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'I' ITEM NOTE

From:	Presidency
To:	Permanent Representatives Committee
No. Cion doc.:	5438/16 + ADD 1 + ADD 2
No. prev. doc.:	15535/18
Subject:	Proposal for a Directive of the European Parliament and of the Council of amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA - Confirmation of the final compromise text with a view to agreement

1. On 19 January 2016, the Commission submitted a proposal for a Directive amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals (TCN) and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA (5438/16 + ADD 1 + ADD 2).
2. During the examination of this proposal under Netherlands Presidency, Member States expressed a strong preference for establishing a centralised system for TCN at EU level. The negotiations on the draft Directive were suspended following the request by Member States to the Commission, at the Council (Justice and Home Affairs) on 9 June 2016, to present a proposal for establishment of a central database for convicted TCN.

3. The proposal for a Regulation to establish a central database was submitted by the Commission on 28 June 2017 (10940/17 + ADD 1; see also 15534/18). Subsequently, the Presidency, in liaison with the Commission, submitted a revised text for the Directive (11568/17 + ADD 1). While the Regulation should regulate all issues related to central database, the Directive would complement the existing Framework Decision on matters of general nature related to functioning of ECRIS.
4. The Council reached a general approach on the proposed Directive under Estonian Presidency in December 2017 (15450/17). On this basis, and on the basis of the report with draft amendments as adopted by the LIBE Committee of the European Parliament on 30 May 2016, the Bulgarian Presidency and subsequently the Austrian Presidency, acting on behalf of the Council, conducted trilogue negotiations with the European Parliament and the Commission with a view to reaching an agreement in first reading.
5. On 11 December 2018, a provisional agreement was reached at the fifth trilogue, which resulted in the final compromise text set out in the Annex to this note.
6. In the light of the above, the Permanent Representatives Committee is invited to:
 - a) approve the final compromise text regarding the Directive on ECRIS as set out in the Annex to this note; and
 - b) confirm that the Presidency can indicate to the European Parliament that, should the European Parliament at first reading adopt its position concerning the Directive as set out in the Annex to this note, subject, if necessary, to revision of this text by the lawyer-linguists of both institutions, the Council would approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position.

(text as agreed 'ad referendum' during the 5th trilogue on 11 December 2018 in Strasbourg)

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 Records
Information System (ECRIS), and replacing Council Decision 2009/316/JHA

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(1)(d) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The Union has set itself the objective of offering its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to the prevention and combating of crime.
- (2) This objective requires that it be possible for information on convictions handed down in the Member States to be taken into account outside the convicting Member State, both in the course of new criminal proceedings, as laid down in Council Framework Decision 2008/675/JHA¹, and in order to prevent new offences.

¹ Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ L 220, 15.8.2008, p. 32).

- (3) This objective presupposes the exchange of information extracted from criminal records between the competent authorities of the Member States. Such information exchange is organised and facilitated by the rules set out in Council Framework Decision 2009/315/JHA² and by the European Criminal Record Information System (ECRIS) which has been established in accordance with Council Decision 2009/316/JHA.³
- (4) The ECRIS legal framework, however, does not sufficiently cover the particularities of requests concerning third country nationals. Although it is now possible to exchange information on third country nationals through ECRIS, there is no procedure or mechanism in place to do so efficiently.
- (5) Information on third country nationals is not gathered within the Union in the Member State of nationality as it is for nationals of Member States, but only stored in the Member States where the convictions have been handed down. A complete overview of the criminal history of a particular individual can therefore only be ascertained if information is requested from all Member States.
- (6) Such blanket requests impose an administrative burden on all Member States, including those not holding information on the particular third country national. In practice, this negative effect deters Member States from requesting information on third country nationals and leads to Member States limiting the criminal record information on information stored in their national register. As a consequence, the risk of information exchange between Member States being inefficient and incomplete is increased.
- (7) The exchange of information on criminal convictions is important in any strategy to combat crime and counter terrorism. It would contribute to the criminal justice response to radicalisation leading to terrorism and violent extremism if Member States used ECRIS to its full potential.

² Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ L 93, 7.4.2009, p. 23).

³ Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA (OJ L 93, 7.4.2009, p. 33).

