

REPORT 22/2017 OF THE JOINT COMMITTEE ON THE EUROPEAN UNION OF 18 OCTOBER 2017, ON THE APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY BY THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A CENTRALISED SYSTEM FOR THE IDENTIFICATION OF THE MEMBER STATES TO HAVE CONVICTIONS OF INFORMATION ON THIRD COUNTRIES AND STATELESS PEOPLE (TCN) COMPLEMENT AND SUPPORT TO EUROPEAN SYSTEM OF CRIMINAL BACKGROUND INFORMATION SYSTEM (ECRIS-TCN) AND AMENDING REGULATION (EU) NO 1077/2011 [COM (2017) 344 FINAL] [2017/0144 (COD)] SWD (2017) 248 FINAL}

BACKGROUND

A. The Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Lisbon Treaty of 2007 and in force since 1 December 2009, has established a control procedure for national parliaments ensure compliance with the principle of subsidiarity by European legislative initiatives. This Protocol has been applied in Spain by means of Law 24/2009 of 22 December, modifying Law 8/1994 of 19 May. In particular, the new Articles 3 (j), 5 and 6 of Law 8/1994 constitute the legal basis for this report.

B. The Proposal for a Regulation of the European Parliament and of the Council establishes a centralised system to identify Member States holding information on convictions of third country nationals and stateless persons (TCN) to complement and support the European Criminal Records Information System (ECRIS-TCN) and amending Regulation (EU) No 1077/2011 has been approved by the European Commission and forwarded to the national parliaments, which have a period of eight weeks to verify the subsidiarity check of the initiatives, ending on 20 October 2017.

C. The Bureau and the Spokespersons for the Joint Committee for the European Union, 12

September 2017 decided to examine the proposal, appointed as rapporteur Rubén Moreno Palanques (MP) and asked the Government for the report provided for in Article 3) of Law 8/1994. ‘

D. The Government has submitted a report, which concludes that the Proposal respects the principle of subsidiarity. A report has also been received from the Basque Parliament concluding that the Proposal respects the principle of subsidiarity, and letters from the Parliaments of Catalonia, La Rioja, Cantabria, and Galicia, notifying acknowledgement and closure of the file or non-delivery of a reasoned opinion.

E. The Joint Committee for the European Union, at its meeting of 18 October 2017, adopted the following

REPORT

1. — Article 5.1 of the Treaty on European Union states that ‘the use of Union competences is governed by the principles of subsidiarity and proporcionalidadDe according to Article 5.3 of the same Treaty, ‘under the principle of subsidiarity the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can be better achieved, by reason of the scale or effects of the proposed action, at Union level’.

2. — The legislative proposal analysed is based on Article 82(1)(d) of the Treaty on the Functioning of the European Union. Article 82(1)(d) is the legal basis for the Union’s right to act in the field of cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions, and provides as follows:

“Article 82

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

(...)

(d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.”

3. — The European Criminal Records Information System (ECRIS) provides for an electronic exchange of information on criminal records between the Member States in a decentralised manner. The ECRIS system, operational since April 2012, allows the authorities to manage the criminal records of each Member State to obtain, from the Member State of nationality, complete information on previous convictions of an EU national.

Although it is now possible to exchange information on convictions concerning third country

nationals and stateless people (TCN) through ECRIS, there is no procedure or mechanism in place to do so efficiently.

Member States are reluctant to use the current system for TCN. One of the reasons for this low level of use with regard to TCN is the fact that a Member State wishing to receive such information have to send ‘blanket’ requests to all Member States, including (the majority) that do not hold the requested information. It was pointed out that the administrative burden caused by the need to respond to ‘blanket’ requests would be the most costly element (EUR 78 million) of the ECRIS workflow, if Member States systematically send such requests.

Since ECRIS in practice inefficient with regard to TCN, Member States often rely only on information stored in their own national criminal record registers. In this way, the courts, the police and other authorities empowered may not always have complete information on the criminal history of convicted TCN.

4. **However, the evolution of the situation has shown that there is a need to step up the work by means of a legislative proposal, in order to establish a centralised system for the processing of identity data of TCN.** This centralised system will enable the authorities of a Member State to determine which other Member States have TCN criminal record, in such a way that they can use the existing ECRIS to send requests for conviction information only to those Member States.

The changes of circumstances can be summarised as follows:

- the new and terrible terrorist attacks in European cities which have resulted in security matters are even more pressing,
- the need for greater efficiency and interoperability of European databases and electronic exchange of information available, including those used for border management and security,
- the evidence that a decentralised system technical problems, in particular with regard to the exchange of fingerprints seudonimizadas decentralised.

