex offence in one member state, from committing a similar crime in another member state, the Proposal sought to require member states to 1) include in their criminal registers “any temporary or permanent bans on exercising professional activities related to the supervision of children, arising from a conviction” related to the offences listed in the 2004 Framework Decision on Sexual Exploitation of Children and Child Pornography, 2) ensure that employment disqualifications are included in responses to requests by other member states for criminal record information, and 3) recognise and enforce employment prohibitions imposed in any member state. This Belgian Proposal was not adopted.

The EU has decided not to create a central criminal records database, but to work towards improving bilateral exchange of criminal records.<sup>20</sup> In 2009, Council Framework Decision 2009/315/JHA on the Organization and Content of the Exchange of Information Extracted From the Criminal Record Between

<sup>18</sup> Official Journal of the European Communities, *Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography*, 20 January 2004, L 013.

<sup>19</sup> Council of the European Union, *Initiative of the Kingdom of Belgium with a view to the adoption by the Council of a framework decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children*, 5 November 2004, 14207/04, COPEN 133; Council of the European Union, *Initiative of the Kingdom of Belgium with a view to adopting Council Framework Decision 2008/.../JHA on the recognition and enforcement of prohibitions arising from convictions for sexual offences committed against children*, 3 December 2007, 15121/07, COPEN 158.

<sup>20</sup> See Council Decision 2005/876/JHA on the Exchange of Information Extracted from the Criminal Record. In 2008, the Council adopted Framework Decision 2008/675/JHA on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings.

Member States<sup>21</sup> mandated that when a member state's court convicts a citizen from another member state, it must notify the defendant's home country's *central authority* which, in turn, must record the conviction in its national criminal register just as if it had been rendered by a domestic court.<sup>22</sup> This should ensure that each member state's criminal register will have its citizens' full record of convictions in all E.U. member states.

This Framework Decision states an intent to incorporate the essential purpose of Belgium's 2004 Proposal: "The main objective of the initiative of the Kingdom of Belgium is attained...to the extent that the central authority of every Member State should request and include all information provided from the criminal records of the member state of the person's nationality in its extract of criminal records when it replies to a request from the person concerned. Awareness of the existence of the conviction as well as, where imposed and entered in the criminal record, of a disqualification arising from it, is a prerequisite for giving them effect in accordance with the national law of the Member State in which the person intends to perform professional activity related to supervision of children. The mechanism established by this Framework Decision aims at inter alia that a person convicted of a sexual offence against children should no longer, where the criminal record of that person in the convicting member state contains such conviction and, if imposed and entered in the criminal record, as disqualification arising from it, be able to conceal this conviction or disqualification with a view to performing professional activity related to supervision of children in another Member State."

Despite its expressed intention to achieve the main objective of the 2004 Proposal, this Framework Decision treats inclusion of employment disqualifications in national criminal registers as optional and does not require member states to enforce each others' employment disqualifications.

The 2007 Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, the first international legal instrument to categorise various forms of sexual abuse of children as criminal offences, entered into force in 2010.<sup>23</sup> It requires parties to ensure that candidates for jobs requiring regular contacts with children have not been convicted of acts

<sup>21</sup> Official Journal of the European Union, *Council Framework Decision of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States*, 7 April 2009, L93/23.

<sup>22</sup> According to article 7 when a member state requests information from the member state of nationality for the purposes of criminal proceedings, the latter must transmit information on all convictions recorded in the register, whether the convictions were rendered in the nationality state, in other E.U. states or in non-EU countries. If information is requested for any purposes other than criminal proceedings, the member state of nationality shall transmit such convictions, in accordance with its national law.

<sup>23</sup> Council of Europe, *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*. See <<http://conventions.coe.int>> (Accessed 11 June 2011).

of sexual exploitation or sexual abuse of children.<sup>24</sup> As of mid-2011, eight EU Member States have ratified this Convention.

