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From:	General Secretariat of the Council
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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 - Written comments and suggestions provided by Member States and Schengen Associated States concerning Articles 1-6

At the meeting on 30 January 2024, the COPEN Working Party discussed the above-mentioned proposal for the first time, in COMIX configuration. Articles 1-6 were examined.

Subsequently to the meeting, the Presidency invited Member States and Schengen Associated States to submit comments and drafting suggestions concerning Articles 1-6 in writing.

The input so received has been set out in the Annex.[1]

[1] If additional input will be provided, a REV version will be made.

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MEMBER STATES

CYPRUS

PUBLIC

Preliminary comments:

Art.3(1)(a):

Overall, we support this Article in principle but, a lot of work needs to be done in order to ensure that it will not be an impediment to successful prosecutions and convictions.

Article 3(1)(a) of the Proposal makes it an offence to assist a third country national to enter a Member State for "*financial gain, material benefit, or promise thereof*". We understand that the intention of this Proposal is to make this offence broader than its predecessor, provided for by Article 1 (b) of the Directive 2002/90/EC, which only refers to "*financial gain*". In our view, this paragraph is not broad enough to cover every situation where there is any gain, of any type, obtained from the smuggling. We therefore suggest that subparagraph (b), of paragraph (1), of Article 3, is rephrased in a way that it broadens its scope, so as to include scenarios or actions where one's gain may not be of "*a financial nature, or a material benefit or a promise*", i.e. where the smuggler agrees that a third country national, instead of paying for the trip, will drive the boat to the Member State. To achieve this, we recommend that the phrase "*a financial or material benefit*" be deleted and replaced by "*benefit*".

Further to the above, we understand that the phrase "*or carries out the conduct in order to obtain such benefit*", included in Article 3(1)(b), intends to cover the situation where it is impossible to prove receipt of any type of benefit from the smuggler. From the 1st working party, it was made obvious that many Member States were unclear as to whether such conduct, where no proof of actual receipt of benefit was possible, was covered by this article. We therefore suggest that the wording of the said phrase is altered by deleting the phrase "*in order to*" and by replacing it with "*with the intention to*", so that it reads as follows: "*or carries out the conduct **with the intention** to obtain such benefit*".

Art.3(1)(b)

Article 3(1)(b) provides that a person who intentionally assists a third country national to enter, transit across or stay in a Member State, when there is a high likelihood that such assistance may cause serious harm to a person, is committing a criminal offence.

There seems to be a huge shift from the broader drafting of the offence provided for by Article 1(a) of the Directive 2002/90/EC. Article 1(a) of the said Directive covers all situations where someone is caught assisting, without any gain, a third country national to enter or transit across a Member State. It is not restricted only to cases where such assistance is accompanied with the rick of causing serious harm to another, which could have been anticipated. Prosecution of this offence, under Article 1 of the said Directive, is also subject to the reservation provided for by paragraph 2, which provides that it is up to the Member States to decide whether or not to impose sanctions where such behavior is a result of humanitarian assistance to the person concerned.

Although we understand that it is a minimum harmonization Directive and Member States can go over and above the minimum standards when transposing it, we, nevertheless believe it's important to keep the original criminal offence of 'intentionally assisting' in its broader form, as provided for by Article 1(a) of the Directive 2002/90/EC, and expand it further, so as to include situations-scenarios where one intentionally assists a third country national to *'stay'* in a Member State, as suggested by the phrasing of Article 3(1) of the Proposal. From a practical point of view, the broader offence covered by Article 1(a) of the said Directive, has an added value in situations where, from the facts of the case, it is clear that the third country nationals were smuggled in the Member State by providing some sort of benefit to the smuggler, but there is insufficient evidence to prove it. Experience shows that third country nationals assisted to enter, transit across or stay in a Member State do not disclose to the authorities anything that might put their smugglers or themselves at risk with the law.

Art. 3(2)

With regards to Article 3(2) of the Proposal, we welcome the objective it seeks to achieve. Nevertheless, we do have some concerns in relation to its practical application and more specifically with the issue of jurisdiction. Therefore, we have a scrutiny reservation and we would be in a better position to comment on it after Article 12 is discussed and explained by the Commission.

Art.8

Most of these sanctions are already included in our national legislation. We do, however, have some reservations as to how paragraph (3) of Article 8 will work in practice. We shall wait for the comments of the Commission before we provide our final views on this paragraph.

Art.12

We do have some reservations regarding the chapter of jurisdiction. We will be in a better position to comment on it after it is discussed and explained by the Commission.

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DENMARK

Regarding article 6(5)(b) of the draft directive on trafficking in human beings, the proposal's section on coherence with the Union's policy in other areas does not refer to the Return Directive (Directive 2008/115/EC). It is therefore unclear how this proposal relates to the Return Directive, cf. preamble 11 and Article 6(5) (b) and (c).

E.g. article 6(5)(c) of the proposal mentions entry bans of a maximum of 10 years, while entry bans under Article 11(2) of the Return Directive may in principle not exceed five years.

In general, the part of article 6(5)(b) dealing with return could perhaps be omitted from the Directive and a general reference to the Return Directive be inserted instead.

FINLAND

Comments by Finland regarding the COPEN meeting on 30th of January 2024

Finland again thanks the Commission on the proposal. As stated in the COPEN meeting on 30th of January, the aims and objectives of the proposal are important. As also stated in the meeting, the matter has not yet been discussed in the Finnish Parliament, which means that all the comments made by Finland are only preliminary.

