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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
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Subject:	Proposal for a Regulation of the European Parliament and of the Council establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European criminal records information system (ECRIS-TCN system) and amending Regulation (EU) No. 1077/2011 [First reading] - Policy debate

I. INTRODUCTION

On 19 January 2016, the Commission submitted a proposal for a Directive improving the existing European Criminal Records Information System (ECRIS)[1] with regard to third country nationals (TCN) (doc. 5438/16 + ADD 1 + ADD 2). During the examination of the proposal, Member States expressed a strong preference for establishing a centralised system for TCN at EU level. The negotiations on the draft Directive were suspended following the request by Member States to the Commission, at the (Justice and Home Affairs) Council on 9 June 2016, to evaluate the legislative framework and present a proposal for establishment of a central database for convicted TCN.

[1] Established by Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ L 93, 7.4.2009, p. 23).

The proposal for a Regulation to establish a central database was submitted by the Commission on 28 June 2017 (doc. 10940/17 + ADD 1). Subsequently, the Presidency submitted a revised text for the accompanying Directive (doc. 11568/17 + ADD 1). The Regulation should regulate all issues related to central database, while the Directive would complement the existing Framework Decision on matters of general nature related to functioning of ECRIS.

The Working Party for Cooperation in Criminal Matters (COPEN) examined these proposals at its meetings on 9 July, 10/11 September, 25/26 September and 9/10 October 2017. Some of the issues were also discussed in CATS on 22 September. The discussions in these preparatory bodies have taken place in a constructive atmosphere and considerable progress on various points has been achieved. Although a number of articles can at this stage be deemed to be agreed upon in view of a future general approach, the discussions revealed that certain issues require guidance by the Council.

In this context, it is to be noted that recent terrorist attacks in several Member States have shown the importance of information exchange, and the necessity for all relevant information to be available to the law enforcement authorities. Information on convictions is, undoubtedly, a necessary piece of information to verify the background of (alleged) perpetrators and possible links to terrorist activities. It is therefore of utmost importance to ensure that ECRIS works efficiently and to address all possible gaps in that system.

Based on these considerations, the Presidency invites the ministers to elaborate on the two topics presented below, which are crucial to ensure effectiveness of the future central system.

II. ISSUES SUBMITTED TO THE COUNCIL FOR DISCUSSION

Question A: Inclusion of EU nationals who also hold another nationality

The proposed Regulation includes an obligation for Member States to enter into the central system information of all TCN who have been convicted of a crime. According to the proposed Regulation, the definition of TCN would also include third country nationals who also hold the nationality of a Member State of the EU.

The effectiveness of the system depends on the amount of data which will be entered. The aim of establishing the ECRIS-TCN system is to address the gaps of the existing system, which currently covers only EU nationals. It is evident that in case the identity data of convicted persons who have both the nationality of an EU Member State and the nationality of a third country are not entered into the central system, this would mean that those people can avoid being confronted with their previous convictions simply by presenting their third country passport in one Member State and their EU passport in another Member State. In this case, the person would have criminal records in two different Member States without those Member States being aware of this.

A similar problem can arise with people who have two or more EU nationalities, as also in this case it is possible that the convicting Member State does not know that a person has another EU nationality. Without the possibility to check this in the central database, it will be impossible to identify which other Member States may hold criminal records information about this individual. However, in cases where Member States are aware that a person has dual EU nationality, they are already obliged under the current ECRIS Framework Decision to inform both Member States of nationality.

Do you think that identity information of the following two categories of persons should be included in the central system:

a) information of convicted persons who have two or more nationalities, at least one of those being the nationality of a third country; and

b) information of convicted persons who do not have third country nationality, but hold more than one EU nationality?

Question B: Categories of criminal offences in respect of which fingerprints must be entered into the ECRIS-TCN system

The proposed Regulation includes an obligation for Member States to enter fingerprints of convicted TCN in the ECRIS-TCN system in addition to alphanumeric identity data. This is based on the fact that fingerprints are often the only means to securely and efficiently identify convicted TCN. It is also the consequence of the increasing EU-wide circulation of unreliable identity documents and multiple aliases used by criminals.

In June 2016, the Council confirmed the necessity to establish a centralised ECRIS system to store both alphanumeric and fingerprint data (doc. 9798/16). The use of fingerprints in ECRIS-TCN is absolutely necessary to ensure functioning of the system. However, the Member States have expressed differing opinions regarding the scope of the obligation to store fingerprints in the central system. Conditions and rules for collection and storage of fingerprints vary considerably among Member States.

Previous discussions have shown that several Member States prefer the inclusion of fingerprints for the persons convicted in any criminal offence. However, since the definitions of criminal offences vary considerably among the Member States, this approach could have as consequence that fingerprints would also have to be collected and entered into the system in case of minor offences, which could be disproportionate.

Several other Member States prefer that fingerprints would only be entered into the system if the collection of fingerprints is foreseen in their national legislation. This option could result in a relatively low number of fingerprints entered into the central system, or none at all, which would seriously hinder the effectiveness of the system. Such approach could potentially increase the amount of false or incorrect data entered in the system, thus undermining the whole aim of establishing the central ECRIS-TCN system.

The Presidency considers that a compromise solution between these two preferences must be found. Previous discussions have indicated that one possibility would be to agree on a list of categories of criminal offences, in respect of which collection and storage of fingerprints in the central system would be obligatory. These categories could be based on a list of serious criminal offences, as defined in other Union legislative instruments (such as the Framework Decision on the European Arrest Warrant) or be defined by the actual criminal sanction that was handed down. The problem with a list of criminal offences is that such lists would still include both serious and less-serious criminal offences, a problem which could be avoided by defining the obligation to collect and store fingerprints on the basis of the actual sanction (such as a custodial sentence). A custodial sentence, whether suspended or not, would indicate that the criminal offence concerned has been considered as being serious by the national courts. Several Member States have also indicated that it would be disproportionate to include fingerprints for unintentional crimes.

In the light of above, Presidency considers that criteria should be agreed upon in order to identify the criminal offences in respect of which fingerprints should be entered in the ECRIS-TCN system as a minimum, in addition to the fingerprints that are collected in accordance with national law.

The Presidency is of the opinion that it would be appropriate to establish that, as a minimum, fingerprints should be entered in the ECRIS-TCN system when the person concerned has been convicted to a custodial sentence in relation an intentionally committed criminal offence.
The Council is invited to confirm this position.

Additionally, the Council is invited to indicate whether in this context "custodial sentence" should include suspended sentences, or not.

III. CONCLUSION

Council is invited to consider the questions mentioned above, with a view to providing guidance for further work at technical level.