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PROPOSAL

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union

Delegations will find attached document COM(2021) 753 final.

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EUROPEAN
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Strasbourg, 23.11.2021
COM(2021) 753 final

2021/0387 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The Union and the Member States are parties to several United Nations Conventions and Protocols destined to combat transnational organised crime, the smuggling of migrants and trafficking in persons, namely:

- the United Nations Convention Against Transnational Organized Crime¹,
- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime²,
- the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime³.

Such illegal activities very often rely on different means and modes of transport, making it necessary to closely involve transport operators in preventing and countering these activities.

Several sectoral initiatives have already been taken at international level in this area. The International Civil Aviation Organization (ICAO) has adopted Circular 357 on '*Guidelines for Reporting Trafficking in Persons by Flight and Cabin Crew*⁴' and in its Circular 352 provided '*Guidelines for Training Cabin Crew on Identifying and Responding to Trafficking in Persons*⁵'. According to these circulars, States' Civil Aviation Authorities should require that operators develop policies, procedures, training and guidance for their employees on these matters. The International Air Transport Association (IATA) also issued a Resolution against trafficking in persons in 2018 and has developed Guidance material for its members⁶. The International Maritime Organization (IMO) published interim measures for combating unsafe practices associated with the trafficking, smuggling or transport of migrants by sea⁷. The International Chamber of Shipping (ICS) has issued guidance on ensuring the safety and security of seafarers and rescued persons⁸.

¹ <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

² <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

³ <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

⁴ <https://www.icao.int/safety/airnavigation/OPS/CabinSafety/Documents/Cir.352.alltext.en.pdf>

⁵ <https://www.icao.int/safety/airnavigation/OPS/CabinSafety/Documents/Circ.357.EN.pdf>

⁶ <https://www.iata.org/contentassets/8e5bb5f5bfa04057a8826cf042cd4df9/human-trafficking-guidelines-v1.pdf> and <https://www.iata.org/contentassets/8e5bb5f5bfa04057a8826cf042cd4df9/resolution-trafficking-persons-agm2018.pdf>

⁷ <https://www.wcdn.imo.org/localresources/en/OurWork/Facilitation/Documents/MS.C.1-Circ.896-Rev.2.pdf>

⁸ <https://www.wcdn.imo.org/localresources/en/OurWork/Facilitation/Documents/large-scale-rescue-at-sea.pdf>

Many transport operators have policies in place to avoid, to the best of their ability, becoming an accessory to trafficking and smuggling. However, in some cases such policies are not in place or not well implemented.

Recent events have also shown how migrants can be instrumentalised for political purposes, and how certain transport operators have been contributing to – and in some cases benefiting from – smuggling and trafficking operations that have put at risk the lives of vulnerable people and the security of the Union external borders.

Therefore, in order to avoid such situations, it is necessary to adopt legislation targeted at transport operators that facilitate or engage in the trafficking in persons, or the smuggling of migrants in relation to illegal entry into the Union territory. To pursue that purpose effectively, that legislation should be applicable across the Union. The conditions for its application should be formulated as close as possible to the ones provided for by the aforementioned UN Convention which have been ratified by the overwhelming majority of countries of the world, including all Member States of the Union. Thus the Union will be able to fully use the tools offered by this Convention, including in the situations envisaged in Article 15(2) of the said Convention, in cases where the smuggling or trafficking activities are committed with a view to committing serious crimes in the Union.

This Regulation should therefore provide a legal framework allowing the Union to adopt measures that should be addressed against transport operators of any mode of transport (air, sea, inland waterways, rail and road) that engage in the aforementioned activities. The types of measures to be imposed should be appropriate and proportionate in view of the particular circumstances of the case in question. They should include, in particular, the prevention of any further expansion or the limitation of current transport operations, the suspension of licences or authorisations granted under Union law, the suspension of the right to fly over the Union, transit through the territory of the Union or call into Union ports, the suspension of the rights to refuel or carry out maintenance within the Union or the suspension of rights to operate to, from and within the Union.

- **Consistency with other Union policies**

The present proposal is complementary to the Union's external action including its common foreign and security policy. In the light of the possible security dimension, it is appropriate that the overall strategy as regards the measures to be taken is defined in coordination with the High Representative of the Union for Foreign Affairs and Security Policy.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The proposal is based on Articles 91 and 100(2) of the Treaty on the Functioning of the European Union in relation to transport matters.

