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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

Introduction

On 18 July 2018, the Working Party discussed this file for the last time. At that occasion, the Presidency presented texts for a solution on the issues of "dual nationals" and "fingerprints", based on "option D" as set out in WK 7855/2018, which was the option most favoured by delegations during the bilateral discussions that were held on 3 and 4 July 2018.

It is reminded that 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). However, while as regards TCN fingerprints will be inserted on the basis of the Council general approach (with the two minimum rules), as regards dual nationals fingerprints will only be inserted when they have been collected in accordance with national law. In this way, the conditions under which fingerprint data can be included in the ECRIS-TCN system with regard to dual nationals will be comparable to the conditions under which fingerprint data are exchanged between Member States with respect to citizens of the Union under the ECRIS system established by Framework Decision 2009/315/JHA.

Outcome of the meeting with the European Parliament on 4 September

At a meeting on 4 September 2018 with the negotiating team of the European Parliament, the Presidency presented this solution. The EP negotiating team expressed a cautiously positive approach, acknowledging that the solution addresses the concerns of the European Parliament regarding 'discrimination' of dual nationals. The team said that it was ready to submit this solution to the LIBE Committee, in order to verify whether it could constitute an acceptable compromise.

The EP negotiating team requested however inserting Article 2a into Article 2, so as to make the text optically more digestible to the European Parliament. Further to this request, the Presidency presented a new drafting of Article 2, which is set out in the Annex to this note. In view of the new wording of Article 2, it does not seem necessary anymore to make changes to Article 5.

Small changes were also made to the wording of the recital accompanying the text of Article 7(2a) on the "access facility".

As regards the rest of the text, the negotiating team seemed ready to accept most of the minor changes that were agreed at the meeting on 18 July and which were inserted in the four column table, with the exception of Article 38. In respect of this Article, the EP negotiating team requested putting the deadline of 36 months in the recitals and making a link with the time that eu-LISA needs to develop and implement the ECRIS-TCN system.

The Presidency does not consider this to be problematic, since also a similar solution is adopted in other texts, and since in practice it is very likely that eu-LISA will need more than three years to develop and implement the system, as a result of which Member States will also have more than 36 months to take the necessary measures (although these measures should, at least partially, already be taken during the period when eu-LISA develops and implements the system).

Questions for Member States

At the meeting on Monday afternoon 10 September, JHA Counsellors will be invited to confirm that they can accept, where necessary subject to any changes, the following texts as set out in the Annex to this note:

- a) the new texts of Article 2, regarding "Scope", and of Article 7(2a), regarding the "Access facility", including the accompanying recitals;
- b) the new text of Article 38(1), regarding "Implementation and transnational provisions", including the accompanying recital.

Concluding remarks

The Presidency intends reconvening a meeting of the Working Party as soon as it has received feedback on the acceptability of the new proposals by the LIBE Committee. The text of the Regulation and of the accompanying Directive can then probably be finalized rather swiftly.

To be noted, finally, that the next - and most likely final - trilogue will take place in the week of 15 October 2018, possibly on Tuesday 16 October.

Revised texts for the solution on dual national and fingerprints

Dual nationals:

Article 2a is deleted. Instead, insertion of a new paragraph to Article 2, worded as follows:

Article 2 - Scope

- 1. This Regulation applies to the processing of identity information of third country nationals who have been subject to convictions in the Member States for the purpose of identifying the Member State(s) where such convictions were handed down.*
- 2. 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. With respect to such persons, by derogation from Article 5(1)(b) fingerprints shall only be inserted in the ECRIS-TCN system where they have been collected in accordance with national law.*

Accompanying recital:

This Regulation should apply to third country nationals. In addition, the Regulation should apply to citizens of the Union within the meaning of Article 20(1) TFEU who also hold the nationality of a third country. However, since these latter persons hold Union citizenship, the conditions under which fingerprint data can be included in the ECRIS-TCN system with regard to these persons should be comparable to the conditions under which fingerprint data are exchanged between Member States with respect to citizens of the Union under the ECRIS system established by Framework Decision 2009/315/JHA. Therefore, in respect of citizens of the Union who also hold the nationality of a third country, fingerprints should only be included in the ECRIS-TCN system when they have been collected in accordance with national law.

Access facility:

Insertion of a new Article 7(2a), worded as follows:

2a 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 (revised):

Citizens of the Union who also hold the nationality of a third country will not be included in the ECRIS-TCN system if the competent authorities are not aware that such persons have the nationality of a third country. However, it may be that such persons have prior convictions as a third country national. In order to ensure that the competent authorities have a complete overview of criminal records, it should be possible to query the ECRIS-TCN system to verify whether, in respect of a citizen of the Union, any Member State holds criminal record information concerning this person as a third country national.

Article 38

Implementation and transnational provisions

1. Member States shall take the necessary measures to comply with this Regulation **as soon as possible so as to ensure the proper functioning of the ECRIS-TCN system.**

Accompanying recital:

Member States should take the necessary measures to comply with this Regulation as soon as possible so as to ensure the proper functioning of the ECRIS-TCN system, taking into account also the time that eu-LISA needs to develop and implement the ECRIS-TCN system. However, Member States should have at least 36 months after the entry into force of this Regulation to take the measures to comply with this Regulation.