Article 3 Criminal offences

We have some comments hoping for clarification on Article 3 and its relation to Article 5. In Finland, for example, *facilitation* of illegal entry has been criminalized. In Article 3, the term *assisting* is used. We believe that it might be useful to clarify a bit further, what is meant by assisting in Article 3 in relation to *aiding and abbetting* in Article 5. We have some concerns on what would be seen as aiding and abetting in a crime relating to assistance of legal entry etc.

Article 4 Aggravated criminal offences

An aggravated offence referred to in Art 4(e) may be punishable in Finland according to separate criminal provisions relating to crimes against life. Since these types of crimes are already punishable in their own provisions in national legal systems, it could be best that an act referred to in Art 4(e) could be punishable through separate national provisions that have already been criminalized.

We also find the gross negligence mentioned in Art 4(b) challenging. We believe that aggravated acts should only be punishable intentionally, as the acts set out in the Art 4 are particularly serious in nature and their attempt should also be punishable according to Art 5. With reference to the basic principles of criminal law, it is challenging to criminalize attempts of acts that are not intentional. In Finland, for example, attempt can only be punishable for intentional acts.

Article 6 Penalties for natural persons

We would like to highlight that in the preparation of EU-level criminal legislation, the basic national solutions of the Member States legal systems and especially the internal consistency of the sanctioning system must be respected. For example, in Finland, the maximum penalty for crimes referred to in Article 3 is two years, and for aggravated crimes, six years. In this regard, we find the proposed maximum penalties too high and support adjusting them to be more reasonable. When defining a reasonable level, the level of maximum penalties in other similar criminal law directives should be taken into account.

Regarding the list in Article 6(5), at this time we would like to point out at least points a), b) and d) as potentially challenging in light of our national legal system. Regarding Article 6(5) we consider that the word "shall" should be replaced with the word "may" to ensure that Member States have sufficient flexibility when implementing the provision.

PUBLIC

FRANCE

(courtesy translations in English inserted)

PUBLIC

Dans le cadre de la réunion du groupe COPEN trafic de migrants du 30 janvier 2024, la présidence sollicite des Etats membres des commentaires écrits sur les articles 1 à 6 de la proposition de directive établissant des règles minimales pour prévenir et combattre l'aide à l'entrée, au transit et au séjour non autorisés dans l'Union, et remplaçant la directive 2002/90/CE du Conseil et la décision-cadre 2002/946/JAI du Conseil. En réponse à la demande de la présidence, les autorités françaises souhaitent indiquer les éléments suivants.

A titre liminaire, les autorités françaises partagent l'objectif de lutte contre le trafic de migrants. Elles s'interrogent toutefois sur la méthodologie d'élaboration de ce texte, qui ne repose pas sur une étude d'impact démontrant l'intérêt d'une nouvelle législation en cette matière. Par ailleurs, elles font valoir plusieurs points de vigilance portant notamment sur les incriminations, les peines encourues, le régime procédural et les règles de compétence prévues par le texte.

Les autorités françaises s'interrogent également sur l'absence de la prise en compte de la numérisation de ce phénomène, largement documenté par EUROPOL, FRONTEX, l'OSCE, le Conseil de l'Europe et mis en avant lors de l'alliance globale du 28 novembre dernier.

Courtesy translation

At the outset, *the French authorities share the Commission's objective of combating migrant smuggling, but question the methodology used in drafting this text, which is not based on an impact assessment demonstrating the benefits of new legislation in this field. In addition, they have a number of points to watch out for, in particular with regard to the incriminations, penalties incurred, procedural arrangements and jurisdictional rules set out in the text.*

The French authorities also question the failure to take account of the digitalisation of this phenomenon, which has been widely documented by EUROPOL, FRONTEX, the OSCE and the Council of Europe and was highlighted at the Global Alliance on 28 November.

A l'article 3, relatif aux infractions pénales prévues par la directive :

Sur le paragraphe 1, qui prévoit que les États membres doivent incriminer l'aide à l'entrée et au séjour irrégulier d'un ressortissant d'un État tiers, au moins lorsque le mis en cause en a tiré un avantage ou lorsqu'il existe une forte probabilité de causer un préjudice grave à une personne :

Les autorités françaises notent que la proposition de directive ne prévoit qu'une harmonisation *a minima* des incriminations relatives au trafic de migrants, comme le rappellent le titre du texte et le considérant 8 (qui prévoit "*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*"). Elles estiment très important de bien garder à l'esprit que les Etats membres sont libres d'aller au-delà dans le champ des comportements qu'ils peuvent prohiber.

Par ailleurs, les autorités françaises s'interrogent sur la pertinence des deux éléments constitutifs tenant à la condition liée à la recherche d'un avantage et à celui de la probabilité de causer un préjudice grave à une personne.

Elles prennent note des explications fournies par la Commission s'agissant de ces deux critères.

Toutefois, d'une part, s'agissant de la condition tenant à la recherche d'un avantage, elles estiment que d'autres instruments internationaux protègent déjà les personnes qui agissent dans un but humanitaire. A ce titre, les conventions SAR **(Convention internationale sur la recherche et le sauvetage maritime)** et SOLAS **(Convention internationale pour la sauvegarde de la vie humaine en mer)** protègent suffisamment les personnes qui interviennent pour sauver les personnes qui se trouvent en état de détresse en mer.

