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NOTE

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Subject:	Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA - General approach

Introduction

On 28 November 2023, the Commission submitted a proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA (ST 16149/23 + COR 1 + COR 2).

The proposal is based on Article 83(2) of the Treaty on the Functioning of the European Union.

The Working Party on Judicial Cooperation in Criminal Matters (COPEN) examined the proposal under the Spanish, Belgian and Hungarian Presidency. The text as it results from these examinations is set out in the Annex.

In the European Parliament, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) has the lead responsibility. Ms Birgit Sippel was appointed rapporteur. No report has been tabled yet.

Main issues

1) Humanitarian clause (Recital 7 in combination with Article 3)

The issue of the humanitarian clause refers to the idea that certain assistance to third country nationals to enter, transit or stay in the European Union – notably assistance to close family members or support to provide basic human needs – should not qualify as the criminal offence of migrant smuggling.

In its proposal for a Directive, the Commission had proposed to insert the clause in a recital, leaving Member States the choice how to deal with it. However, during the examination in the Working Party, some Member States suggested to move the clause to the operative part.

Apart from the question whether the issue of the humanitarian clause should be dealt with in the recitals or in the operative part, the positions of the delegations also differed on the exact wording of the clause.

After thorough consideration of the arguments presented throughout the year-long negotiations, and taking into account the discussions during recent meetings, it seems appropriate to address the issue of the humanitarian clause through a recital, see recital 7 (at page 8).

This text should be read in light of recital 6a, which underlines that this Directive is an instrument of minimum harmonization: Member States are free to adopt or maintain legislation providing for a broader incrimination than what is set out in this Directive.

PUBLIC

2) Penalties for legal persons (Article 8, paragraph 3)

Further to a request by some delegations, a recital 13aa has been inserted in the text, and a paragraph 5 has been added to Article 8. The new texts address the particular situation of States to which other EU criminal law instruments do not apply, and which, in accordance with their national law, do not determine the amount of criminal or non-criminal fines for legal persons in proportion to the gravity of the offence committed by a natural person, but apply other criteria, including a criterion based on the lack of organisational structures and safeguards or other shortcomings within the organisation of the legal person.

PUBLIC

Conclusion

In view of the above, the Permanent Representatives' Committee is invited to:

(a) confirm agreement on the text of the general approach, as set out in the Annex to this note; and

(b) recommend that the Council reach a general approach on this text, which will constitute the mandate for negotiations with the European Parliament.

PRESIDENCY REDRAFT [1]

PUBLIC

Draft

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(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 Committee[2],

Having regard to the opinion of the Committee of the Regions[3],

Acting in accordance with the ordinary legislative procedure,

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1 Additional text in relation to the draft in 14633/24 is marked by **bold and underlining**. Additional text proposed earlier is marked by **bold** only. Deletions are marked by ~~strikethrough~~.

2 OJ C , , p. .

3 OJ C , , p. .

Whereas:

(1) The facilitation of unauthorised entry, transit and stay in the Union are criminal activities that put human life in danger and disrespect the dignity of people for the purpose of obtaining high profits, undermining fundamental rights. These criminal activities contribute to irregular migration, undermining the migration management objectives of the Union. The commission of such criminal activities is driven by increasing demand and the high profits obtained by criminal organisations. Preventing and countering those offences remains a priority for the Union.

(2) Directive 2002/90/EC[4] and Council Framework Decision 2002/946/JHA[5] (the 'Facilitators' Package') constitute the Union legal framework to counter the facilitation of unauthorised entry, transit and stay of third-country nationals. It establishes a common definition of the offences of facilitation of unauthorised entry, transit and residence, and sets up the penal framework for the sanctioning of such offences. To address evolving trends, and to further enhance the effectiveness of the Union framework to prevent and counter these offences, it is necessary to update the existing legal framework.

PUBLIC

4 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 17., ELI: http://data.europa.eu/eli/dir/2002/90/oj).

5 Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 1., ELI: http://data.europa.eu/eli/dec_framw/2002/946/oj).

(3) The European Council Conclusions of 9 February 2023 affirmed the need to reinforce Union action to prevent irregular migration and loss of life, notably by intensifying cooperation with countries of origin and transit, and by ensuring stronger cooperation between Member States and with Europol, Frontex and Eurojust. The renewed Action Plan against migrant smuggling (2021-2025) sets out the policy response to migrant smuggling, as an essential part of the comprehensive approach to migration set out in the New Pact on Migration and Asylum. It sets out actions in four priority areas: reinforcing cooperation with partner countries and international organisations; sanctioning migrant smugglers and preventing the exploitation of migrants; reinforcing cooperation and supporting the work of law enforcement and judicial authorities; and increasing the knowledge base.

(4) The facilitation of unauthorised entry, transit and stay is a transnational phenomenon, and measures adopted at Union and national levels should recognise its international dimension. Union and national actions should therefore take into account the international commitments of the Union and its Member States, including in relation to the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on maritime Search and Rescue, the United Nations Convention on the Rights of the Child, as well as the work of the United Nations Office against Drugs and Crime. **In particular, nothing in this Directive should affect the rights, obligations and responsibilities of Member States and individuals to provide assistance to third-country nationals, for humanitarian reasons or aimed at meeting their basic human needs, under applicable international law - including international human rights law and in particular, where applicable, the 1951 Convention relating to the status of refugees as amended by the Protocol of New York of 1967, the United Nations Convention on the Law of the Sea, and in compliance with legal obligations. This assistance can also include legal, linguistic or social advice or support.**

PUBLIC

(5) Taking account of the evolution of the activities aimed to facilitate unauthorised entry, transit and stay in the Union, as well as the legal obligations of the Union and the Member States under international law, the definition of the criminal offences should be further approximated in all Member States so that it covers the relevant conducts more comprehensively.

