



*Committee on Legal Affairs
The Chair*

26.3.2024

Mr Juan Fernando López Aguilar
Chair
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Opinion on the legal basis of the Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2019/816 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and Regulation (EU) 2019/818 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816 for the purpose of introducing a screening of third country nationals at the external borders (COM(2021)0096 – C9-0088/2021 – 2021/0046(COD))

Dear Mr Chair,

By letter of 15 February 2024¹, the Chair of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested the Committee on Legal Affairs (JURI), pursuant to Rule 40(2) of the Rules of Procedure, to provide an opinion on the appropriateness of the legal basis for the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2019/816 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and Regulation (EU) 2019/818 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816 for the purpose of introducing a screening of third country nationals at the external borders² (hereinafter “the proposed Regulation”).

¹ D(2024)5246.

² COM(2021) 96 of 2.3.2021.

JURI will consider the above question at its extraordinary meeting on 11 March 2024.

I - Background

In March 2021 the Commission put forward the proposed Regulation for the purpose of introducing a screening of third-country nationals at the external borders and based it on a series of Articles of the Treaty on the Functioning of the European Union (TFEU), that is Article 16(2), Article 74, Article 78(2), point (e), Article 79(2), point (c), Article 82(1), second subparagraph, point (d), Article 85(1), Article 87(2), point (a), and Article 88(2). The proposed Regulation complements another legislative proposal introducing a screening of third-country nationals at the external borders (2020/0278(COD)³, hereinafter the “Screening Regulation”) which was put forward by the Commission in September 2020 and is a development of the Schengen *acquis* regarding borders. As a consequence of that Screening Regulation, the proposed Regulation was subsequently put forward to provide for a number of necessary consequential amendments to legal acts applying beyond the Schengen *acquis*, which, for reasons of the so-called Schengen variable geometry, had to be done in a separate instrument.

On 28 March 2023, LIBE adopted its reports on both above-mentioned proposals in which it did not dispute the legal basis. Following plenary endorsement, LIBE entered into interinstitutional negotiations. As work on the two files progressed in negotiations, it emerged that the multiple legal basis chosen by the Commission for the proposed Regulation included Treaty Articles which, despite having served as the legal bases for the two instruments being amended – Regulation (EU) 2019/816⁴ and Regulation (EU) 2019/818⁵ – were not relevant for the modifications to be made to those instruments through the proposed Regulation and seemed therefore redundant. Parliament and the Council thus provisionally agreed to remove Article 16(2), Article 74, Article 85(1) and Article 88(2) TFEU from the legal basis of the proposed Regulation.

Following those provisionally agreed changes in legal basis of the proposed Regulation, LIBE requested JURI to provide an opinion on the appropriateness of the modified legal basis, pursuant to Rule 40 Rules of Procedure.

II - The relevant Treaty Articles

Title II of Part One TFEU reads, *inter alia* (emphasis added):

Article 16
(ex Article 286 TEC)

³ COM(2020) 612 of 23.9.2020.

⁴ Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726 (OJ L 135, 22.5.2019, p. 1).

⁵ Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816 (OJ L 135, 22.5.2019, p. 85).

1. *Everyone has the right to the protection of personal data concerning them.*
2. ***The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.***

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

Chapter 1 (“General provisions”) of Title V of Part Three TFEU reads:

Article 74
(ex Article 66 TEC)

The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament.

Chapter 2 (“Policies on border checks, asylum and immigration”) of Title V of Part Three TFEU reads, *inter alia* (emphasis added):

Article 78
(ex Articles 63, points 1 and 2, and 64(2) TEC)

1. *The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*
2. ***For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:***
 - (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;*
 - (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;*
 - (c) a common system of temporary protection for displaced persons in the event of a massive inflow;*
 - (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;*

- (e) *criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;*
 - (f) *standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;*
 - (g) *partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.*
- (...)

Article 79
(ex Article 63, points 3 and 4, TEC)

1. *The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.*
2. ***For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:***
 - (a) *the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;*
 - (b) *the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;*
 - (c) ***illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;***
 - (d) *combating trafficking in persons, in particular women and children.*

(...)

Chapter 4 (“Judicial cooperation in criminal matters”) of Title V of Part Three TFEU reads, *inter alia* (emphasis added):

Article 82
(ex Article 31 TEU)

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:

- (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;*
 - (b) prevent and settle conflicts of jurisdiction between Member States;*
 - (c) support the training of the judiciary and judicial staff;*
 - (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.***
- (...)*

Article 85
(ex Article 31 TEU)

- 1. Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol. In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:*
 - (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;*
 - (b) the coordination of investigations and prosecutions referred to in point (a);*
 - (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.*
- (...)*

Chapter 5 (“Police cooperation”) of Title V of Part Three TFEU reads, *inter alia* (emphasis added):

Article 87
(ex Article 30 TEU)

- 1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.*
- 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in***

accordance with the ordinary legislative procedure, may establish measures concerning:

- (a) the collection, storage, processing, analysis and exchange of relevant information;*
- (b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;*
- (c) common investigative techniques in relation to the detection of serious forms of organised crime.*

(...)

