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From:	General Secretariat of the Council
To:	Delegations
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 - General technical questions and the issue of data protection

In view of the meeting of the Working Party on 9-10 October, where Member State will discuss i.a. general technical questions in the presence of eu-LISA, as well as the issue of data protection, the Presidency invited Member States to submit the topics relating to these issues that they would like to be discussed at this meeting. The contributions received by the General Secretariat are set out in the Annex.

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GERMANY

Technical questions

(1) Provisions on fingerprint storage:

For the Member States, storing finger prints together with a reference ID in the TCN index is necessary for verifying matches at a later date.

(a) Is such request by the sending/storing Member State foreseen? Can this, if necessary, be defined at a later date in the technical specification?

(b) Is it sufficient for finger prints, after transmission to TCN with ID, to be stored in TCN and then, where relevant, be deleted at the domestic level (background: different deletion periods at Federal Criminal Police Office and Federal Office of Justice)? In order for this to work, all Member States would have to be able to automatically re-access their own data stored in TCN with the relevant ID. Can a consensus be reached on this?

(c) Since each Member State will use its own reference system, there should not be any central stipulation for the structure/setup of the reference ID. What are the Commission's/eu-LISA's ideas on this?

(2) Data entry:

Which minimum data are required for data entry?

As Germany sees it, these are as follows: surname at birth, first name, data of birth and place of birth.

(3) Requests:

Which minimum data are required for requests?

German view: No restrictions should generally apply to requests, because not all data will be available. A search, however, should still be possible. Whether the search then actually yields results, will depend on the search software used. This, however, as the Commission mentions, will likely be an issue for the implementing acts.

(4) Cooperation on technical specification:

How exactly are the Member States to be involved in work on the technical specification? It would be helpful to have as clear an idea of this as possible, in order to be able to earmark the necessary resources. The work of the Technical Expert Group for the development of ECRIS could serve as a model.

(5) Search software:

Do any ideas already exist regarding the search software for alphanumerical data? Is the FIUNET solution still the focus of attention?

(6) Timeframe:

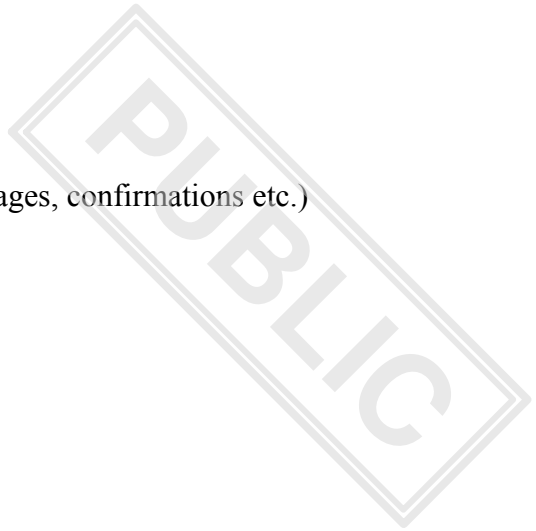
The TCN is supposed to be up and running within two years. Which measures are planned to reduce the usual three-and-a-half-year timeframe for building a finger print register (AFIS) as part of the index in order to complete within two years?

(7) Development of the RI

- (a) Which later further developments of the RI, etc., should EU-LISA be able to carry out alone?
- (b) When should the Member States also be involved?
- (c) Who assigns rights?

(8) Furthermore, eu-LISA is asked to explain/specify:

- Determination of quality thresholds
- obligatory fields
- Form taken by different notifications (error messages, confirmations etc.)



FRANCE

Technical questions

The French delegation has received the provisional agenda of the next meeting on ECRIS-TCN. We welcome the participation of members from EU-LISA, EUROJUST and EUROPOL. Their expertise and presentations will enlighten our discussions.

We are still preparing the next meeting on the 9/10 October. Therefore, we have not settled an exhaustive list of our questions and comments yet.

Nevertheless, on the first question you raise on general technical issues, we could already mention some of the topics we are interested in:

- the guarantees EU-LISA could provide that the data stored in ECRIS-TCN system will be strictly sealed, with no possible comparison or link with the data stored in other systems they host;
- the way they will handle and combine their respective roles in ECRIS-TCN (proposal of regulation) and ECRIS (proposal of directive);
- the way they intend to set up the threshold for a hit;
- the entity on which the obligation of verification will lie after a positive hit;
- the verification methods (manual/automatic/at the discretion of the above mentioned entity).

