



# Bill Digest

## Criminal Records (Exchange of Information) Bill 2019

Bill No. 62 of 2019

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### Abstract

The purpose of the [Criminal Records \(Exchange of Information\) Bill 2019](#) is to give effect to [Council Framework Decision 2009/315/JHA](#) on the organisation and content of the exchange of information extracted from the criminal record between Member States and [Council Decision 2009/316/JHA](#) on the establishment of the European Criminal Records Information System [ECRIS]. ECRIS provides for criminal records information to be exchanged between EU Members, within deadlines, in an efficient and standardised way.

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## Summary

The [Criminal Records \(Exchange of Information\) Bill 2019](#) (the Bill) was published by the Minister for Justice and Equality (the Minister) on 30<sup>th</sup> July 2019. The Government approved drafting of the Bill on 7<sup>th</sup> April 2012.<sup>1</sup> In announcing the proposed legislation, then Minister for Justice, Equality and Defence, Alan Shatter TD stated:

“In view of the fact that our EU membership provides a common travel area between member states, it is increasingly important to have effective systems to exchange information regarding criminal records of persons moving between states. The Criminal Records Information System Bill will facilitate the use of criminal records information from other states in the investigation and detection of crime in this state. In addition it will facilitate the use of criminal records information from other states in vetting persons seeking employment working in this state, where that employment requires vetting under Irish law.”<sup>2</sup>

The purpose of the Bill is to give effect to [Council Framework Decision 2009/315/JHA](#) on the organisation and content of the exchange of information extracted from the criminal record between Member States and [Council Decision 2009/316/JHA](#) on the establishment of the European Criminal Records Information System [ECRIS]. As EU Members do not have access to each other’s criminal records databases, a system is required to provide for the exchange of this information. The aim of ECRIS is to ensure that individuals cannot escape their criminal past by moving between different countries within the EU. ECRIS provides for criminal records information to be exchanged between EU Members, within deadlines, in an efficient and standardised way.

A **Framework Decision**, like a Directive, is binding on Member States as to the result to be achieved. However, it leaves discretion to the Member State as to the principles and procedures to be applied. They do not have direct effect and so cannot be invoked at the national level in the absence of State implementation. Post- Lisbon Treaty, Framework Decisions are no longer used as Regulations, Directives, and Decisions are the means of legislating in the EU.

While ECRIS has been in operation in Ireland since 2012, the failure to properly provide for ECRIS in legislation has meant that the relevant Irish authorities have not been obliged under Irish law to pass on criminal records information to other Member States where convictions arise. Ireland’s failure to implement this measure raises the possibility of the European Commission launching infringement proceedings and imposing fines. In November 2018, the European Commission sent a letter of formal notice to Ireland in respect of Ireland’s failure to implement legislation in relation to ECRIS calling on Ireland to implement legislation to transpose the Framework Decision.<sup>3</sup>

<sup>1</sup> See <http://www.justice.ie/en/JELR/Pages/CriminalRecordsInformationSystemBill>.

<sup>2</sup> See <http://www.inis.gov.ie/en/JELR/Pages/PR12000104>.

<sup>3</sup> See European Commission Press Release (8<sup>th</sup> November 2018), “November infringements package: key decisions”. Available [here](#).

## Table of Provisions

Section	Title	Effect
1.	Interpretation	Standard provision that sets out the meanings to be given to various terms in the Bill. Words or expressions used in both the Bill and <a href="#">Framework Decision 2009/315/JHA</a> have the same meaning unless the context requires otherwise.
2.	Central Authority in State	Provides for the designation of the Commissioner of An Garda Síochána as the Central Authority for the purposes of the Framework Decision and the Bill. The Commissioner can delegate in writing functions of the Central Authority to members of An Garda Síochána or to members of An Garda Síochána's civilian staff.
3.	Recording of nationality of convicted persons	Provides for the recording of the nationality or nationalities of convicted persons, where such information is available, when information is recorded on the Criminal Records Database.
4.	Information relating to conviction in State of person who is national of Member State	Places an obligation on the Central Authority in Ireland to transmit specified information to the relevant central authorities of other Member States, where the person convicted is a national of those other Member States. Any updates of this information must also be sent to the relevant central authority.
5.	Information received under Article 4 of Framework Decision	Where information relating to a national of the State, concerning a conviction in a Member State is received from a central authority of a Member State this shall be stored.
6.	Request for information under Article 6 of Framework Decision	Provides for the circumstances in which the Central Authority may or shall request information on convictions from other central authorities.
7.	Reply to request for information under Article 6 of Framework Decision in relation to person who is national of State	Provides for the categories of information relating to convictions which the Central Authority shall transmit to the central authority of a Member State where a request for information is sought pursuant to Article 6 of the

		Framework Decision. This section also provides for the re-transmission <sup>4</sup> of information received from another Member State. This section also provides for the format which replies to requests shall take.
8.	Reply to request for information under Article 6 of Framework Decision in relation to person who is not national of State	Provides for the transmission of information contained in the Criminal Records Database following a request from another Member States central authority in relation to a person who is not a national of the State. This section also provides for the format which replies to requests shall take.
9.	Time limits for replies to requests under Article 6 of Framework Decision	Provides that the time limit for replies under Article 6(1) of the Framework Decision is 10 working days from the date of receipt of the request or the date of receipt of additional information where required. The time limit for replies under Article 6(2) is 20 working days.
10.	Transmission of information in accordance with Council Decision	Provides for the transmission of information in the standardised electronic format as required in <a href="#">Council Decision 2009/316/JHA</a> with references to the relevant codes that are used for categories of offences in Annex A to the Council Decision and codes used for categories of penalties and measures set out in Annex B to the Council Decision.
11.	Conditions for use of personal data	Provides for the conditions for the use of personal data that is received or transmitted by the Central Authority in accordance with the Framework Decision, the <a href="#">Data Protection Act 2018</a> and the General Data Protection Regulation [ <a href="#">Regulation (EU) 2016/679</a> ].
12.	Limitations on transmission of certain information to third country	Provides that in relation to responses to requests from third countries for information contained in the Criminal Records Database relating to a national of the State, where such responses contain information transmitted to the Central Authority under Article 4 of the Framework Decision, the Central Authority may

