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

CM2104 Creating second-class Union citizenship? Unequal treatment of Union citizens with dual nationality in ECRIS-TCN and the prohibition of discrimination

1. Introduction

This Comment follows up on our recent policy brief on the differential treatment of citizens with dual or multiple nationality and the prohibition of discrimination.[1] In that policy brief, the Meijers Committee highlighted the use of dual nationality as a selection criterion in legislation or administrative practice and its negative effects on the equal treatment of citizens of immigrant origin.

In this Comment, we express our concerns regarding Regulation 2019/816, establishing a new large-scale EU database, ECRIS-TCN (hereafter the Regulation). In this database, personal data (including fingerprints and facial data) of third-country nationals with a criminal conviction in a Member State will be registered. The new database will also register similar information of Union citizens who also hold the nationality of a third country. To our knowledge, the Regulation is the first Union law instrument that treats Union citizens who also hold a third country's nationality as third-country nationals.[2] The Regulation does not cover Union citizens with nationalities of two or more Member States.

According to the Meijers Committee, the difference in treatment of Union citizens with and without a second TCN nationality in the Regulation:

- is codified without due regard to the fact that almost all Union citizens with dual nationality are immigrants or children of immigrants;
- is not adequately justified in terms of proportionality and necessity;
- violates the prohibition of discrimination of Union citizens on the ground of nationality and the prohibition of discrimination on the ground of race and ethnic origin in Article 21 of the Charter and other international instruments binding all Member States, and;
- undermines Union citizenship as the fundamental status of nationals of the Member States.

Therefore, we call upon the European Commission to propose amending the Regulation before the ECRIS-TCN database becomes operational.

[1] CM2016 Policy brief on 'Differential treatment of citizens with dual or multiple nationalities and the prohibition of discrimination', available here. A summary of the policy brief is available here.
[2] With the exception of point (b)(ii) of Article 5(1) of the Regulation which does not apply to Union citizens.

2. Almost all dual nationals are of immigrant origin

The background of our concerns regarding the inclusion of data on Union citizens in ECRIS-TCN is that the overwhelming majority of Union citizens who also hold the nationality of a third country are immigrants themselves or (grand)children of immigrants. They acquired dual nationality either at birth or later in life. Acquisition at birth occurs due to their parents having different nationalities (in all Member States) or to *ius soli* elements in the national law of some Member States, such as Germany, Ireland, and Portugal. Many first-generation immigrants become dual nationals later in life at the time of their naturalisation, option, declaration, or other forms of nationality acquisition. Even in Germany and the Netherlands, both Member States with an official policy against dual nationality, more than 60% of the naturalized citizens retain their original nationality and become dual nationals.

Most Member States do not (systematically) register the second or third nationality of their nationals. From the few available data and estimates, it appears that Union citizens with dual nationality make up a considerable part of the population in several Member States. In Germany, the official estimates in 2015 range from 1.7 to 4.3 million German nationals with dual nationality. In France, it was estimated in 2010 that 3.3 million French nationals, i.e. 5% of the total population, have dual nationality. In the Netherlands, in 2014 8% of the population had multiple nationalities.[3] From those 1.3 million Dutch dual nationals, 20% also held the nationality of another Member State and 80% held the nationality of a third country. One-third of the latter group cannot get rid of their other nationality, since the third countries concerned do not allow renunciation of nationality.[4]

Union citizens with dual nationality are perceived, and sometimes treated, by the majority population of the Member States as members of a visible minority based on their family name, the colour of their skin, or their religion. Generally, Union citizens with two EU nationalities (whose data will not be included in the ECRIS-TCN database) will be less visible than Union citizens also holding the nationality of a third country, whose personal data will be included in ECRIS-TCN. This perception and differential treatment of visible minorities in our view should not be supported by Union legislation or national law of Member States. Moreover, as we will explain below, differences in treatment of persons of immigrant origin in law or practice by institutions or Union and Member States officials, may result in difference in treatment on grounds of race or ethnic origin and thus are lawful in very exceptional cases only.

