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

CM1711 Note on Proposal for a Regulation of the European Parliament and of the Council establishing a centralized 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) and amending Regulation (EU) No 1077/2011

23 October 2017

The Meijers Committee would like to express its concerns with regard to the Commission proposal of 29 June 2017 on the introduction of a centralized system, ECRIS-TCN (COM (2017/344) (further: the proposal).

ECRIS, as it currently exists, is a European decentralized system used by EU Member States to exchange information on previous convictions of EU citizens as contained in the national criminal record systems. ECRIS is now regulated by the Framework Decision 2009/315 and Council Decision 2009/316. These legal instruments are to be amended, respectively replaced.[1]

In addition to the decentralized exchange via ECRIS, the Commission presents in the proposal a centralized data system containing solely the convictions of third-country nationals (including EU citizens with dual nationality) and stateless persons. It appears that this centralized system is intended to coexist with the existing decentralized exchange of information on criminal records.

The proposal is meant to ensure the exchange of criminal record information for non-EU citizens and EU-citizens with dual nationality, including the nationality of a third country. According to the Explanatory Memorandum[2] , the central processing of information on third-country nationals would be necessary because if Member States need information concerning convictions of third-country nationals, they can obtain these information only by sending a so-called 'blanket request' to all Member States, which would be a time-consuming and costly procedure. Since every conviction of a EU citizen will be reported to the Member State of nationality, this problem does not occur for EU citizens.[3] The European Commission further notes in the Explanatory Memorandum that another incentive for this proposal is the need to solve security issues and the political stance for a more effective and efficient data exchange in the aftermath of the recent terror attacks in Europe. However, neither the evaluation of the current ECRIS, nor the 'Analytical Support Document' presented by the proposal regarding ECRIS-TCN in place of the usual Impact Assessment, offer information on the added value of the decentralized ECRIS and the presented centralized ECRIS-TCN for the fight against terrorism.[4] The

1 As a result of a Commission proposal of 19 January 2016 (COM (2016/7).

2 CM1710 Note on the definition of third-country nationals in the Commission's ECRIS-TCN proposal, 4 October 2017, the Meijers Committee.

3 Aside from ECRIS, the exchange of information on convictions is established pursuant to Article 22 of the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe. According to the rules laid down therein, the convicting Member State must inform the Member State of which the convict holds the nationality. The text of Article 22 requires this exchange of information at least once a year but the Member States are free in conducting an exchange more often.

4 European Commission 29 June 2017, SWD (2017) 248 final.

Meijers Committee is concerned that the proposal, with an immense potential impact for individuals and the protection of their rights, will be adopted without first examining the added value, necessity and proportionality of such centralized system.

It is necessary to first evaluate the effectiveness of the current ECRIS regarding the judicial cooperation and exchange of information on criminal convictions, and to consider why existing systems (such as Prüm, Europol, SIS II) do not provide sufficient information in the context of the fight against or the prevention of serious criminal offences and terrorism.

This note supplements CM1710 Note on the definition of third-country nationals in the Commission's ECRIS-TCN proposal (2 October 2017) where the Meijers Committee concluded that Union citizens with the nationality of a third country should not be treated as second class Union citizens.

Proportionality and purpose limitation

The Meijers Committee notes that the consequences of the proposal may be more far-reaching than the current information exchange on EU citizens through ECRIS. If agreed upon, the proposal could lead to a disproportionate violation of their rights, contrary to prior standards set by the European Court of Justice of the European Union (CJEU) and the ECtHR.[5]

First, the proposal of ECRIS-TCN does not include a clear and defined purpose of the data system. Article 1 of the proposal states that the purpose of the ECRIS-TCN proposal is first, to identify the Member State holding information on previous convictions of third-country nationals and second, to lay down the conditions under which the ECRIS-TCN shall be used by 'competent authorities of the Member States to obtain such information'. According to Article 7 of the proposal, the information stored on previous criminal convictions on third-country nationals can be requested for criminal proceedings 'or for any purposes other than criminal proceedings in accordance with national laws'. Furthermore, according to the proposal, the information stored into ECRIS-TCN will be accessible for Europol, Eurojust and the European Public Prosecutor. This is a too wide definition of the purpose, in breach of the applicable guarantees under Articles 7 and 8 CFR. [6]

Second, in contrast to the current ECRIS, the proposal allows for the exchange and collection of fingerprints, facial recognition and other possible biometric data of third-country nationals.

Third, ECRIS-TCN may also be used to store information on criminal convictions of third-country nationals because of violations of national immigration laws. In its opinion in 2015, the Fundamental Rights Agency (FRA) warned against the risk that ECRIS-TCN would be used to withdraw or refuse issuance or extension of residence permits. Furthermore, the FRA proposed that convictions related to irregular entry and stay would not be processed in ECRIS-TCN, to avoid secondary effects from national convictions, which, specifically for refugees and children, would have adversary effects for their integration and protection. [7]

5 See HJEU *Schrems v. Data Protection Commissioner*, 6 October 2015, C- 362/14. CJEU *Digital Rights Ireland Ltd* 8 April 2014,C-293/12 and ECtHR, 4 December 2008, *S. and Marper v. UK*, appl.no. 30562/04, 30566/04.

6 See CJEU *Schrems v. Data Protection Commissioner*, 6 October 2015, C- 362/14; HJEU *Digital Rights Ireland Ltd* 8 April 2014, C-293/12 and CJEU Tele2 Sverige AB-Watson 21 December 2016, C-203/15 and C-698/15.