<sup>4</sup> Re-transmission refers to where information has been sent to the Irish Central Authority by a central authority of another Member State and is subsequently sent by the Irish Central Authority

		only reply within the limitations as set out in section 7(2), (3) and (4).
13.	Disclosure of information under other enactments, etc.	Provides that the Bill does not affect pre-existing legal powers or obligations to provide or request information.
14.	Expenses	Standard provision that provides that expenses incurred in the administration of this Bill shall be paid out of moneys provided by the Oireachtas.
15.	Short title and commencement	Standard provision that defines the short title of the Bill and provides for commencement by Ministerial order. Commencement orders may be limited to particular provisions of the Bill or purposes.
Schedule 1.	Text of Framework Decision 2009/315/JHA	Includes the full text of the relevant Framework Decision.
Schedule 2.	Information relating to a conviction	Lists the information relating to a conviction which can be provided on request.
Schedule 3.	Other purposes for which information may be requested	Lists the purposes, other than in relation to criminal proceedings, for which information can be requested. These include: <ul style="list-style-type: none"> <li>• for an application for Irish citizenship;</li> <li>• for an application for an airport identification card, a crew identification card, a certificate for training of security staff or other persons employed or contracted to work in designated security roles pursuant to the national civil aviation security programme;</li> <li>• for an application for a firearm certificate;</li> <li>• for court proceedings in connection to child care or child protection to which the applicant is a party; and</li> <li>• to determine disqualification from exercising professional activities involving direct and regular contacts with children.</li> </ul>
Schedule 4.	Council Decision 2009/316/JHA	Provides the full text of the implementing Council Decision on ECRIS.

## Background

This section provides general background information in relation to:

- ECRIS;
- ECRIS-TCN [Third Country Nationals];
- Criminal records; and
- Inter-state co-operation.

## ECRIS

The European Criminal Records Information System [ECRIS] has been operational since April 2012.<sup>5</sup> ECRIS gives effect to [Framework Decision 2009/315/JHA](#). ECRIS is operated by An Garda Síochána in Ireland. However, it is not currently subject to national legislation setting out the requirements of the Framework Decision. The Garda National Vetting Bureau [GNVB] currently operates as the designated Central Authority for criminal records for Ireland. The GNVB carries out the following actions in respect of the Framework Decision:

- Make requests to the Central Authorities in other Member States for extracts from their National Criminal Record in respect of Nationals of the Member State concerned in instances where the information is required in connection with criminal proceedings in the requesting State.
- Respond to requests from the Central Authorities in other Member States for extracts from the National Criminal Record in respect of Nationals of the requested Member State, in instances where the information is required in connection with criminal proceedings in the requesting Member State.
- Receive, store, and update where necessary, the National Criminal Record, information received from Central Authorities in other Member States in respect of Nationals of the receiving State convicted in those other Member States.
- Transmit information, and any necessary updates, in respect of criminal convictions imposed in the transmitting State on all Nationals of other EU Member States to the Central Authority of the Member State of the convicted person.<sup>6</sup>

The ECRIS database ensures that all criminal records information can be transmitted between EU Member States in a quick, efficient and uniform manner through the use of a decentralised common electronic format. This ensures that such information is available when needed by the relevant authorities. ECRIS is one of several EU data sharing initiatives, including:

- The Second Generation Schengen Information System [[SIS II](#)];
- The European Asylum Dactyloscopy Database [[EURODAC](#)];
- The [Prüm regime](#); and
- The passenger name record [[PNR](#)] system.

Writing about the operation of ECRIS, Jackson and Davies note:

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<sup>5</sup> See <https://www.garda.ie/en/about-us/specialist-units/garda-national-vetting-bureau-gnvb-/european-criminal-records-information-system-ecris-.html>.

<sup>6</sup> *Ibid.*

“The duty to store information regarding an individual's criminal record rests with the Member State which is the individual's country of origin. Where an individual is convicted of an offence within a Member State which is not that individual's country of origin, there is an obligation on the Member State within whose jurisdiction the individual has been convicted to transmit that information to the relevant Member State. Requests may then be made to the individual's country of origin for information relating to that person's criminal record and the individual's country of origin will then transmit any relevant information to the requesting state. This ensures that each Member State is able to reply fully to requests for information from other Member States and can provide up-to-date information on the criminal records of its own nationals, regardless of where in the EU those convictions were handed down. The system is decentralised, which means that data is only stored on national databases and then exchanged upon the request of another Member State.

A standardised format is used to transmit the information electronically. Convictions are coded using two reference tables listing categories of offences and penalties. These tables facilitate automatic translation and are designed to enhance mutual understanding of the information transmitted. Theoretically, the codes of the offence and sanction should be translated into the language of the recipients, enabling them to understand the nature of the conviction and relevant penalty.”<sup>7</sup>

The European Commission prepared an Implementation Report in 2016 in relation to Framework Decision 2009/315/JHA.<sup>8</sup> This found that 25 Member States were exchanging information via ECRIS, resulting in over 1.8 million messages by the end of 2015. It states that over 24,000 requests are made per month, with over 30% leading to a ‘positive hit’.<sup>9</sup> The European Commission published a statistical report in June 2017 in relation to the exchange of information through ECRIS.<sup>10</sup>

Table 1 (below) is a reproduction of the information in a number of graphs from this report illustrating the numbers of sent notifications on new convictions, sent requests for information and sent replies and replies received for all interconnected Member States in 2016.

