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From:	Presidency
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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 - Revised four column table

I. Introduction

Following the meeting of the Working Party on 15 March, the second trilogue was held on 22 March and a technical meeting was held on 10 April. Both meetings with the European Parliament (EP) and the Commission (COM) were conducted in a constructive atmosphere.

The results of these meetings are set out in the fourth column of doc. 7520/18. Green texts are provisionally agreed, blue text (which were dealt with in the technical trilogue) could possibly also be agreed upon, and yellow texts are still to be discussed in the political trilogue.

In view of the third trilogue on 24 April, the Presidency (PRES) invites Member States (MS) to consider the questions set out under points II and III below.

II. Political questions

a) Use of delegated act for 'facial images'

The Presidency has the impression that the EP might agree to keeping Article 10 on 'implementing acts' basically as it stands - without prejudice to the time-limits, which still have to be discussed - on condition that the use of facial images be decided in accordance with the procedure for 'delegated acts' as proposed by EP in its Article 34a (AM 102). PRES understands the sensitivity of EP towards the use of facial images and considers that such a deal, if proposed, would be reasonable.

Q: MS are invited to indicate if they could accept that the use of 'facial images' would be made subject to the procedure of 'delegated acts', while Article 10 on 'implementing acts' would be kept as it stands, it being understood that the precise wording of Articles 10 and, in particular, 34a still has to be examined.

b) Purposes other than criminal proceedings

By its amendment 34, EP suggested deleting the possibility of using ECRIS-TCN for purposes other than that of criminal proceedings. During the trilogue-negotiations, the EP clarified that the amendment merely aimed at narrowing the notion of 'purposes other than that of criminal proceedings': the EP does not want ECRIS-TCN to be used too widely, also for purposes that are not intended.

In this light, it was discussed if 'purposes other than that of criminal proceedings' could be made more specific. The Commission informally presented the following initial list of 'purposes other than those of criminal proceedings' which should, according to COM, in any case be covered:

- Security clearances
- Obtaining a license or permit
- Visa, naturalisation and asylum procedures
- Employment vetting
- Vetting for voluntary activities involving direct and regular contacts with children
- Checking of own criminal record

PRES invited MS to indicate whether this list would be sufficient (see WK 3806/18). The answers of the MS to this question are set out in WK 4207/18.

While some MS could accept the list as it stands, other MS asked to expand the list. Various MS underlined that the list should not be exhaustive. On this basis, PRES suggests proposing a solution whereby the words 'or for any other purpose in accordance with national law' would stay in the first sentence of Article 7(1), but whereby a recital would explain what is meant by these words.¹

To that end, recital 18 (11c in the GA) could be amended as follows:

(11c) The central authorities of the Member States should use the ECRIS-TCN system to identify the Member State(s) holding criminal record information on a third country national when criminal records information on that person is requested in the Member State concerned for the purposes of criminal proceedings against that person, or for any other purpose in accordance with national law, such as for the checking of one's own criminal record, security clearances, obtaining a license or permit, employment vetting, vetting for voluntary activities involving direct and regular contacts with children, as well as for visa, acquisition of citizenship and asylum procedures.

While the ECRIS-TCN system should in principle be used in all such cases, the authority responsible for conducting the criminal proceedings may decide that the ECRIS-TCN system should not be used when this would not be appropriate in the circumstances of the case, e.g. in certain types of urgent criminal proceedings, in cases of transit, when criminal record information was obtained via the ECRIS system recently, or in respect of minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences.

Q: MS are invited to indicate whether such solution would be acceptable in the context of an overall compromise package.

¹ PRES considers that putting a list in the operative part, as proposed by the Commission, would not fulfil the requirements of Article 10 of Data Protection Regulation (EU) 2016/679. Further, if a list is would be used, various Member States would prefer a non-exhaustive list; hence, the list would provide examples only; good legislation, however, requires examples to be put in the recitals, not in the operative part.

c) Dual nationals

The European Parliament is strongly opposed to including in the central system identity information of EU-nationals who also have the nationality of a third country. According to the EP, there is no need to include such information, because identity information of EU-nationals is in any case stored in the national databases and exchanged according to the 'normal' ECRIS system established by the Framework Decisions.

Further, the EP considers that there could be a legal problem, since discrimination would be created between, on the one side, EU-nationals, and, on the other side, EU-nationals that in addition have a third country nationality. The EP also considers that the notion of 'EU national' would be devaluated if EU nationals would be inserted in the ECRIS-TCN system.