PUBLIC

D'autre part, les deux critères paraissent difficiles à démontrer sur le plan probatoire, ce qui risque de générer de la complexité dans la recherche et la poursuite de ces infractions. Les autorités françaises ont noté la précision de la Commission tenant à expliquer que cette difficulté était précisément à l'origine du caractère alternatif des critères. Toutefois, elles estiment que certains cas pourraient ne pas être couverts par l'une ou l'autre des hypothèses. Ce serait le cas à titre d'exemple, du recours aux systèmes de paiement par compensation informelle dans un pays tiers (« hawala ») ou d'une contrepartie immatérielle (une demande en mariage avec un membre européen de la famille que le passeur a aidé à entrer ou circuler irrégulièrement sur le territoire de l'Union européenne) lorsque la commission des faits n'est pas de nature à entraîner un préjudice particulièrement grave aux personnes.

PUBLIC

Enfin, le fait de prévoir une exemption pénale en cas d'aide à l'entrée irrégulière lorsque les faits n'ont pas donné lieu à une contrepartie pour le mis en cause, est de nature à soulever des difficultés juridiques et politiques marquées dans des systèmes où l'entrée irrégulière sur le territoire elle-même constitue une infraction pénale.

Par conséquent, les autorités françaises soutiennent l'absence de modification de l'incrimination prévue actuellement dans la directive de 2002.

Sur le paragraphe 2, qui prévoit que les Etats membres doivent incriminer l'incitation à entrer, séjourner et circuler irrégulièrement sur le territoire de l'Union européenne :

Cette incrimination appelle une grande vigilance dans la mesure où elle serait susceptible de porter une atteinte excessive à la liberté d'expression, en particulier compte-tenu de la nature très politique du sujet de la politique migratoire. Il ne semble pas que la rédaction exclue par exemple, des propos qui contesteraient le bien-fondé de la réglementation en vigueur en matière d'immigration.

Dès lors, les autorités françaises émettent un avis très réservé sur la création d'un tel délit autonome d'incitation et suggèrent plutôt que l'on se concentre sur la responsabilité du complice par instigation (tel que le prévoit l'article 5 de la proposition de directive).

En revanche, elles déplorent que le principal besoin opérationnel n'ait pas été traité : celui des boucles "fermées" (Whatsapp, Telegram, Snapchat ou Tiktok, etc), qui ne peuvent pas juridiquement être qualifiées de lieu d'expression publique et qui sont aujourd'hui utilisées beaucoup plus largement que les moyens de communication « publics » et qui attirent toujours plus de candidats au départ.

PUBLIC

Courtesy translation

Article 3, on the criminal offences covered by the directive:

<u>On paragraph 1</u>, which provides that Member States must make it a criminal offence to facilitate the unauthorized entry and residence of a third-country national, at least where the person concerned has derived an advantage or where there is a strong likelihood of causing serious harm to a person:

The French authorities note that the proposal for a directive only provides for minimum harmonization of offences relating to migrant smuggling, as recalled in the title of the text and Recital 8 (which states "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"). They consider it very important to bear in mind that Member States are free to go further in the scope of behaviors they can prohibit.

In addition, the French authorities question the relevance of the two constitutive elements relating to the condition of seeking an advantage and the likelihood of causing serious harm to a person.

They take note of the explanations provided by the Commission regarding these two criteria.

However, on the one hand, with regard to the condition of seeking an advantage, they consider that other international instruments already protect persons acting for humanitarian purposes. In this respect, the SAR and SOLAS conventions provide sufficient protection for those who intervene to rescue people in distress at sea.

On the other hand, the two criteria appear to be difficult to prove from an evidential point of view, which is likely to generate complexity in the investigation and prosecution of these offences. The French authorities have noted the Commission's clarification that this difficulty was precisely the reason for the alternative nature of the criteria. However, they consider that certain cases might not be covered by either of the hypotheses. This would apply, for example, to the use of payment systems based on informal compensation in a third country ("hawala"), or immaterial consideration (a marriage proposal to a European family member whom the smuggler has helped to enter or circulate illegally within the territory of the European Union) when the commission of the acts is not such as to cause particularly serious harm to individuals.

PUBLIC

Lastly, providing for a criminal exemption in the case of aiding unauthorized entry where the acts have not given rise to any consideration for the respondent is likely to raise significant legal and political difficulties in systems where unauthorized entry itself constitutes a criminal offence.

Accordingly, the French authorities maintain that there is no need to amend the incrimination currently provided for in the 2002 Directive.

<u>With regard to paragraph 2</u>, which stipulates that Member States must criminalize incitement to enter, reside and move illegally within the territory of the European Union:

This incrimination calls for great vigilance as this provision could unduly infringe freedom of expression, particularly given the highly political nature of the subject of migration policy. The wording does not appear to exclude, for example, comments that challenge the validity of current immigration regulations.

The French authorities are very cautious about the creation of such an autonomous offence of incitement, and suggest instead focusing on the liability of the accomplice by instigation (as provided for in article 5 of the proposed directive).