(6) In accordance with the principles of legality and proportionality of criminal law, and in order to address criminal activities that put human life in danger and disrespect the dignity of people for the purpose of obtaining profits, it is necessary to provide a precise and detailed definition of the criminal offences that counter these criminal behaviours. Assistance of unauthorised entry, transit or stay in the Union should constitute a criminal offence **at least** when there is a link with an actual or a promised financial or material benefit. **This is without prejudice to the way in which Member States deal in their national law with facilitation conducts for which an actual or a promised financial or material benefit is not a constituent element of the offence.**

~~This conduct should also be criminalised provided that this is highly likely to cause serious harm to the third-country nationals who were subject to the criminal offence or to any other person, even though there is no financial or material benefit or no promise of such benefit. It is necessary to establish a criminal offence in order to discourage the *modus operandi* of persons who publicly instigate, for instance through the internet, third-country nationals to enter, transit or stay in the Union without authorisation. Providing objective information or advice to third-country nationals on the conditions for the legal entry and stay in the Union, and on international protection, should not be understood as public instigation.~~

PUBLIC

(6a) **This Directive is an instrument of minimum harmonisation. As a consequence, Member States are free to adopt or maintain legislation providing for a broader incrimination than what is set out in this Directive, in the interests of enhancing the effectiveness of the fight against migrant smugglers. Member States should ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence at least where the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit. However, since this Directive is an instrument of minimum harmonisation, Member States are free to criminalise such conduct when no financial or another material benefit has been provided.**

(7) **Nothing in this Directive should be understood as requiring the criminalisation, on the one hand, of assistance provided to close family members and, on the other hand, of humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with the applicable national and international legal framework.**

~~It is appropriate to provide for criminal liability where there is a link to a financial or material benefit, or where migrants are highly likely to be subjected to serious harm. These elements will usually not be fulfilled when it comes to assistance among family members or the provision of humanitarian assistance or the support of basic human needs. Third-country nationals should not become criminally liable for having been the subject to such criminal offences. Moreover, it is not the purpose of this Directive to criminalise, on the one hand, assistance provided to family members and, on the other hand, humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.~~

PUBLIC

(7a) **Without prejudice to rules of national law relating to unauthorised entry in the territory of the Member State concerned,** third-country nationals should not become criminally liable for **the sole fact of** having been the subject to the criminal offence **of facilitating the unauthorised entry, transit across, or stay within the territory of any Member State.**

(8) The impact of facilitation of unauthorised entry, transit and stay extends beyond the Member State of unauthorised entry. Minimum rules concerning the definition of the criminal offences should encompass conducts taking place in the territory of any Member State, to allow Member States other than those of unauthorised entry to act on such offences, provided that the Member States concerned establish jurisdiction over these offences.

(9) There is a need to distinguish between the criminal offence of facilitation of unauthorised entry, transit and stay in the Union and the aggravated criminal offences that create higher harm to individuals and to society. The levels of penalties should reflect the higher social concern regarding more serious and harmful conducts, therefore aggravated offences should be sanctioned by more severe criminal penalties.

(10) Member States should apply this Directive in accordance and in full compliance with the 1951 Convention Relating to the Status of Refugees as amended by the Protocol of New York of 1967, obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights.

(11) Penalties for the criminal offences should be effective, dissuasive and proportionate. To this end, minimum levels for the maximum term of imprisonment should be set for natural persons. Accessory measures are often effective and, therefore, should be also available in criminal proceedings.

PUBLIC

~~Considering the possible risk to public policy and public security that they may pose, third-country nationals who committed the offences defined in this Directive should be subject to return in accordance with Directive 2008/115/EC of the European Parliament and of the Council[6] or in accordance with national law where Member States have made use of Article 2(2), point (b), of that Directive, either after having served the prison sentence in a Member State or in view of serving the prison sentence, or part of it, in a third country, without prejudice to more favourable provisions applicable by virtue of Union or national law; furthermore, without prejudice to more favourable provisions applicable by virtue of Union or national law, those third-country nationals should be prohibited to re-enter the territory of the Member States for an appropriate period of time to be determined on a case-by-case basis, and that can reach 10 years in the most serious cases. This should not affect the discretion of judges or courts in criminal proceedings to impose appropriate sanctions in the individual cases.~~

(11a) The maximum terms of imprisonment provided for in this Directive for the criminal offences committed by natural persons should apply at least to the most serious forms of such offences. The criminal law of all Member States includes provisions on homicide, aggravated assault, as well as assault on law enforcement, or other offences where the use of serious violence is part of the crime, either committed intentionally or with serious negligence. Member States should be able to have recourse to those general provisions, including provisions on aggravating circumstances, when transposing the provisions in this Directive that relate to criminal offences that cause the death of a person, whether committed intentionally or with serious negligence.

[6] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98, ELI: http://data.europa.eu/eli/dir/2008/115/oj).

(11b) Where this Directive provides that an unlawful conduct only constitutes a criminal offence where it is carried out intentionally and, by seriously endangering the life of a third-country national, causes the death of that ~~a~~ person, the notion of 'intention' should be interpreted in accordance with national law, taking into account relevant case law of the Court of Justice of the European Union. Nothing in this Directive should be understood as requiring strict liability for any consequence arising from the activities qualified as criminal offences in this Directive.

~~(12) The assessment of the seriousness of the offence should also extend to attempts to committ the offence that do not result in unauthorised entry in the Union. Attempts that cause the death of one or more third-country nationals should be sanctioned with more severe penalties than other types of attempts. Setting minimum rules on the maximum level of penalties at Union level for such attempts is justified and proportionate in view of the transnational dimension of the offence, and the fact that an attempt to committ the offence resulting in the death of third-country nationals bears the same gravity as a committed offence resulting in death.~~

PUBLIC

(13) Where national law provides for it, legal persons should be held criminally liable for the facilitation of unauthorised entry, transit and stay in the Union. Member States whose national law does not provide for the criminal liability of legal persons should ensure that their administrative sanctioning systems provide for effective, dissuasive and proportionate sanction types and levels, as laid down in this Directive in order to achieve its objectives. They should be accompanied by accessory measures. ~~The financial situation of legal persons should be considered to ensure the dissuasiveness of the sanction imposed with criminal and non-criminal fines taking into account worldwide turnover of the legal persons.~~ **The gravity of the conduct, as well as the individual, financial and other circumstances of the legal persons concerned, should be taken into account to ensure that the penalty imposed is effective, dissuasive and proportionate. Member States should be able to set the maximum levels of fines either as a percentage of the total worldwide turnover of the legal person concerned, or in fixed amounts. Member States should decide which of those two options they will use, when transposing this Directive.**

(13aa) **<u>However, given that this Directive constitutes a development of the Schengen acquis, account should be taken of the specific situation of those Member States to which other EU criminal law instruments do not apply, and which, in accordance with their national law, do not determine the amount of criminal or non-criminal fines for legal persons in proportion to the gravity of the offence committed by a natural person, but apply other criteria, including a criterion based on the lack of organisational structures and safeguards or other shortcomings within the organisation of the legal person. If imperative to preserve the coherence of the national penalty system for legal persons, those Member States should have the possibility to set the maximum amount of fines for legal persons at a level compatible with their national system, provided that, as a result, the level of penalties applicable to legal persons is consistent with the one provided for in national law for crimes of a comparable seriousness and that the penalties are effective proportionate and dissuasive.</u>**

