Meijers Committee
standing committee of experts on international immigration,
refugee and criminal law

CM1710 Note on the definition of third-country nationals in the Commission's ECRIS-TCN proposal

2 October 2017

Union citizens with the nationality of a third country should not be treated as second class Union citizens

In June 2017 the Commission proposed to establish a centralized system, the ECRIS-TCN, for the exchange of criminal record information on convicted third-country nationals and stateless persons.1 The system will include not only data such as the name, nationality, place and date of birth, gender and parents' names, but also biometric data, including fingerprints and facial images.
This centralized system is meant to complement the current ECRIS, which allows for the exchange of data on criminal records on a decentralized basis between Member States. ECRIS is operational since April 2012. It allows Member State's authorities to obtain information on previous convictions of an EU national from the Member State of that person's nationality. According to the Commission, a separate and centralized database would be necessary to enable the exchange of information on criminal records of third-country nationals in the EU.
According to Article 3 (g) of the proposal 'third country national' for the purpose of this Regulation, means 'a national of a country other than a Member State regardless of whether the person also holds the nationality of a Member State, or a stateless person or a person whose nationality is unknown to the convicting Member State.' This means that Union citizens with a double nationality, whose second nationality is from a third state, will also be included in the centralized ECRIS system.

This note of the Meijers Committee explains why the wide definition of third-country national in this proposal is in breach of Union law, for the following reasons:

- The justification for the ECRIS-TCN does not make sense for Union citizens who also have a third country nationality.
- The wide definition has the effect of depriving these Union citizens from the enjoyment of benefits resulting from their status of Union citizen
- It results in discriminatory treatment in comparison with other Union citizens. This is particularly serious since the persons affected are in many cases immigrants or descendants of immigrants in the Union.

According to this proposal, a large category of Union citizens will for the first time in Union Law no longer be treated as Union citizens but as nationals of third countries. De facto, this proposal will introduce the idea of first and second class Union citizens.

No serious justification for entering categories of EU citizens in the centralized ECRIS system

1 COM(2017)344 final.

The general justification of ECRIS-TCN is that information on third country nationals is not gathered within the Union in the Member State of nationality as it is for nationals of Member States (see preamble 5), since third country nationals do not have a Member State of nationality within the Union. This justification does obviously not apply to EU citizens with dual nationality. Information on their criminal records will always be available in the Member State of their nationality.
The only justification for this new definition is to be found in a footnote on the second page of the proposal, reading: "In line with the Commission's 2016 proposal (COM(2016) 07 final), the current proposal equally applies to third country nationals also holding the nationality of a Member State, in order to ensure that the information can be found whether or not the additional nationality is known. See page 12 of the explanatory memorandum on that proposal." 2 However, on p. 11/12 of COM(2016)07 final the Commission stated: "This definition now covers convictions, irrespective of whether they were handed down against a national of another Member State or a TCN. A definition of 'third country national' is added to clarify that this group of persons includes stateless persons and persons whose nationality is not known." These sentences do not provide a clear, convincing and sufficient justification for the far-reaching proposal to treat certain Union citizens as third-country nationals.
This proposal is also not justified by standing practice. When in 2004 and in later years new states became Member States of the EU the entries on the nationals of these Member States were deleted from the SIS data systems, irrespective of whether they had a second nationality or not. The data on Polish nationals also having the nationality of Russia or Ukraine or of Bulgarian nationals who are also nationals of Turkey were deleted from the SIS. Now it is proposed to treat such Union citizens as third-country nationals.

Union citizens should not be deprived from the enjoyment of the status of Union citizen.

The Court has held in constant case law since 2001 "*that the status of Union citizen, which is intended to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality*".3 A citizen of the European Union is even entitled to rely on this strong status in cases where there does not exist any specific provision of EU law where he can rely on.4 Moreover, it is constant case law of the Court of Justice that the Union citizen can rely on this status, even in cases where he did not make use of the right of free movement within the EU. As the Court ruled, *"Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens."5*
With regard to dual nationality, the Court held in the *Micheletti* judgment "*that the provisions of Community law on freedom of establishment preclude a Member State from denying a*

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2 Footnote 2 on p. 2 of COM(2017)344.

