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from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Javier SOLANA, Secretary-General/High Representative

Subject: Commission working document on the feasibility of an index of third-country
nationals convicted in the European Union

Delegations will find attached Commission document COM(2006) 359 final.

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COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMISSION WORKING DOCUMENT

on the feasibility of an index of third-country nationals convicted in the European Union

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1. This working paper forms part of the preparatory work which is necessary in order to assess the impact of any future legislative proposal on the creation of an index of third-country nationals (or persons whose nationality is not known) convicted in the EU. The preparation of such a proposal is only one aspect of the work being undertaken at EU level in order to improve access to information on criminal convictions. The first part of this working paper sets out the other aspects of the work in this area. The second part presents the main conclusions of a feasibility study on the specific issue of the index. Finally, the third part of this paper outlines the key issues which need to be discussed in more depth. The answers to the questionnaire (annexed to of this paper) should enable this debate to take place on the basis of a better understanding of the situation in the Member States.
2. Any legislative proposal in this field will be subject to an in-depth impact assessment. In accordance with the Communication of the Commission of 27 April 2005¹, one of its objectives will be to assess its impact on fundamental rights, especially the right to privacy and the protection of personal data as laid down in the Charter of Fundamental Rights.

1. BACKGROUND

3. The need to improve the quality of information exchanged on criminal records has become a priority for the EU. The Hague Programme, which was adopted in November 2004², called on the Commission to put forward proposals in this regard and these objectives are set out in the joint action plan which was adopted by the Commission and the Council on 2/3 June 2005.
4. Exchanges of information on convictions are currently governed by Articles 13 and 22 of the 1959 European Convention on Mutual Assistance in Criminal Matters (Council of Europe)³. These provisions govern the conditions for communicating extracts from a criminal record between the parties to the Convention and require each party to notify any other party of all convictions in respect of the nationals of the latter party. This exchange should take place at least once a year. In practice however these mechanisms do not yield reliable results and the information held by the state of nationality is rarely complete. Moreover, the mechanism for centralising information in the state of nationality provided for in Article 22 of the Convention does not apply to nationals of countries which are not party to the 1959 Convention.

¹ Communication from the Commission on Compliance with Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring. COM (2005). 172 final of 27.04.2005.

² OJ C 53, 3.3.2005, p.1.

³ <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>

In the context of the EU, as far as those “third-country” nationals are concerned, it is not possible to determine whether there are previous convictions in other Member States without consulting all of those states. For example, in circumstances where Germany prosecutes a third-country national, it has no way of knowing that the accused person has already been convicted of similar offences in Denmark without consulting 24 Member States.

5. The shortcomings of the existing mechanisms are explained in the White Paper which was adopted by the Commission on 25 January 2005⁴. After having analysed these deficiencies, the White Paper put forward proposals for improving the current situation. In particular, it proposed relying on the Member State of conviction instead of the Member State of nationality for obtaining complete and reliable information on an individual’s criminal record. This, however, requires setting up a system to enable easy identification of the Member States in which a person has already been convicted. With this in mind, the White Paper set out the framework of a future EU computerised system for exchanging information on criminal convictions which would enable the easy and reliable identification of the Member State in which a person has already been convicted. Such a system would rely on the creation of an EU index of offenders (limited to personal identification data) and on the networking of national criminal records.
6. The proposals made in the White Paper were discussed by the Justice and Home Affairs Council of 14 April, which defined the way forward:
 - for the purposes of obtaining information on convictions handed down against EU nationals, it was decided to continue to rely upon the Member State of nationality. This principle is at the core of an interconnection project which is being carried out between Germany, France, Spain and Belgium with a view to networking their criminal records. In order to remedy the shortcomings identified in the White Paper, an in-depth reform of existing mechanisms was however necessary and this led to the adoption by the Commission in December 2005 of a proposal for a framework decision on the organisation and content of exchange of information from criminal records between the Member States⁵. This proposal aims to ensure that the Member State of nationality will be in a position to provide exhaustive information in relation to its nationals’ criminal records upon request by another Member State. It also establishes a framework for the development of a computerised system to allow for faster transmission of information on criminal convictions in a form that Member States can understand and use more easily. The proposal incorporates a series of improvements introduced by a preliminary decision on criminal records, which was proposed by the Commission in October 2005 and adopted by the Council on 21 November 2005⁶.

⁴ White Paper on exchanges of information on convictions and the effect of such convictions in the European Union, COM (2005) 10.

⁵ COM(2005) 690.

⁶ Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, OJ L 322, 9.12.2005, p. 33.