(13a) **Where Member States, in the determination of fines to be imposed on legal persons, opt to implement the criterion of the total worldwide turnover of a legal person, they should decide whether to calculate that turnover based on the business year preceding that in which the criminal offence was committed, or on the business year preceding that of the decision to impose the fine. They should also consider providing for rules for cases where it is not possible to determine the amount of a fine on the basis of the total worldwide turnover of the legal person in the business year preceding that in which the criminal offence was committed, or in the business year preceding that of the decision to impose the fine. In such cases, Member States should be able to take into account other criteria, such as total worldwide turnover in a different business year. Where those rules include the setting of fixed amounts of fines, it should not be necessary for the maximum levels of those amounts to reach the levels established in this Directive as the minimum requirement for the maximum level of fines set in fixed amounts.**

(13b) **Where Member States opt for a maximum level of fines set in fixed amounts, such levels should be laid down in national law. The highest levels of such fines should apply to the most serious forms of criminal offences defined in this Directive committed by legal persons of financial strength. Member States should be able to determine the method of calculation of those highest levels of fines, including specific conditions therefor. Member States are invited to regularly review the levels of fines set in fixed amounts having regard to rates of inflation and other fluctuations in monetary value, in accordance with procedures laid down in their national law. Member States that do not have the euro as their currency should provide for maximum levels of fines in their currency that correspond to the levels determined in this Directive in euro on the date of its entry into force. Those Member States are invited to regularly review the levels of fines also with regard to the development of the exchange rate.**

PUBLIC

(13c) **The establishment of the maximum level of fines is without prejudice to the discretion of judges or courts in criminal proceedings to impose appropriate penalties in individual cases. As this Directive does not establish any minimum levels of fines, the judges or courts should, in any case, impose appropriate penalties taking into account the individual, financial and other circumstances of the legal person concerned and the gravity of the conduct.**

(14) **The notion of aggravating circumstances should be understood either as facts allowing the judge to pronounce a higher sentence for the same offence than the one normally incurred without these facts, or as the possibility of retaining several offences cumulatively in order to increase the level of sanction.** ~~Therefore,~~ Member States should not be obliged to provide for specific aggravating circumstances where national law already provides for separate criminal offences or a general ability for national courts to weigh all relevant aggravating circumstances, and this can lead to more severe penalties.

~~Effectiveness of sanctions imposed in practice should be fostered through providing for aggravating circumstances that reflect the severity of the criminal offence. Graver circumstances should include situations conducive to other unlawful activities, such as exploitation, including sexual exploitation, instrumentalisation, dispossession of identity documents, and involvement in illegal employment.~~

(14a) **A situation of instrumentalisation could arise where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders of the Union or to a Member State, where such actions are indicative of an intention of a third country or a hostile non-state actor to destabilise the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security.**

PUBLIC

(14b) **Situations in which non-state actors are involved in organised crime, in particular smuggling, should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a Member State.**

(14c) **Humanitarian assistance should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a Member State.**

(14d) **As regards Cyprus, Council Regulation (EC) No 866/2004[7] provides for specific rules that apply to the line between the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus exercises effective control and those areas in which it does not exercise effective control. Although that line does not constitute an external border, a situation where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to cross that line should be considered as instrumentalisation, if all the other elements of instrumentalisation are present.**

PUBLIC

[7] Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession (OJ L 161, 30.4.2004, p. 128–143).

~~The notion of 'instrumentalisation' should be understood as a situation where a third country or hostile non-state actor, encourages or facilitates the movement of third country nationals and stateless persons to the external borders of the Union or to a Member State, with the aim of destabilising the Union or a Member State where such actions are indicative of an intention of a third country or a hostile non-state actor to destabilise the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security. Situations in which non-state actors are involved in organised crime, in particular smuggling, should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a Member State. Humanitarian assistance should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a Member State. As regards Cyprus, Council Regulation (EC) No 866/2004 (12) provides for specific rules that apply to the line between the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus exercises effective control and those areas in which it does not exercise effective control. Although that line does not constitute an external border, a situation where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to cross that line should be considered as instrumentalisation, if all the other elements of instrumentalisation are present.~~

(15) The approximation and effectiveness of sanction levels imposed in practice should also be fostered with common mitigating circumstances that reflect the contribution provided by natural or legal persons that perpetrated a criminal offence referred to in this Directive through cooperation with the competent national authorities in the investigation or detection of such offence. **In any case, it should remain within the discretion of the judge or the court to determine whether to decrease the sentence, taking into account the specific circumstances in each individual case.**

(16) Member States should lay down rules concerning limitation periods in order to enable them to counter the criminal offences referred to in this Directive effectively, without prejudice to national rules that do not set limitation periods for investigation, prosecution and enforcement. **As a general rule, the start of a limitation period should be the moment when the offence was committed. However, as this Directive sets minimum rules, Member States can provide in their national legislation that the limitation period starts later, for instance at the moment when the offence was discovered, provided that such moment is clearly defined in accordance with national law. Where Member States are permitted under this Directive to establish shorter limitation periods, provided that the period may be interrupted or suspended in the event of specified acts, such acts may be defined in accordance with the legal system of each Member State.**

(17) To counter the facilitation of unauthorised entry, transit and stay in the Union, it is of outmost importance to ensure the effective seizure of the proceedings of the crime, as well as of the instrumentalities that are used to commit the criminal offences, including for instance boats, engines and other boat components and vehicles. For this purpose, full use should be made of existing instruments on the freezing and confiscation of proceeds and instrumentalities of crime, such as Directive **2024/1260/EU** of the European Parliament and of the Council[8].

[8] Directive 2024/1260/EU of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation (OJ L, 2024/1260, 2.5.2024).