3. Treatment of Union citizens in ECRIS and ECRIS-TCN is not comparable

According to recital 9 of the Regulation "*the conditions under which fingerprint data* [of Union citizens who also hold the nationality of a third country] *can be included in ECRIS-TCN in respect of those persons should be comparable to the conditions under which the fingerprint*

[3] See para. 2 of our policy brief CM2016.
[4] E.g. Algeria, Iran, Morocco, Pakistan, Somalia, Syria and Tunisia do not allow renunciation.

data of Union citizens are exchanged between Member States through ECRIS". This recital implicitly confirms that the two categories of Union citizens are treated differently in the two data systems. Considering the current rules on storage and use of personal information of convicted Union citizens in ECRIS[5] and on convicted Union citizens who also hold the nationality of a third county in ECRIS-TCN, the Meijers Committee observes that the treatment of Union citizens in the two data systems is not 'comparable', as suggested in the recital. We give five examples of important differences between the two systems and their effects on Union citizens:

(1) Unlike ECRIS, ECRIS-TCN contains the central storage of biometric data (including fingerprints and facial images).
(2) Unlike ECRIS, ECRIS-TCN is a centralized system; ECRIS is a decentralized information system, used to facilitate the bilateral exchange of information on criminal records between the participating Member States. This decentralized structure of ECRIS provides more protection against irregular access to and use of the information and considerably reduces interference with the right to protection of personal data.[6]
(3) Unlike ECRIS, ECRIS-TCN, when operational, will be connected via the Common Identity Repository with other EU large-scale databases (including Visa Information System, Schengen Information system, Eurodac, Entry Exit System and ETIAS) based on the Interoperability Regulations 2019/817 and 2019/818. This will allow a far greater number of end-users access to the information in ECRIS-TCN than to information in ECRIS.[7]
(4) Unlike ECRIS, ECRIS-TCN can be used for multiple purposes, including decision-making in the field of immigration law. Information acceded via ECRIS-TCN may be used to restrict the free movement rights of the Union citizens with dual nationality, whilst the information on criminal convictions of Union citizens in ECRIS may not be used for that purpose. In its opinion of 2015, the EU Fundamental Rights Agency (FRA) explicitly warned against an option in the Regulation allowing Member States to use the information for immigration law purposes, stating that "*intended as a neutral tool, it will have certain adverse effects for third-country nationals which are either irrelevant or less adverse for EU nationals*". According to FRA, such use of ECRIS-TCN would represent "*a substantial departure from the primary purpose of ECRIS from judicial cooperation in criminal matters to measures in the fields of return and combating irregular migration. This 'function-creep' should be avoided because of its unforeseeable effect on fundamental rights*";[8]
(5) Unlike ECRIS, ECRIS-TCN will be accessible by Europol, Eurojust and the European Public Prosecutor. These agencies do not have access to data exchanged via ECRIS.

[5] Established by Council Decision 2009/316 of 6 April 2009, amended by Directive 2019/884 of 17 April 2019, *OJ* L 151, 7.6.2019.
[6] See also Fundamental Rights Agency, Opinion 1/15, 4 December 2015, p. 15; European Data Protection Supervisor, Opinion 11/2017, 12 December 2017, p. 9.
[7] See also the proposal of 2 March 2021, COM (2021) 96, providing for the use of ECRIS-TCN for the purpose of screening third-country nationals at the external borders (on the basis of the Regulation on Screening as proposed in the New Pact on Migration and Asylum).
[8] FRA, opinion 1/15, p. 9-10.

These differences in the implementation and use of ECRIS were not taken into account during the negotiations on ECRIS-TCN. This lack of harmonized criteria for storing information on individuals with criminal records in ECRIS-TCN, may have far-reaching consequences for the free movement rights of Union citizens with dual nationality and third-country nationals, since Article 7(1) of the Regulation allows the use of this information in national immigration procedures.

The Meijers Committee concludes that due to these differences, the ECRIS and ECRIS-TCN databases are not comparable, the latter interfering far more strongly in the privacy of individuals with potentially far more negative effects for the rights of Union citizens registered in ECRIS-TCN. Moreover, the prohibition of discrimination of Union citizens on the basis of nationality, race, or ethnic origin, codified in the TFEU and the EU Charter of Fundamental Rights requires that Union citizens are treated equally and in a non-discriminatory manner. This requirement is clearly stricter than 'comparable conditions.' The requirement of equal treatment of Union citizens in primary Union law is not limited to the conditions under which the fingerprint data of Union citizens are exchanged between Member States, but covers all elements and effects of their inclusion in ECRIS-TCN.