On the other hand, they deplore the fact that the main operational need has not been addressed: that of "closed" loops (Whatsapp, Telegram, Snapchat or Tiktok, etc.), which cannot legally be qualified as a place for public expression, and which are now used much more widely than "public" means of communication, attracting ever more would-be departures.

A l’article 4, relatif aux infractions pénales aggravées :

Les autorités françaises notent que la Commission interprète cette disposition comme imposant la création d’infractions autonomes et qu’il lui paraît nécessaire qu’elle demeure comme telle, dans la mesure d’une part où de telles infractions permettraient de mieux rendre compte des modes opératoires des trafics de migrants et d’autre part où il serait plus compliqué d’écarter une circonstance aggravante que l’élément constitutif d’une infraction.

Les autorités françaises insistent sur le fait que la distinction entre « circonstances aggravantes » et « infractions aggravées » n’existe pas en tant que telle en droit pénal dans tous les systèmes nationaux. Il leur semble qu’une circonstance aggravante permet aussi bien qu’un élément constitutif de caractériser les faits le plus finement possible, au regard d’un mode opératoire, de circonstances particulières etc. Par ailleurs, l’opération de qualification juridique ne présente pas de caractère plus ou moins obligatoire selon qu’un élément constitue un élément constitutif ou une circonstance aggravante, de sorte qu’elle n’identifie pas de plus-value à l’obligation de créer des incriminations autonomes aggravées.

Elles proposent qu’une marge de souplesse soit aménagée pour les Etats membres, qui pourrait prendre la forme d’un considérant qui pourrait être rédigé comme suit :

> “*The concept of aggravated criminal offences referred to in Article 4 may, depending on national legislation, refer to autonomous offences or to the offence referred to in Article 3 aggravated by an aggravating circumstance*.”

Par ailleurs, afin de respecter l’esprit du texte tenant au caractère minimal de l’harmonisation imposée, elles demandent à ce que l’aggravation de l’infraction puisse être prévue dans l’une ou plusieurs des situations mentionnées. La rédaction pourrait être la suivante :

Article 4

Aggravated criminal offences

> *Member States shall ensure that the conduct referred to in Article 3 constitutes an aggravated criminal offence in one or more of the following cases ~~where~~:*

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

(b) the criminal offence deliberately or by gross negligence caused serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence;

(c) the criminal offence was committed by use of serious violence;

(d) the third-country nationals who were subject to the criminal offence were particularly vulnerable, including unaccompanied minors;

(e) the criminal offence caused the death of third-country nationals who were subject to the criminal offence.

PUBLIC

Courtesy translation

Article 4 on aggravated criminal offences:

The French authorities note that the Commission interprets this provision as requiring the creation of autonomous offences, and considers it necessary that it remains as such, since on the one hand they would better reflect the modus operandi of migrant smuggling, and on the other hand it would be more complicated to set aside an aggravating circumstance than the constituent element of an offence.

The French authorities stress that the distinction between "aggravating circumstances" and "aggravated offences" does not exist as such in criminal law in all national systems. In their view, an aggravating circumstance is just as effective as a constituent element in characterizing the facts as precisely as possible, in terms of the modus operandi, particular circumstances, etc. Furthermore, the operation of legal qualification is not more or less obligatory depending on whether an element constitutes a constituent element or an aggravating circumstance, so that it does not identify any added value to the obligation to create autonomous aggravated incriminations.

They propose that a margin of flexibility be provided for Member States, which could take the form of a recital worded as follows:

> "*The concept of aggravated criminal offences referred to in Article 4 may, depending on national legislation, refer to autonomous offences or to the offence referred to in Article 3 aggravated by an aggravating circumstance.*"

In addition, they ask that minimum harmonization should only be imposed in at least one of the five situations mentioned. The alternative wording could be as follows:

Article 4

Aggravated criminal offences

Member States shall ensure that the conduct referred to in Article 3 constitutes an aggravated criminal offence in one or more of the following cases~~where~~ :

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

(b) the criminal offence deliberately or by gross negligence caused serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence;

(c) the criminal offence was committed by use of serious violence;

(d) the third-country nationals who were subject to the criminal offence were particularly vulnerable, including unaccompanied minors;

(e) the criminal offence caused the death of third-country nationals who were subject to the criminal offence.

PUBLIC

A l'article 5, relatif à l'incitation, la complicité et la tentative :

S'agissant spécifiquement de l'incitation, les autorités françaises pourraient accepter la rédaction actuelle de l'article 5 sous réserve qu'un renvoi soit prévu, par exemple dans un considérant, aux notions du droit national. Il semble essentiel que soit possible pour les législateurs nationaux, conformément aux règles de droit pénal national, de préciser que la notion renvoie au fait d'avoir, par incitation, provoqué la commission d'un délit effectivement tenté ou consommé.

PUBLIC

Courtesy translation

Article 5, on incitement, complicity and attempt:

With regard specifically to incitement, the French authorities could accept the drafting of Article 5, provided that a reference is made, for example in a recital, to the concepts of national law. It seems essential that it should be possible for national legislators, in accordance with the rules of national criminal law, to specify that the notion refers to the fact of having, by incitement, provoked the commission of an offence actually attempted or consumated.