Data protection

As far as data protection is concerned, we are committed to find the best drafting to ensure the consistency of the proposals with the 2016/680 Directive. We will discuss it on the next meeting, in line with the previous interventions from CZ, SE et NL.

CROATIA

Technical questions

Which format and which standard shall be used for the purpose of fingerprint exchange ?

Besides, we consider important the data related to the biometry of face, namely the photograph of the person.

We would like to know which standard shall be used for the taking of the photography. Shall it be one photo and face or there shall be included side view photos?

We are also keen to know about the standard of exchange for biometry of faces and photos, as we are aware, there exists the standard ISO/IEC 19794-5:2011. Standard itself does not specify only the format of the data bank, but the additional requests as well, such as background limitations (illumination, the pose, facial expression etc.) the position of the camera, the focus of the camera, resolution of photo, the size of the photo measured in pixels, etc.

ITALY

Technical questions

In Italy at the current time the Criminal Record System does not store fingerprints, nor their shape is known (although they are compliant with the AFIS schemes). In order to integrate fingerprints in our Criminal Record System, we need interoperability with the Ministry of the Interior, with an estimable huge expenditure of time and costs.

Moreover, we need further explanations about the kind of proposed architectural scheme for ECRIS-TCN.

Data protection

We do not have particular questions to raise, considering that our legislation about the Criminal Record System already provides for the storing of fingerprints, although it has not yet been technically implemented.

LV technical questions on ECRIS-TCN

Whilst understanding that many of the issues raised by LV ECRIS technical experts might be/will be tackled at later stage¹ (including in the COM implementing acts as indicated in Article 10 of the Proposal for ECRIS-TCN Regulation), LV would still appreciate receiving additional information (to the extent possible) to the following issues:

1. What **type of files** will be used for **fingerprint handling**, for instance – NIST files? If, yes – what NIST file standard will be used? And – moreover, what quality requirements² would be applied?
2. What **fingerprint sets** will be used?
3. In the context of hits, what **type of operations** will be foreseen: CUD? Search?
4. What **extent (amount) of fingerprint files** would need to be delivered in order to obtain an answer within ECRIS-TCN?
5. With regard to **data transmission** (in the context of national databases) – what **technologies** will be used (web services, synchronous / asynchronous)? What **data transmission network** will be used?
6. In case if web services will be used – is it foreseen to prepare a separate **documentation** describing the relevant web service (analogous to ICD and DTS documents for SIS II)?
7. LV would appreciate obtaining more detailed information on the possibly foreseen processes with regard to the **migration of relevant data**, including – what would the **MS need to ensure** (MS responsibilities)?³

¹ LV understands that these issues are also linked to the on-going discussion with regard to the European search portal, shared biometric matching service and common identity repository. In this context, HLEG, for instance, has recommended to “ensure that ECRIS-TCN system could make use of a future shared biometric matching service and, if appropriate, common identity repository” (HLEG Final report of May 2017). Furthermore, in the COM report on the preparatory workshop on a legislative proposal on interoperability (27 July 2017) some delegations supported “having ECRIS –TCN under the scope of [European] search portal”, at the same time however “some reservations [were] highlighted”.

² LV is aware of Article 10 (b) of the Proposal for ECRIS-TCN Regulation and footnote 77 of the doc. 12187/17.

³ Linkage to Article 10 (f) of the Proposal for ECRIS-TCN Regulation.

8. Are there any (more concrete) estimations on the **amount of fingerprint files (in total)** to be included in ECRIS-TCN?
9. What will be the **execution time** of the queries? Also – on what **accuracy percentage** MS may count on (in comparison to SIS II, for instance)?
10. LV would appreciate receiving more detailed information on **ECRIS reference implementation integration with ECRIS-TCN**, including on any sort of the **implications to the MS** (in this context – please, see Article 4 (1) (c-d) and (3) of the Proposal for ECRIS-TCN Regulation⁴).
11. What type of **facial images**⁵ will be processed (frontal view, other options)? If possible, LV would appreciate any **further information** on this subject-matter.

In addition and – in more general terms – LV is concerned about certain ECRIS-TCN effectiveness aspects; those concerns refer to the implementation of Article 7 (3), especially in cases when fingerprints will not be available to the relevant competent authority⁶ (and thus the query in ECRIS-TCN would be done by using data⁷ mentioned in Article 5 (1) (a)).

⁴ LV is aware of Article 10 (c) of the Proposal for ECRIS-TCN Regulation.