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<sup>7</sup> Adam M. Jackson & Gemma Louise Davies, “Making the case for ECRIS: post- ‘Brexit’ sharing of criminal records information between the European Union and the United Kingdom” E. & P. (2017), 21(4), 330-350, at 333.

<sup>8</sup> *Report from the Commission to the European Parliament and the Council on the implementation of the Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from criminal record between Member States*, (January 2016) [the Implementation Report]. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0006&from=EN>.

<sup>9</sup> i.e. a response containing one or more convictions.

<sup>10</sup> *Report from the Commission to the European Parliament and the Council concerning the exchange through the European Criminal Records Information System (ECRIS) of information extracted from criminal records between the Member States*, (June 2017). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1499260933081&uri=CELEX%3A52017DC0341>.

**Table 1: Notifications, Requests, Replies sent and Replies received by Member States in 2016**

	<b>Notifications on new convictions</b>	<b>Replies sent</b>	<b>Requests sent</b>	<b>Replies received</b>
<b>United Kingdom [UK]</b>	32,889	13,000	97,425	95,716
<b>Slovakia [SK]</b>	757	31,817	542	535
<b>Sweden [SE]</b>	3,793	3,162	5,276	4,880
<b>Romania [RO]</b>	232	56,836	892	821
<b>Poland [PL]</b>	2,234	60,929	6,311	6,063
<b>Netherlands [NL]</b>	7,174	12,686	9,104	8,982
<b>Malta [MT]</b>	5	55	4	4
<b>Latvia [LV]</b>	174	6,458	406	396
<b>Luxembourg [LU]</b>	5,192	1,808	2,955	2,877
<b>Lithuania [LT]</b>	109	15,501	1,511	1,474
<b>Italy [IT]</b>	62,971	17,851	34	32
<b>Ireland [IE]</b>	4,455	9,975	1,784	1,765
<b>Hungary [HU]</b>	2,227	10,947	150	148
<b>Croatia [HR]</b>	101	7,186	378	359
<b>France [FR]</b>	17,379	16,217	12,679	12,344
<b>Finland [FI]</b>	2,688	1,516	3,395	3,209
<b>Spain [ES]</b>	29,828	9,445	13,497	13,375
<b>Greece [EL]</b>	0	4498	0	0
<b>Estonia [EE]</b>	12	3,112	386	412
<b>Denmark [DK]</b>	3,852	2,504	2,027	1,997
<b>Germany [DE]</b>	98,422	21,849	140,669	131,092
<b>Czechia [CZ]</b>	3,847	12,897	36,950	36,801
<b>Cyprus [CY]</b>	3,040	232	70	61
<b>Bulgaria [BG]</b>	134	13,034	27	22
<b>Belgium [BE]</b>	45,175	7,123	3030	2,936
<b>Austria [AT]</b>	5,088	10,043	25,249	24,380

Source: European Commission (2017), Note 10.

## Brexit

All EU Member States are currently connected to ECRIS. Concerns have been raised as to the future position of the United Kingdom following Brexit. At present only EU Member States are permitted access to ECRIS, with even the non-EU Schengen countries excluded. However, in 2018 then Home Secretary in the UK, Sajid Javid MP suggested that the UK should seek to continue its strong stance of cooperation with the EU in relation to matters relating to counter-terrorism and security.<sup>11</sup> Hanratty notes that the UK was the fourth most regular user of ECRIS in 2015.<sup>12</sup> He stated that in the event of no deal being reached in the context of Brexit negotiations on ECRIS:

“It is likely the UK would fall-back on the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, or informal Interpol channels, in order to exchange data on international criminal convictions.”<sup>13</sup>

These means of exchanging information on criminal records have been criticised as lacking the efficiency of ECRIS.<sup>14</sup>

## ECRIS-TCN

An issue that has arisen with ECRIS is whether the system can be adapted to effectively deal with third country nationals [TCNs]. This arises where an individual who carries out a crime is not from a Member State. In such cases there is no designated authority to which a Member State is required to transmit existing information of convictions to, meaning that to obtain information on TCNs, Member States have to request the conviction information from all Member States. These “blanket requests” have been viewed as imposing a disproportionate administrative burden on all Member States.

Initially a new Directive was proposed to address this issue within the current framework of the decentralised ECRIS format. However, technical problems emerged notably with respect to decentralised exchanges of pseudonymised fingerprints.<sup>15</sup> ECRIS-TCN will allow Member States to perform a “hit/no hit” search in a centralised ECRIS-TCN system to identify which Member State holds conviction information for a particular TCN. ECRIS-TCN will be managed and developed by EU-LISA.<sup>16</sup>

[Regulation \(EU\) 2019/816](#) establishes ECRIS-TCN, a centralised system that complements ECRIS, and sets out the conditions upon which ECRIS-TCN shall be used by central authorities in

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<sup>11</sup> See <https://www.theguardian.com/uk-news/2018/jun/04/uk-europe-brexit-security-deal-sajid-javid-contest>.

<sup>12</sup> Robert Hanratty, “The effect of Brexit on the fight against crime” Arch. Rev. (2018) Vol. 4, 4-9.

<sup>13</sup> *Ibid*, at 8.

<sup>14</sup> Adam M. Jackson & Gemma Louise Davies, Note 7, at 346-347. See Conor Lally, “Harris says six decades of policing co-operation will ‘fall away’ post-Brexit” *Irish Times* (22<sup>nd</sup> August 2019). Available at <https://www.irishtimes.com/news/crime-and-law/harris-says-six-decades-of-policing-co-operation-will-fall-away-post-brexit-1.3993927>.

<sup>15</sup> See [https://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=82551](https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=82551).

<sup>16</sup> EU-LISA is the European Agency for the Operational Management of large-scale IT Systems in the Area of Freedom, Security and Justice and is based in Tallinn, Estonia. More information about EU-LISA is available at <https://www.eulisa.europa.eu/>.

order to obtain information on such previous convictions through ECRIS. It also sets out the conditions under which Eurojust, Europol and the European Public Prosecutor's Office shall use ECRIS-TCN. [Directive 2019/884](#) amends Framework Decision 2009/315/JHA, in relation to TCNs.