(18) Considering the cross-border nature of the criminal offences referred to in this Directive, the mobility of perpetrators of illegal conducts and the possibility of cross-border investigations, it is necessary to lay down rules on the establishment of jurisdiction by Member States in order to counter such conduct effectively. The unauthorised transit **across** or stay taking place in whole or in part in the territory of a Member State should allow a Member State different from the Member State of first unauthorised entry to establish jurisdiction. The gravity and the cross-border nature of the offences referred to in this Directive require that jurisdiction be established ~~not only on~~ **over** natural persons who are nationals of the Member State concerned. **For the same reasons, it is necessary that Member States establish jurisdiction over criminal offences committed on board of ships and aircrafts registered in the Member State or flying its flag. Member States should also be allowed to extend their jurisdiction to offences which have been committed outside their territory** ~~but also on~~ **by** third-country nationals habitually residing in **their** ~~its~~ territory ~~Jurisdiction over~~ **and by** legal persons ~~should be established~~ when these are established in the Member State concerned or in respect of any business carried out in whole or in part in its territory. ~~For the same reasons, it is necessary that Member States establish jurisdiction over criminal offences committed on board of ships and aircrafts registered in the Member State or flying its flag.~~ Member States, including those other than that of first unauthorised entry, should **be allowed to** establish jurisdiction in relation to criminal offences referred to in this Directive when **the conduct has been committed outside their territory and** ~~this results~~**aims** ~~in~~ **at** the **unauthorised** entry~~,~~ **or** transit ~~or stay~~ of the third-country nationals subject to the offence in the concerned Member State.

(19) Where assistance is provided for a third-country national to reach the territory of a Member State, the concerned Member States may also be able to establish their jurisdiction with regard to attempts, even if the third-country national does not enter their territory. ~~Member States should at least establish their jurisdiction with regard to the attempt of an offence that caused the death of a third-country national.~~

(19a) **Member States are encouraged to criminalise migrant smuggling regardless of where the offence was committed and to consider establishing jurisdiction over migrant smuggling outside of their territories, beyond the minimum rules set forth in this Directive, in line with international law.**

(20) Where a criminal offence falls within jurisdiction of more than one Member State, the Member States concerned should cooperate to determine which Member State is best placed to prosecute. Where the competent authorities of the Member States concerned decide, following cooperation or direct consultations under Council Framework Decision 2009/948/JHA[9], to centralise criminal proceedings in a single Member State through the transfer of criminal proceedings, the Regulation (EU) …/… [*adopted but not yet signed and published Regulation on the transfer of proceedings in criminal matters*][10] should be used for such a transfer. For this purpose, the relevant criteria of Article 5 of that Regulation should be duly taken into account. The priority and weight of such criteria should be based on the facts and merits of each individual case.

(21) To counter the facilitation of unauthorised entry, transit and stay in the Union, both criminal justice and preventive mechanisms should be used. The prevention of the criminal offences referred to in this Directive should mitigate the need for criminal justice response and should have wider benefits in crime reduction. **Prevention** ~~Such measures~~ should aim at raising public awareness, and include **appropriate measures such as** information campaigns, research and education programmes, **with respect for national competence and national law**. These should be carried out in cooperation with other Member States, relevant Union agencies and third countries.

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9 Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ L 328, 15.12.2009, p. 42, ELI: http://data.europa.eu/eli/dec_framw/2009/948/oj).

10 The text was adopted on 5 November, it will be signed in November II (25 – 28 November). Publication – with number of the Regulation – will probably be somewhere in December.

(22) Lack of resources and enforcement powers for national authorities which detect, investigate, prosecute or adjudicate the criminal offences referred to in this Directive creates obstacles for the effective prevention and punishment thereof. In particular, a shortage of resources may prevent authorities from taking action or limit their enforcement actions, allowing offenders to escape liability or to receive punishment that does not correspond to the gravity of the criminal offence. Minimum criteria concerning resources and enforcement powers should therefore be established.

(23) The effective functioning of the enforcement chain depends on a range of specialist skills. The complexity of the challenges posed by the facilitation of unauthorised entry, transit and stay in the Union, and the nature of such criminal offences require a multidisciplinary approach, a high level of legal knowledge, technical expertise and financial support as well as a high level of training and specialisation within all relevant competent authorities. Member States should provide training appropriate to the function of those who detect, investigate, prosecute or adjudicate criminal offences concerning the facilitation of unauthorised entry, transit and stay in the Union.

(24) To ensure successful enforcement, Member States should make available **to competent authorities** effective investigative tools for the criminal offences referred to in this Directive, such as those **available under** ~~included in~~ their national law for combat**t**ing organised crime or other serious **criminal offences** ~~crimes,~~. **Such tools could include** ~~including for instance~~ the interception of communications, covert surveillance including electronic surveillance, monitoring of bank accounts and other financial investigation tools. **Those** ~~These~~ tools should be **used** ~~applied~~ in line with the principle of proportionality and in full respect of the Charter ~~of Fundamental Rights of the European Union~~. In accordance with national law, the nature and gravity of the criminal offences under investigation should justify the use of these investigative tools. The right to the protection of personal data should be respected.

PUBLIC

(25) ~~Online content constituting or facilitating criminal offences referred to in this Directive, notably providing assistance to or publicly instigating unauthorised entry, transit and stay in the EU through the internet, will be subject to measures pursuant to Regulation (EU) 2022/2065 of the European Parliament and of the Council[11] as regards illegal content.~~

(26) To effectively tackle the facilitation of unauthorised entry, transit and stay in the Union, it is necessary that competent authorities in the Member States collect accurate ~~, consistent and comparable~~ data on the scale of and trends in the criminal offences referred to in this Directive~~, the efforts to combat them and their results~~. Member States should collect and report to the Commission **as a minimum** relevant **existing** statistical data **available at the central level** on such offences. The Commission should regularly assess and publish the results based on data transmitted by the Member States. Member States should also regularly collect and disseminate **existing** statistical data and information on the application of this Directive to allow for the monitoring of its implementation. Statistical data and information should be ~~comparable between the Member States and~~ collected on the basis of common minimum standards.

(27) Since the objective of this Directive, namely to lay down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effect of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

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11 ~~Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ L 277, 27.10.2022, p. 1, ELI: http://data.europa.eu/eli/reg/2022/2065/oj).~~

(28) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the respect and protection of human dignity, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security, the rights of the child, the freedom of association, the right to an effective remedy and to a fair trial, the principles of legality and proportionality of criminal offences and penalties, and the prohibition of *ne bis in idem*.

(29) This Directive aims to amend and expand the provisions of Directive 2002/90/EC and Framework Decision 2002/946/JHA. Since the amendments to be made are of substantial nature, Directive 2002/90/EC and Framework Decision 2002/946/JHA should, in the interests of clarity, be replaced in their entirety in relation to the Member States bound by this Directive.