⁵ LV is aware of Article 10 (d) of the Proposal for ECRIS-TCN Regulation.

⁶ For instance, in cases when criminal records information on a third country national would be requested for the purposes other than of criminal proceedings.

⁷ Those data may, indeed, differ; for instance, a person may be convicted as X (first name/surname) in one MS but apply for a job (where Certificate of (Non) Convictions is required) in another MS as Y (different first name/surname).

HUNGARY

Technical questions

Art. 11: eu-LISA suggests a modification regarding development time in Article 11 as they believe a definite two years deadline of developing and testing the system should not be fixed in the Regulation. They suggest to rephrase the section with „as soon as possible after the entry into force of this Regulation” instead of using „two years after the entry into force”. This might indicate that the development may take either more or even less time than two years. This question should be clarified.

Art. 29: In Article 3. eu-LISA expresses concerns regarding elevated costs due to the need of additional storage capacity in case fingerprints of EU-TCNs with double nationalities have to be stored as well. Will these additional costs affect the costs of the Member States?

Art. 38: eu-LISA points to the fact that the upload time regarding former convictions needs to be revised. The proposal of eu-LISA includes that the central authorities shall create the data regarding former convictions at the latest by 12 months after the entry into operation of the Central System (and NOT by 12 months after the entry into force of this instrument), which suggestion we can agree with.

Art 3. and 12: We would also like to clarify the precise function of the „national access points” in Article 3.o) and Article 12 (namely are these planned to be only ECRIS-TCN access points to the Member States or might they have any additional functions as well)?

Technical questions

With regard to the first point, namely with regard to the general technical (operability) issues to be discussed in the presence of eu-LISA on Monday 9 October:

Firstly, one of the main topics that should be raised, so as to be clarified by EU-LISA, is the level of development that it shall be tasked to create. In other words, whether:

- (i) EU-LISA shall be tasked to create ‘only’ an interface where each Member State then ‘connects’ with it through their national systems by creating a web service on either side, for a system-to-system connection; or whether.
- (ii) EU-LISA shall be tasked to develop a more complete system, where all Member States accede to it through a web portal (similar in concept to the Delegates’ Portal) where all Member States may log in and upload information on third-country nationals (TCNs), in order for all Member States to have an identical system (such as the system that is being proposed for ETIAS).

Secondly, it is strongly believed that these arguments revolve around the notion of interoperability. Therefore, in respect of systems that may benefit from such a leap in technology, such as the EES, ETIAS, SIS and others, the question that arises relates to the minimum set of information that one (the receiver/user) is expected to receive from ECRIS-TCN in order to conduct a comprehensive query, namely whether:

- (i) it is required to be a hit/no hit only and then refer to the National competent authority for additional information; or
- (ii) the user shall be prompted with minimal information on the ending side.

Kindly note that in respect of the above, different answers imply different efforts which would have an impact on investment, in terms of both capital and human resources.

POLAND

Technical questions

1. During ECRIS "lifespan" we've noticed that low-level meetings are very important for better solving legal and technical issues, such as practical problems with kinematics and type of responses. We think that it should be clarified who and in what procedure will deal with such cases if they appear in ECRIS-TCN especially in first stage. We would also want to know are there any plans to create a manual or a set of principles with regard to using ECRIS-TCN?
2. Poland would like to clarify the role of the Advisory Group both during the ECRIS-TCN development phase likewise in further years of development and maintenance of ECRIS-TCN and ECRIS RI. Article 11.2 with connection to art. 36 gives only overall impression of the tasks. We would like to know more about this Group, especially is the Advisory Group going to replace or complete the existing expert meetings in Commission?
3. Crucial issue for Poland is how the future development - possible connection with other systems (eg. ETIAS) and in the context of planned interoperability (eg. BMS,SSI etc.) will be managed. Is the Advisory Group designed to address this issues? To what extent Member States will be involved in development of such solutions?
4. How Commission and EU-LISA envisaged the schedule for preparing ECRIS-TCN? Is adoption of implementing acts in committee procedure going to be simultaneous with work in EU-LISA? Or will the development stage in EU-LISA starts after the committee procedure is completed?
5. Poland would like to clarify the relation between the obligation of EU-LISA to define the design of the physical architecture of the ECRIS-TCN system including its technical specifications and their evolution (..) (art. 11.3) and the adoption of technical specifications in committee procedure as indicated in article 10.1. Poland would like to ensure that after the establishment of ECRIS-TCN system future evolution will not be out of control of Member States.