- **Subsidiarity**

Since the objective of this proposal, namely to ensure a harmonised approach with regard to measures against transport operators, cannot be sufficiently achieved by the Member States but can rather, by reason of its effect, complexity, and trans-border and international

character, 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.

- **Proportionality**

The proposal does not exceed what is necessary in order to achieve its objective.

- **Choice of the instrument**

In order to ensure that migrants and other persons affected by such illegal operations are protected in a uniform and effective manner, the rules to be established in that regard should take the form of a Regulation. Appropriate humanitarian measures should accompany the present measures.

3. STAKEHOLDER CONSULTATIONS

Since the beginning of the crisis at the EU's external borders with Belarus, the EU has been making full use of the diplomatic and outreach tools at its disposal both at political and technical levels.

The Commission and the High Representative have stepped up visits to key countries of origin and transit. Authorities in those third countries have been reminded of their obligations under international conventions on trafficking and smuggling, alerted to the situation at the EU's border with Belarus, the risks of exploitation of their citizens and of people in transit, the need to actively inform their citizens of the risks and dangers of irregular migration to Europe, and the potential for a negative impact on their relations with the EU. The outreach has included direct contacts with airlines and civil aviation authorities.

All parties consulted have agreed on the need to ensure that effective and appropriate tools are in place to fight the smuggling of migrants and the trafficking of persons, in particular the use of commercial means of transport in this context, and to ensure appropriate action is taken to protect the lives and safety of people being instrumentalised for political ends.

- **Fundamental rights**

Processing of personal data will be performed in a way that the obligations on personal data protection laid down in Regulation (EU) 2016/679⁹ and Regulation (EU) 2018/1725 of the European Parliament and of the Council¹⁰ are respected.

4. BUDGETARY IMPLICATIONS

This proposal does not entail any implication for the Union budget.

⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

¹⁰ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Any measures adopted under this Regulation will be limited in time and will be subject to review in accordance with Article 3(2).

- **Detailed explanation of the specific provisions of the proposal**

The proposal is structured as follows:

Article 1: Subject matter and scope

Article 2: Definitions

Article 3: Measures concerning transport operators

Article 4: Right to be heard

Article 5: Procedural rules

Article 6: Cooperation with third countries

Article 7: Information and rights of passengers

Article 8: Committee procedure

Article 9: Entry into force

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union

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 91 and Article 100(2) thereof,

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee¹¹,

Having regard to the opinion of the Committee of the Regions¹²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Trafficking in persons and smuggling of migrants endanger the lives and security of migrants, and in particular of the most vulnerable people.
- (2) The instrumentalisation of migrants, whereby State actors facilitate irregular migration for political purposes is an increasingly worrying phenomenon, which may involve the smuggling of migrants or trafficking of persons in relation to illegal entry into the territory of the Union, thereby endangering the lives and security of those people, while posing a security threat to the borders of the Union.
- (3) Such illegal activities very often rely on different means and modes of transport, making it necessary to target transport operators in preventing and countering these activities. In order to combat trafficking in persons and smuggling of migrants, it is therefore necessary to provide for measures to be taken in respect of commercial transport operators that facilitate or engage in such illegal operations. Such measures should apply not only where the transport operators use the transport means for the trafficking in persons and smuggling of migrants, but also in cases where transport operators take an active part in the criminal activities of an organised criminal group

¹¹ OJ C , , p. .

¹² OJ C , , p. .

active in trafficking in persons and smuggling of migrants with knowledge either of the aim and general activity of that organised criminal group, or of its intent to commit those crimes, or where they aid or facilitate the commission of those crimes, including where those transport operators and those organised criminal groups are State sponsored. The measures in question may target the activities of transport operators even where the latter do not transport persons or migrants into the Union. Those measures should not affect the activities of non-commercial operators, in particular humanitarian activities.