*Article 88
(ex Article 30 TEU)*

(...)

2. *The European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Europol's structure, operation, field of action and tasks. These tasks may include:*

- (a) the collection, storage, processing, analysis and exchange of information, in particular that forwarded by the authorities of the Member States or third countries or bodies;*
- (b) the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust.*

(...)

III – CJEU case law on the choice of legal basis

The Court of Justice has traditionally viewed the question of the appropriate legal basis as an issue of constitutional significance, guaranteeing compliance with the principle of conferred powers (Article 5 of the Treaty on European Union) and determining the nature and scope of the Union's competence⁶.

According to well-established case law, the legal basis of a Union act does not depend on an institution's conviction as to the objective pursued, but must be determined according to objective criteria amenable to judicial review, including in particular the aim and the content of the measure⁷. Furthermore, the legal basis for an act must be determined having regard to its own aim and content⁸.

⁶ Opinion 2/00 ("*Cartagena Protocol*"), ECLI:EU:C:2001:664, para 5.

⁷ Case C-300/89, *Commission v Council* ("*Titanium dioxide*"), ECLI:EU:C:1991:244, paragraph 10.

⁸ Case C-187/93, *Parliament v Council*, ECLI:EU:C:1994:265, paragraph 28. See also Case C-411/06, *Commission v Parliament and Council* ("*Shipments of waste*"), ECLI:EU:C:2009:518, paragraph 77, and Case C-81/13, *UK v Council*, ECLI:EU:C:2014:2449 paragraph 36.

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component⁹. Only exceptionally, if it is established that the act simultaneously pursues a number of objectives, inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases¹⁰. This would however only be possible if the procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament¹¹.

IV – Aim and content of the proposed Regulation

As explained in the explanatory memorandum to the proposed Regulation, in September 2020 the Commission adopted a Communication on a New Pact on Migration and Asylum¹² aiming, *inter alia*, to put in place a common framework for asylum and migration management at Union level and to promote mutual trust between the Member States. The Communication encompassed the Screening Regulation and announced the proposed Regulation - both intrinsically linked.

The Screening Regulation establishes, at the external borders of the Member States, a screening of third-country nationals who, without fulfilling entry conditions, have crossed the external borders in an unauthorised manner, have applied for international protection during border checks or have been disembarked after a search and rescue operation. It also provides for the screening of third-country nationals illegally staying within the territory of the Member States where there is no indication that they have been subject to controls at the external borders.

The Commission also explains in the explanatory memorandum that the security checks as part of the screening should be at least of a similar level as the checks performed in respect of third-country nationals that apply beforehand for an authorisation to enter the Union for a short stay, whether they are under a visa obligation or not. It follows that the automated verifications for security purposes in the context of the screening should be carried out against the same systems as for applicants for a visa or for a travel authorisation under the European Travel Information and Authorisation System (ETIAS), the Visa Information System (VIS), the Entry/Exit System (EES) and the Schengen Information System (SIS).

The screening also comprises measures to establish or verify the identity of the person concerned and a security check. For the purposes of the identification and verification of identity, the screening authorities should query the common identity repository (CIR) established under Regulations (EU) 2019/817 and (EU) 2019/818; consulting the CIR would

⁹ Case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, paragraph 53 and case-law cited.

¹⁰ Case C-300/89, paragraphs 13 and 17; Case C-42/97, *Parliament v Council*, ECLI:EU:C:1999:81, paragraph 38; *Opinion 2/00*, paragraph 23; Case C-94/03, *Commission v Council ("Rotterdam Convention")*, ECLI:EU:C:2006:2 and Case C-178/03, *Commission v Parliament and Council*, ECLI:EU:C:2006:4, paragraphs 36 and 43.

¹¹ Case C-300/89, paragraphs 17-25; Case C-268/94, *Portugal v Council*, ECLI:EU:C:1996:461.

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum (COM(2020) 609 of 23.9.2020).

allow checking in one source the identity data present in all of the above-mentioned systems, as well as in Eurodac¹³ and ECRIS-TCN. For the purpose of the security check, the screening authorities should also be able to consult ECRIS-TCN itself.

However, since Union databases can only be used if prior access has been granted by law and since access to the EES, ETIAS, VIS and ECRIS-TCN is necessary for the authorities designated to carry out the screening, the Union Regulations establishing those systems, as well as CIR, need to be amended to provide for this additional access right for screening authorities.

The Screening Regulation amends Regulations establishing the EES, ETIAS and VIS, which are all developments of the Schengen *acquis* regarding borders, as is the Screening Regulation as a whole.

In view of the fact that Regulation establishing ECRIS-TCN is not a development of the Schengen *acquis*, its amendment could not be part of the Screening Regulation and there was a need for a self-standing amendment of that Regulation.

In addition, the CIR was established by two Regulations, (EU) 2019/817 and (EU) 2019/818, and while the Screening Regulation could provide for amendments to Regulation (EU) 2019/817, which applies to the EES, VIS and ETIAS, due to the so-called Schengen variable geometry, the necessary amendment to Regulation (EU) 2019/818, which applies to Eurodac and ECRIS-TCN, could not be part of the Screening Regulation either.