- as explained above, it is not possible to rely on the State of nationality to obtain exhaustive information about convictions handed down in the EU against third-country nationals (or persons whose nationality is not known). For those persons, Member States supported the solution proposed in the White Paper, i.e. the creation of an index of convicted persons limited to third-country nationals and called on the Commission to bring forward legislative proposals in this regard. At the end of 2004 and in the course of 2005, an initial feasibility study was carried out on the basis of the solution proposed in the White Paper. The results of this study were presented to the Member States in an expert meeting which took place on 14 March 2005. Following the Council of 14 April 2005, the study was supplemented by further examination of the specificities of an index limited to third country nationals.
- the Council of 14 April also reaffirmed the need to base exchanges of information on convictions on bilateral communications between Member States criminal records' systems. In this regard, future work will encompass the development of an EU standardised format for the exchange of information, in order to overcome existing difficulties both in terms of language and in terms of differences in legal systems. A study covering this aspect is currently being carried out. This aspect of the work covers both EU nationals and "third-country" nationals.

2. ROLE AND TECHNICAL FEASIBILITY OF AN INDEX LIMITED TO THIRD-COUNTRY NATIONALS CONVICTED IN THE EU

2.1. Role of the limited index

7. The role of the index is very specific: it is to enable a Member State which requires information about a person's criminal record to receive immediate notification of which other Member State(s) hold(s) information about this person. In order for the system to function, the following steps should be followed.
 - the Member State of conviction should provide the index with information enabling the identification of convicted third country nationals (or persons for whom the nationality is unknown). Only those elements enabling the identification of the convicted person are communicated to the index, not the content of the criminal record itself. There should be an update mechanism to allow for the deletion of obsolete information. The decision to have an index limited to third-country nationals (and persons whose nationality is unknown) will require individual Member State to be in a position to communicate to the index the identities of these persons only.
 - the national criminal record system which wishes to know whether a third-country national has a criminal record may then consult the index on the basis of the person's identifiers. The database will answer with a simple "hit" and identify in which Member State(s) the person has a criminal history.
 - requests for extracts of criminal records are made bilaterally between the authority responsible for criminal records and its counterpart from another Member State which has been identified as holding information on the third-country national in question.

2.2. Results of the study on the feasibility of a limited index

8. The results of the feasibility study⁷ show that there is little difference between a European Register of Convicted Persons (hereafter “ERCP”) with a full index or with an index limited to third country nationals as far as the complexity of the system is concerned. There is no fundamental difference with regard to the functional and the technical framework. There is little impact on the organisation required at national level, on the viability of the proposed infrastructure linking the central system (CS) to the national interface (NI) and on the proposed mechanisms for bilateral information exchanges.
9. The main difference between the two versions is in the sizing of the system. A limited index will require less storage and processing capacity than a full index. The study concludes that the costs for a limited-index ERCP are likely to be about 40% lower than those for a full-index ERCP. The initial study had estimated that the development of an ERCP based on a full-index would cost approximately € 4 million⁸. These cost differences are mainly due to differences in hardware and network infrastructure requirements as a limited index will require less storage space, lower computing power and less bandwidth.
10. It should be remembered that these estimations only cover the provision of an index to connect to a network and the provision of a secure communication channel. Member States will, however, be responsible for adjusting their own IT infrastructure so that it can communicate with the index (on the basis of interfacing specifications to be provided) and for developing an end-user interface which suits their needs. The study does not assess these costs⁹.

3. KEY ISSUE: HOW TO ENSURE EFFICIENT FUNCTIONING OF THE LIMITED INDEX?

11. It would be pointless to set up an index system which would deliver information that can not be relied upon. Efficient functioning of the index requires there to be a sufficient degree of certainty regarding the data identifying the person who is listed in the index. The absence of a sufficient degree of certainty would lead to unacceptable situations. First, certain convictions might not be found and the system would therefore fail to meet its objective of providing exhaustive information.

⁷ Available upon request.

⁸ In order to benefit from economies of scale, the assumption made in the feasibility study is that the index would be developed on the basis of the technical platform used for the SIS II, even though both systems would be different, with strictly separated data and access. The study assesses first the costs of a scenario without biometrics storage for an amount of € 4 million and then a scenario with biometrics storage for 2 additional millions. The implementation of searching capacity will require a supplementary expenditure.

⁹ The Commission’s communication COM(2005)122 includes a proposal for a Council decision establishing for the period 2007-13 the specific programme “Criminal Justice” as part of the general programme “Fundamental Rights and Justice”. This proposal would, if adopted, provide the legal basis to permit support from the EU budget for the development and implementation of a European computerised system of exchange of information on criminal records, which could include direct support for the modernisation of national criminal records.