- (4) In the light of the possible security dimension at hand, it is appropriate that the overall strategy as regards the measures to be taken is defined in coordination with the High Representative of the Union for Foreign Affairs and Security Policy.
- (5) The procedure for adopting measures against transport operators which contribute to trafficking in persons or smuggling of migrants should allow for decisions to be taken swiftly. Such measures should at all times be necessary and proportionate, and limited in time. Where necessary, it should be possible to extend the measures. The types of measures that may be taken against transport operators should be sufficiently broad to effectively target the specific conduct of the relevant transport operator.
- (6) According to Article 6 of Regulation (EC) No 1071/2009 of the European Parliament and of the Council¹³ and to Article 8 of Council Directive 87/540/EEC¹⁴, managers and transport operators are required to be of good repute, in order to provide certain transport services in the Union. Member States should take into account any measures taken by the Commission pursuant to this Regulation when assessing whether managers and transport operators fulfil or continue to fulfil that requirement.
- (7) In order to ensure that the measures against transport operators may be taken swiftly, implementing powers should be conferred on the Commission to impose such measures through immediately applicable implementing acts. Implementing powers should also be conferred on the Commission to adopt detailed rules on the procedures to be followed before adopting such measures. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council¹⁵.
- (8) It is fundamental to ensure the respect of the right of persons to be heard before any individual measure which affects them adversely is taken. The Commission should ensure that, before adopting any measures against transport operators, those operators are given the opportunity to be heard, while also taking into account the urgency of the procedure. It should also be possible to invite transport operators to cease any activities relating to trafficking in persons or smuggling of migrants without delay, before measures are taken.

¹³ Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (OJ L 300, 14.11.2009, p. 51).

¹⁴ Council Directive 87/540/EEC of 9 November 1987 on access to the occupation of carrier of goods by waterway to national and international transport and on the mutual recognition of diplomas, certificates and other evidence of formal qualifications for the occupation (OJ L 322, 12.11.1987, p. 20).

¹⁵ Regulation (EU) No 182/2011 of the European Parliament and of 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).

- (9) Before taking measures against transport operators established in third countries, the Commission should consult the relevant authorities in an appropriate manner, with a view to coordinating their actions. In that context, the Commission should also be able to ask those authorities to take any relevant measures.
- (10) Measures taken against transport operators pursuant to this Regulation should be made known to the public. The implementing acts imposing such measures should therefore be published without delay in the *Official Journal of the European Union*, and relevant actors in transport operations should bring such measures to the attention of passengers, both via their websites and, where relevant, on their premises.
- (11) This Regulation is without prejudice to the application of Directive 2011/36/EU¹⁶ on preventing and combating trafficking in human beings and protecting its victims, which establishes, inter alia, appropriate mechanisms aimed at the early identification of, assistance to and support for victims, determines penalties and sets out the liability of legal persons committing trafficking in human beings.
- (12) This Regulation should not affect the rights of passengers established in Regulations (EC) No 261/2004¹⁷, (EC) No 1107/2006¹⁸, (EC) No 1371/2007¹⁹, (EU) No 181/2011²⁰ and (EU) No 1177/2010 of the European Parliament and of the Council²¹. In particular, the rights to reimbursement, re-routing and compensation should be safeguarded. Moreover, the cancellation of transport operations due to the application of measures taken by the Commission should not be considered as extraordinary circumstances.
- (13) Since the objective of this Regulation, namely to ensure a harmonised approach across the Union with regard to measures against transport operators, cannot be sufficiently achieved by the Member States, but can rather, by reason of its effect, complexity, and trans-border and international character, 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 Regulation does not go beyond what is necessary in order to achieve that objective.

¹⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1).

¹⁷ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1).

¹⁸ Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ L 204, 26.7.2006, p.1).

¹⁹ Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, p. 14).

²⁰ Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ L 55, 28.2.2011, p. 1).

²¹ Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ L 334, 17.12.2010, p. 1).

- (14) While this Regulation affects the freedom to conduct a business enshrined in Article 16 of the Charter of Fundamental Rights of the European Union, it respects the essence of that freedom and limits it only to the extent necessary to meet the objectives of preventing and countering the use of commercial means of transport for the smuggling of migrants and trafficking in persons.
- (15) In view of the urgency entailed by the exceptional circumstances caused by the situation at the Union's external borders with Belarus, it is considered to be appropriate to invoke the exception to the eight-week period provided for in Article 4 of Protocol No 1 on the role of national Parliaments in the European Union, annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community.
- (16) In the light of the overriding need to address without delay any instrumentalisation of vulnerable people, this Regulation should enter into force as a matter of urgency on the day following that of its publication in the *Official Journal of the European Union*,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

1. This Regulation lays down rules to prevent and counter the use of commercial means of transport to facilitate or engage in the commission of smuggling of migrants or trafficking in persons.

