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Sir William Cash MP
Chairman of the European Scrutiny Committee
House of Commons
14 Tothill Street
London
SW1H 9NB

21 November 2016

Dear Sir William,

Proposal for a DIRECTIVE of the EUROPEAN PARLIAMENT and of the COUNCIL amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Record Information System (ECRIS), and replacing Council Decision 2009/316/JHA.

5438/16 and 2 Addenda COM(2016)7

Further to your report of 19 October, I note the further information your Committee requests following my letter of 12 October, which provided you with an update on negotiations with regards to the European Commission's proposal to extend the European Criminal Records Information System (ECRIS) to third country nationals (TCNs).

“We ask the Minister whether the approach agreed by the Justice and Home Affairs Council in June, which will involve the setting up of a centralised, automated system for the storage and exchange of fingerprints and alphanumeric data of third country national offenders within the EU, will increase the costs of ECRIS for the UK, and by how much.”

The European Commission conducted an analysis regarding the potential costs of setting up a centralised system. The analysis suggests that a centralised system is likely be less expensive for Member States to operate than a decentralised system and observed that both the initial setup and annual maintenance costs are likely to be lower.

The exact costs will be dependent on the specifications for the system which we expect to be set out in a Commission proposal in early 2017. The Home Office has already committed to working with the Ministry of Justice to produce a full impact assessment of the new system once the legislation has been published.

“The Presidency’s progress report on negotiations (which formed the basis for discussions at the June Justice and Home Affairs Council) indicates that the development of a centralised automated system would have implications for the legal form of the proposal. The Presidency suggests that “the present draft Directive cannot serve as a basis for the ECRIS proposal” and that a Regulation is likely to be the most appropriate legal instrument. We ask the Minister whether Justice and Home Affairs Ministers agreed in June that a Regulation, rather than an amending Directive, would be necessary and, if so, to set out the next steps.”

At the Justice and Home Affairs Council in June, Ministers took stock of the progress made at working level on the proposal and supported the change of approach from a decentralised operating model to a centralised one. However, the merits of whether a Regulation, rather than an amending Directive, is required to achieve this change were not discussed. Member States are awaiting clarification from the Commission as to how they will seek to implement a centralised system.

“In particular:

Does the Minister expect the Commission to withdraw its current proposal?

Can he confirm that any new proposal for a Regulation to establish a centralised system would be subject to the UK’s Title V (justice and home affairs) opt-in and require a separate opt-in decision?”

It is possible the Commission will withdraw its current proposal, although it may suggest proceeding by way of parallel proposals for the Directive and a Regulation. Following the Justice and Home Affairs Council in June, all of the working groups under the Slovakian Presidency intended to discuss this file have been cancelled. Once any new legislation has been brought forward by the Commission, I will consider whether the opt-in applies and the Committees will receive an Explanatory Memorandum in the usual way.

“What assessment has he made of the likelihood that changes to ECRIS will be agreed and implemented before the UK leaves the EU?”

Would the Government wish to participate in ECRIS following its withdrawal from the UK and is there any existing mechanism to enable third (non-EU) countries to do so?”

I do not want to speculate as to whether changes to ECRIS will be implemented before the UK leaves the EU. However, I will of course keep the Committee updated on the progress of the file.

Regarding whether there are any existing mechanisms to enable third countries to participate in ECRIS, the ECRIS legislation does not explicitly provide for the possibility of third country agreements, but the EU could conclude an agreement with a third country to exchange criminal records. At present, however, there are no countries other than EU Member States participating in ECRIS.

“We remind the Minister that we also expect to hear how the concerns identified in his predecessor’s Explanatory Memorandum, for example on the handling of “spent” convictions, the mandatory storage of the fingerprints of convicted third country nationals, the mechanism for exchanging fingerprints, and the treatment of dual nationals are being addressed in the negotiations.”

I acknowledge the Committee’s continuing interest in these issues and will address each item in turn.

First, regarding ‘spent’ convictions. The Government remains of the view that retaining access to ‘spent’ convictions would be beneficial. However, other Member States do not take the same view in relation to ECRIS and, to date, we have not been able to gain any significant traction on negotiations in this area. The June Justice and Home Affairs Council endorsed a ‘Roadmap to enhance information exchange and information management, including interoperability solutions in the Justice and Home Affairs area’ (provided separately), which called for work to “consider solutions (other than the ECRIS system) to allow the proactive sharing of convictions data, in particular relating to terrorism; and, as appropriate, assess the legal and practical feasibility of implement a solution which includes making certain convictions data available to the relevant authorities.” As such, we remain hopeful that progress can be made on this issue. .

Second, regarding the mandatory storage of fingerprints of TCNs, the current proposal reflects the fact that all Member States will be compelled to collect the fingerprints of convicted TCNs under the new system. During negotiations the majority of other Member States have been supportive of this element of the proposal.

Finally, with regards to dual nationals, a majority of Member States supported the UK's position in negotiations, as did the LIBE Committee. I am therefore hopeful that we will see dual nationals treated as TCNs in any new proposal.

“The Minister draws our attention to the Roadmap to enhance information exchange and information management, including interoperability solutions in the Justice and Home Affairs area published by the Dutch Presidency in June. We ask him to provide us with a copy.”

As the Committee is aware, the Roadmap is a Council document outlining a series of priority initiatives in relation to information sharing in the JHA area. The Roadmap focuses on three broad themes: information exchange, identifying individuals connected to terrorism and terrorist related activity, and border management and migration. The Council's Committee on Internal Security (COSI) has been charged with overseeing the implementation of the Roadmap.

I attach a copy of the Roadmap for the Committee's attention. However, the attached Roadmap is being provided to the Committee under the Government's authority and arrangements agreed between the Government and the Committee for the sharing of EU documents carrying a limité marking. It cannot be published, nor can it be reported on in any way which would bring detail contained in the document into the public domain.

I am copying this letter to Lord Boswell, Chair of the Lords European Union Committee; and to Eve Samson, Clerk to your Committee; Chris Johnson, Clerk to the Lords Committee; Les Saunders (Cabinet Office); and the Departmental Scrutiny Coordinators for the Home Office.

A handwritten signature in black ink, appearing to read 'Brandon Lewis', with a long horizontal flourish extending to the right.

Rt Hon Brandon Lewis MP