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 TFEU, and without prejudice to Article 4 of that Protocol, **Ireland is not taking part in the adoption of either Regulation 2019/816 or Directive 2019/884 and is not bound by them or subject to their application.**<sup>17</sup>

## Criminal records

If a person is convicted of a criminal offence, the offence is recorded against the person's name and held by An Garda Síochána. Previous convictions are an important source of information for investigators and security officials. They can be significant for indicating a previous history of offending which can have a serious impact on operational decisions taken by security officials. For example, previous convictions relating to organised crime may indicate that more covert methods of surveillance of an individual suspected of crime are appropriate in an investigation, as the individual's history suggests that he would be more likely to be sensitive to ordinary surveillance techniques. Criminal records information is also used by the courts in relation to sentencing.

The disclosure of criminal records is also often required in relation to employment and education opportunities. The consequences of a criminal record can be severe, and include:

- Being refused a job or admission to an educational programme;
- Disqualification from certain posts, e.g. a company director; and
- Being refused a visa/entry into another country.

## Inter-state cooperation

The need for increased cooperation and legislation at an EU level, culminating in the development of ECRIS, was prompted by failures under the pre-existing scheme of sharing criminal convictions which was based on the [1959 Council of Europe Convention on Mutual Assistance in Criminal Matters](#).

These failures were highlighted by the tragic circumstances surrounding the case of the serial killer, Michel Fourniret. In 1987 Fourniret was given a 7 year sentence for sexually assaulting young women in France. He was released after serving one year in prison due to good behaviour and taking into account time served for a previous conviction. He moved to Belgium and worked as a school supervisor in circumstances where the Belgian authorities were unaware of his previous convictions. In 2004 he confessed to the murder of 9 women in the Ardennes region along the border between France and Belgium. Jacobs and Larrauri note that the Fourniret case "made it

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<sup>17</sup> By contrast the UK has notified its wish to take part in the adoption and application of this Regulation and Directive.

politically imperative for the EU to take action to improve criminal record sharing among member states.”<sup>18</sup>

In March 2006 the Network of Judicial Registers was set up between France, Germany, Spain and Belgium, providing for the interconnection and automated exchange of information on convictions and criminal record extracts between these countries.<sup>19</sup> This pilot project was later joined by Luxembourg, Poland, Czechia, Slovakia, Bulgaria, Italy, the UK, Portugal, the Netherlands, Lithuania, Sweden and Slovenia.<sup>20</sup>

In 2005, a Commission White Paper was published by the European Commission examining the conditions governing the circulation of information on convictions throughout the European Union and recommended that:

“With a view to putting in place an effective mechanism for exchanging information on convictions within a reasonable time frame, a hybrid solution somewhere between setting up a European central records office and networking national criminal records offices should be considered.”<sup>21</sup>

This was followed by [Council Decision 2005/876/JHA](#) which required Member States to set up a Central Authority to act as the designated contact point for exchanges of criminal records information and put in place deadlines for responses to requests for information. The provisions of this Council Decision are repealed under Article 12(4) of Framework Decision 2009/315/JHA.

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<sup>18</sup> Jacobs, James B. and Larrauri, Elena, "EUROPEAN CRIMINAL RECORDS & EX-OFFENDER EMPLOYMENT" (2015). *New York University Public Law and Legal Theory Working Papers*. Paper 532 at p.19. Available at [http://lsr.nellco.org/nyu\\_plltwp/532](http://lsr.nellco.org/nyu_plltwp/532).

<sup>19</sup> Council of the European Union, *ECRIS Non-Binding Manual for Practitioners* (2013), at p. 8. Available at <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/1405>.

<sup>20</sup> *Ibid.*

<sup>21</sup> European Commission, *White Paper on exchanges of information on convictions and the effect of such convictions in the European Union*, (25<sup>th</sup> January, 2005). Available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0010:FIN:EN:PDF>.

## Framework Decision 2009/315/JHA

This section examines some of the key provisions of [Framework Decision 2009/315/JHA](#). The Framework Decision sets out a number of important definitions and core obligations that are required of Member States in relation to the transmission of information on criminal convictions. This section will draw on the findings of the European Commission in their 2016 Implementation Report<sup>22</sup> which analysed the transposition of the Framework Decision in the 22 Member States that had notified the Commission of national transposition of the Framework Decision. Accordingly this section focuses on those Articles of the Framework Decision that are considered in the Implementation Report.

### Article 2(a) ‘Conviction’

Article 2(a) defines a conviction as “any final decision of a criminal court against a natural person in respect of a criminal offence, to the extent these decisions are entered in the criminal record of the convicting Member State”. The Implementation Report notes that there is split between countries which have adopted the definition in the Framework Decision<sup>23</sup> and those which have opted for a broader definition that includes prosecutorial and investigative decisions.<sup>24</sup>

### Article 3 Central authority

Article 3 requires Member States to designate a central authority or central authorities for the transmission of information and replies to requests from other Member States. The Implementation Report indicates that criminal records generally come under the authority of the Ministry of Justice or the Ministry of the Interior of Member States. In those Member States where criminal records are under the responsibility of the Ministry for Justice, the criminal records offices are usually nominated as the central authority for the purposes of the Framework Decision. In those Member States where criminal records are under the responsibility of the Ministry for Interior, the relevant police departments are generally nominated as the central authority for the purposes of the Framework Decision.

### Article 4 Obligations of the convicting Member State

Article 4 introduces the following obligations on the convicting Member State:

- The registration of information on the nationality of the convicted person (Article 4(1));
- Notification of convictions (Article 4(2));
- Notification of updates (Article 4(3)); and
- The provision of additional information (Article 4(4)).

