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REPORT

From:	Presidency
To:	Delegations
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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 - Presidency note with questions

I. Introduction

On 27 June 2018, the Bulgarian Presidency presented a progress report on the work carried out during its term in office (10364/18). While substantial progress has been achieved on many issues, two big issues (dual nationals and fingerprints) remain outstanding, as well as a couple of small issues.

The Austrian Presidency aims at reaching an agreement with the European Parliament as soon as possible, preferably by the end of September 2018. A first meeting with the European Parliament has been scheduled for Tuesday 4 September.

II. Dual nationals and fingerprints

In order to find a solution for the issues of duals nationals and fingerprints, the Presidency has held bilateral meetings with the Member States on 3 and 4 July. The bilateral meetings were conducted in a very positive spirit, all delegations indicating that they want to finish this file soon.

Five possible solutions were presented to the Member States (WK 7855/2018). Option D was favoured by most delegations: under this option, the ECRIS-TCN system will contain identity information of both third country nationals (TCN) and dual nationals (= EU-citizens that also have the nationality of a third country). As regards TCN, fingerprints will be inserted on the basis of the Council general approach (with the two minimum rules), whereas as regards dual nationals, fingerprints will only be inserted 'if available' (so on the same basis as for EU-citizens under Framework Decision 2009/315/JHA).

Although this solution has not yet been discussed with the EP, the Presidency is hopeful that this solution is acceptable to the EP, since it addresses, at least to a great extent, the concerns of the EP as regards alleged discrimination between EU-citizens and dual nationals.

This option D should be complemented with the 'access facility', under which the competent authorities of the Member States can consult the ECRIS-TCN system in order to ascertain whether a person who has declared to be (only) an EU national has previous convictions as a third country national (so that he is in fact a dual national).

Concrete texts for this solution on dual national and fingerprints could be the following:

Dual nationals:

Insertion of a revised Article 2a, worded as follows:

Article 2a

Citizens of the Union that also have the nationality of a third country

The provisions of this Regulation that apply to third country nationals also apply to citizens of the Union within the meaning of Article 20(1) TFEU who also hold the nationality of a third country, without prejudice to point (b) of Article 5(1).

Fingerprints:

Rewording of Article 5(1), as follows:

b) fingerprint data:

(i) fingerprints of third country nationals that have been collected in accordance with national law during criminal proceedings;

(ii) as a minimum, fingerprints on the basis of either of the following criteria:

- where the third country national has been convicted to a custodial sentence of a minimum of 6 months; or*
- where the third country national has been convicted in relation to a criminal offence which is punishable under the national law of the Member State by a custodial sentence for a maximum period of at least 12 months.*

However, in respect of citizens of the Union within the meaning of Article 20(1) TFEU who also hold the nationality of a third country, only point (i) shall apply.

The fingerprint data shall have the specifications for the resolution and use of fingerprints referred to in point (b) of Article 10(1), and the reference number of the fingerprint data of the convicted person shall include the code of the convicting Member State.

Access facility:

Insertion of a new Article 7(1b), worded as follows:

1b The competent authorities may also query the ECRIS-TCN system to verify whether, in respect of a person having the nationality of a Member State, any Member State holds criminal record information concerning this person as a third country national.

Accompanying recital:

When EU nationals who also hold the nationality of a third country present themselves only with their EU-nationality, they will in principle not be included in the ECRIS-TCN system. In order to ensure that the competent authorities have a complete overview of the criminal record of such persons, it should be possible to query the ECRIS-TCN system to verify whether, in respect of a person having the nationality of a Member State, any Member State holds criminal record information concerning this person as a third country national.

Q: Delegations are invited to confirm that this solution on dual nationals and fingerprints may be presented to the European Parliament with a view to reaching an overall compromise on the draft Regulation.

III. ECRIS4ALL

At the bilateral meetings, the Presidency also questioned Member States about option E, regarding 'ECRIS4ALL'. According to this solution, the data-base of the central system would contain identity information of all persons that have been convicted in the EU, whether EU-citizens, third country nationals or dual nationals (as well as people holding two or more EU-citizenships). Such a central data-base, which would address all concerns regarding alleged discrimination between different persons, could also replace the decentralised system of Framework Decision 2009/315/JHA.

