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Committee on Civil Liberties, Justice and Home Affairs

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DRAFT REPORT

on the proposal for a Council decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA
(COM(2008)0332 – C6-0216/2008 – 2008/0101(CNS))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Luca Romagnoli

Symbols for procedures

*	Consultation procedure *majority of the votes cast*
**I	Cooperation procedure (first reading) *majority of the votes cast*
**II	Cooperation procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***	Assent procedure *majority of Parliament's component Members, except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty*
***I	Codecision procedure (first reading) *majority of the votes cast*
***II	Codecision procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***III	Codecision procedure (third reading) *majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics*.** In the case of amending acts, passages in an existing provision that the Commission has left unchanged, but that Parliament wishes to amend, are highlighted in **bold**. Any deletions that Parliament wishes to make in passages of this kind are indicated thus: [...]. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). Suggested corrections of this kind are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA
(COM(2008)0332 – C6-0216/2008 – 2008/0101(CNS))

(Consultation Procedure)

The European Parliament,

– having regard to the Commission proposal (COM(2008)0332),

– having regard to Article 31 and Article 34(2)(c) of the EU Treaty,

– having regard to Article 39(1) of the EU Treaty, pursuant to which the Council consulted Parliament (C6-0216/2008),

– having regard to Rules 93 and 51 of its Rules of Procedure,

– having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A6-0000/2008),

1. Approves the Commission proposal as amended;

2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;

3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;

4. Calls on the Council to consult Parliament again if it intends to amend the Commission proposal substantially;

5. Should that proposal not be adopted prior to the entry into force of the Treaty of Lisbon, is determined to consider any future proposal by urgent procedure, in close cooperation with the national parliaments;

6. Instructs its President to forward its position to the Council and Commission.

Amendment 1

Proposal for a decision
Recital 6 a (new)

Text proposed by the Commission	*Amendment*
	(6a) This decision is based on the principles already established by Council Framework Decision 2008/XX/JHA on the organisation and content of the exchange of information extracted from criminal records between Member States, and supplements and applies those principles from a technical standpoint.

Or. it

Justification

It would seem appropriate to make clear that this decision is one that applies and supplements an already-existing regulatory instrument, without altering its principles.

Amendment 2

Proposal for a decision
Recital 9

Text proposed by the Commission	*Amendment*
(9) In order to ensure the mutual understanding and transparency of the common categorisation, each Member State should submit the list of national offences and sanctions falling in each category referred to in the respective table, as well as the list of national criminal courts. Such information should be accessible to national judicial authorities in particular through any available electronic channels.	(9) In order to ensure the mutual understanding and transparency of the common categorisation, each Member State should submit the list of national offences and sanctions falling in each category referred to in the respective table, ***together with a short description of the constitutive elements of the offence,*** as well as the list of national criminal courts. Such information should be accessible to national judicial authorities in particular through any available electronic channels.

Or. it

Justification

The often substantial differences between the definition of types of offence in the various Member States make it all the more appropriate for as much information as possible to be provided to the persons who will have to use the criminal record extracts. This amendment is linked to the subsequent Amendment 6.

Amendment 3

Proposal for a decision
Recital 9 a (new)

Text proposed by the Commission	*Amendment*
	(9a) The reference tables contained in Annexes A and B do not in any way aim to harmonise the types of offence or the sanctions set out therein, which will continue to be governed by national law.

Or. it

Justification

It should be made clear that this decision is not aimed at harmonising substantive criminal law, but rather at facilitating the exchange of information extracted from the criminal record.

Amendment 4

Proposal for a decision
Recital 13

Text proposed by the Commission	*Amendment*
(13) Both reference tables of categories of offences and sanctions, as well the technical standards used for the exchange of information should require constant revision and regular updates. ***Implementing powers in this respect were therefore delegated to the Commission assisted by a Committee. The regulatory procedure under Community law should apply mutatis mutandis for the adoption of measures necessary for the***	(13) Both reference tables of categories of offences and sanctions, as well the technical standards used for the exchange of information should require constant revision and regular updates.

implementation of this Decision.