In relation to the registration of the nationality of the convicted person, the Implementation Report notes that almost all Member States have included a ‘nationality’ reference in the criminal records

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<sup>22</sup> European Commission Implementation Report, Note 8.

<sup>23</sup> Austria, Cyprus, Czechia, Finland, Portugal, Poland, Slovakia and the UK.

<sup>24</sup> Belgium, Germany, Estonia, Croatia, Luxembourg, the Netherlands, Sweden and Slovenia.

of offenders. The Implementation Report also notes that the Netherlands have a provision ensuring that data is passed on between Member States in the event of a change of nationality of an offender.

In relation to the notification of convictions the Implementation Report sets out that nearly all Member States have fully transposed the notification obligation, however, there is some variation as to the wording used. It states that:

“While most indicated that the notification should be sent ‘immediately’, ‘without delay’, ‘as soon as possible’ or ‘when entered in the criminal record’, three introduced a concrete deadline for transmission. This ranges from ‘the next working day at the latest’ (LT), through 10 days (CZ) to two months after the entry of the information in the criminal records (ES).”<sup>25</sup>

In relation to the provision of notifications relating to subsequent alterations and updates of information, most Member States have implemented Article 4(3) with explicit reference to the transmission of updates. In relation to providing additional information at the request of the Member State of nationality, again most Member States have transposed Article 4(4) in its entirety. The Implementation Report notes that additional measures beyond what is required are being taken in a number of Member States. It states that:

“BG appears to be sending transcripts of judgments not on request in individual cases, but automatically for all notifications. In many Member States, copies of judgments are not directly available to the central authorities or in the criminal records. Some Member States (CZ, LT, LV and SK) therefore imposed an explicit obligation on their courts or relevant state authorities to provide the central authority with the requested information. AT forwards such requests to its courts for further action. CZ and CY appointed additional central authorities that have direct access to copies of judgments to deal with Article 4(4) requests. PT does not explicitly refer to an obligation to respond to such requests, but its central authority may request copies of judgments from the issuing courts for the purpose of responding to requests from other Member States.”

## Article 5 Obligations of the Member State of the person’s nationality

Article 5 provides for obligations relating to the storage of information for the purpose of retransmission and the updating of such information. The Implementation Report notes that most Member States have introduced an explicit provision on the storage obligation in their legislation stipulating that information should be stored in their criminal records independently of whether the offence for which the offender is convicted is punishable under the law of the Member State of nationality. While most Member States store this information in their existing criminal records databases, four Member States<sup>26</sup> have created separate registers for storing convictions for the purpose of retransmission.

In relation to obligations arising out of updated information received by a Member State from a convicting Member State, this requires the receiving Member State to amend or delete their

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<sup>25</sup> European Commission Implementation Report, Note 8, at p. 4.

<sup>26</sup> Belgium, Finland, Hungary and Portugal.

information accordingly. The Implementation Report notes that this must not result in an offender “being treated less favourably than if they had been convicted by their national court.”<sup>27</sup> The Implementation Report gives as an example where national rules provide for the deletion of a criminal conviction, the Member State of the person’s nationality may no longer use such information in national proceedings. However, it must still retain such information so as to be capable of transmitting this information on request. The Implementation Report notes that Belgium, Croatia, Hungary and the UK have provided that only the updated information may be retransmitted further. France and Portugal have provided that the deletion of a foreign conviction from their national registers in accordance with their national rules does not prevent its transmission unless it was deleted in the convicting Member State.

### Article 6 Request for information on convictions

Article 6(1) provides that when information is sought for the purposes of criminal proceedings or other purposes, the central authority of the Member State may request information from the central authority of another Member State. The Implementation Report considers the different approaches which have been adopted in enacting Article 6(1). It states that:

“Some (BG, EE, FI, HR, HU, LV, PL, PT, SE and SI) indicated exactly who can request the information and in what circumstances from the central authority at national level. CZ, FI and HU would request information only for the purpose of criminal proceedings. PL requests information in accordance with the law of the addressee Member State, rather than its own. FR and LT have not adopted explicit provisions on requests under Article 6(1).”<sup>28</sup>

Article 6(2) provides that when a person asks for information on his own criminal record, the central authority of the Member State in which the request is made may request information from the central authority of another Member State, provided the person requesting the information is or was a resident or a national of the requesting or requested Member State.

Article 6(3) governs the procedure since April 2012, for when a person asks the central authority of a Member State other than his own nationality for his criminal record from April 2012 or later. Where this occurs, the central authority where the request is made must request information from the Member State of nationality to ensure that criminal record is complete and include this information in the extract provided to the person making the request. This provision is of particular importance where criminal record extracts are sought in the context of employment in occupations relating to security or working with children. The Implementation Report sets out that there has been a degree of variation in terms of how this obligation has been transposed. It states that:

“In HR, in general, individuals cannot obtain criminal records extracts, but only read the record in the presence of a clerk. A special certificate can be issued exceptionally for the purpose of activities involving regular contact with children or for exercising a specific right abroad or in an international organisation. In DE, HR and NL, the citizen receives a special ‘certificate of conduct’. EE, HU, NL and UK have not transposed the obligation in Article

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<sup>27</sup> European Commission Implementation Report, Note 8, at p. 6.

<sup>28</sup> European Commission Implementation Report, Note 8, at p. 10.

6(3) FD. In NL, as in HR, an individual cannot apply for an extract from his/her criminal records, but only has the right to inspect them. A certificate of 'good behaviour' can be obtained, for example for job screening purposes, but this is regulated in separate provisions, not notified to the Commission. The UK transposed only Article 6(2) FD, with no obligation to request information."<sup>29</sup>

## Article 7 Reply to a request for information on convictions

Article 7(1) requires Member States to reply to requests concerning criminal proceedings and obliges Member States to transmit to the requesting central authority information on national convictions, convictions handed down in other Member States and any convictions handed down in third countries that have been transmitted to it and entered in the criminal record. The Implementation Report sets out that all Member States have transposed Article 7(1) in its entirety into their national law.