A l'article 6, relatif aux sanctions applicables aux personnes physiques :

S'agissant des points 3 et 4, qui prévoient des quanta de peines minimales en répression des infractions aggravées mentionnées à l'article 4, points a à d) - quinze ans d'emprisonnement - et e) - quinze ans d'emprisonnement - :

Les autorités françaises, en cohérence avec leur proposition relative à l'article 4 prévoyant que les situations mentionnées aux points a à d soient alternativement incriminées (à titre autonome ou dans le cadre d'infractions aggravées), sollicitent que ces deux points soient réunis dans un même point et prévoient un même *quantum* de peine encouru. Elles peuvent être souples sur le *quantum* minimal de la peine encourue, qui pourrait être de dix ou quinze ans.

S'agissant du point 5 qui prévoit plusieurs peines complémentaires applicables aux personnes physiques ayant commis des faits relevant du champ de la directive :

Les autorités françaises sollicitent l'introduction d'une certaine souplesse dans la rédaction.

Elles proposent notamment des modifications rédactionnelles à la marge afin de clarifier que les Etats membres peuvent prévoir une durée de l'interdiction de territoire plus longue que dix ans, voire définitive.

Elles proposent l'ajustement rédactionnel suivant :

> ***5.*** *In addition to criminal sanctions imposed in accordance with paragraphs 1 to 4, Member States shall take the necessary measures to ensure that natural persons who have been convicted of committing any of the criminal offences referred to in Articles 3, 4 and 5 may be subject to one or more of the following criminal or non-criminal sanctions or measures imposed by a competent authority ~~, including~~ :*
>
> > *(a) withdrawal of permits or authorisations to pursue activities which have resulted in committing the 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) exclusions from access to public funding, including tender procedures, grants and concessions;*
> >
> > *(e) fines;*
> >
> > *(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.*

Courtesy translation

Article 6, on penalties applicable to natural persons:

With regard to points 3 and 4, which provide for minimum penalties for the aggravated offences mentioned in article 4, points a) to d) - fifteen years' imprisonment - and e) - fifteen years' imprisonment - :

The French authorities, in line with their proposal relating to Article 4 that the situations mentioned in points a to d be alternatively incriminated (on an autonomous basis or as part of aggravated offences), request that these two points be brought together in a single point and provide for the same quantum of penalty incurred. They can be flexible on the minimum quantum of sentence incurred, which could be ten or fifteen years.

With regard to point 5, which provides for a number of additional penalties applicable to natural persons who have committed acts falling within the scope of the directive:

The French authorities are calling for a degree of flexibility in the wording.

In particular, they propose editorial changes in order to clarify that Member States pay provide for a duration of inadmissibility of ten years, if not definitive.

They propose the following editorial adjustment:

> **5.** *In addition to criminal sanctions imposed in accordance with paragraphs 1 to 4, Member States shall take the necessary measures to ensure that natural persons who have been convicted of committing any of the criminal offences referred to in Articles 3, 4 and 5 may be subject to one or more of the following criminal or non-criminal sanctions or measures imposed by a competent authority~~, including~~ :*
>
> > *(a) withdrawal of permits or authorisations to pursue activities which have resulted in committing the criminal offence, or prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the criminal offence was committed;*

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(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) exclusions from access to public funding, including tender procedures, grants and concessions;

(e) fines;

(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.

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Written Comments - Germany

COPEN (Migrant smuggling) - 30 January 2024

Article 3

- Paragraph 1: The proposal states in recital 7 that the purpose of this Directive is not to criminalise 'humanitarian aid', but according to Article 3 para 1 b), the intention to benefit is not a precondition if there is a "high likelihood of causing serious harm to a person". It would be important to know whether, from the Commission's point of view, 'humanitarian aid', such as rescues of refugees and migrants in distress at sea and subsequently disembarked in Europe after allocation of a port, does not fulfil Article 3 para 1 b). If so, which elements of the offence are not met, or would it only be exempt because the element of the offence "high likelihood of causing serious harm to a person" is not fulfilled as the rescue is aimed at reducing the risk. How is the inherently continuously dangerous situation on board following the rescue and before disembarkation being factored in? It is also unclear whether the required intent needs to encompass the "high likelihood of serious harm". As humanitarian actions in "compliance with legal obligations" are to be excluded according to recital 7, it would be important to clarify that possible non-compliance with national administrative rules following a rescue conducted in compliance with international law or ship safety concerns following a port state control do not result in criminalization under Article 3. How does the proposal ensure exclusion in the case of humanitarian smuggling of family members? Germany could provide for a provision to clarify the exemption for "humanitarian aid".

  Additionally, we would like to know which cases should be covered using the wording "transit across" that are not already covered by "enter or stay within the territory"?

- Paragraph 1 b): It is unclear what is meant by "serious harm." At least the type of damage, such as damage to health, but not financial damage, should be explicitly described. Moreover, this offense should be designed as an aggravated criminal offense (as in Germany). In this way, the interpretation that cases of humanitarian aid are covered can be avoided because a criminal offense then always requires the fulfilment of the conditions in Article 3 para 1 a) or para 2. Differences in the extent of the violation of legal interests compared to the cases under Article 4 b) and e) can also be resolved through different penalty frameworks for aggravated criminal offenses (see Article 6 para 3 and 4).

  If Article 3 para 1 b) is not transferred to Article 4, therefore not designed as an aggravated criminal offense it would be necessary to include an additional provision in the regulatory text in Article 3 in order to prevent parents from being punished for smuggling their minor children. Because the parents exposed the

children at least objectively to the danger of serious damage through a crossing or even journey by land.