Or. it

Amendment 5

Proposal for a decision
Article 3 - paragraph 5

Text proposed by the Commission	*Amendment*
5. In order to ensure efficient operation of ECRIS, the Commission shall provide general support and monitoring services.	5. In order to ensure efficient operation of ECRIS, the Commission shall provide general support and monitoring services ***and verify that the measures set out in Article 6 are correctly implemented.***

Or. it

Justification

The Commission has both an overview of the situation and the relevant technical expertise, and must therefore play a coordinating and supervisory role in the implementation of the interconnection system.

Amendment 6

Proposal for a decision
Article 5 - paragraph 1 - letter a

Text proposed by the Commission	*Amendment*
(a) the list of national offences in each of the categories referred to in the table of offences in Annex A. The list shall include the name or legal classification of the offence and reference to the applicable legal provision. It ***may*** also include a short description of the constitutive elements of the offence;	(a) the list of national offences in each of the categories referred to in the table of offences in Annex A. The list shall include the name or legal classification of the offence and reference to the applicable legal provision. It ***must*** also include a short description of the constitutive elements of the offence;

Or. it

Justification

The often substantial differences between the definition of types of offences in the various Member States make it all the more appropriate to make it a requirement to provide, along with the title of the crime, a description of its constitutive elements. If the judicial authorities are to receive the fullest and most accurate information possible, then both the formal and the substantive data relating to the offence committed must be made available immediately. That requirement is all the more pressing when the offence does not fit into any sub-category but is only classified in an open category.

Amendment 7

Proposal for a decision
Article 6 - first subparagraph

Text proposed by the Commission	*Amendment*
The following implementing measures shall be adopted in accordance with the procedure referred to in Article 7:	***Where necessary, and in accordance with Article 34(2)(c) and Article 39 of the Treaty on European Union, the Commission shall propose that the Council adopt all the measures needed to ensure an optimum functioning of ECRIS and its interoperability with national systems, such as:***

Or. it

Amendment 8

Proposal for a decision
Article 7

Text proposed by the Commission	*Amendment*
Article 7 ***Committee procedure***	***Deleted***
1. Where reference is made to this Article, the Commission shall be assisted by a regulatory committee composed of representatives of the Member States and chaired by a representative of the Commission (the "Committee"). ***2. The Committee shall adopt its rules of procedure.***	

3. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 205(2) and (4) of the Treaty establishing the European Community, in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

4. The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.

5. If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall without delay submit to the Council a proposal relating to the measures to be taken and shall inform the European Parliament thereof.

6. The Council may act by qualified majority on the proposal, within three months from the date of referral to the Council.

If within that period the Council has indicated by qualified majority that it opposes the proposal, the Commission shall re-examine it. It may submit an amended proposal to the Council, re-submit its proposal or present a legislative proposal on the basis of the Treaty.

If, on the expiry of that period, the Council has neither adopted the proposed implementing act nor indicated its opposition to the proposal for implementing measures, the proposed implementing act shall be adopted by the Commission.

Or. it

Justification for amendments 4, 7 and 8

The Court of Justice (case C-133/06) has recently confirmed the principle that 'the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves'. Amendments 4, 7 and 8 are in line with the case law of the Court, and are the product of a strict interpretation of the Treaty on European Union, which does not provide for so-called 'Comitology' for the areas governed by Title VI, or authorise the creation of secondary legal bases outside the cases covered by the Treaties. The system established in Title VI, and in particular the combined provisions of Articles 34 and 39, in fact provides that any measures implementing decisions must be adopted in accordance with the procedure indicated in Article 39.

JUSTIFICATION

The exchange of information extracted from criminal records is still based essentially on the rules laid down in the Convention on mutual assistance in criminal matters, adopted by the Council of Europe in 1959, and in particular articles 13 and 22 thereof, which provide that such information should be communicated by the Ministries of Justice at least once a year.