- (8) In order to increase the utility of information on convictions and disqualifications arising from convictions for sexual offences against children, Directive 2011/93/EU of the European Parliament and of the Council ⁴ established the obligation for Member States to take the necessary measures to ensure that for the purpose of recruiting a person to a post involving direct and regular contact with children, information is transmitted in accordance with the procedures set out in Council Framework Decision 2009/315/JHA on existing convictions for sexual offences against children entered in the criminal record, or of existing disqualifications. The aim of this mechanism is to ensure that a person convicted of a sexual offence against children should not be able to conceal this conviction or disqualification with a view to performing professional activity related to supervision of children in another Member State.
- (9) In order to improve the situation, the Commission submitted a proposal, which led to the adoption of Regulation (EU) [XX/XXXX] ⁵ creating a centralised system at Union level, containing personal data of convicted third country nationals in order to identify the Member State(s) holding information on their previous convictions ('ECRIS-TCN system').
- (10) The ECRIS-TCN system will allow the central authority of a Member State to find out promptly and efficiently in which other Member State criminal record information on a third country national is stored so that the existing ECRIS framework can be used to request the criminal record information from that Member State or those Member States in accordance with Framework Decision 2009/315/JHA.

⁴ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, p. 1).

⁵ Reference to the ECRIS-TCN Regulation to be inserted.

- (11) This Directive aims at introducing the necessary modifications to Framework Decision 2009/315/JHA that will allow for an effective exchange of information on convictions of third country nationals via ECRIS. It sets up the obligations for Member States to take the necessary measures to ensure that convictions are accompanied by information on the nationality, or nationalities, of the convicted person, in so far as the Member States have such information at their disposal. It also regulates procedures to reply to requests for information, ensures that a criminal record extract requested by a third country national is supplemented as appropriate with information from other Member States, and makes the technical changes necessary to make the information exchange system work.
- (12) Directive (EU) 2016/680 should apply to the processing of personal data by competent national authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including safeguarding against and the prevention of threats to public security. Regulation (EU) 2016/679 should apply to the processing of personal data by national authorities when such processing does not fall within the scope of Directive (EU) 2016/680.
- (13) In order to ensure uniform conditions for the implementation of Framework Decision 2009/315/JHA, the principles of Council Decision 2009/316/JHA should be incorporated in that Framework Decision, and implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and the Council⁶.
- (14) The common communication infrastructure used for the exchange of criminal record information should be the secure Trans European Services for Telematics between Administrations (sTESTA) or any further development thereof or any alternative secure network.

⁶ Regulation (EU) No 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p.13).

- (15) Notwithstanding the possibility of using the Union's financial programmes in accordance with the applicable rules, each Member State should bear its own costs arising from the implementation, administration, use and maintenance of its criminal records database, and from the implementation, administration, use and maintenance of the technical alterations needed to be able to use ECRIS.
- (16) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the right to protection of personal data, judicial and administrative redress, the principle of equality before the law, the right to a fair trial, the presumption of innocence and the general prohibition of discrimination. This Directive should be implemented in accordance with these rights and principles.
- (17) Since the objective of this Directive, namely to enable rapid and efficient exchange of criminal record information on third country nationals, cannot be sufficiently achieved by the Member States, but can rather, by putting in place common European rules and interoperability, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (18) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.
- (19) In accordance with Articles 1 and 2 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the Treaty on the Functioning of the European Union (TFEU), and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Directive and is not bound by it or subject to its application.

- (20) In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and the TFEU, the United Kingdom has notified its wish to take part in the adoption and application of this Directive.
- (21) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council⁷ and delivered an opinion on ...⁸.
- (22) Framework Decision 2009/315/JHA should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

⁷ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p.1).

⁸ OJ C ...

Article 1

Framework Decision 2009/315/JHA is amended as follows:

- (1) Article 1 is replaced by the following:

"Article 1

Subject Matter

This Framework Decision

- (a) defines the conditions under which a convicting Member State shares information with other Member States on convictions.
- (b) defines obligations for the convicting Member State and for the Member State of the person's nationality, and specifies the methods to be followed when replying to a request for information extracted from criminal records;
- (c) establishes a decentralised information technology system for the exchange of information on convictions based on the criminal records databases in each Member State, the European Criminal Record Information System (ECRIS).";

(2) in Article 2, the following points are added:

- "(d) 'convicting Member State' means the Member State where a conviction is handed down;
- (e) 'third country national' means a person who is not a citizen of the Union within the meaning of Article 20(1) TFEU, or a stateless person or a person whose nationality is unknown;
- (f) 'fingerprint data' means the data relating to plain and rolled impressions of the fingerprints of each of a person's fingers;
- (g) 'ECRIS reference implementation' means the software developed by the Commission and made available to the Member States for the exchange of criminal records information through ECRIS;
- (h) 'facial image' means a digital image of a person's face;

(3) in Article 4, paragraph 1 is replaced by the following:

- "1. Each convicting Member State shall take all the necessary measures to ensure that convictions are accompanied by information on the nationality or nationalities of the convicted person if the person is a national of another Member State, or a third country national. In case the information on nationality is unknown or where the convicted person is a stateless person the criminal record shall reflect this.";

(4) In Article 6, paragraph 3 is replaced by the following:

- "3. Whenever a national of a Member State asks the central authority of a Member State other than the Member State of the person's nationality for information on his own criminal record, that central authority shall submit a request to the central authority of the Member State of the person's nationality for information and related data to be extracted from the criminal record in order to include such information and related data in the extract to be provided to the person concerned.
- 3a. Where a third country national asks the central authority of a Member State for information on his own criminal record, that central authority shall submit a request only to those central authorities of the Member States which hold information on the criminal record of this person for information and related data to be extracted from the criminal record in order to be able to include it in the extract to be provided to the person concerned.";

(5) in Article 7, paragraph 4 is replaced by the following:

"4. When information extracted from the criminal record on convictions handed down against a national of a Member State is requested under Article 6 from the central authority of a Member State other than the Member State of the person's nationality, the requested Member State shall transmit such information to the same extent as provided for in Article 13 of the European Convention on Mutual Assistance in Criminal Matters.

4a. When information extracted from the criminal record on convictions handed down against a third country national is requested under Article 6 for the purposes of criminal proceedings, the requested Member State shall transmit information on any conviction handed down in the requested Member State and entered in the criminal record and on any conviction handed down in third countries and subsequently transmitted to it and entered into the criminal record.

If such information is requested for any purpose other than that of criminal proceedings, paragraph 2 of this Article shall apply accordingly.";

- (5a) in Article 8, paragraph 2, the words "Article 6(2)" are replaced by "Article 6(2), (3) and (3a)"
- (6) Article 9 is amended as follows:
- (a) in paragraph 1, the words "Article 7(1) and (4)" are replaced by "Article 7(1), (4) and (4a)";
 - (b) in paragraph 2, the words "Article 7(2) and (4)" are replaced by "Article 7(2), (4) and (4a)";
 - (c) in paragraph 3, the words "Article 7(1), (2) and (4)" are replaced by "Article 7(1), (2), (4) and (4a)";

(7) Article 11 is amended as follows:

(a) in point c of paragraph 1, point (iv) is added:

"(iv) facial image."

(b) paragraphs 3 to 7 are replaced by the following:

- "3. Central authorities of Member States shall transmit the information referred to in Article 4, requests referred to in Article 6, replies referred to in Article 7 and other relevant information electronically using ECRIS and a standardised format in accordance with the standards laid down in implementing acts.
4. If the mode of transmission referred to in paragraph 3 is not available, central authorities of Member States shall transmit all information referred to in paragraph 3, by any means capable of producing a written record under conditions allowing the central authority of the receiving Member State to establish the authenticity thereof, taking the security of transmission into consideration.

In case the mode of transmission referred to in paragraph 3 is not available for a longer period of time, the Member State concerned shall inform the other Member States and the Commission thereof.

5. Each Member State shall carry out the necessary technical alterations to be able to use the standardised format, referred to in paragraph 3, to electronically transmit all information referred to in paragraph 3 to other Member States via ECRIS. It shall notify the Commission of the date from which it will be able to carry out such transmissions.";

(8) the following article is inserted:

"Article 11a

European Criminal Records Information System (ECRIS)

1. In order to exchange information extracted from criminal records in accordance with this Framework Decision electronically, a decentralised information technology system based on the criminal records databases in each Member State, the European Criminal Records Information System (ECRIS), is established. It is composed of the following elements:

- (a) ECRIS reference implementation;
- (b) a common communication infrastructure between central authorities that provides an encrypted network.