Article 7(2) sets out that where information is requested for purposes other than criminal proceedings, the central authorities may reply in accordance with national law. While all Member states have transposed Article 7(2) into their national law there is considerable variation in relation to the applicable national rules that apply to such requests.<sup>30</sup>

Article 7(3) relates to requests from a third country. Where Member States are responding to such requests, information relating to convictions transmitted from Member States can be transmitted to the third country provided this is carried out in accordance with Articles 7(1) and 7(2). The Implementation Report notes that in the legislation of Member States, "the transmission of criminal records information to third countries is governed by conventions on mutual legal assistance, other international agreements or specific provisions in criminal records law."<sup>31</sup>

Article 7(4) relates to a situation where a request for information is sought by a competent authority of a Member State other than the Member State of the person's nationality. The requested Member State is required to transmit information it holds in its criminal record database on convictions handed down in its territory and convictions on third country nationals and stateless persons in accordance with the conditions of Article 13 of the [European Convention on Mutual Assistance in Criminal Matters](#) [the MLA Convention].<sup>32</sup> The Implementation Report notes that most Member States have implemented Article 7(4) in its entirety without making any distinction in relation to how replies to requests will be dealt with in respect of their own citizens, citizens of other Member States and third country nationals.

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<sup>29</sup> European Commission Implementation Report, Note 8, at p. 11.

<sup>30</sup> European Commission Implementation Report, Note 8, the different approaches that are adopted are set out at pp. 8-9.

<sup>31</sup> European Commission Implementation Report, Note 8, at p. 9.

<sup>32</sup> Article 13 of the MLA Convention provides that a reply to a request for judicial records is obligatory and must contain all information (in the case of requests for the purpose of criminal proceedings) or be in accordance with national law (in the case of requests for other purposes).

## Article 8 Deadlines for replies

Article 8(1) provides that requests made pursuant to Article 6(1) shall be transmitted to the central authority of the requesting Member State “immediately and in any event within a period not exceeding ten working days from the date the request was received”.<sup>33</sup> Article 8(2) provides that requests made pursuant to Article 6(2) shall be transmitted within twenty working days from the date the request was received.

The Implementation Report notes that almost all Member states have transposed the deadlines. However, the Implementation Report also notes that:

“HU and PL did not adopt detailed provisions on asking for additional information. CZ, NL and SK apply the ten-day deadline also to requests from an individual. SE regulated replies to requests for criminal proceedings, but not for other purposes. DE did not mention the deadline for replies to requests in accordance with Article 6(1) FD, only for those from an individual. PT seems not to have laid down deadlines in its legislation.”<sup>34</sup>

## Article 9 Conditions for the use of personal data

Article 9 sets out a number of restrictions in relation to the use of transmitted information. Article 9(1) provides that where personal data is provided for the purposes of criminal proceedings it can only be used for the purposes of the criminal proceedings for which it was requested. Article 9(2) sets out that where personal data is provided for any purpose other than criminal proceedings it must be used in accordance with the national law of the requesting Member State and within the limits specified by the requesting Member State as set out when sought.

Notwithstanding these provisions, Article 9(3) provides that personal data may be used to prevent an immediate and serious threat to security. Article 9(4) provides that where a Member State is transmitting personal data to a third country, it must take necessary measures to ensure that such data is subject to the same limitations and may only be used for the purpose for which it was sought.

## Article 11 Format and other ways of organising and facilitating exchanges of information on convictions

Article 11 requires that when central authorities are transmitting information in accordance with Article 4(2) and (3), the central authority of the convicting Member State shall transmit certain information, outlined below, unless such information is not known to the central authority. Article 11 also lists types of additional and optional information that shall be transmitted where available. Article 11(1)(a) provides that the following obligatory information shall always be transmitted:

- i. information on the convicted person (full name, date of birth, place of birth (town and State), gender, nationality and – if applicable – previous name(s));

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<sup>33</sup> Article 8(1) of the Framework Decision. The deadlines are based on the requested Member States' own calendar, taking into account public holidays and office closing days. See Note 19, *ECRIS Non-Binding Manual for Practitioners* (2013), at p. 12.

<sup>34</sup> European Commission Implementation Report, Note 8, at p. 10.

- ii. information on the nature of the conviction (date of conviction, name of the court, date on which the decision became final);
- iii. information on the offence giving rise to the conviction (date of the offence underlying the conviction and name or legal classification of the offence as well as reference to the applicable legal provisions); and
- iv. information on the contents of the conviction (notably the sentence as well as any supplementary penalties, security measures and subsequent decisions modifying the enforcement of the sentence).

Article 11(1)(b) provides that the following optional information shall be transmitted if entered in the criminal record:

- i. the convicted person's parents' names;
- ii. the reference number of the conviction;
- iii. the place of the offence; and
- iv. disqualifications arising from the conviction.

Article 11(1)(c) provides that the following additional information shall be transmitted if available to the central authority:

- i. the convicted person's identity number, or the type and number of the person's identification document;
- ii. fingerprints, which have been taken from that person; and
- iii. if applicable, pseudonym and/or alias name(s).

Article 11(1)(c) also provides that the central authority may transmit any other information concerning convictions that have been entered in the criminal record.

Article 11(2) provides that the central authorities of Member States are required to store all information of the types listed in Article 11(1)(a) and Article 11(1)(b) which has been received in accordance with Article 5(1) for the purpose of retransmission in accordance with Article 7. The central authorities of Member States may also store the information of the types listed in Article 11(1)(c) for the same purpose.