The European Commission, noting the inefficiency and the exceptional slowness of that system, brought forward range of regulatory initiatives from 2005 onwards, aimed on the one hand at regulating and facilitating the exchange of criminal record extracts and, on the other, at establishing rules on the use that recipient Member States could make of such extracts.

The latter aspect was addressed in the Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. That Framework Decision establishes the principle of equivalence between judgements handed down by a national judicial authority and judgements handed down by the judicial authority of another Member State.

Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record is, chronologically, the first measure aimed at regulating and facilitating the exchange of information. It is based on the principle of each Member State managing the information relating to its own nationals and stipulates that the information extracted from the criminal record must be sent to the requesting Member State within 10 days of the request, using the form provided for that purpose. The information received may only be used for the purpose for which it was requested.

The proposal for a framework decision on the organisation and content of the exchange of information extracted from criminal records between Member States (COM(2005) 690 final), presented by the European Commission in late 2005, was designed to enlarge upon that legal framework. It develops on the basic principle that the Member States of which the convicted person is a national should be the point of reference for all requests relating to the criminal record, in order to ensure that any sentences passed in other Member States are also made available. It also imposes on the Member State in which a judgement is handed down the obligation to ensure that all judgements are accompanied by information on the nationality of the convicted person, and to update and communicate any relevant information to the Member State of which that person is a national.

In June 2007, the JHA Council reached political agreement on the proposal for a framework decision, which incorporates the rules laid down in the 2005 decision and once in force will replace it.

The proposal for a decision concerning ECRIS is intended, as required by Article 11 of the Framework Decision, to supplement in technical and IT terms the system set up by the previous regulatory instruments.

To repeat, there is no change in the basic principles:

- the point of reference remains the Member States of which the convicted person has

nationality;
- the information is only kept in the central national records and is not directly accessible to the records of the other Member States;
- the Member States manage and update their own databases;

Besides this, in order to facilitate the exchange of information, reference codes have been devised for the various categories of offences (Annex A) and sanctions (Annex B).

It should also be pointed out that a pilot project was launched in June 2006, involving Belgium, the Czech Republic, France, Germany, Luxembourg and Spain, to electronically interconnect the central records of those countries. In view of the success of that project, other countries have subsequently also subscribed to it.

Rapporteur's position

Your rapporteur takes a positive view of this proposal, which from a technical standpoint gives tangible form to European criminal records arrangements as set out in Framework Decision 2008/XX/JHA on the organisation and content of the exchange of information extracted from criminal records between Member.

Your rapporteur notes in particular that the aim of the proposal is to implement the principles already agreed in previous regulatory instruments, by creating an electronic interconnection between national records - the lack of which has until now prevented the European records system from functioning effectively. In that perspective, Amendment 1 sets out to make it clear that this regulatory instrument is of an implementing nature, and emphasises that it does not aim to establish new rules, but rather to confer on those which already exist the technical means they need to become operational.

Amendment 3 is also designed to clarify the tenor of the proposal, specifying that Annexes A and B are not intended to harmonise the types of offence and sanctions set out therein, which will instead continue to be governed by national law.

The need to find a common focal point for 27 different legal systems, all of which have their own judicial and social sensitivities, has led the Commission to synthesize the criminal offences into the categories set out in Annex A. The system proposed consists of clear and concise records which have the great merit of being 'readable' by all the Member States, but which are liable, at least in some cases, to be inadequate or not fully relevant. Being aware of the inevitable approximation resulting from this synthesis, the Commission has also made provision for 'open' categories. However, these are by definition even more vague. This over-generalisation must therefore be remedied by providing the judicial authorities with all the cognitive tools needed to understand and interpret the information available as effectively as possible. This specifically refers to the constitutive elements of the offence, which must be made accessible to the judicial authorities, especially when the offence does not fit into any of the sub-categories, but belongs to an open category.