(30) This Directive is without prejudice to the application of Directive 2004/38/EC of the European Parliament and of the Council[12] and the EU-UK Withdrawal Agreement[13].

(31) Ireland is taking part in this Directive, in accordance with Article 5(1) of Protocol No 19 on the Schengen *acquis* integrated into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and Article 6(2) of Council Decision 2002/192/EC[14].

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12 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77, ELI: http://data.europa.eu/eli/dir/2004/38/oj).

13 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 (OJ C 384 I, 12.11.2019, p. 1, ELI: http://data.europa.eu/eli/treaty/withd_2019(3)/oj).

14 Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20, ELI: http://data.europa.eu/eli/dec/2002/192/oj).

(32) In accordance with Articles 1 and 2 of ~~the~~ Protocol **No 22** on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds upon the Schengen *acquis*, Denmark ~~should~~ **shall**, in accordance with Article 4 of that Protocol, decide within a period of six months after the Council has decided on this Directive whether it will implement it in its national law.

(33) As regards Iceland and Norway, this Directive constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*[15] which fall within the areas referred to in Article 1, point **E** ~~A~~ of Council Decision 1999/437/EC[16].

[15] OJ L 176, 10.7.1999, p. 36, ELI: http://data.europa.eu/eli/agree_internation/1999/439(1)/oj.

[16] Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis (OJ L 176, 10.7.1999, p. 31, ELI: http://data.europa.eu/eli/dec/1999/437/oj).

(34) As regards Switzerland, this Directive constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*[17] which fall within the areas referred to in Article 1, point **E** ~~A~~ of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC[18].

(35) As regards Liechtenstein, this Directive constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*[19] which fall within the areas referred to in Article 1, point **E** ~~A~~ of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU[20].

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17 OJ L 53, 27.2.2008, p. 52.

18 Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19, ELI: http://data.europa.eu/eli/dec/2011/350/oj).

19 OJ L 160, 18.6.2011, p. 21.

20 Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, relating to the abolition of checks at internal borders and movement of persons, (OJ L 160, 18.6.2011, p. 19, ELI: http://data.europa.eu/eli/dec/2011/350/oj).

(36) As regards Cyprus~~, Bulgaria and Romania~~, this Directive constitutes an act building upon, or otherwise related to, the Schengen *acquis* within ~~, respectively,~~ the meaning of Article 3(1) of the 2003 Act of Accession ~~and Article 4(1) of the 2005 Act of Accession~~,

HAVE ADOPTED THIS DIRECTIVE:

PUBLIC

Article 1

Subject matter

This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of facilitation of unauthorised entry, transit **across** and stay of third-country nationals **within the territory of any Member State** as well as measures to prevent and counter the commission of such criminal offences.

PUBLIC

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

1. 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union and who is not a person enjoying the right of free movement under Union law as defined in Article 2, point 5, of Regulation (EU) 2016/399 of the European Parliament and of the Council;

2. 'unaccompanied minor' means a third-country national below the age of 18 years who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person, including a minor who is left unaccompanied after he or she has entered the territory of the Member States;

3. 'legal person' means any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations.

Article 3

Criminal offences

~~1.~~ Member States shall ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence where ~~a)~~ the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct, in order to obtain such a benefit ~~or.~~

~~b) there is a high likelihood of causing serious harm to a person.~~

~~2. Member States shall ensure that publicly instigating third-country nationals to enter, or transit across or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals, constitutes a criminal offence.~~

Article 4

Aggravated criminal offences

(deleted)

Article 5

***Inciting**, aiding and abetting, and attempt*

Member States shall ensure that inciting, aiding and abetting, and **the** attempt~~ing~~ to commit any of the criminal offences referred to in Article 3~~(1) and Article 4~~ are punishable as criminal offences.

Article 6

Penalties for natural persons

1. Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3~~, 4~~ and 5 are punishable by effective, proportionate and dissuasive criminal penalties.

2. Member States shall take the necessary measures to ensure that the criminal offences referred to in Article~~s~~ 3~~(1)~~ are punishable by a maximum term of imprisonment of at least **three** years.

3. Member States shall take the necessary measures to ensure that the criminal offences referred to in ~~Article 4, points (a) to (d) by~~ **Article 3** are punishable by a maximum term of imprisonment of at least ~~ten~~ **eight** years **where:**

   (a) that offence was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA;

   (b) that offence seriously endangered the life of third-country nationals who were subject to the criminal offence;

   (c) that offence was committed by use of serious violence against the third-country nationals who were subject to the criminal offence;

   (d) the third-country national who was subjected to the criminal offence was particularly vulnerable, such as an unaccompanied minor.

   It shall be within the discretion of Member States to decide whether this provision also applies in situations of intentionally assisting a third-country national to stay within the territory of a Member State.

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4. Member States shall take the necessary measures to ensure that the criminal offences referred to in ~~Article 4 point (c),~~ ~~by~~ Article **3(1),** ~~including attempts to commit this criminal offence referred to in that provision~~, are punishable by a maximum term of imprisonment of at least ~~fifteen~~ **ten** years **where that offence, by seriously endangering the life of a third-country national who was subject to the criminal offence, caused the death of that person.**

5. In addition to criminal penalties imposed in accordance with paragraphs 1 to 4, Member States shall take the necessary measures to ensure that natural persons **who** ~~that~~ have ~~been convicted of committing~~ **committed** ~~one of~~ the criminal offences referred to in Articles 3~~, 4~~ and **5** may be subject to **accessory** criminal or non-criminal sanctions or measures imposed by a competent authority, ~~including~~ **which may include the following**:

(-a) fines;

(a) withdrawal of permits or authorisations to pursue activities **that** resulted in the relevant criminal offence, or prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the criminal offence was committed;

~~(b) return after the enforcement of the penalty in a Member State, or to serve the penalty imposed, or part of it, in the third country of return, without prejudice to more favourable provisions that may be applicable by virtue of Union or national law;~~

(c) prohibition to enter and stay on the territory of the Member States ~~for an appropriate period of maximum 10 years~~, ~~without prejudice to more favourable provisions that may be applicable by virtue of Union or national law~~;

(d) exclusion from access to public funding, including tender procedures, grants and concessions.