Most recently (June, 2011), the European Commission is urging adoption of an E.U. Directive on Combating the Sexual Abuse, Sexual Exploitation of Children and Child Pornography that would fully implement Belgium's 2004 Proposal.<sup>25</sup> The proposed Directive seeks to protect E.U. children by ensuring that 1) 22 named criminal offences related to the sexual abuse of children are defined as criminal offences in all member states; 2) employment disqualifications arising from convictions for any of these offences are recorded in the convicting member state's criminal register; 3) information on disqualifications is transmitted to other member states so that disqualified persons may not obtain employment involving regular contacts with children and 4) personal data on disqualifications may be used for such purpose;<sup>26</sup> 5) the member state where the offender seeks employment must recognise and enforce the convicting member state's employment disqualification.

The European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) Committee has recommended amendments that would strengthen the proposed Directive by requiring that member states ensure, in accordance with national law, that employers have access to job applicants' and employees' sex offence convictions and employment disqualifications for any offence referred to in the Directive. Moreover, LIBE Committee's amendments require member states to ensure, in accordance with national law, that employers are able to obtain information about convictions and employment disqualifications imposed by any other member state. The LIBE Committee wants the Directive to cover

<sup>24</sup> For the purposes of prevention and prosecution of offences, parties are asked to collect and store "data relating to the identity and to the genetic profile (DNA) of persons convicted of the offences established in accordance with this Convention and ensure that this information can be transmitted to other parties' competent authorities". However, the 2007 Council of Europe Convention does not require member states to create a sex offender database. See Explanatory Report <<http://conventions.coe.int>> (Accessed 11 June 2011).

<sup>25</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA* /\* COM/2010/0094 final – COD 2010/0064 \*/, 29 March 2010, COM(2010)94 Final. The proposed Directive requires Member States to take necessary measures "to ensure that a natural person who has been convicted of any of the offences referred to in Articles 3 to 7 may be temporarily or permanently prevented from exercising activities involving regular contacts with children". Compared with Council Framework Decision 2004/68/JHA, the proposed Directive: 1) deleted 'if appropriate'; 2) deleted 'professional' from 'professional activities', and; 3) changed 'activities related to the supervision of children' to 'activities involving regular contacts with children'.

<sup>26</sup> The proposed Directive requires member states, by way of derogation from articles 7 and 9 of Council Framework Decision 2009/315/JHA, to ensure that information on disqualifications is transmitted when requested under article 6 of that Framework Decision from the member state of the person's nationality and that such information may in all cases be used for the purpose of preventing sex offenders from exercising activities involving regular contacts with children.

volunteer as well as paid positions. Member states should ensure that public and private organisations that provide children with services or supervision to check the criminal records of new employees. The LIBE Committee also favours establishing a European certificate of good conduct<sup>27</sup> that would certify the absence of convictions for any offence referred to in the Directive or any relevant employment disqualification.<sup>28</sup>

This proposed Directive, especially with the LIBE amendments, raises a number of thorny questions and concerns that have to be answered.<sup>29</sup> First, the proposed Directive asks member states to ensure that employment disqualifications are recorded in their national criminal registers. This may pose some difficulties as employment disqualifications associated with a conviction vary greatly among member states. In some countries, the judge can impose a disqualification as part of the criminal sentence. Other countries impose disqualifications via civil, administrative or disciplinary proceedings or by laws setting licensing standards for particular professions. (US states have hundreds of employment laws imposing such “collateral consequences.”<sup>30</sup>). Although disqualifications imposed as a part of the criminal sentence are usually recorded in the national criminal record register, this is not the case with disqualifications flowing automatically from conviction or ordered by administrative authorities.<sup>31</sup>

<sup>27</sup> Nothing came of an Institute for International Research on Criminal Policy (IRCP)’s proposed EU clean record certificate that applicants for jobs in vulnerable professions could submit to prospective employers. G. Vermeulen, T. Vander Beken, E. de Busser and A. Dormaels, *Blueprint for an EU Criminal Records Database, Legal, Politico-Institutional & Practical Feasibility*. (Antwerpen/Apeldoorn, Maklu/IRCP, 2002). Currently, the Presidency is of the view that the *European certificate of good conduct is too ambitious to be achieved in the framework of a criminal directive with the intention of harmonising criminal law. There is no legal basis for such certificate*. Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on Combating Sexual Abuse, Sexual Exploitation of Children and Child Pornography, repealing Framework Decision 2004/68/JHA*, Working Document DS 1114/6/11 REV 6, 30 May 2011.