3 CJEU 20 September 2001, C-184/99 (*Grzelczyk*) and recently CJEU 13 September 2016, C-304/14 (*CS*).

4 CJEU 17 September 2002, C-413/99 (*Baumbast and R).*

5 E.g. CJEU 8 March 2011, C-34/09 (*Ruiz Zambrano).*

national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deems him to be a national of the non-member country."6 The definition of third-country national in the proposal would have the effect which the Court in Micheletti found to be in breach with Union law.
Moreover, in the judgment *Kahveci & Inan* the Court held that the family members of a lawfully employed Turkish worker can still invoke the rights granted on the basis of the Association Agreement EEC-Turkey once that worker has acquired the nationality of the host Member State while retaining the Turkish nationality7. The Court held that a Turkish worker does not lose the right to live with family members under the Association Agreement because of the acquisition of the nationality of a Member State. This case concerned the specific situation of a third country national who derived certain benefits from the nationality of a third country. The proposed definition of third-country national will have the opposite effect. The Union citizen will no longer be treated as a Union citizen because (s)he also has the nationality of a third-country. This would deprive that Union citizen from the enjoyment of the status of Union citizen.

Union citizens with double nationality should not be discriminated

According to the definition in the proposed directive, the status of Union citizens is not treated as the fundamental status but disregarded only because the Union national also has the nationality of a third country. Such definition is not only incompatible with Article 20 TFEU, but also with Article 18 TFEU which prohibits any discrimination on the basis of nationality within the scope of the Treaty. In *Huber v. Germany*, the Court applied this prohibition of discrimination on the basis of nationality to assess whether the German central register of foreign nationals (AZR) including data on EU citizens, and accessible for law enforcement purposes, was in accordance with the data protection principle of purpose limitation.8 Referring to its settled case-law that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, it found that such treatment is only justified if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued. As we mentioned above, the general justification for ECRIS-TCN, namely the absence of a Member State of nationality, does not apply to EU citizens with dual nationality.

The discriminatory treatment mainly affects immigrants and descendants of immigrants

The German *Statistisches Bundesamt* estimated that in 2015 between 2 and 4 million German nationals also had another nationality. From data concerning the other nationality of 1.7 million German nationals it appears that 1 million of these Germans also had the nationality of a non EU country and half of these dual nationals were first generation immigrants. Most

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6 CJEU 7 July 1992, C-369/90 (*Micheletti*), interpreting the provisions of freedom of establishment.

7 CJEU 29 March 2012, C-7/10 (*Kahveci & Inan*).

8 CJEU 16 December 2008, C-524/06.

probably most of the other half are children of immigrants.9 In 2015 approximately 3.3 million French nationals had a second nationality; 90 percent of these dual nationals are immigrants or descendants of immigrants.10 From the official CBS statistics it appears that more than 1 million Dutch nationals have a second nationality. The large majority are immigrants or children of immigrants. Approximately, 70 percent of the Dutch nationals who also have the nationality of a third country, had the nationality of a country with a majority Muslim population. A considerable part of these Union citizens are unable to abandon their third-country nationality, due to legislation from that third state.
The proposed difference in treatment of Union citizens with or without the nationality of a third country will affect large numbers of Union citizens. In practice, the proposal will affect predominantly Union citizens of immigrant origin. In several Member States, difference in treatment will run to a large extent along ethnic and religious lines.

Conclusion: inclusion of Union citizens with double nationality in ECRIS-TCN is incompatible with EU Charter and CERD

The proposed definition is incompatible with Article 21(2) of the EU Charter of Fundamental Rights because it introduces a difference in treatment between Union nationals with and without the nationals of a third country. The proposal creates a difference between first and second class Union citizens. Union citizens no longer enjoy the same treatment irrespective of their nationality.
The proposed definition is also incompatible with Article 21(2) of the EU Charter because it introduces an indirect discrimination on the ground of race between Union citizens of immigrant origin and other Union citizens and, in certain Member States, an indirect discrimination on the ground of religion. The ECtHR has set a very high standard for the justification of direct or indirect difference in treatment of the basis of race.11
Moreover, the proposed definition is also incompatible with Article 2 of the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) which prohibits racial discrimination by state organs and public officials and Article 5(a) CERD which prohibits racial discrimination before the tribunals and all other organs administering justice. All EU Member State are bound by the CERD convention.

It is for these reasons that the Meijers Committee strongly recommends the European Parliament and the Council to amend the proposal using the standard definition of the concept third-country national in EU migration directives, reading: 'third-country national' means a person who is not a citizen of the Union within the meaning of Article 20(1) TFEU".12

NB: This note will be followed by a more extensive comment in which we express our concerns with regard to the necessity and proportionality of the ECRIS-TCN in general.

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9 Statistisches Bundesamt, Mikrozensus 2015, Fachserie 1, Reihe 2.2.2015, p. 9 and 158

10 Le Monde 24 December 2015.

11 ECtHR 24 May 2016, appl. no. 38590/10, Biao v Denmark.

12 See e.g. the definition in directive 2003/86, directive 2003/109, directive 2004/114 and, recently directive 2016/801.

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Contact info:
Ph +31(0)20 362 0505
E post@commissie-meijers.nl
W www.commissie-meijers.nl