(e) *(moved to -a)*

~~(f) freezing and confiscation of the proceeds derived from, and instrumentalities used for, the commission of the offence, in accordance with Directive 2014/42/EU of the European Parliament and of the Council.~~

PUBLIC

Article 7

***Liability** of legal persons*

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for the criminal offences referred to in Articles 3~~,~~ ~~4~~ and 5 committed for the benefit of those legal persons by any person, acting either individually or as part of an organ of the legal person concerned, who has a leading position within the legal person, based on:

   (a) a power of representation of the legal person;

   (b) an authority to take decisions on behalf of the legal person;

   (c) an authority to exercise control within the legal person.

2. Member States shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the criminal offences referred to in Articles 3,~~ 4~~ and 5 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 **of this Article** shall not **preclude** ~~exclude~~ criminal proceedings against natural persons **who commit, incite** or are accessories to the criminal offences referred to in Articles 3~~,~~ ~~4~~ and 5.

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Article 8

Penalties ~~*Sanctions*~~ *for legal persons*

1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 **(1) or (2)** is ~~subject to~~ **punishable by** effective, proportionate and dissuasive criminal **or non-criminal penalties** ~~sanctions~~ **or measures**.

2. Member States shall take the necessary measures to ensure that **penalties** ~~sanctions~~ or measures for legal persons **held** liable pursuant to Article 7 **(1) or (2)** for the criminal offences referred to in Articles 3~~,~~ ~~4~~ and 5 **shall include criminal or non-criminal fines and may include other criminal or non-criminal penalties** ~~**sanctions**~~ **or measures, such as** ~~may include~~:

   ~~(a) criminal or non-criminal fines;~~

   (b) exclusion from entitlement to public benefits~~,~~ **or** aid ~~or subsidies~~;

   (c) ~~temporary or permanent~~ exclusion**s** from access to public funding, including tender procedures, grants**,** ~~and~~ concessions **and licences**;

   (d) temporary or permanent disqualification from the practice of **business** ~~commercial~~ activities;

   (e) placing under judicial supervision;

   (f) judicial winding-up;

   (g) ~~temporary or permanent~~ closure of establishments ~~which have been~~ used for committing the ~~criminal~~ offence;

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~~(h)~~ withdrawal of permits and authorisations to pursue activities **that** ~~which have~~ resulted in ~~committing~~ the **relevant** criminal offence;

~~(i) freezing and confiscation of the proceeds derived from, and instrumentalities used for, the commission of the offence, in accordance with Directive 2014/42/EU of the European Parliament and of the Council.~~

3. **Member States shall take the necessary measures to ensure that, at least for legal persons held liable pursuant to Article 7(1), criminal offences covered by Articles 3, 6(3) and 6(4) are punishable by criminal or non-criminal fines,** the amount of ~~criminal or non-criminal fines~~ **which** shall be proportionate to the **gravity** ~~seriousness~~ of the conduct and to the individual, financial and other circumstances of the legal person concerned. Member States shall take the necessary measures to ensure that the maximum level of such fines is not less than:

(a) for criminal offences covered by ~~referred to in~~ **Article 3~~(1)~~**

(i) **3%** of the total worldwide turnover of the legal person, either in the business year preceding **that** ~~the one~~ in which the criminal offence was committed, or in the business year preceding **that of** the ~~fining~~ decision **to impose the fine**, ~~for criminal offences referred to in Article 3.~~ **or**

(ii) an amount corresponding to EUR 24 000 000.

(b) for criminal offences covered by ~~referred to in~~ **Article** ~~4, points (a) to (d)~~ **6(3) and Article 6(4):**

(i) **5%** of the total worldwide turnover of the legal person, either in the business year preceding the one in which the criminal offence was committed, or in the business year preceding the ~~fining~~ decision **to impose the fine**, ~~for criminal offences referred to in Article 4, points (a) to (d)~~**, or**

(ii) an amount corresponding to EUR 40 000 000;

~~**(c) for criminal offences covered by** referred to in **Article** 4, points (a) to (d) **6(4):**~~

~~**(i) 5%** of the total worldwide turnover of the legal person, either in the business year preceding **that** the one in which the criminal offence was committed, or in the business year **preceding that of** the fining decision, for criminal offences referred to in Article 4, point (e) **6(4)**~~

4. ~~When providing for criminal or non-criminal fines pursuant to paragraph 3~~, Member States may **establish** ~~provide for~~ rules ~~applicable in~~ **for** cases where it is not possible to determine the amount of the fine on the basis of the total worldwide turnover of the legal person in the business year preceding **that** ~~the one~~ in which the ~~criminal~~ offence was committed, or in the business year preceding **that of** the ~~fining~~ decision **to impose the fine**.

5. If imperative to preserve the coherence of the national penalty system for legal persons, the maximum amount of fines for legal persons held liable pursuant to Article 7(1) for the criminal offences covered by Articles 3, 6(3) and 6(4) may be different to the one set out in Article 8(3), provided that, as a result, the level of penalties is consistent with the one provided for in national law for crimes committed by legal persons of a comparable seriousness and that the penalties are effective proportionate and dissuasive.

Without prejudice to Article 8(2), such penalty systems shall also include the possibility of

a) imposing monetary sanctions that take into account gaps or deficiencies within the structure and organisation of the legal person which have allowed offences to take place,

b) compensation claims and

c) confiscation.

PUBLIC

Article 9

Aggravating circumstances

To the extent that the following circumstances do not form part of the constituent elements of the criminal offences referred to in Article 3, Member States shall take the necessary measures to ensure that **one or more of** the following circumstances ~~may~~ **can**, **in accordance with national law,** be regarded as **an** aggravating circumstance~~s~~, in relation to the criminal offences referred to Articles 3,~~ 4~~ and 5:

(a) the criminal offence was committed by a public official when performing his or her duties;

~~(b) the criminal offence entailed or resulted in the involvement of third-country nationals who were subject to the criminal offence in illegal employment as referred to in Directive 2009/52/EC of the European Parliament and of the Council;~~

(c) the offender has previously been ~~definitively~~ convicted **by a final judgment** of ~~criminal~~ offences of the same nature ~~under~~ **as those referred to in** Articles 3,~~ 4~~ or 5;

(d) the criminal offence entailed or resulted in ~~the exploitation or~~ instrumentalisation of a third-country national who was subject to the criminal offence;

(e) dispossessing the third-country nationals who are subject to the criminal offence of their identity or travel documents;

(f) ~~the criminal offence was carried out while carrying a firearm;~~

(g) the criminal offence was committed involving cruel, inhuman, or degrading treatment of a third-country national who was subject to the criminal offence.