7 FRA, Opinion 1/2015 http://fra.europa.eu/en/opinion/2015/fra-opinion-exchange-information-third-country-nationals-under-possible-system

According to the European Commission, although stating that the ECRIS-TCN is not meant as a tool for regulating migration, the extent to which criminal record information is processed for other purposes would be a matter of national law, and therefore limitations to this further use would not be possible in the ECRIS-TCN proposal.[8] The Meijers Committee underlines that when establishing a new centralized information system, it is the obligation of the EU legislator to define a clear and limited purpose of the use of the personal information.[9]

Certainly, the Member States have wide discretion regarding the standardization of criminalisation and prosecution and the collection and use of criminal record information can have severe consequences for the legal position of the person concerned. One can think of restricted or limited access to the employment market, loss of legal custody of children and for EU citizens staying in another Member State and for third-country national in general, loss of residence status and expulsion. Moreover, the convictions on which the Member States exchange information, concern also violations of immigration laws.

In conclusion:

- The consequences of this proposal regarding third-country nationals (including long-term residents in the EU and EU citizens with dual nationality) are not only disproportionate in respect of their rights, but there is an unjustified distinction made on the basis of nationality between different categories of citizens.
- Taking into account the wide impact of the use of the information in ECRIS-TCN and the diverging rules in the different Member States with regard to both the criminalization of irregular stay or migration, as the consequences of earlier criminal convictions for legal stay, the Meijers Committee urges the European Parliament and the Council to reconsider the defined goal and use of ECRIS-TCN.

Unlawful distinction between EU citizens and EU citizens holding the nationality of a third state

The Meijers Committee concluded in its earlier note of 2 October 2017 (CM1710 on the definition of third-country nationals in the Commission's ECRIS-TCN proposal (2 October 2017) that Union citizens with the nationality of a third country should not be treated as second class Union citizens.

This conclusion was based on the following considerations:
- 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.

The Meijers Committee understands that one of the options to address these problems, currently discussed, is to include Union citizens with two Union nationalities as well in the centralized system.

8 See p. 7 of the explanatory memorandum.

9 As underlined as well by the CJEU in CJEU *Digital Rights Ireland Ltd* 8 April 2014,C-293/12.

The Meijers Committee takes the view that this would not be a proper solution. It still discriminates immigrants and descendants from immigrants (although with origins in another Member State). Moreover, there are no good reasons for including this category in the centralized system, because the people in this category are already included in the current system of ECRIS.

Evaluation of the current system – solving existing shortcomings

In the evaluation report of the European Commission regarding the current functioning of ECRIS (COM (2016) 6, 19 January 2016), the Commission points at the problem of national differences as regards the exchange of information on EU citizens. Accordingly, the Member States have different interpretations of the term 'conviction', whereas some Member States exchange data solely on criminal convictions and others also exchange data on non-criminal convictions. The Netherlands, for example, processes also information on non-judicial decisions and even on pending matters, thus without a conviction. When informing the other Member States about convictions (on the basis of article 4 (2) of Framework Decision 2009/315), Member States also interpret the term 'as soon as possible' differently. In this way, in practice the disclosure of information on criminal convictions is handled by using different terms or even no terms at all.

Before voting in favor of the extension of ECRIS, the Meijers Committee deems it necessary to evaluate the effectiveness of the current system regarding the judicial cooperation and why existing systems (such as Prüm, Europol, SIS II) do not provide sufficient information in the context of the fight against serious criminal offenses and terrorism.

It appears from the statistics published on the use of ECRIS that the number of information requests about criminal convictions for other purposes than criminal investigations increased in 2016, namely from 18% in 2012, to 22% in 2016.[10] From these statistics it also follows that in 63% of all requests through ECRIS, there is no mention of a criminal conviction. Besides that, the overview also shows that there is mentioning of an unjustified classification of new convictions and, for example, an update about previous convictions. It is also stated that the Netherlands not only acquire information on convictions as intended by the Framework Decision 2009/315 but also on other convictions such as the ones registered in the national files.[11] This means that the Netherlands not only register final convictions but also information on other decisions, such as non-final convictions.

The above-mentioned raises the following questions which according to the Meijers Committee must be answered before this proposal on the centralized ECRIS-TCN can be adopted:

- For which other purposes than criminal law enforcement, listed on p. 10 of the Staff Working Document of the European Commission concerning the exchange through ECRIS, is the information from the existing ECRIS in the Member States currently requested?
- To what extent is the current ECRIS considered to be an effective and efficient tool for criminal investigations and prosecutions?
- How is a harmonized and equivalent application of ECRIS ensured that shall prevent that ECRIS arbitrarily stores national decisions taken on basis of varying grounds, and incorrect or outdated information?

10 https://ec.europa.eu/info/sites/info/files/annex-to-statistical-report-use-of-ecris_june2017_en.pdf.

11 Ibid, p. 11-12.

- Why is it not further assessed in how far the operational and informational cooperation between the Member States can be improved instead of establishing another new centralized system with similar shortcomings and risks for individual rights?
- How does a central database on third-country nationals solve the problem of deficient informational cooperation between the Member States about the EU citizens who possibly pose a risk for the internal security of the EU?

The Meijers Committee is of the opinion that first the problem of national differences regarding the current functioning of ECRIS should be solved, and that the effectivity of the existing system must further be assessed, before the extension of ECRIS or the establishment of a new centralized system on third-country nationals and EU citizens with dual nationality can be taken into consideration.