- Paragraph 2: We would like to point out that the translation of "publicly instigating" in Article 3 para 2 with "öffentliche Anstiftung" in the German version of the proposed directive raises problems and is incorrect. "Anstiftung" is defined in Section 26 StGB (German Criminal Code) as the intentional provision of another to its "intentionally committed illegal act". However, according to the comments made by the COM to Article 3 para 2, this should not be meant here. In Article 5, on the other hand, the translation into German is correct (translation of "incitement" with "Anstiftung"). We ask for an examination as to whether, in Article 3 para 2, the concept of "public call" better reflects the content of the proposal in Article 3 para 2.

  If, in the opinion of the COM, the dissemination by agencies of a "rumour that Greece has opened the borders" is also covered by para 2 as an act to be punished, we understand that this affects the freedom of expression and possibly also freedom of the press. This should be avoided.

  Additionally, we have doubts that the offence referred to in para 2 is sufficiently well defined. We fear that the objective of the proposed directive, to "clarify what acts should be punished", will not be fulfilled by para 2. We propose to consider a new wording of para 2 so that only the instrumentalization of migrants through public calls, cited by the COM, is captured.

Article 4

- New regulatory proposal: Germany provides for a provision in which the attempt to evade police control in the context of a traffic smuggling while acting grossly against the traffic rules and in a ruthless manner, thereby endangering the physical integrity or life of another person or property of significant value, is designed as an aggravated criminal offence. A similar scheme is requested to be included in the proposed directive.

- b) and e): It is not clear why in the cases of Article 4 b) and e), which obviously refer to the basic case of Article 3 para 1b), regarding the injured party it is not referred to the person in general (instead of the third-country nationals)? These aggravated criminal offences should also cover serious harm to the health of or fatal consequences for others such as police officers.

- c): The notion of "use of serious violence" seems unclear because it is not stated whether the use of certain means (such as weapons or the like) is necessary and against whom the violence used must be directed at (against the smuggled person or against third parties?).

2

PUBLIC

- d): It is requested to specify in more detail what the particular vulnerability of the smuggled persons (comparable to the unaccompanied minors mentioned by way of example) should result from in concrete terms.

Article 6

- Paragraph 2: In Germany, the penalty framework for acts of smuggling comparable to Article 3 of the proposed directive will be increased to a maximum term of imprisonment of ten years. The previous penalty threats for smuggling offences were unreasonably low (three months to five years) and in many cases did not allow for an adequate punishment. The nature and extent of the penalty must reflect the social detriment of the specific smuggling behaviour and properly guide the court's penalty decision. To adequately influence the perpetrators as well as for general preventive considerations with regard to the increase of smuggling crime in Germany, it was necessary to increase the penalty framework to a maximum term of imprisonment of ten years. In order to ensure a consistent and effective European fight against smuggling crime, Germany proposes to increase the maximum level of at least three years currently foreseen in the proposed directive.

- Paragraph 5: It is necessary to ensure that member states have sufficient flexibility during implementation (choice of means, conditions, duration, etc.). For example, in Germany, the imposition of a criminal prohibition on professional activities is subject to certain further conditions with regard to the risk of repetition and proportionality. In principle, it will only be imposed for a period of one to five years

- Paragraph 5 c): The re-entry ban of no more than ten years laid down in the proposed directive is not consistent with the Return Directive, which, in Article 11 paragraph 2, sets a maximum period of 5 years for the duration of the entry ban, but which is not limited in time if the third-country national presents a serious risk to public policy, public security or national security. The proposal should therefore be adapted so that entry bans are also possible for more than 10 years, similar to what has been formulated in the Return Directive.

- Paragraph 5 f): Freezing and confiscation should be regulated in a separate article. Article 10 of the PIF Directive (2017/1371) could be used as an example.

PUBLIC

GREECE

PUBLIC

Remarks from Greece on the proposed directive laying down minimum rules to prevent and counter the facilitation of unauthorized entry, transit and stay in the Union:

According to article 3 of the proposal, obtaining financial or material benefits is a constituent element for the criminalization of smuggling. Thus, the specific criminal conduct is considered as a crime of purpose with direct subjective element (*mens rea*). However, this approach is in clear contradiction with the modus operandi of the migrant smuggling networks as described in the explanatory memorandum (page 2) i.e. the payment with the use of crypto-currencies, digital money or other unofficial forms of payment (e.g. hawala).

Thus, in practice, it will be almost impossible to prove the economic or other benefit and obtain the criminal conviction of the responsible persons. The same difficulties would apply when it comes to the so called “lower level actors”, who are in practice often used by smuggling networks for the transport tasks with a high risk of arrest.

So the condition of benefit as part of the constituent element of the crime should be deleted.

Furthermore, it is necessary to delete the risk of serious harm as part of the constituent element, because there are cases in which there is no risk of serious harm. This is the case, particularly in the small-scale road transport. The risk of harm mentioned in the article 3, is appropriate for maritime smuggling or large-scale road smuggling (people in trucks for example).

Therefore, it is necessary to delete these conditions (under 3.1, a and b) and keep the crime in its basic form. Otherwise, it will be extremely difficult to punish the actual perpetrators of the smuggling.

In conclusion, these two conditions should constitute aggravating circumstances.