Data protection

Chapter V – reference to Directive (EU) 2016/680

Poland has doubts regarding the reference made in the article 21 to Directive (EU) 2016/680 and not to Regulation (EU) 2016/679. The Polish National Criminal Register is an administrative body and its main task is to provide information about convictions to authorized bodies and state services. Most of the requests submitted to the Polish National Criminal Register are made for the purposes of criminal proceedings. However it should be underlined that a large number of information is issued outside the context of criminal proceedings, for instance on the basis of requests from individuals, competent administrative authorities and employers.

The Polish National Criminal Register is not an authority competent for crime prevention purposes, conducting of preparatory proceedings, and does not take part on any level at pre- and post-trial proceeding. The only task of the Register is to issue up-to-date information on convictions.

Poland believes that it would be more convenient to impose an obligation on central authorities of Member States to act in line with Regulation (EU) 2016/679 than with Directive (EU) 2016/680. Additionally, Poland is of the opinion that imposing obligation on central authorities to act in line with Directive 2016/680 only with regard to ECRIS-TCN leads to unjustified disproportion. Directive that amends Council Decision 2009/315/JHA does not regulate this aspect of data processing. Consequently each central authority shall act as controller only in case of ECRIS-TCN but not in respect of basic ECRIS exchange. There is no reason for such difference in our opinion.

FINLAND

Technical questions

Here are some comments from Finland relating to technical questions:

- the discussion on technical questions is still on such a general level that it is hard to make relevant questions or comments. As Finland has already mentioned in previous comments it would be most important to get as soon as possible technical details from the Commission so that cost analysis could be made nationally.
- however, the most important question for Finland is to be able to continue to use national applications and we strongly support the Spanish proposals on this question. If Finland would have to quit using national applications, it would mean that IT-systems would have to renewed largely. This would mean great extra costs and it would also endanger that Finland would be able to start using the ECRIS-TCN-system in time.
- the exchange of information now works well in relation to other Member States using the national application and we cannot see why this would not be possible in relation to the ECRIS-TCN.

Data protection

Relating to EU data protection legislation Finland is not able to make comments in the given timeframe. Generally we would like to point out that the timetables given by the presidency are problematic especially to small Member States like Finland with limited resources. We see that we have not sufficient time to work properly.

SWEDEN

Data protection

SE delegation comments on data protection issues in the proposed texts of the ECRIS-TCN Regulation and the Directive for a revised Framework Decision

These comments are not exhaustive and may be reviewed in the light of further discussions.

ECRIS-TCN Regulation (doc. 11445/17)

Article 7.5 Use limitation for hits in ECRIS-TCN

SE insists (footnote 63) on keeping the substance of the use limitation as it was expressed in doc. 8999/1/16. Not only the identity information but the TCN hit as such is considered to be sensitive information that cannot be used for other purposes than an ECRIS request. We therefore propose to adjust the text as proposed in footnote 63.

Additional comment: This is of course without prejudice to the upcoming proposals and discussions about the sBMS, the CIR and the simplified access for Law Enforcement, where customized rules for such access have to be drafted (for the purpose of identification without full access to the contents of the respective systems). In the present ECRIS context however, we have to consider that a hit in ECRIS-TCN is an information (though still rather unreliable!) about the person being registered in the criminal records, which is sensitive information subject to a high level of confidentiality.

Alignment with the Data Protection Directive – General

As from May 2018 the data protection directive (DPD) will be applicable. The negotiations of the proposal leading to the DPD needed over four years and every paragraph of the instrument has been thoroughly contemplated and negotiated. Much of it is the result of compromises, down to specific wordings.

The DPD intends to provide “a strong and more coherent framework for the protection of personal data in the Union”. Article 60 of the DPD regulates that “specific provisions for the protection of personal data in Union legal acts that entered into force on or before 6 May 2016 in the field of judicial cooperation in criminal matters and police cooperation, which regulate processing between Member States and the access of designated authorities of Member States to information systems established pursuant to the Treaties within the scope of this Directive, shall remain unaffected.”

However, in the second part of recital 94 of the DPD, reference is made to Article 8 of the Charter and Article 16 TFEU that require “the fundamental right to the protection of personal data be ensured in a consistent manner throughout the Union”, asking the Commission to evaluate the situation with regard to the relationship between the DPD and previously adopted acts “regulating the processing of personal data between Member States or the access of designated authorities of Member States to information systems established pursuant to the Treaties, in order to assess the need for alignment of those specific provisions with this Directive. Where appropriate, the Commission should make proposals with a view to ensuring consistent legal rules relating to the processing of personal data.”