4. EU and international standards prohibiting discrimination

The inclusion of Union citizens with the nationality of a third country in ECRIS-TCN creates a difference in treatment on the grounds of nationality (compared to Union citizens with only one nationality or with a second nationality of another Member State) and, indirectly, on the grounds of racial or ethnic origin.

In our policy brief on differential treatment of citizens with dual nationality, we reiterated the importance of the prohibition of discrimination on the ground of nationality both in Union law and under Articles 8 and 14 of the European Convention on Human Rights. These provisions also cover distinctions between single and dual nationals. Furthermore, the Meijers Committee refers to the application of Article 7 (right to private life), Article 8 (right to data protection), and Article 21 (non-discrimination) of the Charter on Fundamental Rights of the EU (CFR). According to the settled case-law of the European Court of Human Rights (ECtHR), differences in treatment exclusively based on nationality require very weighty reasons to be justified.[9]

Additionally, differentiation between single and dual nationals can amount to indirect discrimination on the grounds of racial or ethnic origin as prohibited under Article 21(1) of the Charter, the ECHR, and Article 2 and Article 5 of the UN Convention on the Elimination of all Forms of Racial Discrimination (CERD). It follows from case-law of the ECtHR that very weighty

[9] *Gaygusuz/Austria*, ECtHR 16 September 1996, app.no. 17371/90, para 42; Andrejeva/Latvia, ECtHR (GC) 18 February 2009, app.no. 55707/00, para 87; Ribać/Slovenia, ECtHR 5 December 2017, app.no. 57101/10, para 53.

reasons are also required where distinctions between citizens predominantly affect citizens of foreign ethnic origin.[10] The difference in treatment in the Regulation between Union citizens with one nationality and Union citizens who also hold the nationality of a third country is a clear example of such a distinction between citizens. The particular disadvantage imposed on the latter group is further exacerbated by the fact that a large percentage of the Union citizens also having the nationality of a third country cannot get rid of that other nationality.[11] In the following paragraphs, we will demonstrate why the difference in treatment between Union citizens who also hold the nationality of a third country and those who do not, cannot be considered to be justified by very weighty reasons.

5. The legislative history of ECRIS-TCN

The issue of the treatment of Union citizens with dual nationality in ECRIS was mentioned for the first time in the 2016 Commission proposal to include and exchange information on third-country nationals' criminal records in ECRIS.[12] The European Data Protection Supervisor (EDPS) expressed serious concerns on the inclusion of dual nationals, questioning its necessity, proportionality, and legality. According to the EDPS, the storage of data in the proposed ECRIS-TCN did not meet the requirements of necessity in EU data protection law and could lead to discrimination." If "*the processing of data in the index filter*[13]*, is not needed for EU nationals, it is not needed for EU nationals who are also TCN, either*." The EDPS held this element of the proposal to be incompatible with the prohibition of discrimination in Article 21(1) Charter and with the *Huber* judgment of the Court of Justice of the European Union (CJEU).[14] Therefore, the EDPS recommended, "that the measures in the Proposal only refer to TCNs and not also to EU nationals that also have a third-country nationality."

In the Commission's 2017 proposal for a separate ECRIS-TCN, the only justification for the treatment of Union citizens with dual nationality as third-country nationals was given in a footnote in the Explanatory Memorandum. The footnote stated: "*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, to ensure that the information can be found whether or not the other nationality is known. See page 12 of the*

[10] *Biao/Denmark*, ECtHR (GC) 24 May 2016, app.no. 38590/10, para 114
[11] On the relevance of that element see CJEU (Grand Chamber) 12 March 2019, C-221/17, *Tjebbes a.o.*, ECLI:EU:C:2019:189, para 46.
[12] COM(2016)7. In the impact assessment for that proposal (SWD(2016)4, the issue of Union citizens who also are nationals of a third country is not even mentioned.
[13] An indexfilter is "a tool to find a match between the individual whose criminal record data are sought in other Member States' criminal records and the data stored in those criminal records" Council doc 6064/16.
[14] EDPS Opinion 3/2016 of 13 April 2016, points 31-35 at p. 11/12, 16-04-13_ecris_en.pdf (europa.eu). In the summary of the opinion published in OJ 2019 L 151/143 these points were not included.

explanatory memorandum on that proposal."[15] On page 12 of the 2016 proposal, Union citizens with dual nationality are not mentioned. In the 2017 proposal, the Commission did not refute or even address the criticism of the EDPS on this aspect of its 2016 proposal.