Precisely because an accurate assessment of the relevance of extracts from the record of another Member State is not possible without adequate information on the nature of the criminal offence to which the extract relates, it is proposed in Amendments 2 and 6 that the

document in which the Member States give notification of the list referred to in Article 5(1)(a) must as a matter of course include a description of the constitutive elements of the offence.

The prosecuting judicial authorities will nonetheless still be able to request the full text of the sentence or other forms of clarification, where they see a need for this. However, in such cases the traditional channels of mutual assistance in criminal matters will have to be followed, and these can prove long and complex.

In this respect, your rapporteur hopes that electronic tools aimed at speeding up those supplementary requests and allowing the judicial authorities swiftly to obtain the necessary information are introduced as soon as possible.

It should be pointed out, in that regard, that the ECRIS proposal forms part of the broader framework of the E-justice system which is also designed to facilitate increased and swifter communication between the judicial authorities of the Member States.

Lastly, Amendments 4, 7 and 8 are based on a principle recently confirmed by the Court of Justice in its ruling in case C-133/06, points 54 *et seq*, which reiterates that the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves. In the Court's opinion, to acknowledge that an institution can establish secondary legal bases, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaty. This would also enable the institution concerned to undermine the principle of institutional balance which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions. Nor, as the Court also stated, can the adoption of secondary legal bases be justified on the basis of considerations relating to the politically sensitive nature of the issue concerned or to a concern to ensure the effectiveness of a Community action.

The procedure proposed by the European Commission, which would operate via a committee chaired by the Commission itself, is wholly outside the scope of Title VI of the Treaty on European Union, and would give rise to the creation of secondary legal bases not provided for in the Treaty itself.

Amendments 4, 7 and 8 are aimed at aligning the Commission proposal with the Court of Justice guidelines and at ensuring that the implementing measures bearing on the content of the decision are adopted in accordance with Articles 34 and 39 of the Treaty on European Union.

As concerns data protection, which is a very sensitive issue in the LIBE Committee, your rapporteur is pleased to note that there are no criticisms to be levelled at the Commission proposal.

In building on the principles already established in the framework decision, the decision in fact lays down that each Member State must centralise the information relating to its own citizens. That information is managed by the central administration, which is the only body to have access to the interconnection with the other European records. This means that the

judicial authorities do not have access to the European record either, and that they themselves must send requests for information to the central record of their own country, which will see that these are sent to the country or countries concerned. It will always be the central administration that takes receipt of the information requested and, lastly, sends it to the requesting judicial authority. Your rapporteur firmly hopes that management of the central national records will also remain the preserve of national authorities in the future.

The reference, in recital 14 of the proposal, to the Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, ensures that the standards set out therein are also guaranteed in the present case.

It would also be appropriate, in that respect, to align recital 10 of Framework Decision 2008/XX/GAI on the organisation and content of the exchange of information extracted from criminal records between Member States, which makes reference to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, adopted in Strasbourg on 28 January 1981, with recital 14 of the present decision which, on the other hand, quite rightly makes reference to the Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters.

Still on the subject of data protection, your rapporteur agrees with the decision to use the S-TESTA system, which guarantees the network security needed when handling such sensitive information. Your rapporteur recommends continued use of the S-TESTA system, and that the information extracted from the record should not be sent over the Internet or through other channels that do not guarantee the highest security standards.

Conclusion

Your rapporteur is firmly convinced of the need for electronic interconnection of the criminal records to take place as soon as possible, and believes that without this proposal the Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States would remain a dead letter.

The amendments proposed are therefore aimed primarily at clarifying the content of the decision and further facilitating the use of the information obtained.

Your rapporteur is also aware that the practical implementation of the interconnection system will, in all likelihood, require constant updating as well as technical expertise and adaptations. He would nevertheless point out that the solution proposed by the Commission does not appear to be in line with the Treaties in force, or to conform to the guidelines recently confirmed by the Court of Justice on secondary legal bases, and therefore calls on the Council to respect the rules laid down in the Treaties, and in particular Articles 34 and 39 of the Treaty on European Union.