<sup>28</sup> R. Angelilli *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Combating Sexual Abuse, Sexual Exploitation of Children and Child Pornography, repealing Framework Decision 2004/68/JHA*. (European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 24 January 2011); European Parliament, Press Release, ‘Delete Child Pornography Web Pages across the E.U., says Civil Liberties Committee’, 14 February 2011; Council of the European Union, Working Document DS 1114/6/11 REV 6, 30 May 2011.

<sup>29</sup> The aim is for a first reading agreement to be reached as soon as possible. See <[www.europarl.europa.eu/oeil/file.jsp?id=5849492](http://www.europarl.europa.eu/oeil/file.jsp?id=5849492)> (Accessed 11 June 2011).

<sup>30</sup> Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (2005).

<sup>31</sup> White Paper on Exchanges of Information on Convictions and the Effect of such Convictions in the European Union (SEC(2005)63) and Communication from the Commission to the Council and the European Parliament Disqualifications Arising from Criminal Convictions in the European Union (SEC(2006)220). See also G. Ritchie, *Study on disqualification from working with children within the EU*. (London, Institute of Advanced Legal Studies, 2001).



Adoption of a Directive that requires employers to enquire about applicants' employees' convictions and employment disqualifications would be a major extension of EU authority in the area of crime and justice.<sup>32</sup> Whether mandatory or discretionary, how will employers determine which, if any, positions in their organization are closed to previously convicted sex offenders because they involve contacts with children? (A teaching position would, of course, be covered, but what about a school cook or a janitor? What about nurses and other hospital and medical workers? Social workers?) Perhaps some government agency in each member state needs to be made responsible for issuing guidelines or responding to employers' position-by-position queries?

Member states will be able to employ different strategies for enabling employers to obtain information on applicants' employees' convictions and disqualifications (direct access to information; access upon request; requiring job applicants to submit an official summary of criminal record information or official proof of a clean record). However, it is not clear how employers will obtain such information from another member state.<sup>33</sup> Let's say member state A only allows the record subject to request criminal record information, but member state B authorizes employers to access the information. How will an employer from member state B find out about a prospective employee's criminal record from member state A? To add another complication, how will an employer from member state B find out about a foreign applicant's convictions or disqualifications for a position which in state A, but not in state B, is not considered to involve prohibited contact with children? Probably the easiest solution would be for employers to ask non-nationals themselves to obtain the necessary information. But then there will have to be some way for an employer easily to recognize the authenticity of the proffered document that may originate from any one of the more than two dozen E.U. member states.

The multiplicity of European languages also presents serious implementation challenges. Will E.U. employers be responsible for obtaining translations of foreign employment disqualification orders? Will job applicants have to present

<sup>32</sup> "Some countries ban individuals from working with children on the basis of a criminal conviction, others rely instead on employers to take decisions on a case-by-case basis, based on their interpretation and assessment of the prospective employee's criminal record extract. [...] In the UK the Criminal Records Bureau (CRB) was established in 2002 to conduct pre-employment checks on individuals applying to work in regulated positions. Recent research illustrates the effectiveness of this approach, concluding that in the last three years, pre-employment checks have prevented over 60,000 unsuitable adults from working with children and vulnerable adults" (Ipsos MORI, 2007). Quoted in: K. Fitch with K. Spencer Chapman and Z. Hilton, *Protecting Children from Sexual Abuse in Europe: Safer Recruitment of Workers in a Border-free Europe*. (NSPCC, 2007).