LATVIA

PUBLIC

Article 1 of the Directive sets out the scope of the proposed Directive, notably that it establishes minimum rules concerning the definition of criminal offences and sanctions on the facilitation of unauthorised entry, transit and stay of third-country nationals in the Union, as well as measures to better prevent and counter it.

Latvia supports to set up the scope of the proposed Directive and to establish minimum rules concerning the definition of criminal offences and sanctions on the facilitation of unauthorised entry, transit and stay of third-country nationals in the Union, and measures to better prevent and counter it.

Article 2 of the Directive sets out definitions of the main terms used in the Directive, namely 'third-country national', 'unaccompanied minor' and 'legal person'.

Latvia has no objections in general to the main terms used in the Directive.

Article 3 of the Directive defines that intentionally assisting a third-country national to enter, transit across or stay within the territory of any Member State constitutes a criminal offence when there is an actual or promised financial or material benefit, or where the offence is highly likely to cause serious harm to a person. Publicly instigating third-country nationals, for instance through the internet, to enter, transit or stay in the Union irregularly is also considered to be an offence. The proposal also highlights in recitals that the purpose of the Directive is not to criminalise third-country nationals for the fact of being smuggled. It also clarify that 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.

Latvia does not support the proposal which defines Criminal offences. Latvia does not support Directives Article 3, paragraph 1, in Latvia's view, a definition of illegal transfer of person is too narrow. In Latvia`s opinion criminal liability for criminal offences described in Directives Article 3, paragraph 1 should be for fact that person 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. Obtaining a financial or material benefit should be aggravating circumstances with more severe punishment.

Directives Article 3, paragraph 2 does not provide aggravating circumstances, but it is less harmful offence. Latvia points out that according to Directives Article 3, paragraph 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. Instigating to commit criminal offence which is contained in Directives Article 5, so Latvia calls for withdrawal Directivees Article 3, paragraph 2.

Article 4 of the Directive defines the criminal offences related to more serious conducts concerning the facilitation of unauthorised entry, transit and stay in the Union, e.g. where the offence is committed within the framework of a criminal organisation, causes serious harm to, or endangers the life of the third-country nationals concerned, is committed using serious violence, or the smuggled migrants are particularly vulnerable, including unaccompanied minors. Facilitation that causes the death of one or more third-country nationals is also an aggravated criminal offence.

Latvia supports the need to define the criminal offences related to more serious conducts. At the same time, with regard to the definition of "serious harm" in Article 4(b) of the Directive, is it determined according to the national legislation of each country, or unified explanation and understanding is needed in the context of this Directive.

Also, with regard to the definition of "serious violence" in Article 4(c), in such a case, should the occurrence of severe bodily injuries or the intensity of individual actions, or the tools used be determined?

PUBLIC

Article 5 of the Directive requires Member States to criminalize forms of aiding and abetting, inciting and attempting the offences referred to in this Directive.

Latvia supports need to criminalize forms of aiding and abetting, inciting and attempting the offences referred to in this Directive.

Article 6 of the Directive establishes minimum rules on the penalties for the offences and the aggravated offences defined in this Directive. Member States should ensure that these are punishable by effective, proportionate and dissuasive criminal penalties. The proposed level of penalties reflects the seriousness of the offences: the main criminal offence of facilitation should be punishable by a maximum term of imprisonment of at least three years; aggravated offences should be punishable by a maximum term of imprisonment of at least ten years; the most serious aggravated offences, notably those that cause death of third-country nationals, should be punishable by a maximum term of imprisonment of at least fifteen years. The proposed article also establishes the additional sanctions or measures that could be imposed to convicted natural persons.

Latvia has no objections in general to the minimum rules on the penalties for the offences and the aggravated offences defined in this Directive.

According to Article 6, paragraph (b) there is determined punishment - 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. This type of punishment is not clear to Latvia.

PUBLIC

MALTA

General Comments

Malta reiterates its support for the objectives of the proposal with a view to improving the fight against migrant smuggling, including by strengthening criminal law rules and ensuring further consistency and coherence in this regard. Malta maintains a general scrutiny reservation on the entire proposal since national internal consultations are ongoing. Therefore, these comments are being made without prejudice to Malta's final position.

Article 3 (Criminal Offences)

Malta confirms its position expressed during the meeting of the Justice and Home Affairs Council on 5 March that the fight against migrant smuggling requires a broad definition of the criminal conduct. Therefore, the constitutive element in Article 3(1)(a), that is, '***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***' should be re-worded. It is proposed to refer to the 'the intent to make any gain whatsoever'.

Malta, therefore, suggests that the wording in paragraph 1(a) is amended as follows: '***the person who carries out the conduct requests, receives or accepts, directly or indirectly, any gain ~~a financial~~ or ~~material~~ benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit***'.

As regards to Article 3(1)(b), Malta reiterates that the constitutive element of '***high likelihood of causing serious harm to a person***' is legally unclear. Malta proposes the deletion of this constitutive element from Article 3. In addition, Malta reiterates that the distinction between this provision and Article 4(b) remains unclear.

PUBLIC

On paragraph 2, Malta notes that the conduct referred to in such provision, that is, '***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*** ' requires further clarification in terms of the legal distinction to be drawn with the notion of 'incitement' in Article 5. In addition, Regulation (EU) 2022/2065 already covers, through the definition of the term 'illegal content' in Article 3(h), 'any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject-matter or nature of that law'.