The European Parliament opposed from the beginning of the trilogue, early in 2018, the inclusion of Union citizens with the nationality of a third country in ECRIS-TCN. The European Parliament found that "*since discrimination would be created between, on the one side, EU-nationals, and, on the other side, EU-nationals that also 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*."[16] When in the final stage of the trilogue a compromise was reached, the European Parliament's negotiating team asked to delete the separate Article 2a with the heading "Citizens of the Union that also have the nationality of a third country" and move the relevant clause to Article 2 "*to make the text optically more digestible to the European Parliament."*[17] This change made the inclusion of these Union citizens in the Regulation less visible but did not alter the content of the proposed clause.

No serious evaluation of necessity and proportionality

The Council, in its General Approach to the proposal for the Regulation, explicitly recognized the need for an evaluation of the "*advisability, necessity and proportionality*" of the inclusion of dual nationals. The evaluation would take place four years after the ECRIS-TCN has been in operation.[18]

In the early phase of the trilogue, the Presidency proposed that dual nationals, for the time being, would not be included in the ECRIS-TCN system. The Commission would be asked to carry out a study on the advisability of inclusion of dual nationals in the ECRIS-TCN system in the future and, where appropriate, present a legislative proposal in that respect.[19] Member States did not agree with this proposal. A later council document mentions discussions in the Council on five alternative options.[20] The content of those alternatives is not mentioned.

In the final stage of the trilogue, both the aim of the ex-post evaluation and the class of dual nationals to be evaluated changed. Article 36(10)(a) of the adopted Regulation now provides for an ex-post assessment of "*the extent to which […] the inclusion in the ECRIS-TCN system of*

[15] COM(2017)344, p. 2, footnote 2.
[16] Council doc. 7521/18, p. 4.
[17] Council doc. 11310/18, p. 2.
[18] A new Article 34(5a) of the proposal in Council doc. 15448/17.
[19] Council document 8767/18.
[20] Council document 10828/18.

identity information of citizens of the Union who also hold the nationality of a third country has contributed to the achievement of the objectives of this Regulation."[21]

From the legislative documents, it appears that none of the three EU institutions involved undertook a serious evaluation of the necessity and proportionality of the inclusion of Union citizens with the nationality of a third country in the central system of ECRIS-TCN before the adoption of the Regulation.

Different treatment of dual EU-EU and dual EU-TCN Union citizens

Early in the negotiations on the proposal for the Regulation in the Council working group, the issue of two different categories of dual national Union citizens was raised by the Commission's Legal Service, arguing that "*it might be necessary to assimilate citizens with a double EU-nationality with EU nationals holding also the nationality of a third country, since these people can otherwise "hide" one of their nationalities*." One Member State opposed this idea, arguing for differentiation "*between people with multiple EU nationalities and those who have a third country nationality."* The Commission promised to study the issue of "double nationality."[22] The outcome of that study is not reported in the Council documents. If the study took place, its outcome was not visibly taken into account before adopting the Regulation.

In the working group, it was stated that similar problems arise with both categories of Union citizens. In the case of a convicted Union citizen with two EU nationalities, it would be possible that the convicting Member State does not know that the person has another EU nationality. "*Without the possibility to check this in the central database, it will be impossible to identify which other Member States may hold criminal records information about this individual*."[23] It was decided to bring the issue to the ministerial level of the JHA Council.