During the trilogues, the Presidency and the Commission argued that EU-nationals who also have the nationality of a third country should be included in the system in order to 'close the loopholes', given that people could 'hide' behind another nationality. The Commission also considered that there would be no discrimination, since the situations of the two types of EU nationals would be objectively different, one having also a third-country nationality, and the other not.

In order to address these issues, PRES has submitted some questions to MS (see WK 3806/18). The responses of MS are set out in WK 4207/18.

PRES considers that the strategy of the Council should continue to be that EU-nationals who also have the nationality of a third country should be included in the system, just like third country nationals who are not EU nationals. We will continue to try to (collect arguments and) convince EP.

However, if EP cannot be convinced, PRES wonders whether as a solution it could be envisaged to maintain the principle of the GA, by inserting in ECRIS-TCN not only persons having a third country nationality, but also EU-nationals that in addition have a third country nationality, **while providing that in respect of the latter category, no fingerprints will be inserted in the system.** In this way, the EU nationals would be treated on more or less the same basis (same information would be collected) as in the (decentralised) ECRIS system under the Framework Decisions, where fingerprints are transmitted only, if they are available. As such, the discrimination concerns of EP would, to a major extent, be addressed. Although not perfect, it may be a possible solution.

Q: MS are invited to consider whether such solution would be acceptable in the context of an overall compromise package. On the basis of the indications by the Member States, PRES will further reflect on this issue.

III. Technical questions

These questions are about points on which the proposed text is different from the text of the GA.

a) Line 37, Recital 25: it is suggested to accept the drafting proposed by EP, but in a modified form. The exchange of information should not be accurate, but the criminal record information, as exchanged, should be accurate. Please note that 'accurate' is also used in recital 4 (line 4).

Q: MS are invited to indicate if the text in the fourth column of line 37 is acceptable in the context of an overall compromise package.

b) Line 62, Article 3(h), definition of 'Central System': the texts of EP and Council are merged. Legal-linguists have further refined the results of this merged product.

Q: MS are invited to indicate if the text in the fourth column of line 62 is acceptable in the context of an overall compromise package.

c) Line 64, Article 3(j), definition of 'identification/identity information': in the GA, Council had replaced 'identification' by 'identity information'. As a possible compromise, EP suggests putting both definitions, stating that a definition of 'identification' is necessary i.a. for Article 30(1) (line 262). PRES is not sure whether adding a definition of 'identification' is a good idea, since it doesn't seem to work, at least in the wording as proposed by EP, in all circumstances, see e.g. Art. 22(1), where the identification of Member States is concerned. While PRES is actually of the opinion that a definition of 'identification' is not needed - we do not have to define all words - it promised EP to check the additional definition with MS.

Q: MS are invited to indicate what they think of the idea to add a definition of 'identification' in Article 3.

d) Line 100, Article 7(5): EP wants to avoid references to 'facial images' as much as possible, and therefore suggests deleting the words 'resulting from ... facial images'. EP referred to Article 7(3) GA, where Council has put 'all or some of [the data referred to in Article 5(1)]', which would lead to the same result, and that EP would be willing to accept (possibly also in a more elaborated form). In this light, PRES considers that the deletion of 'resulting from ... facial images' will not change the substance. The reference to Article 5(1) could probably also be deleted.

Q: MS are invited to indicate if the text in the fourth column of line 100 is acceptable in the context of an overall compromise package.

e) Line 113, Article 9(4)(b): in case data of a criminal record have been erased or deleted because they were inaccurate or where these data were processed in contravention with the Regulation, EP wants that in addition to the Member State who brought up the issue, other Member States who have been a recipient of conviction information pertaining to this record are informed of the action that has been taken. PRES understands where the EP comes from and would like to know what Member States think of this suggestion.

Q: MS are invited to indicate what they think of the compromise text set out in Article 9(4)(b) in the context of an overall compromise package.

f) Line 163, Article 12(2): EP is afraid that 'relevant' before 'fundamental rights' implies a hierarchal order in the fundamental rights. EP suggested deleting 'relevant', arguing that 'appropriate training' would already contain the necessary flexibility. PRES considers that relevant is useful, since the training should only concern the fundamental rights that are relevant in the context of ECRIS-TCN; it seems that 'appropriate training' does not provide the same flexibility. However, MS may see this differently.

