

Brussels, 15 September 2017  
(OR. en)

12033/17

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**Interinstitutional File:  
2017/0144 (COD)**

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**LIMITE**

**COPEN 263  
EJUSTICE 100  
JURINFO 41  
DAPIX 284  
CATS 94  
CODEC 1358**

**NOTE**

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From:	Presidency
To:	CATS
No. Cion doc.:	10940/17 + ADD 1
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 - Questions on prior convictions and on access by certain agencies

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**1. INTRODUCTION**

On 19 January 2016, the Commission submitted a proposal for a Directive improving the existing European Criminal Records Information System (ECRIS)<sup>1</sup> 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 the Member States to the Commission, at the Justice and Home Affairs (JHA) Council on 9 June 2016, to evaluate the legislative framework and present a proposal for establishment of a central database for convicted TCN.

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<sup>1</sup> Established by the 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. 23–32

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.

## **2. QUESTIONS FOR CATS**

The proposed Regulation has been discussed in the COPEN Working Party on 18 July and on 11/12 September. The discussions have shown that certain issues require guidance by CATS in order to facilitate the negotiations in the COPEN Working Party.

### **A: Prior Convictions - Art. 5(4)**

Article 5(4) of the draft Regulation includes an obligation for Member States to create data records also for convictions handed down prior to the date of entry into force of the Regulation (*prior convictions*), to the extent that the corresponding convictions are stored in the criminal records database and the identity data (alphanumeric and fingerprint data) is stored in national criminal records or national fingerprints databases.

Inclusion of prior convictions is essential for the ECRIS-TCN system to be effective as early as possible following the entry into force of the Regulation. Unless prior convictions are included in the ECRIS-TCN system, the system will only become useful several years after establishment of the system. The discussions in the COPEN Working Party have indicated that it is of utmost importance that identity data already available in the national criminal records databases (*ie* alphanumeric data) is included in the ECRIS-TCN system. It must be noted, however, that ECRIS-TCN system will not achieve its full potential if only alphanumeric data of prior convictions would be included in the

new system. As discussions have shown, central ECRIS-TCN system can only be efficient if fingerprint data complements the alphanumeric data of convicted TCN.<sup>2</sup>

However, during the negotiations at the Working Party level, several Member States mentioned that the inclusion of the fingerprint data could create a substantial administrative burden for them. In most Member States, the fingerprint data is not part of the criminal records database and is stored separately in other databases. Therefore inclusion of the fingerprints related to TCN with prior convictions would require additional efforts to be made in order to identify the existence of the fingerprint data and include such data in the ECRIS-TCN database. Additionally, some Member States observed that inserting fingerprint data of prior convictions in the ECRIS-TCN system could also pose legal obstacles.

In the light of the above, the Presidency takes the view that as regards prior convictions a gradual approach is necessary whereby Member States should immediately insert alphanumeric identity data in the ECRIS-TCN system. Where available as part of criminal records or in any other database (such as national fingerprints database etc) and in so far as such fingerprint data fulfills the criteria set out by the Regulation (including quality requirements), the Member States should also insert in the system fingerprint data related to the convicted TCN in order to achieve the aim of the Regulation and ensure that the system is operational as soon as possible. For this purpose a transitional period would be necessary to ensure that Member States have sufficient time to analyse whether the fingerprints of convicted TCN are available, to match the fingerprints and enter the relevant fingerprints data in the central ECRIS-TCN system. The obligation to enter fingerprints in the central ECRIS-TCN system would not involve collection of additional fingerprints, but matching and including the fingerprints already collected for law enforcement purposes and stored in the national databases in accordance with national law.

Article 38 (2) of the draft Regulation currently provides for a transitional period of 2 years from the date of entry into force of the Regulation for the Member States to enter both alphanumeric and fingerprints data in the central ECRIS-TCN system.

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<sup>2</sup> As expressed by the (JHA) Council on 09-10.06.2016, doc. 9979/16.

**In light of the above, the Presidency invites CATS to confirm that**

- a) both alphanumeric and fingerprint data (if available in national registries) of prior convictions should be entered in the central ECRIS-TCN system;**
- b) a transitional period of 2 years should be provided from the establishment of the ECRIS-TCN system to enter such information in that system.**

**B: Direct access for certain EU agencies and bodies and creating a contact point at EU level for third countries - Art. 7(2) and 14, 15 and 16**

The proposed Regulation includes access rights for Eurojust, Europol and the European Public Prosecutor's Office (once established). Such access rights would entail the possibility to make queries in the ECRIS-TCN database to identify the Member State(s) possibly holding conviction information for certain individuals. Such direct access would be granted only for the purpose of fulfilling their statutory tasks and in line with the mandate of respective agencies and bodies, in accordance with the legal acts establishing the agencies and bodies. After identifying the Member States possibly holding conviction data, the actual conviction data can only be queried through their current exchange channels with national authorities. The agencies would not be able to modify any data in the system.

Additionally, giving Eurojust direct access to ECRIS-TCN database would make it possible to appoint Eurojust as a contact point at the EU level for third countries and international organisations interested in obtaining criminal record information on TCN.

The advantage of such central contact point would be that third countries would no longer need to address such requests to all 28 Member States separately, as is currently the case. According to the proposal, after receiving the information request from a third country, Eurojust would make a query to the ECRIS-TCN database and identify which Member State(s) possibly have conviction data. Eurojust would then inform the Member State(s) concerned, and its authorities could then decide whether or not they wish to reply to the request of the third country, as regulated in the national legislation of this Member State. Eurojust nor any other EU body themselves, may transfer nor make available to any third country, international organisation or a private party any information received through the ECRIS-TCN database.

**CATS is invited to indicate**

- 1) whether direct access rights should be given to Eurojust, Europol and the European Public Prosecutor's Office, as foreseen in the proposed Regulation;**
- 2) whether it agrees with the creation of a central contact point for third countries via Eurojust.**

### **3. CONCLUDING REMARKS**

On the basis of the guidance by CATS, the Working Party will pursue the examination of the proposed Regulation (and the revised Directive). The Presidency aims at reaching a general approach on both texts by the end of this year.

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