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 of information.

- 2. All criminal records data shall be stored solely in databases operated by the Member States.
- 3. Central authorities of the Member States shall not have direct access to criminal records databases of other Member States.

4. The ECRIS reference implementation and databases storing, sending and receiving information extracted from criminal records shall operate under the responsibility of the Member State concerned. The European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) shall support the Member States in accordance with its tasks as laid down in [Regulation XXX/XXX].⁹
5. The common communication infrastructure shall be operated under the responsibility of the Commission. It shall fulfil the necessary security requirements and fully meet the needs of ECRIS.
6. eu-LISA shall provide, further develop and maintain the ECRIS reference implementation referred to in paragraph 1.
7. Each Member State shall bear its own costs arising from the implementation, administration, use and maintenance of its criminal records database and the installation and use of the software referred to in paragraph 1.

The Commission shall bear the costs arising from the implementation, administration, use, maintenance and future development of the common communication infrastructure of ECRIS.

8. The Member States which use their national ECRIS implementation software in accordance with paragraphs 4-8 of Article 4 of Regulation [XXX/XXXX]¹⁰ may continue to use their national ECRIS implementation software instead of the ECRIS reference implementation, provided that they fulfil all the conditions set out in paragraphs 4-8 of Article 4 of Regulation [XXX/XXXX].¹¹;

⁹ Reference to the ECRIS-TCN Regulation to be inserted.

¹⁰ Reference to the ECRIS-TCN Regulation to be inserted.

¹¹ Reference to the ECRIS-TCN Regulation to be inserted.

(9) the following article is inserted:

"Article 11b

Implementing Acts

1. The Commission shall lay down the following in implementing acts:
 - (a) the standardised format referred to in Article 11(3), including as regards information on the offence giving rise to the conviction and information on the content of the conviction;
 - (b) the rules concerning the technical implementation of ECRIS and the exchange of fingerprints;
 - (c) any other technical means of organising and facilitating exchanges of information on convictions between central authorities of Member States, including:
 - (i) the means of facilitating the understanding and automatic translation of transmitted information;
 - (ii) the means by which information may be exchanged electronically, particularly as regards the technical specifications to be used and, if need be, any applicable exchange procedures.
2. The implementing acts referred to in paragraph 1 shall be adopted in accordance with the examination procedure referred to in Article 12a(2).";

(10) the following article is inserted:

"Article 12a

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this Article, Article 5 of Regulation (EU) No 182/2011 shall apply.
3. Where no opinion is delivered by the committee the draft implementing act shall not be adopted.";

(11) the following article is inserted:

"Article 13a

Reporting by the Commission and review

1. By [*12 months after the date mentioned in Article 3(1) of this Directive*], the Commission shall submit a report on the application of this Framework Decision to the European Parliament and the Council. The report shall assess the extent to which the Member States have taken the necessary measures to comply with this Framework Decision, including the technical implementation.
2. The report shall be accompanied, where appropriate, by relevant legislative proposals.
3. The Commission services shall regularly publish a report concerning the exchange of information extracted from the criminal record through ECRIS and concerning the use of the ECRIS-TCN system based in particular on the statistics provided by eu-LISA and the Member States in accordance with [Regulation XX/XXXX]¹². This report shall be published for the first time one year after the report referred to in paragraph 1 is submitted.
- 3a. The Commission report referred to in paragraph 3 shall cover in particular the level of exchange of information between Member States, including that relating to third country nationals, as well as the purpose of requests and their respective number, including requests for purposes other than criminal proceedings such as background checks and requests for information of the concerned person on his own criminal record."

¹² Reference to the ECRIS-TCN Regulation to be inserted.

Article 2

Replacement of Decision 2009/316/JHA

Decision 2009/316/JHA is replaced with regard to the Member States bound by this Directive, without prejudice to the obligations of those Member States with regard to the date for implementation of that Decision into national law.

Article 3

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [36 months after its adoption] at the latest. They shall immediately communicate the text of those measures to the Commission.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Decision repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.
3. Member States shall carry out the technical alterations referred to in Article 11(5) by [36 months after adoption of this Directive].

Article 4

Entry into force and application

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 2 shall apply from [*date for transposition of this Directive*]

Article 5

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Strasbourg,

For the European Parliament

For the Council

The President

The President