During the Council meeting of 12 October 2017, a majority of Member States confirmed that identity information on convicted Union citizens, who also hold the nationality of a third country (hereafter: the first category), should be included in the proposed central system ECRIS-TCN. Regarding the inclusion of Union citizens, who also hold the nationality of one or more other EU Member States (but not the nationality of a third country – hereafter: the second category), *"further analysis would be needed*." Furthermore, "*Member States mostly expressed cautious opinions"* about the inclusion of the second category of Unions citizens in the system.[24] A few weeks later, it was decided that the second category would not be included in the central system. Member States were more cautious about the privacy and

[21] Council document 15534/18.
[22] Council document 11445/17, p. 6.
[23] Council document 12596/17 2 October 2017, p. 2/3.

[24] Council document 13733/17, p. 1-3 and 13976/17, p. 1-3.

rights of convicted Union citizens with two EU nationalities than the privacy and rights of convicted Union citizens with the nationality of a non-EU country.

The inclusion of the first category of Union citizens only is relevant for the issue of the compatibility with the prohibition of discrimination since the first category of Union citizens with dual nationality is far more visible in society than the second one. Most EU citizens in the second category will not be perceived as immigrants or descendants of immigrants. Only personal data of Union citizens of the first category, who are perceived as being of immigrant origin by the majority of the population, are included in the central system of ECRIS-TCN.

6. The lack of a proper justification for differential treatment

The Commission's proposal did not include any rationale for the differentiation between Union citizens with and without dual nationality, besides the unhelpful reference in a footnote to an earlier proposal. In the accompanying Commission Staff Working Document, Union citizens with dual nationality are not discussed at all. Under the heading 'Fundamental rights/non-discrimination,' the focus is on differences in treatment between Union citizens and TCNs. The document states "*that all options considered create a difference in the way conviction information of TCN and EU nationals are treated, since a separate mechanism is created to deal with TCN conviction information. However, these differences only relate to technical issues*."[25]

During the trilogue on the Regulation proposal, the Commission repeatedly argued: "*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*."[26] By presenting the difference as 'objective,' the Commission effectively denied the need to justify the differential treatment resulting from its proposal.

Nonetheless, during the negotiations, three justifications were given. All three return in the recitals of the Regulation.

Completeness

The Commission's first argument refers to the aim of having complete information on convictions of Union citizens who also hold the nationality of a third country. During the negotiations, the aim of "*closing the loopholes*" was mentioned repeatedly.[27] However, while

[25] SWD(2017)248, p. 10
[26] Council documents 7521/18, 8259/19, 8767/18 and 9174/18.

being mentioned in the recitals, completeness is not included in the definition of the aim in Article 1 of the Regulation.

A serious ex-ante assessment of the inclusion of Union citizens with dual nationality in ECRIS-TCN would have made clear that the aim of completeness of the data in the central system of ECRIS-TCN is not realistic, if only because (a) records on criminal convictions of Union citizens in third countries are not accessible via ECRIS-TCN and (b) the lack of reliable information on which Union citizens have dual nationality. Many individuals do not have correct information about their status as dual nationals. They are unaware that they have acquired multiple nationalities at birth or have lost their second nationality long ago. The *Tjebbes* case decided by the Court of Justice in 2019 concerns the latter situation.[28]

Many Member States, as mentioned in par. 2 above, do not systematically register the second or third nationality of their nationals, either on administrative or on political grounds. The Dutch government stopped registration of dual nationalities in the population registration in 2014 and promised to delete all references to other nationalities to protect Dutch dual nationals against discrimination.[29] Germany started to register the second nationality of German citizens only in 2015. The fact that the German Statistical Office in 2015 estimated that the total number of German nationals with a second nationality living in Germany was somewhere between 1.7 and 4.3 million[30] illustrates the level of uncertainty in this regard. France and many other Member States do not register the other nationalities of their citizens.

Considering the differences in law and practice between Member States concerning the registration of second nationalities, the inclusion of data on Union citizens with dual nationality in ECRIS-TCN in the first place will have widely different consequences per Member State and undermine the aim of completeness of the registration of criminal records of Union citizens with dual nationality. Secondly, in many Member States, it is not possible to verify in the population registration whether or not a Union citizen has more than one nationality. This increases the chance of information incorrectly being stored in ECRIS-TCN and reduces the trustworthiness of the system. Thirdly, while the aim to make the information on convicted persons in ECRIS-TCN as complete as possible is understandable, Article 21 Charter sets limits to the realization of that aim.

