Directive (EU) 2019/884 of the European Parliament and of the Council of 17 April 2019 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

DIRECTIVE (EU) 2019/884 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 17 April 2019

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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), second subparagraph, point (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[(1)],

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. That objective should be achieved by means of, among others, appropriate measures to prevent and combat crime, including organised crime and terrorism.

(2) That objective requires that information on convictions handed down in the Member States be taken into account outside the convicting Member State in the course of new criminal proceedings, as laid down in Council Framework Decision 2008/675/JHA[(2)], as well as in order to prevent new offences.

(3) That objective presupposes the exchange of information extracted from criminal records between the competent authorities of the Member States. Such an exchange of information is organised and facilitated by the rules set out in Council Framework Decision 2009/315/JHA[(3)] and by the European Criminal Records Information System (ECRIS), established in accordance with Council Decision 2009/316/JHA[(4)].

(4) The existing ECRIS legal framework, however, does not sufficiently address the particularities of requests concerning third-country nationals. Although it is already possible to exchange information on third-country nationals through ECRIS, there is no common Union procedure or mechanism in place to do so efficiently, rapidly and accurately.

(5) Within the Union, information on third-country nationals is not gathered as it is for nationals of Member States — in the Member States of nationality- but only stored in the

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Member States where the convictions have been handed down. A complete overview of the criminal history of a third-country national can therefore be ascertained only if such information is requested from all Member States.

(6) Such 'blanket requests' impose a disproportionate administrative burden on all Member States, including those not holding information on the particular third-country national. In practice, that burden deters Member States from requesting information on third-country nationals from other Member States, which seriously hinders the exchange of information between them, limiting their access to criminal records information to information stored in their national register. As a consequence, the risk of information exchange between Member States being inefficient and incomplete is increased.

(7) In order to improve the situation, the Commission submitted a proposal, which led to the adoption of Regulation (EU) 2019/816 of the European Parliament and of the Council[(5)], which establishes a centralised system at Union level containing the personal data of convicted third-country nationals allowing identification of the Member States holding information on their previous convictions ('ECRIS-TCN').

(8) ECRIS-TCN will allow the central authority of a Member State to find out promptly and efficiently in which other Member States criminal records information on a third-country national is stored so that the existing ECRIS framework can be used to request the criminal records information from those Member States in accordance with Framework Decision 2009/315/JHA.

(9) 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.

(10) 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[(6)] laid down the obligation for Member States to take the necessary measures to ensure that for the purpose of recruiting a person for a post involving direct and regular contact with children, information concerning the existence of criminal convictions for sexual offences against children entered in the criminal records, or of any disqualifications arising from those criminal convictions, be transmitted in accordance with the procedures set out in Framework Decision 2009/315/JHA. The aim of that mechanism is to ensure that a person convicted of a sexual offence against children is not able to conceal that conviction or disqualification with a view to performing a professional activity involving direct and regular contact with children in another Member State.

(11) This Directive aims to introduce 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 obliges 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 introduces procedures for replying to requests for information, ensures that a criminal records extract requested by a third-country

national is supplemented with information from other Member States, and provides for the technical changes necessary to make the information exchange system work.

(12) Directive (EU) 2016/680 of the European Parliament and of the Council[(7)] 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 of the European Parliament and of the Council[(8)] 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 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 Council[(9)].

(14) The common communication infrastructure used for the exchange of criminal records information should be the secured Trans European Services for Telematics between Administrations (sTESTA), any further development of it or any alternative secure network.

(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 fundamental rights and freedoms enshrined, in particular, in the Charter of Fundamental Rights of the European Union, including the right to protection of personal data, the rights to 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 those rights and principles.

(17) Since the objective of this Directive, namely to enable rapid and efficient exchange of accurate criminal records information on third-country nationals, cannot be sufficiently achieved by the Member States, but can rather, by putting in place common rules 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 (TEU). 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 (TFEU), 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

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justice, annexed to the TEU and to the 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, 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 Council[(10)] and delivered an opinion on 13 April 2016[(11)].

(22) Framework Decision 2009/315/JHA should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Framework Decision 2009/315/JHA

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 convicted person's nationality (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 Records 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 who is 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) "facial image" means a digital image of a person's face;

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(h) "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.;

(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 handed down within its territory 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. Where a convicted person is of unknown nationality or stateless, the criminal record shall reflect this.;

(4) Article 6 is amended as follows:

(a) paragraph 3 is replaced by the following:

3. Where a national of one Member State asks the central authority of another Member State for information on his or her 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 records and shall include such information and related data in the extract to be provided to the person concerned.;

(b) the following paragraph is inserted:

3a. Where a third-country national asks the central authority of a Member State for information on his or her 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 that person for information and related data to be extracted from the criminal records and shall include such information and related data in the extract to be provided to the person concerned.;

(5) Article 7 is amended as follows:

(a) paragraph 4 is replaced by the following:

4. Where information extracted from the criminal records 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.;

(b) the following paragraph is inserted:

4a. Where information extracted from the criminal records 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 records and on any conviction handed down in third countries and subsequently transmitted to it and entered into the criminal records.

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