Consequently, the Commission put forward the proposed Regulation in necessary observance of the Schengen variable geometry.

V – Analysis

It follows from the above that the aim of the proposed Regulation, as provisionally agreed by the co-legislators, is to provide the screening authorities with the necessary access rights to ECRIS-TCN and to the CIR for the purpose of applying the measures to establish or verify the identity of the person concerned, as well as the security checks that form part of screening. It thus ensures that the aims pursued by the ECRIS-TCN and the CIR can also be achieved during screening.

To enable that, the proposed Regulation contains necessary amendments to Regulation establishing ECRIS-TCN in order to grant access of the screening authorities to that system and provide under what conditions a hit with data in ECRIS-TCN may result in a security flag in the screening form that is drawn up at the end of screening.

In so far as the amendments of Regulation (EU) 2019/818 are concerned, the proposed Regulation inserts a new Article providing for access to the CIR for the purpose of the establishment or verification of the identity of persons subject to screening. Other amendments ensure that existing provisions of Regulation (EU) 2019/818 on the keeping of logs also apply to queries by the screening authorities.

¹³ System established by Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 (OJ L 180, 29.6.2013, p. 1).

The proposed Regulation supports the aims of Regulation establishing ECRIS-TCN, which it amends. That Regulation was based on Article 82(1), second subparagraph, point (d), TFEU. The amendments to Regulation (EU) 2019/818 reinforce the exchange of information between police authorities. It would therefore be appropriate to base the proposed Regulation also on Article 87(2), point (a), TFEU, which provides legal basis for measures concerning the collection, storage, processing, analysis and exchange of relevant information for the purposes of establishing police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

Finally, in so far as the amendments of Regulation (EU) 2019/818 also allow for access to Eurodac identity data in the CIR, it would be appropriate to base the proposed Regulation also on Article 78(2), point (e), and Article 79(2), point (c), TFEU. Both provisions are among the legal bases for the new Eurodac Regulation¹⁴ that has also been provisionally agreed by the co-legislators.

As for the other four Treaty Articles that the Commission envisaged as legal bases of the proposed Regulation, their inclusion does not appear to be in accordance with the case-law set out in point III above.

While the amendments to Regulation (EU) 2019/818 extend the existing obligation to keep logs of data processing activities under that act to the queries of screening authorities, the impact of the proposed Regulation on the data protection provisions of Regulation (EU) 2019/818 is clearly not the main aim or component, but is merely of an ancillary nature. Article 16(2) TFEU should therefore not be used for the proposed Regulation.

Furthermore, the proposed Regulation does not contain any elements that would require the use of Article 74 TFEU, which allows the Council to adopt certain measures, as a legal basis.

Lastly, there does not seem to be any justification for the use of Articles 85(1) and 88(2) TFEU among the legal bases either. Those Articles provide a legal basis for the determination of the structure, operation, field of action and tasks of Eurojust and Europol respectively. However, the proposed Regulation does not contain any amendments that directly or indirectly concern Eurojust nor Europol. The main and sole purpose of the proposed Regulation is to authorise and regulate access of the screening authorities to ECRIS-TCN and the CIR.

VI – Conclusion and recommendation

At its meeting of 11 March 2024 the Committee on Legal Affairs accordingly decided, by 16 votes in favour, none against and one abstention¹⁵, to recommend to the Committee on Civil Liberties, Justice and Home Affairs that reference to Article 16(2), Article 74, Article 85(1)

¹⁴ 2016/0132(COD) (COM(2016) 272 of 4.5.2016 and COM(2020) 614 of 23.9.2020).

¹⁵ The following were present for the final vote: Adrián Vázquez Lázara (Chair), Marion Walsmann (Vice-Chair), Lara Wolters (Vice-Chair), Alessandra Basso, Ilana Cicurel, Ibán García Del Blanco, Pascal Durand, Daniel Freund (for Sergey Lagodinsky, pursuant to Rule 209(7)), Heidi Hautala, Pierre Karleskind, Gilles Lebreton, Maria-Manuel Leitão-Marques, Karen Melchior, Sabrina Pignedoli, René Repasi, Franco Roberti, Michaela Šojdrová (for Jiří Pospíšil, pursuant to Rule 209(7)), Axel Voss, Javier Zarzalejos.

and Article 88(2) TFEU should rightly be deleted from the legal basis of the proposed Regulation and that it be based on the remaining Article 78(2), point (e), Article 79(2), point (c), Article 82(1), second subparagraph, point (d), and Article 87(2), point (a), TFEU.
Yours sincerely,

Adrián Vázquez Lázara

**ANNEX: ENTITIES OR PERSONS
FROM WHOM THE RAPPORTEUR HAS RECEIVED INPUT**

The rapporteur declares under his exclusive responsibility that he did not receive input from any entity or person to be mentioned in this Annex pursuant to Article 8 of Annex I to the Rules of Procedure.