<sup>33</sup> Under Council Framework Decision 2009/315/JHA on the Organization and Content of the Exchange of Information Extracted From the Criminal Record Between Member States, a request for criminal record information, outside the context of criminal proceedings, can only be submitted by a judicial authority, a competent administrative authority or by the record subject.

potential employers with an “official translation” of any document issued by the applicant’s home country’s criminal register? Will employers be able to understand the context of a foreign criminal record, containing references to national legislation, even if translated? Because hiring decisions often cannot be delayed weeks, or even months, whatever system is adopted must be capable of providing an authoritative translation promptly.<sup>34</sup>

Should employers be entitled to obtain information on applicants’/employees’ convictions or disqualifications related to the sexual abuse of children imposed prior to the adoption and implementation (within two years) of the Directive? Arguably, convicted sex offenders should be screened out of child-contact positions for several years after completion of their sentence.<sup>35</sup> Nevertheless, the Directive does not seem to apply to pre-2013 convictions and employment disqualifications.

What exactly will member states be obliged to do if asked to recognise and enforce each others’ disqualification from working with children? On the one hand, the proposed Directive definitely requires that if a person is convicted of certain offences, he or she “may be” prohibited from supervising children in all member states. On the other hand, asking the member state where the individual is seeking employment to enforce the disqualification of the convicting member state would raise many legal and practical difficulties. For example, some member states may object to enforcing another member state’s very lengthy (even lifetime) disqualification; many member states may object to enforcing another member state’s disqualification when imposed by an administrative authority and not by a criminal court; disagreements may arise as to what positions a disqualification covers. Suppose that member state A provides that persons convicted of sexual abuse of children cannot work as a nurse’s aide and that member state B’s disqualification law does not cover nurse’s aides. This not-fanciful example suggests that ultimately harmonization of disqualifications (with respect to duration, nature, scope, weight) will be required.<sup>36</sup>

<sup>34</sup> When Council Decision 2009/316/JHA on the Establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA is implemented member states will be able to use a standardised format allowing information to be exchanged in a uniform, electronic and easily computer-translatable way.

<sup>35</sup> Currently, it is very difficult for employers to find information on convictions or employment disqualifications imposed by another member state. Member states will not be required to record convictions imposed in other member states until 2012. If the proposed Directive is adopted in 2011, member states will not be required to include employment disqualifications in their registers until 2013. Thus, currently, member states do not have a comprehensive record of EU-wide conviction and disqualification information on their nationals. Criminal record information would have to be collected from every member state the applicant/employee had resided in the past. Employers would, thus, rely on the applicant’s/employee’s honesty as to the previous member states he or she had resided.

<sup>36</sup> Communication from the Commission to the Council and the European Parliament Disqualifications arising from Criminal Convictions in the European Union (SEC(2006)220).

The LIBE Committee's amendment encourages member states to take additional child protective measures, such as establishing national sex offender registers accessible to law enforcement agencies and/or judicial officials. It remains to be seen how many member states will eventually establish even non-publicly accessible sex offender databases.<sup>37</sup> As of 2008, only the U.K., France and Germany had established registers. Some member states may be philosophically unwilling to establish even a confidential sex offender database because they think it inconsistent with rehabilitation<sup>38</sup> and/or a violation of privacy.<sup>39</sup> Clearly, a US-style on-line sex offender register, is inconceivable for member states and for the EU.<sup>40</sup>

It is important to keep in mind that the proposed 2011 Directive only addresses employment vetting for child sex offenders applying for jobs requiring close contacts with children. However, children may be sexually abused by offenders who do not work in positions requiring close contact with children (e.g. Ian Huntley was a school caretaker). What about employees of a snack bar or grocery store near a school? Children can be victimized by strangers on the street and in parks, by neighbors and, of course, most frequently by family members and friends. Thus, the employment disqualification regime, even if it is smoothly implemented, will not protect children from the most prevalent sources of sexual abuse.<sup>41</sup> This does not, of course, mean that the employment screening