During the bilateral meetings, this option received mixed reaction. While several delegations indicated that this would, in the long term, be the perfect solution, some other delegations indicated that this solution would encounter serious obstacles in their Member States.

The Presidency considers that ECRIS4ALL would in the short term not be an advisable solution, since it would probably imply that the Commission would have to make a new legislative proposal, which could considerably delay the proceedings. However, the Presidency would like to invite Member States to reflect whether, at the adoption of the current Regulation, a declaration could be made along the following line:

*Declaration by the Council [and of the European Parliament?]
[to be inserted in the minutes of the Council meeting at which the Regulation
will be finally adopted]*

The Council invites the Commission to consider submitting a legislative proposal converting ECRIS-TCN into ECRIS4ALL. The data-base of such central system should contain identity information of all persons that have been convicted in the EU, whether EU-citizens, third country nationals, or persons holding two or more nationalities.

Q: Member States are invited to indicate their opinion on such declaration.

IV. Other issues

The Presidency would appreciate receiving answers to the following questions:

1) **Line 17, recital 11c1**

FI wondered why the second sentence of recital 11c of the general approach had been deleted (starting with '*While the ECRIS-TCN system ...*', in text mentioned in yellow). The Presidency considers that this is an unintentional mistake, and suggests asking EP to agree re-inserting this sentence.

Q: Unless Member States indicate otherwise, it is assumed that MS agree with this position.

2) **Lines 133 and 343, Art. 11(4) and 38(1)**

It was agreed in the Working Party that eu-LISA should develop and implement the ECRIS-TCN system as soon as possible but at the latest within three years after the entry into force of this Regulation and following the adoption by the Commission of the measures provided for in Article 10.

Upon reflection, and after talks with eu-LISA, the Presidency considers that it does not make sense to impose a fixed deadline on eu-LISA, which has a heavy workload these days. What would happen if eu-LISA cannot respect the deadline because it needs a bit more time?

The Presidency therefore suggests putting 'as soon as possible' in Article 11(4).

At the same time, as regards Article 38(1), it would be unfair to require MS to respect the deadline of 36 months for taking the necessary measures to comply with this Regulation. Hence, PRES suggests making a modification in line 343 as well.

To be noted that the recently adopted ETIAS Regulation also allows a lot of flexibility as regards time-limits.

Q: Member States are invited to indicate if they can accept the new texts in lines 133 and 343.

3) **Line 283, Article 33(7) (new)**

COM suggests allowing it to set different dates for the entry into the ECRIS-TCN system of alphanumeric data and fingerprint data as included in Article 5, as well as for the start of operations with respect to these different categories of data.

The Presidency considers that it would be a good idea to allow the Commission to have this possibility, in case of problems of development of the system. The Presidency wonders though whether it should be provided that this possibility should not oblige the Member States to insert data earlier than as currently foreseen. The text of Article 33(7) could therefore read as follows:

7. When taking the decisions referred to in this Article, the Commission may specify different dates for the entry into the ECRIS-TCN system of alphanumeric data and fingerprint data as included in Article 5, as well as for the start of operations with respect to these different categories of data [, it being understood that such dates cannot be earlier than as resulting from paragraphs 1-6 of this Article].

Q: Member States are invited to indicate if they can accept this text of Article 33(7).

4) **Line 304, Article 35(2): no opinion clause**

The Council in its general approach has indicated that it would like the no-opinion clause to be added in the text. The EP also seems to be able to accept this, but the Commission opposes, saying that the no-opinion clause could complicate the ECRIS-TCN system to be developed.

Q: Member States are invited to indicate/confirm if they wish the text to contain the no-opinion clause.

V. **Final remark**

The references to the current eu-LISA Regulation (1077/2011) will need to be replaced by references to the new eu-LISA Regulation, which was recently agreed and which will probably be adopted in the autumn. The Presidency will have a look into this matter.