5. — In the proposed option, the identity data of convicted TCN are centralised in an EU wide system, developed and managed by eu-LISA which is intended to treat the ECRIS-TCN system. A Member State wishing to identifying the Member State or States holding criminal record information on a particular TCN can do so through a search of a hit or a negative response in the central system of TCN, either using the alphanumeric data of TCN or fingerprints, depending on the availability of data. In the event of a “hit”, the name of the Member State or Member States that have provided the data shall be communicated together with the reference data and details of the relevant partners. This will allow the Member States to make use of the existing ECRIS for verifying the identity of the persons concerned before the exchange of information on criminal records.

Centralised ECRIS-TCN system must be used only for data processing of the identity of third

country nationals who have been subject to final decisions of criminal courts in the European Union, in order to obtain information on the previous convictions through the European Criminal Records Information System.

The identity information should include alphanumeric data, fingerprint data and facial images in so far as they have been registered in national databases of criminal records of the Member States.

It also obliges Member States to set up “ECRIS-TCN system historical records of convictions of nationals of third countries”, i.e. convictions handed down prior to the entry into force of the Regulation, which provides for a period of twenty-four months from the date of entry into force of this Regulation.

6. Eurojust — The designated as point of contact for third countries and international organisations wishing to request information on convictions of TCN. Eurojust should not provide any information to the third State or international organisation applicant, nor information on the Member State or States holding information on convictions, but should be limited to inform the Member State (s) concerned in case of a hit. It is up to the Member States to decide whether or not to contact the third State or international organisation to indicate that the information on previous convictions of TCN can be provided in accordance with national legislation.

Eurojust, Europol, the European Public Prosecutor’s Office, once the Regulation establishing it, shall have direct access to the system ECRIS-TCN for the exercise of its statutory tasks. However, those competent authorities should not have access to ECRIS as such in order to request information on convictions in itself but to make use of their established channels with national authorities to obtain this information.

7. — **The Member States have been reluctant, at this stage, to change the system of ECRIS for EU nationals, unreliable, whilst recognising the advantages of this alternative solution.** However, although that is not the appropriate moment for change, accept that the entire system may be reviewed in the near future after analysing the experience with the centralised ECRIS-TCN.

8. — On compliance with the principle of subsidiarity of the initiative (a non-exclusive competence), the establishment of a centralised system for the exchange of criminal record information on convicted TCN cannot be done at Member State level. A common exchange of information aiming at a standardised, rapid, coordinated and efficient between Member States requires concerted action. This can neither be achieved unilaterally at Member State level nor bilaterally between Member States. It is by its nature a Tarca to be undertaken at EU level.

9. — The efficient exchange of criminal record information is instrumental in combating cross-border crime and contributes considerably to putting into practice the

principle of mutual recognition of judgments and judicial decisions in a common area of justice and security where people move freely. Therefore, action at EU level is proportionate to the objectives of the initiative. The proposed changes do not go beyond what is necessary to achieve the objective of cross-border judicial cooperation, and build on what is already applied for EU nationals in the existing ECRIS.

In comparison with the Commission proposal of 2016 for a decentralised system, the proportionality of the proposed solution differs only in respect to the centralised processing of personal data. With regard to non-discrimination between EU nationals and TCN, the solution proposed centralises the identifying data of TCN at EU level, while national data is stored and processed in each Member State. This difference in treatment is justified and proportionate, because it does not give rise to any substantial disadvantage for TCN and the targets of the initiative could not be achieved equally well on a decentralised basis

On the choice by the Commission of a regulation as the legal instrument, is establishing a central system at EU level, managed by the European Agency eu-LISA, and amending Regulation (EU) No 1077/2011¹². The Regulation is directly applicable in all Member States and binding in its entirety and therefore this instrument guarantees a uniform application of the rules across the Union and their entering into force at the same time. Ensuring legal certainty by avoiding divergent interpretation in the Member States, in such a way as to prevent legal fragmentation.

CONCLUSION

For the above reasons, the Joint Committee for the European Union finds that the Proposal for a Regulation of the European Parliament and of the Council establishes a centralised system to identify Member States holding information on convictions of third country nationals and stateless persons (TCN) to complement and support the European Criminal Records Information System (ECRIS-TCN) and amending Regulation (EU) No 1077/2011, complies with the principle of subsidiarity laid down in the current Treaty on European Union.