<sup>37</sup> Currently, the creation of an E.U. database on sex offenders is not a subject of debate. Nothing came of Institute for International Research on Criminal Policy (IRCP)'s proposed EU database on suspected and convicted sex-offenders. G. Vermeulen, *EU Forum on the Prevention of Organised Crime EU Action against Child Trafficking and Related Forms of Exploitation*. (Brussels, 26 May 2004). In 2007, a campaign to find Madeleine McCann, presumed to have been abducted from an English family's holiday residence in Portugal, reported that 97% of the members of the European Parliament favored creating a European sex offender database. However, it never became a serious legislative possibility. Likewise, in 2010, the Parliamentary Assembly of the Council of Europe rejected the idea of a Europe-wide sex offender register. See Council of Europe, *Reinforcing Measures against Sex Offenders, Report, Committee on Legal Affairs and Human Rights*, Doc.12243, 4 May 2010 and Council of Europe, Resolution 1733(2010), Reinforcing Measures against Sex Offenders.

<sup>38</sup> According to the EU Parliament some 20% of sex offenders commit further offences after conviction. In the US, Meagan's laws critics often cite studies finding that sex offenders recidivism rate is not higher, and indeed is actually lower, than other offenders' recidivism. Bureau of Justice Statistics, *Recidivism of Sex Offender Released From Prison in 1994*. See <<http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>> (Accessed 11 June 2010).

<sup>39</sup> Council of Europe, *Reinforcing Measures against Sex Offenders, Report, Committee on Legal Affairs and Human Rights*, Doc.12243, 4 May 2010. Available at: <<http://assembly.coe.int>>.

<sup>40</sup> See the Child Sex Offender Disclosure Scheme in the UK ("Sarah's Law"). Available at: <[www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)> and BBC News, Q&A: 'Sarah's Law' explained, 28 September 2010. <[www.bbc.co.uk/news/uk-england-11427787](http://www.bbc.co.uk/news/uk-england-11427787)> (Accessed 11 June 2011).

<sup>41</sup> European Parliament, Combating Sexual Abuse of Children, Child Pornography. Available at: <[www.europarl.europa.eu](http://www.europarl.europa.eu)>; Commission of the European Communities, *Commission Staff Working Document, Accompanying document to the Proposal for a Council Framework Decision on Preventing and Combating Trafficking in Human Beings, and Protecting Victims, repealing Framework Decision 2002/629/JHA, Impact Assessment*. (SEC(2009)355).

is not worth doing. It suggests, however, that there is much more work to be done in order to give children the fullest possible protection.

Finally, we need to ask whether this effort to protect children from recidivist sex offenders will open the door to other initiatives for preventing other categories of dangerous and unreliable persons from working in positions where they might present a special risk. It is easy to imagine a politician or victim's rights advocate arguing that because children and adults face an elevated risk of injury when certain categories of previously convicted persons (e.g. drug traffickers and drunk drivers) are employed as taxi drivers, bus drivers and airplane pilots, such persons should be barred from those employments. The same argument could be made on behalf of banning persons previously convicted of fraud from positions of financial trust.<sup>42</sup> Once certain criminal convictions are accepted as proof of criminal propensity, won't an (irresistible) logic lead to expanding the use of criminal background checks as in the US?

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<sup>42</sup> See G. Vermeulen, T. Vander Beken, E. De Busser and A. Dormaels (2002), suggesting that employers in vulnerable professions should be able to have information on the criminal history of the applicant (e.g. public professions (all crimes), educational professions (crimes related to children), medical professions (crimes that could endanger their trustworthy position, such as violence, mistrust, abuse of narcotic substances, etc.), financial professions (crimes related to the handling of money or mistrust, theft, money laundering, fraud, etc.), transportation professions (drunk driving, disqualification to drive), trustworthy telecommunication professions (crimes related to sensitive data, such as pornography, racism, etc.).