Q: MS are invited to indicate if 'relevant' before 'fundamental rights' is necessary. Could it be deleted in the light of 'appropriate training'?

g) Lines 165 - 169, Article 13(1): instead of referring to the data protection Regulation and/or Directive, EP suggests referring to 'applicable Union data protection rules'. EP also prefers indicating more specifically what these rules aim at in this case, keeping in this way letters 'a' to 'd'. PRES would like to know whether the 'possible compromise' as suggested by EP would be acceptable.

Q: MS are invited to indicate if the 'possible compromise' for Article 13(1) would be acceptable in the context of an overall compromise package.

h) Line 183, Article 14(3): EP insists on its AM 64 relating to the EPPO. EP considers that recital 21 of the Council is not strong enough.

Q: MS are invited to re-consider their positions and, where necessary, provide arguments why AM 64 is not acceptable.

i) Line 184, Article 14(4): further to a suggestion by EP, PRES suggests putting this paragraph in a separate Article, in order to give it more emphasis. PRES considers that this does not change the meaning and that it could be acceptable.

Q: MS are invited to confirm that Article 14(4) could be inserted in a separate Article 14a.

j) Lines 186-188, Article 15: EP again has an issue on the word 'relevant', see above under point f). Rest of the text seems OK. In order to streamline the text, PRES suggests a redrafting as follows:

ARTICLE 15

Responsibilities of Eurojust, Europol, and the European Public Prosecutor's Office

Eurojust, Europol, and the European Public Prosecutor's Office shall:

- 1. establish the technical means to connect to the ECRIS-TCN system and shall be responsible for maintaining that connection;*
- 2. provide appropriate training to those members of their staff who have a right to access the ECRIS-TCN system before authorising them to process data stored in the Central System. The training shall, in particular, cover data security and data protection rules, and relevant fundamental rights;*
- 3. ensure that the personal data processed by them under this Regulation is protected in accordance with the applicable data protection provisions.*

Q: MS are invited to indicate whether this text would be acceptable.

k) Line 190, Article 16a: at the second trilogue, PRES suggested inserting 'identity' before 'information', but both EP and COM felt that this would not be advisable: there should be a general interdiction for the EU bodies to provide information from ECRIS-TCN to third parties, with the sole exception set out in the last sentence. Further, '**any** international organisation' was changed to '**an** international organisation'.

Q: MS are invited to indicate if the text set out in the fourth column of line 190 is acceptable in the context of an overall compromise package.

l) Line 216, Article 21(1): like in point g), EP instead of referring to the data protection Regulation and/or Directive, EP suggests referring to 'applicable Union data protection rules'.

Q: MS are invited to indicate if the text set out in the fourth column of line 216 is acceptable in the context of an overall compromise package.

m) Line 222, Article 23(1): EP would like to insert the words 'restriction of processing'. PRES has no strong opinion about this.

Q: MS are invited to indicate if the insertion of the words 'restriction of processing' would be acceptable in the context of an overall compromise package.

n) Line 225, Article 23(4): 1) EP wants to provide 'administrative decision'; PRES thinks that 'administrative' is not necessary, but would like to hear the opinion of the MS. 2) EP would like to provide that in cases where a MS takes a negative decision on a request to rectify or erase data, such a decision should be communicated to the national supervisory authority for data protection, so as to allow the latter to monitor these cases and, where appropriate, take action.

Q: MS are invited to express their opinion on the text in the fourth column of line 225, in particular on the two mentioned issues.

o) Line 238, Article 26(1): like in points g) and l), instead of referring to the data protection Regulation and/or Directive, EP suggests referring to 'applicable Union data protection rules'.

Q: MS are invited to indicate if the text set out in the fourth column of line 238 is acceptable in the context of an overall compromise package.

p) Line 241, Article 26(4): EP would like to add a reference to Article 23(7), which deals with persons requesting information on their own criminal record. PRES considers that this is a legitimate request.

Q: MS are invited to indicate if the text in the fourth column of line 241 is acceptable in the context of an overall compromise package.

q) Line 272, Article 32: EP has asked to take account of possible changes to the competent authorities. EP also stressed that publication of the authorities on the eu-LISA website is appropriate - where else should it be published? PRES considers that the text proposed by EP, as further refined, is acceptable.

Q: MS are invited to indicate if the text in the fourth column of line 272 is acceptable in the context of an overall compromise package.

r) Line 292, Article 34(5): the text of Article 34(5) has been revised by legal-linguists. MS are invited to confirm that this text is acceptable.

Q: MS are invited to indicate if the text set out in the fourth column of line 292 is acceptable in the context of an overall compromise package.