PUBLIC

Article 10

Mitigating circumstances

Member States shall take the necessary measures to ensure that, in relation to the **relevant** criminal offences referred to in Articles 3, ~~4~~ and 5, **one or more of the following circumstances can, in accordance with national law,** ~~it may~~ be regarded as a mitigating circumstance ~~that the offender provides the competent authorities with information which they would not otherwise been able to obtain, helping them to~~:

(a) **the offender provides the competent authorities with information, helping them to** identify or bring to justice other offenders; ~~or~~

(b) **the offender provides the competent authorities with information, helping them to** find evidence.

Article 11

Limitation periods ~~for criminal offences~~

1. Member States shall take the necessary measures **to enable** ~~provide for a limitation period that enables~~ the investigation, prosecution, trial and ~~judicial decision~~ **adjudication** of criminal offences referred to in Articles 3, ~~4~~ and 5 for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively.

Member States shall take the necessary measures to provide for a limitation period that enables the enforcement of penalties imposed following a final conviction for criminal offences referred to in Article 3 for a sufficient period of time after that conviction.

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~~2. Member States shall take the necessary measures to enable the investigation, prosecution, trial and judicial decision:~~

~~(a) of criminal offences referred to in Article 3, for a period of at least seven years from the time when the criminal offence was committed,~~

~~(b) of criminal offences referred to in Article 4, points (a) to (d) for a period of at least ten years from the time when the criminal offence was committed;~~

~~(c) of criminal offences referred to in Article 4, point (e), including attempts to commit the offence referred to in Article 4, point (e), for a period of at least fifteen years from the time when the criminal offence was committed.~~

2. The limitation period referred to in paragraph 1, first subparagraph~~,~~ shall be as follows:

(a) at least three years from the commission of a criminal offence punishable by a maximum term of imprisonment of at least three years;

(b) at least eight years from the commission of a criminal offence punishable by a maximum term of imprisonment of at least eight years;

(c) at least 10 years from the commission of a criminal offence punishable by a maximum term of imprisonment of at least 10 years.

PUBLIC

~~3. Member States shall take the necessary measures to enable the enforcement of:~~

~~(a) a penalty of imprisonment in the case of a criminal offence, imposed following a final conviction for a criminal offence referred to in Article 3, for at least seven years from the date of the final conviction;~~

~~(b) a penalty of imprisonment in the case of a criminal offence, imposed following a final conviction for a criminal offence referred to in Article 4, points (a) to (d), for at least ten years from the date of the final conviction;~~

~~(c) a penalty of imprisonment in the case of a criminal offence, imposed following a final conviction for a criminal offence referred to in Article 4, point (e), including attempts to commit the criminal offence referred to in Article 4, point (e), for at least fifteen years from the date of the final conviction.~~

3. The limitation period referred to in paragraph 1, second subparagraph, shall be as follows:

(a) at least three years from the date of the final conviction in the following cases:

(i) a penalty of imprisonment of up to ~~four~~ <u>one</u> year~~s~~, or alternatively

(ii) a penalty of imprisonment for a criminal offence punishable by a maximum term of imprisonment of at least three years; and

(b) at least ~~eight~~ <u>five</u> years from the date of the final conviction in the following case~~s~~:

~~(i)~~ a penalty of imprisonment of more than ~~four~~ <u>one</u> year~~s, or alternatively~~<u>; and</u>

<u>(c) at least eight years from the date of the final conviction in the following case:</u>

~~(ii)~~ a penalty of imprisonment for a criminal offence punishable by a maximum term of imprisonment of at least eight years; and

PUBLIC

~~(e)~~ **(d)** **at least 10 years from the date of the final conviction in the following cases:**

(i) a penalty of imprisonment of more than five years, or alternatively

(ii) a penalty of imprisonment for a criminal offence punishable by a maximum term of imprisonment of at least 10 years.

4. By way of derogation from paragraphs 2 **b)-c)** and 3 **b)-c)**, Member States may establish a shorter limitation period, **but not shorter than five years,** provided that the period may be interrupted or suspended in the event of specified acts. ~~[This period shall not be shorter than:~~

~~(a) five years for the criminal offences referred to in Article 3;~~

~~(b) years for the criminal offences referred to in Article 4, points (a) to (d);~~

~~(c) years for the criminal offences referred to in Article 4, poi€(e), including attempts to commit the criminal offence referred to in Article 4, €nt (e)]~~

Article 12

Jurisdiction

1. Each Member State shall **take the necessary measures to** establish its jurisdiction over **the** criminal offence**s** referred to in Articles 3, ~~4~~ and 5 where ~~the criminal offence~~:

(a) **the offence was** ~~is~~ committed in whole or in part **with**in its territory;

(b) **the offender** is ~~committed by~~ one of its nationals ~~or a third-country national who is a habitual resident in its territory;~~

~~(c) is committed for the benefit of a legal person~~

~~(i) established in its territory;~~

~~(ii) in respect of any business done in whole or in part in its territory;~~

~~(d)~~**(c) the offence was** ~~is~~ committed on board ~~of~~ a ship or an aircraft registered in **the Member States concerned** ~~it~~ or flying its flag;

~~(e) results in the entry, transit or stay in the territory of that Member State of third country nationals who were subject to the criminal offence.~~

2. A Member State shall inform the Commission where it decides to extend its jurisdiction to one or more criminal offences referred to in Articles 3 and 5 which have been committed outside its territory, where:

(a) the offender is a habitual resident in its territory;

(b) the offence is committed for the benefit of a legal person

(i) established in its territory;

(ii) in respect of any business done in whole or in part on ~~in~~ **its territory;**

(c) the conduct is aimed at the unauthorised entry or transit of third-country nationals, who were subject to the criminal offence, in the territory of that Member State.

~~**3.** 2. Member States shall establish jurisdiction over attempts the attempt to commit a criminal offence referred to in Articles **3(1)** 4 point (e), the conduct would have constituted a criminal offence over which jurisdiction would have been established pursuant to paragraph 1.~~

4. ~~3.~~ **In the case referred to in paragraph 1 under b), and in the case where a Member State has decided to extend the jurisdiction in accordance with paragraph 2, each Member State shall,** ~~F~~**f**or the prosecution of the criminal offences referred to in Articles 3,~~ 4~~ and 5 committed outside the territory of a Member State, ~~each Member State shall~~ take the necessary measures to ensure that **the exercise of** its jurisdiction is not subject to ~~either of~~ the ~~following~~ conditions~~s~~ that **the prosecution can be initiated only following a denunciation from the State of the place where the criminal offence was committed.**

~~(a) the acts are a criminal offence at the place where they were carried out;~~

~~(b) the prosecution can be initiated only following a transmission of information from the State of the place where the criminal offence was committed.~~

5. ~~4.~~ Where a criminal offence referred to in Articles 3,~~ 4~~ and 5 falls within the jurisdiction of more than one Member State, **those** ~~these~~ Member States shall cooperate to determine which Member State is to conduct **the** criminal proceedings. The matter shall, where appropriate and in accordance with Article 12 **(2)** of Framework Decision 2009/948/JHA[21], be referred to Eurojust.