Second, convictions might be attributed by mistake to a person other than the one against whom they had been handed down - this situation would be particularly detrimental to the person whose identity has been mistaken.

3.1. Existing IT systems at EU level

12. Currently, there are several large-scale IT systems and ongoing projects at EU level which are of relevance in the present context:
- **The Schengen Information System (SIS)** is an information system that allows competent authorities in the Member States to obtain, through an automatic request procedure, information related to alerts on persons and property. In particular, it is used in the context of police and judicial cooperation in criminal matters, as well as on national territories and for external border control and for the issuance of visas and residence permits. It has been operational since March 1995. The current version of SIS does not contain biometrics. The second generation of SIS (SIS II), which will integrate the new Member States, will allow the storage of biometric data but not the use of biometrics as a search criterion. It will however offer central search facilities on individuals' names which will contribute to a higher accuracy in the searches. It will become operational in March 2007.
 - **The Europol Information System** aims to centralise all information available in the Member States on organised crime including for each individual (amongst other things): his/her identity, physical characteristics, fingerprints, DNA profile and the criminal offence in respect of which he or she appears in the system (e.g. on suspicion of having committed that offence, following conviction, etc). The Europol Information System software has been available in all 25 Member States since 10 October 2005. Data is entered in the System by each Member State and falls under the responsibility of the Europol National Unit.
 - On 12 October 2005, the Commission adopted a proposal for a Framework Decision on exchange of information under **the principle of availability**¹⁰. The aim of this proposal is to make certain types of existing law enforcement information which is available in one Member State also available to authorities with equivalent competences of other Member States or Europol. It provides that available information should be shared either by online access, or by transfer based on an 'information demand' after matching solicited information with index data provided by Member States in respect of information that is not accessible online. The types of information covered include DNA-profiles, fingerprints, ballistics reports, vehicle registration information, telephone numbers and other communication data, and names contained in civil registers. In this context, reference should also be made to the Treaty signed on 27 May 2005 in Prüm between Germany, Austria, the Netherlands, Belgium, Luxembourg, Spain and France on enhancing cross-border cooperation which deals within particular, combating terrorism, cross-border crime, and illegal immigration.

¹⁰ Proposal for a Council Framework Decision on the exchange of information under the principle of availability, COM (2005) 490 of 12.10.2006.

This instrument, which has not yet been ratified, will *inter alia* introduce far-reaching measures to improve information exchange, especially in the field of fingerprints and DNA profiles, such as an index system and direct access to national databases.

- **The Visa Information System (VIS)** aims to improve consular cooperation and consultation between central consular authorities and improve the administration of the common visa policy in order to counter threats to internal security and to prevent “visa shopping”. In addition it aims to facilitate checks not only at external border checkpoints but also within the territories of the Member States thereby facilitating the fight against fraud. Further, it will assist in the identification and return of illegal immigrants and facilitate the application of the “Dublin II Regulation “EC N° 343/2003¹¹. It will become operational at the end of 2006. VIS will contain biometric and alphanumeric information and will allow the use of biometrics as a search criterion. On 24 November 2005, the Commission adopted a proposal for a Council Decision concerning the access to the VIS to authorities responsible for internal security and to Europol in the context of police and judicial cooperation in criminal matters¹².
- The purpose of **Eurodac** is to assist in determining which Member State is to be responsible, pursuant to the Dublin Regulation, for examining an asylum application lodged in one of the Member States by a third-country national. It is a database limited to biometric information (fingerprints) which enables comparison of the fingerprints of asylum seekers and illegal immigrants.

3.2. Possible options

13. As far as the limited-index ERCP is concerned, it will be necessary to determine the type of data regarding the identity of the persons listed therein that the index will need to contain in order for it to be an effective research tool. In this regard, the following should be noted:
 - the index will be fed by national criminal record systems. Most of them contain only alphanumeric (i.e. text-based) information, with the exception of the UK and Cyprus whose records include fingerprints. Nevertheless, it does seem that even in those countries which do not include fingerprints in their criminal records, this information is sometimes collected at an earlier stage in an investigation/prosecution (e.g. by the police).
 - at national level, establishing a person’s identity with a sufficient degree of certainty raises more problems for third-country nationals than for EU nationals (absence of reliable identity documents, false identities, etc). The alphanumeric information on the identity of a third-country national which is recorded in the national criminal record (and which would be transferred to the index once it is set up), will therefore be unreliable in a certain number of cases.