The Implementation Report notes that:

“While the vast majority of the Member States (AT, BE, BG, CY, DE, EE, FI, FR, HR, HU, LT, LU, NL, PL, SK and UK) store all the required information, three (CZ, LV and SE) have adopted implementing provisions that do not specify what information needs to be stored, but are more general or include specific conditions.<sup>12</sup> ES and PT have not provided lists of stored information, but established a general obligation to store all information transmitted by other Member States.”<sup>35</sup>

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<sup>35</sup> European Commission Implementation Report, Note 8, at p. 6.

## Principal Provisions of the Bill

This section of the Digest examines the main provisions of the Bill. The Bill comprises fifteen sections and has four Schedules. Section 1 sets out the interpretation of certain definitions used in the Bill. Section 13 relates to the disclosure of information under other enactments. Section 14 relates to the payment of expenses incurred in the administration of this Bill. Section 15 relates to the short title and commencement of the Bill. Sections 1, 13, 14 and 15 are standard provisions and for that reason they are not discussed below. A short synopsis of each provision and Schedule is given in the Table of Provisions (above).

### Central Authority in the State

Section 2(1) provides that the Commissioner of An Garda Síochána is designated as the Central Authority in the State for the purposes of the Bill and the Framework Decision.<sup>36</sup> Section 2(2) provides that the Garda Commissioner may delegate functions of the Central Authority to members of the Garda Síochána or members of the Garda Síochána's civilian staff. Section 2(3)(a) provides that a delegation may relate to the performance of a function generally, in a particular case, in a particular class of case or in respect of a particular manner. Section 2(3)(b) provides that a delegation may be subject to conditions or restrictions, while section 2(3)(c) provides that a delegation may be revoked or varied by the Garda Commissioner at any time.

Section 2(4) provides that a delegation being in force does not preclude the Garda Commissioner from performing the delegated function. Section 2(5) provides that where a delegation is in force references in the Bill to the Central Authority should be construed as a reference to the person to whom the function is so delegated. Section 2(6) provides that an act done pursuant to a delegation has the same force and effect as if done by the Garda Commissioner.

### Recording of the nationality of convicted persons

Section 3 provides that the Central Authority shall take the necessary steps to ensure that when information relating to a conviction is recorded on the Criminal Records Database, it shall include, where available, information in respect of the nationality or nationalities of the convicted person.

### Information relating to convictions in the State of person who is a national of a Member State

Section 4(1) provides that where a person who is a national of one or more Member States and is convicted of an offence in the State, the Central Authority shall, as soon as practicable, inform the central authority or central authorities of each Member State of which the convicted person is a national, of the conviction by transmitting to the relevant central authority or central authorities, the information specified in Schedule 2 in relation to that conviction.

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<sup>36</sup> It should be noted that where the Bill and this Bill Digest refers to the "Central Authority" this refers to the Irish Central Authority, i.e. the Garda Commissioner. Where the Bill and this Bill Digest refers to a "central authority" or "central authorities", this refers to central authorities of other Member States.

Section 4(2) provides that when transmitting information pursuant to section 4(1), the Central Authority may include other information contained in the Criminal Records Database relating to the conviction in addition to information specified in Schedule 2. Section 4(3) provides that where transmitted information under section 4(1) or section 4(2) is subsequently deleted or altered in the Criminal Records Database, the Central Authority shall, as soon as practicable, transmit the up-to-date information to the central authority to which the information had been previously transmitted.

Section 4(4) provides that where information has been transmitted to a central authority under section 4(1) or section 4(2), the Central Authority shall, on request from the central authority, transmit a copy of the conviction, sentence or related court order in respect of the conviction and any other relevant information for the purpose of enabling that central authority to consider whether any measures are necessitated in the Member State of the person's nationality.

Section 4(5) provides that when transmitting information under section 4, the Central Authority may inform the relevant central authority that such information may not be retransmitted for any purposes other than for the purpose of criminal proceedings. Section 4(6) provides that section 4 applies irrespective of whether the convicted person in section 4(1) is also a national of the State.

### **Information received under Article 4 of the Framework Decision**

Section 5(1) provides that where the Central Authority receives information under Article 4(2) or (3) of the Framework Decision, the Central Authority shall store such information that comes under paragraph 1 and 2 of Schedule 2 and may store such information that comes under paragraph 3 of Schedule 2 for the purpose of retransmitting such information in accordance with section 7.

Section 5(2) provides that where the Central Authority receives information pursuant to Article 4(3) of the Framework Decision in relation to the alteration or deletion of information stored in accordance with section 5(1), the Central Authority shall delete or alter such stored information accordingly and shall retransmit such information in accordance with section 7.

Section 5(3) provides that where the Central Authority receives information under section 5(1) or section 5(2), the Central Authority may request from the central authority concerned a copy of the conviction, sentence or any related court order and any other information relevant in order to consider whether any measures are necessitated in the State.

### **Request for information under Article 6 of the Framework Decision**

Section 6(1) provides that where information in relation to a person is required for the purposes of criminal proceedings against the person in the State, or a purpose specified in Schedule 3, the Central Authority may submit a request under Article 6 of the Framework Decision to the relevant central authority.

Section 6(2) provides that where a person who is a national of a Member State request from the Garda Síochána a copy of his or her criminal records, the Central Authority shall submit a request to the central authority of the Member State for the purpose of including such information in the information to be provided by the Garda Síochána to the person. Section 6(3) provides where a person requests from the Garda Síochána a copy of his or her criminal record, the Central

Authority may submit a request to the central authority of a Member State for information relating to the person.

Section 6(4) provides that requests by the Central Authority shall be made using the form set out in the Annex to the Framework Decision in one of the official languages of the Member State to whom the request is made.

### **Reply to request for information under Article 6 of the Framework Decision in relation to a person who is a national of the State**

Section 7(1) provides for that section 7 applies when a request is made to the Central Authority by a central authority of a Member State pursuant to Article 6 of the Framework Decision in relation to a person who is a national of the State.