Article 13

Prevention

1. Member States shall take appropriate **measures** ~~action~~, such as information and awareness-raising campaigns, and research and education programmes, **where relevant with specific attention to the online dimension and with respect for national competence and national law,** aimed at raising public awareness and reducing the commission of the criminal offences referred to in Articles 3,~~ 4~~ and 5.

[21] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ L 328, 15.12.2009, p. 42).

2. Where appropriate, Member States shall take the necessary measures to carry out the activities referred to in paragraph 1 in cooperation with other Member States, relevant Union agencies, ~~and~~ third countries **and relevant civil society organisations and other stakeholders such as the private sector**.

Article 14

Resources

Member States shall ensure that national authorities ~~competent~~ **which** ~~for the~~ detect~~ion~~, investigat**c**~~ion~~, prosecut**c**~~ion~~ or adjudicat**c**~~ion of~~ the criminal offences referred to Articles 3, ~~4~~ and 5 have a sufficient number of qualified staff and sufficient financial, technical and technological resources ~~necessary~~ for the effective performance of their functions related to the implementation of this Directive.

Article 15

Training

1. Member States shall take the necessary measures to ensure adequate resources for and the provision of **regular and** specialised training ~~at regular intervals~~ for the members of the law enforcement, ~~the judiciary~~ and the staff of authorities **including court staff, assistance and support services, border guards** tasked with criminal investigations and proceedings of criminal offences referred to in Articles 3, ~~4~~ and 5.

2. Without prejudice to judicial independence **and differences in the organisation of the judiciary across the Union**, Member States shall **encourage both general and specialised training for judges and prosecutors** ~~take the necessary measures to ensure that specialised regular training is provided to judges, prosecutors, law enforcement and judicial staff and competent authorities' staff~~ involved in criminal proceedings and investigations with respect to the objectives of this Directive.

Article 16

Investigative tools

Member States shall take the necessary measures to ensure that effective and proportionate investigative tools are available for investigating or prosecuting criminal offences referred to in Articles 3, ~~4~~ and 5. Where appropriate, **those** ~~these~~ tools shall include special investigative tools, such as those ~~which are~~ used in **combatting** ~~countering~~ organised crime or in other serious crime~~s~~ cases.

Article 17

Data collection and statistics

1. Member States shall ~~collect~~ **ensure that a system is in place for the recording, production and provision of anonymised** statistical data ~~disaggregated by~~ **on** the type of criminal offence referred to in Articles 3~~,~~ ~~4~~ and 5 **in order to monitor the effectiveness of their systems to combat offences referred to in this Directive.**

2. The statistical data referred to in paragraph 1 shall ~~include, at least, the following~~**, as a minimum, include existing data available at the central level on:**

   a) The number of **registered** third-country nationals who were subject to the criminal offence, disaggregated by citizenship, sex and age (child/adult) **in accordance with national law and practices;**

   ~~b) the average length of the criminal investigation of cases;~~

c) the number of natural persons prosecuted for criminal offences referred to in this Directive, ~~disaggregated by sex and citizenship~~;

d) the number of legal persons prosecuted for criminal offences referred to in this Directive, ~~disaggregated by place of establishment;~~

e) the number of **prosecution decisions** ~~of the prosecution services disaggregated by type of decision~~ (**decisions** to prosecute or not to prosecute)~~;~~

f) the number of final-court **judgements** ~~decisions disaggregated by type of decision~~ **(i.e**. conviction, acquittal, ~~dismissal on the substance or not, and including non-trial resolutions~~);

g) the number of natural persons convicted of criminal offences referred to in this Directive, ~~disaggregated by sex and citizenship~~;

h) the number of natural persons subjected to penalties disaggregated by the type and level of penalty (imprisonment, fines, others) sex and citizenship;

i) the number of legal persons convicted for criminal offences referred to in this Directive ~~and sanctioned~~;

j) the number of legal persons sanctioned **following a conviction**, disaggregated by ~~place of establishment and~~ type of sanction (fines, others);

~~k) the average length of courts proceedings of cases in first instance, second instance and cassation.~~

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3. Member States shall, ~~on an annual basis and by 1 July each year~~ **transmit annually to the Commission the statistical data referred to in paragraph 2 for the previous year in a standard, easily accessible and comparable format basis**. **The Member States shall endeavour to transmit these data each year by 30 September, and shall transmit them at the latest by 31 December.** ~~publish, in a machine-readable and disaggregated format, the statistical data referred to in paragraph 2 for the previous year and transmit it to the Commission.~~

Article 18

~~*Replacement of Directive 2002/90/EC and Framework Decision 2002/946/JHA*~~

References to Directive 2002/90/EC and Framework Decision 2002/946/JHA

References to Directive 2002/90/EC and Framework Decision 2002/946/JHA shall be construed as references to this Directive.

~~1. Directive 2002/90/EC and Framework Decision 2002/946 JHA are replaced with regard to the Member States bound by this Directive, without prejudice to the obligations of those Member States with regard to the date for transposition of those instruments into national law.~~

~~2. With regard to the Member States bound by this Directive, references to Directive 2002/90/EC and Framework Decision 2002/946 JHA shall be construed as references to this Directive.~~

PUBLIC

Article 19

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [~~*one*~~ ***two*** *years* ***from*** ~~*after*~~ *the* ***date of*** *entry into force of this Directive*] ~~at the latest~~. They shall **immediately inform** ~~forthwith communicate to~~ the Commission ther**eof** ~~text of those provisions~~.

2. When Member States adopt those **measures** ~~provisions~~, they shall contain a reference to this Directive or **shall** be accompanied by such ~~a~~ reference on the occasion of their official publication. **The methods of making such reference shall be laid down by** Member States ~~shall determine how such reference is to be made~~.

3. Member States shall communicate to the Commission the text of the main **measures** ~~provisions~~ of national law which they adopt in the field covered by this Directive.

PUBLIC