This would mean that any post-DPD legislation should be consistent, avoiding non-consistent wording that might result in problems of diverging interpretation. Such problems are indeed to be expected both during the implementation phase and in later stages, where the rules or their implementation/application may be questioned. Below are a few examples where we would appreciate changes or explanations.

Article 13.1

This article in the ECRIS-TCN proposals contains a mixture of ingredients, mainly from article 4 of the DPD. While the article doesn't reflect all the corresponding content of the DPD, as DE has remarked, there are overlaps and duplication in the article. Further, the reference to “human dignity” in 13.1.(b) is not present in the DPD at all, it seems to be picked from the data protection regulation, where it appears only in article 88, Processing in the context of employment. We would propose a minimalistic approach and maximum alignment with the DPD.

Article 13.2 and 21.2

The reference in article 13.2 to Regulation (EC) No 45/2001 [or its successor Regulation] should be carefully examined and explained, to avoid any doubts about which data protection rules are actually applicable to information in ECRIS-TCN.

In the general approach for the "new" Regulation (EC) No 45/2001 (as in doc. 8431/17?) the scope is defined in Article 2.1a: "This Regulation shall not apply to the processing of operational personal data by Union bodies, offices or agencies carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of the TFEU where the acts establishing those bodies, offices or agencies provide for comprehensive rules relating to the protection of natural persons with regard to the processing of their data."

In the proposal for a new eu-LISA Regulation (doc. 12666/17), Article 31, the application of Regulation (EC) No 45/2001 [or its successor] by the agency is "Without prejudice to the provisions on data protection laid down in the legislative instruments governing the development, establishment, operation and use of large-scale IT systems,"

The eu-LISA Regulation does not contain any "comprehensive rules" relating to protection of personal data inserted by Member States in the systems managed by eu-LISA. The ECRIS-TCN proposal Article 21.2 states that "eu-LISA shall be considered as data processor in accordance with Regulation (EC) No 45/2001 as regards the personal data entered into the Central System by the Member States."

Summing up: Do the proposals (ECRIS-TCN and eu-LISA) provide for "comprehensive rules relating to the protection of natural persons with regard to the processing of their data", preventing the application of Regulation (EC) No 45/2001 to personal data entered into ECRIS-TCN by Member States? In our view, Regulation (EC) No 45/2001 should only be applicable to the processing by eu-LISA of "administrative" personal data about the agency's staff etc.

Article 20

The comment of the Commission in footnote 110 (“COM notes that this would break the consistency with the text of EES regulation”): The problem seems to be that the EES proposal is not aligned with the DPD, c.f. our general comments above. Does this mean that we should, in the ECRIS negotiations, prioritise alignment with the EES rather than with the DPD?

Articles 23-25

Our previous written comments are well reflected in footnotes 120, 122 and 125 and we would ask to revise the text accordingly or explain/motivate the choice of a diverging wording in the ECRIS-TCN Regulation.

Article 29

The wording of this article should be aligned with the wording and the logic of the DPD:

29.2(a) A log can never ~~show the purpose~~, only make it possible to establish the justification of a processing operation. The need for traceability regarding the justification for a search is clearly expressed in para 29.3. Therefore, para 29.2(a) about the “purpose” should be deleted, as well as para 29.2(f) last part about “the official who ordered the search” (c.f. ES in footnote 136). Documentation (case files etc.) is needed to provide further information but should not be mentioned in an article dealing with “Keeping of logs”. Article 25 of the DPD exhaustively mentions what a technical security log is actually able to show.

29.4 According to DPD Art. 25.2 logs can be used for “self-monitoring /.../ and for criminal proceedings” (namely as evidence in cases of illegal processing). Would this be covered by the proposed wording?

ECRIS DIRECTIVE changing the ECRIS Framework Decision (doc. 11568/17)

Article 1(8) The proposed Article 11a.1, footnote 21.

Additional comment: Not only technical but also organisational measures are needed and the appropriateness should expressly include state of the art as well as costs and risks.

Text proposal: “To ensure the confidentiality and integrity of criminal record information transmitted to other Member States, appropriate technical and organisational measures should be used, taking into account the state of the art, the cost of implementation and the risks posed by the processing.”