In particular, it lays down rules on measures that may be taken to prevent or restrict the activities of transport operators who, in relation to the illegal entry of such migrants and persons into the territory of the Union, either:

- (a) use transport means in the commission of smuggling of migrants or trafficking in persons; or
 - (b) with knowledge of either the aim and general criminal activity of an organised criminal group active in smuggling of migrants or trafficking in persons or of its intention to commit those crimes take an active part in the criminal activities of such a group; or
 - (c) organise, direct, aid, abet, facilitate or counsel the commission of smuggling of migrants or trafficking in persons involving an organised criminal group.
2. This Regulation also lays down measures to ensure that Member States take into account the measures taken by the Commission in the light of the conduct of transport operators referred to in paragraph 1 when assessing the good repute of managers and transport operators.

Article 2

Definitions

For the purpose of this Regulation, the following definitions shall apply:

- (a) ‘trafficking in persons’ means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation;
- (b) ‘smuggling of migrants’ means the procurement, in order to obtain, directly or indirectly, a benefit, of the illegal entry of a person into the Union of which the person is not a national or a permanent resident;
- (c) ‘serious crime’ means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;
- (d) ‘organised criminal group’ means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences of smuggling of migrants or trafficking in persons, in order to obtain, directly or indirectly, a benefit;
- (e) ‘transport operator’ means any natural or legal person providing a transport operation on commercial terms by any mode of transport, namely by air, sea, inland waterways, rail or road;
- (f) ‘illegal entry’ means crossing borders without complying with the necessary requirements for legal entry into the receiving Member State.

Article 3

Measures concerning transport operators

1. Without prejudice to the application of national criminal and administrative measures, where a transport operator facilitates or engages in an activity referred to in Article 1(1), the Commission may, by means of immediately applicable implementing acts, decide to take measures against that transport operator. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 8(2). They shall be published immediately in the Official Journal of the European Union.
2. The measures referred to in paragraph 1 shall be necessary and proportionate, and may consist of any of the following:
 - (a) preventing any further expansion of or limiting the current transport operations in the Union market;
 - (b) suspension of the right to provide transport services from, to or within the Union;
 - (c) suspension of the right to fly over the territory of the Union;
 - (d) suspensions of the right to refuel or carry out maintenance within the Union;
 - (e) suspension of the right to call into and enter the Union ports;
 - (f) suspension of the right to transit through the territory of the Union;

- (g) suspension of licences or authorisations granted under Union law to operate within the Union or to carry out activities of international carriage of passengers.

The period of application of those measures shall not exceed one year. They shall be reviewed where necessary and may be renewed.

3. Member States shall take into account the measures taken by the Commission pursuant to paragraph 1 when assessing the good repute of managers and transport operators for the purposes of Article 6 of Regulation (EC) No 1071/2009 and Article 8 of Directive 87/540/EEC.

Article 4

Right to be heard

The Commission shall ensure that, before it adopts any of the measures referred to in Article 3, the transport operator concerned is given the opportunity of being heard, taking into account the need for urgency. The transport operator may be invited to cease any activity referred to in Article 1(1) without delay.

Article 5

Procedural rules

The Commission may adopt implementing acts establishing the procedures to be followed for the adoption of the measures referred to in Article 3. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 8(3).

Article 6

Cooperation with third countries

Before taking any measures pursuant to Article 3 against transport operators established in third countries, the Commission shall consult, in an appropriate manner, the relevant authorities from that country with a view to coordinating their actions. The Commission may ask those authorities to take any relevant measures.

Article 7

Information and rights of passengers

1. The implementing acts adopted by the Commission pursuant to Article 3 shall be published immediately in the Official Journal of the European Union.
2. Transport operators, national enforcing authorities, the European Aviation Safety Agency, the European Union Agency for Railways, the European Maritime Safety Agency, and the managing entities of ports, airports, stations and other relevant infrastructures in the territory of the Member States shall bring the measures taken by the Commission pursuant to Article 3 to the attention of passengers, both via their websites and, where relevant, in their premises.

3. This Regulation shall not affect passengers' rights under Regulations (EC) No 261/2004, (EC) No 1107/2006, (EC) No 1371/2007, (EU) No 181/2011 and (EU) No 1177/2010.

4. For the purposes of those Regulations, the cancellation of transport operations due to the application of measures taken by the Commission pursuant to Article 3 shall not be considered as extraordinary circumstances.

Article 8

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 paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.
3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 9

Entry into force

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg,

For the European Parliament
The President

For the Council
The President