¹¹ OJ L 50 of 25.2.2003.

¹² COM(2005)600.

14. There are a number of options that will have to be assessed in light of, in particular, the principles of proportionality and necessity. These options will be analysed further in the context of the impact assessment prior to any legislative proposal.
15. **Option 1:** an index limited to alphanumeric information. The two main risks associated with this option are: i) incomplete information on a person's previous convictions (e.g. because he or she has already been convicted but under another name/alias); ii) erroneous attribution of a conviction to a person. As the index is only a tool enabling the user to determine where the person has previously been convicted, this second risk could be limited by ensuring that the Member States involved in the exchange of information carefully check the identity of the person (if need be on the basis of biometric data). However, this option does not guarantee access to exhaustive information.
16. **Option 2:** an index containing biometric data. This option involves higher costs (at the EU level¹³ but also for the Member States that would have to be in a position to feed the index with biometric information). It also raises different data protection issues than option 1. There are two possibilities as far of the use of biometric information is concerned:
- first, biometric data could be stored in the index but only used for the purposes of confirming a person's identity. It would not then be possible to conduct general searches of the database using biometric search criteria. This is how SIS II will function.
 - second, a biometric search engine could be added to the index to allow for general searches on biometrics to take place. It would give access to exhaustive information while avoiding erroneous attribution of a conviction to a person.
17. **Option 3:** an index containing biometric data but limited to certain categories of serious offences. This is an option chosen at national level by certain Member States who have set up separate registers containing biometric information for certain types of offences (but without distinguishing between EU and third-country nationals). This would imply agreement on the categories of offences to be covered.
18. **Option 4:** no index would be created. In order to determine whether a third-country national has already been convicted in another Member State, the requesting Member State would rely upon the traditional mechanisms of judicial or police cooperation. In the future in particular, the exchange of certain types of information – notably DNA profiles and fingerprints - between law enforcement authorities could be facilitated through the implementation of the principle of availability (see paragraph 12).
19. The answers to the attached questionnaire should enable the debate on these different options to take place on the basis of a better understanding of the situation in the Member States

¹³ See footnote 8.

ANNEX

Questionnaire sent to Member States

I. INFORMATION COLLECTED AT POLICE LEVEL

1. When you arrest a person in the course of a criminal investigation, do you generally encounter difficulties in establishing his/her nationality?

yes - approximate %

no

2. When you arrest a person in the course of a criminal investigation, do you generally encounter difficulties in establishing his/her identity?

yes - approximate %

no

3. If yes, what are the main reasons:

the person does not possess any identity documents

the documents produced are not reliable

the person refuses or is unable to (e.g. linguistic difficulties...) produce any evidence as to his / her identity

other, please specify

4. How do you establish his or her identity ?

5. Which kind(s) of biometric information do you collect from an arrested person?

fingerprints

photographs

DNA

other, please specify

6. If it is established that the arrested person is a third-country national, i.e. a non-EU national, do you routinely contact the third country in order to verify the person's identity and statements regarding his/her personal circumstances?

yes - approximate %

no

7. **If yes, is the answer satisfactory?**

- yes - approximate %
- no, please specify the reasons

8. **Is it possible to collect biometric information after the police investigation stage or when a person is convicted?**

- yes. Please specify
- no

II. INFORMATION AVAILABLE AFTER THE POLICE INVESTIGATION STAGE

9. **Is the information on a person's identity (including biometrics) which is collected at the police stage automatically transferred to the prosecution authorities?**

- yes
- no
- only partially. Please specify

10. **Once the person has been convicted, is the information on his / her identity which has been collected at the police stage automatically transferred to that person's criminal record?**

- yes
- no
- only partially. Please specify

11. **If no, please specify:**

- whether there are legal requirements which make this transfer impossible
 - yes. Please specify
 - no
- whether the criminal record contains a link or references to the police file which ensures that this information is easily accessible
 - yes
 - no

12. **When you prosecute a non-national, do you systematically address a request to the national criminal record to check whether the person has already been convicted?**
- yes - approximated %
- no
13. **If yes, what are the main problems encountered?**
14. **Where the convicted person uses an alias, will details of this alias be included in the criminal record?**
- yes
- no
15. **To the extent that biometric data are collected at a certain stage of the proceedings, are they kept in *searchable* databases?**
- yes
- no
16. **If your answer to question 15 is yes, please specify whether these databases are limited to certain types of offences (e.g. sexual offences):**
- yes. Please specify
- no
17. **Do you collect statistics regarding convictions handed down on your territory against third-country nationals? If so, please provide the relevant information.**