Section 7(2) provides for where a request is made for the purposes of criminal proceedings in the requesting Member State. The following categories of information in relation to the person shall be transmitted by the Central Authority:

- a) information relating to convictions in the State contained in the Criminal Records Database;
- b) information relating to convictions in a Member State transmitted to the Central Authority after 27 April 2012 under Article 4 of the Framework Decision and stored in accordance with section 5;
- c) information relating to convictions in a Member State transmitted to the Central Authority on or before 27 April 2012 and contained in the Criminal Records Database; and
- d) information relating to convictions in a third country transmitted to the Central Authority and contained in the Criminal Records Database.

Section 7(3) provides for where a request is made for a purpose specified in Schedule 3 in relation to a person. Subject to section 7(4), the Central Authority shall transmit the following categories of information to the central authority of the Member State in relation to the person:

- a) information relating to convictions in the State contained in the Criminal Records Database;
- b) information relating to convictions in a Member State transmitted to the Central Authority after 27 April 2012 under Article 4 of the Framework Decision and stored in accordance with section 5;
- c) information relating to convictions in a Member State transmitted to the Central Authority on or before 27 April 2012 and contained in the Criminal Records Database; and
- d) information relating to convictions in a third country transmitted to the Central Authority and contained in the Criminal Records Database.

Section 7(4) provides that the Central Authority shall not transmit information under section 7(3)(b) where the central authority of the convicting Member State informed the Central Authority that such information may not be retransmitted for any purposes other than the purpose of criminal proceedings. In such a case the Central Authority shall inform the central authority of the requesting Member State of the convicting Member State which transmitted the information, thus allowing the requesting Member State to directly contact and submit a request to the convicting Member State.

Section 7(5) provides that information transmitted under section 7(2)(b) or section 7(3)(b) shall be updated, if applicable, in accordance with section 5(2). Section 7(6) provides that a reply to a request under section 7 shall be in the form set out in the Annex to the Framework Decision, in one of the official languages (or in any other language accepted by the requesting Member State) of the Member State to whom the request is made and shall be accompanied by a list of the conviction referred to in section 7(2) and section 7(3).

### **Reply to request for information under Article 6 of the Framework Decision in relation to a person who is not a national of the State**

Section 8 provides for replies to requests for information from a central authority of a Member State under Article 6 of the Framework Decision where the person is not a national of the State. Section 8(1) provides that the Central Authority shall transmit any information relating to convictions in the State where the request is for the purposes of criminal proceedings in the requesting Member State or for a purpose specified in Schedule 3. Section 8(2) provides that requests shall be in the form set out in the Annex to the Framework Decision, in the official language of the requesting Member State (or any other language accepted) and shall be accompanied by a list of the convictions.

### **Time limits for replies to requests under Article 6 of the Framework Decision**

Section 9(1) provides that the Central Authority shall reply to requests under Article 6(1) as soon as practicable but no later than 10 working days from the date the request is received. Section 9(2) provides that where the Central Authority requires further information to identify the person the subject of the request, it shall, as soon as practicable, consult the central authority of the requesting Member State so as to enable the Central Authority to be in a position to reply to the request within 10 working days from the date of receipt of the additional information. Section 9(3) provides that the Central Authority shall transmit replies to requests under Article 6(2) of the Framework Decision within 20 working days from the date the request is received.

### **Transmission of information in accordance with the Council Decision**

Section 10 provides for the transmission of responses by the Central Authority in the electronic standardised format as required under [Council Decision 2009/316/JHA](#). Section 10(2) provides that when transmitting information relating to the name or legal classification of an offence the Central Authority shall refer to the code opposite the relevant category of offences set out in Annex A to the Council decision to which the offence corresponds.

Section 10(3) provides that when transmitting information relating to a sentence, penalty or measure imposed in respect of a conviction or subsequently modifying the enforcement of a sentence, the Central Authority shall refer to the code opposite the relevant category of offences set out in Annex B to the Council decision to which the penalty or measure corresponds and where applicable shall refer to available information relating to the nature and conditions of the execution of the penalty or measure.

## Conditions for use of personal data

Section 11 relates to restrictions and obligations where personal data received from other central authorities is transmitted and retransmitted by the Central Authority and transposes the requirements set out in Article 9 of the Framework Decision. Section 11(1) provides that, subject to section 11(3), personal data transmitted under Article 7(1) or (4) of the Framework Decision for the purposes of criminal proceedings may only be used for the purposes of the criminal proceedings for which it was requested by the Central Authority.

Section 11(2) provides that, subject to section 11(3), personal data transmitted under Article 7(2) or (4) of the Framework Decision for a purpose specified in Schedule 3 may be used only for the purposes for which it was requested by the Central Authority and subject to the limitations specified when transmitted.

Section 11(3) provides that personal data transmitted under Article 7(1), (2) or (4) of the Framework Decision may be used for the purpose of preventing an immediate and serious threat to public security.

Section 11(4) provides that where personal data, received under Article 4 of the Framework Decision, is transmitted to a third country, the Central Authority shall, when transmitting such information to the third country, specify that such personal data:

- a) if transmitted for the purposes of criminal proceedings, may only be used for the purposes of the criminal proceedings for which it was requested; and
- b) if transmitted for a purpose specified in Schedule 3, may only be used for the purposes for which it was requested and subject to the limitations specified by the central authority who originally transmitted such information.

Section 11(5) limits the application of section 11 to personal data obtained by the Central Authority under the Framework Decision that did not originate from the State. Section 11(6) notes that section 11 is without prejudice to the [Data Protection Act 2018](#) and the [General Data Protection Regulation](#).

## Limitations of the transmission of certain information to third countries

Section 12 provides that where the Central Authority receives a request from a third country for information contained in the Criminal Records Database in relation to a person who is a national of the State, when transmitting information relating to convictions in a Member State transmitted to it under Article 4 of the Framework Decision, the Central Authority may only reply within the limitations that exist in relation to transmissions of such information to other Member States in accordance with section 7(2), section 7(3) and section 7(4).



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