[28] CJEU (Grand Chamber) 12 March 2019, C-221/17, *Tjebbes a.o.*, ECLI:EU:C:2019:189.
[29] Seven years later a parliamentary inquiry established that the tax authorities continued to use an old copy of the register with Dutch dual nationals (both nationals of other Member States and of third countries) to target these nationals in searches for possible fraud. The tax authorities used as justification that they had also targeted Dutch nationals with the nationality of another Member State.
[30] Statistisches Bundesamt, Bevölkerung und Erwerbstätigkeit: Bevölkerung mit Migrationshintergrund: Mikrozensus 2015, Fachserie 1, Reihe 2.2., Wiesbaden, p. 17 and D. Thränhardt, *Einbürgerung im Einwanderungsland Deutschland*, Bonn, Friedrich-Ebert-Stiftung, 2017, p. 18-20.

Hiding Union citizenship

The second argument is that this inclusion is necessary to prevent that dual nationals can "hide" behind their third country nationality by not telling the authorities that they also hold the nationality of a Member State. This argument is presented in the second sentence of recital No. 9: "*Given the possibility that those persons could present themselves as holding one or several nationalities, and that different convictions could be stored in the convicting Member State or the Member State of nationality, it is necessary to include citizens of the Union who also hold the nationality of a third country within the scope of this Regulation*." It is unknown how often this hiding behind a third country nationality occurs in real life. Considering the rights and protection of the status of Union citizens, it may be unattractive to hide Union citizenship. Moreover, the argument also applies to Union citizens with two or more EU nationalities. They also could decide not to mention one of these nationalities to hide criminal records in other Member States. The aim of completeness of information is taken less seriously concerning these Union citizens.

Pre-naturalisation convictions

The third argument is mentioned in the second sentence of recital No. 22: "*Where the competent authorities are not aware that citizens of the Union also hold the nationality of a third country, it is nevertheless possible that such persons have prior convictions as third-country nationals*." This argument refers to possible criminal convictions of a Union citizen before (s)he acquired the nationality of a Member State. Here the requirements of necessity and proportionality were, in the quest for completeness, disregarded again. In all Member States, naturalization requests may be denied on grounds of public order.[31] Therefore, the chances that that Member State naturalizes a third country national with a serious criminal conviction in a Member State are limited. Why should other Member States years later have access to information on (minor) offences that did not block the road to naturalisation and become a Union citizen?

7. Conclusion

As we have set out in this Comment, the difference in treatment between two classes of Union citizens lacks proper justification. It thus does not meet the standard of 'very weighty reasons' set by EU and international non-discrimination law. Neither in the Commission's proposal for the Regulation nor in the publicly available Council documents reporting on the negotiations within the Council, it has been taken into consideration that most Union citizens with dual

[31] European Migration Network, Pathways tot citizenship for third-country nationals in the EU (2019), p. 20.

nationality are immigrants or children of immigrants, that most dual Union citizens with also the nationality of a third country belong to visible minorities who are at risk of discrimination because of their national or ethnic origin, and that a large share of those Union citizens is unable to renunciate their non-EU nationality.

We, respectfully, advise the Commission to propose to the European Parliament and the Council to delete the second sentence of Article 2, Article 36(10)(a) and recitals nos. 9 and 22 of Regulation 2019/816 before the start of operations of ECRIS-TCN. An unattractive alternative course of (in)action would be to wait until a national court makes a reference to the CJEU asking the Court to rule on the compatibility of said provisions of the Regulation with Article 21 of the Charter. A third option would be to ask independent experts or the FRA to conduct an in-depth study of the necessity, proportionality and legality of the inclusion of Union citizens in ECRIS-TCN before the database becomes operational.

The Union should avoid giving a bad example of institutional discrimination of Union citizens to Member States and their population in Union law. The Union should refrain from creating a second class of Union citizens by way of this Regulation. Dual nationality is a suspect criterion as its use leads to discrimination on the basis of nationality and racial and ethnic origin. Its use should be restricted to those situations where this is required by very weighty reasons.