PUBLIC

Article 4 (Aggravated criminal offences)

Malta reiterates its position on this Article calling for a more coherent and consistent approach with other criminal law instruments and therefore maintains opposition for the proposed nuanced approach as expressed during the meeting of the Justice and Home Affairs Council of 5 March.

More specifically, on paragraph (a), Malta notes that this provision is a standard aggravating circumstance and should therefore be moved to Article 9 (Aggravating circumstances).

On paragraph (d), Malta would also welcome a more severe punishment vis-à-vis vulnerable victims as an aggravating circumstance and hence this provision should also be moved to Article 9.

On paragraphs (b), (c) and (e), where reference is made to the notion of 'serious harm', 'endangering the life' or 'death', Malta reiterates its position that these are separate and autonomous offences. Therefore, Malta considers it appropriate to have these acts punished separately as additional charges to the offence of migrant smuggling depending on the specific facts of the individual cases.

Nationally, the act of causing the death of a person (wilful homicide) is punishable with life imprisonment whereas involuntary homicide is punishable with an imprisonment sentence not exceeding four years (or a fine). In addition, the involuntary death of more than one person, or the act by the same person causing involuntary death of a person as well as bodily harm to another person(s) is punishable with an imprisonment sentence of a term of up to ten years.

Article 5 (Incitement, aiding and abetting, and attempt)

Malta reserves its position on this Article pending further clarity on the discussion on Article 3(2).

Article 6 (Penalties for natural persons)

Malta reserves its position on this Article pending further clarity on the definition of the criminal offences. However, as a general remark, Malta would not be, in principle, opposed to the idea of having more severe penalties in this future Directive.

PUBLIC

THE NETHERLANDS

Article 3

- The Netherlands wants to iterate that the directive concerns minimum norms that member states may exceed positively, for instance in relation to which acts they do additionally criminalise and consider migrant smuggling. Nationally, we intend to go further than only criminalizing migrant smuggling for financial or material gain, and opt to not include this as a separate element of the criminalization. This is to avoid placing an additional burden on law enforcement authorities to motivate this element. In light of the extensive discussion that took place in relation to this element, we could support the removal of financial or material benefit in the article.

- We further emphasize the importance of not penalizing cases involving humanitarian assistance. An explicit humanitarian clause in the operational part of the text is however not necessary or effective and can be addressed through other means. This would spare law enforcement agencies the burden of refuting these grounds each time, even in cases of obvious criminal migrant smuggling. Inclusion in the recitals of the directive stating that the aim of criminalization cannot be to punish humanitarian cases seems in our opinion a suitable solution.

- Even though the directive is laying out minimum norms, we wonder if it is desirable to limit the minimum criminalisation under the directive to the entry, transit, or stay in relation to 'the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned'. The UN protocol's definition of migrant smuggling namely already stipulates a broader criminalization, in relation to the illegal entry of a person into one of the States Parties to the Protocol. As many European states have also ratified the UN protocol, this is a consideration to take into account in the European framework.

PUBLIC

- Moreover, the Netherlands is not yet convinced about article 3 para 2. It is currently too broadly formulated to ensure legality. What is publicly? What is instigation? How does it relate to preparatory acts for migrant smuggling as well as incitement, aiding and abetting, and attempts of migrant smuggling? If such a paragraph is to remain in the proposal, this will need to further clarified. Also, how does paragraph 2 relate to the question of jurisdiction? Is it not desirable to have a more far reaching extraterritorial jurisdiction so that instigation can also be addressed properly in relation to acts happening outside of the EU? We namely think that in practice this might often be the case.

PUBLIC

Article 4

- The relation between article 4 and 9 at this point is not satisfactory. We consider it more useful when the directive encapsulates that member states should be able to weigh all these instances in articles 4 and 9 as aggravations, but that it is up to member states which instances they actually codify as aggravating offenses, and which ones they consider aggravating circumstances. Perhaps they can be combined in one single article that provides for the above?

Article 6

- The Netherlands suggest that we change the title of this article to 'Penalties and measures for natural persons'.

- Furthermore, paragraph 4 talks of 'attempts to commit the criminal offence referred to in that provision [being with death as a consequence]'. To us it is not sufficiently clear in which cases 'the attempt of an offense that caused the death' applies. It is of course conceivable that no entry is made as the migrant e.g. drowns before entry. Yet this attempt of an offense that inherently entails a consequence from it being *completed* feels odd legally (in our national system).

- Paragraph 5 should be formulated more clearly and in line with other instruments, vividly pointing out that these measures are facultative rather than that all of the measures should be available nationally. Also, we feel that '(f) freezing and confiscation' has no place in this list and could rather use its own provision.

POLAND

PUBLIC

With regard to Article 3 (1) (b)

The term of 'serious harm' needs clarification.

It is unclear what the specific harm is? Is it related to harm to a person's life, health or freedom? Or does it refer to psychological harm, linked to the physical, mental suffering of the person concerned?

Article 3 (2)

The term of "public instigating third-country nationals to enter or transit across, or stay within the territory of …" needs clarification.

The lack of such a definition can lead to many doubts, as it is impossible to know whether it is: - encouraging the commission of the crime of smuggling migrants or - encouraging the migrants themselves to cross the border illegally.

Article 4 (b)

The term of "gross negligence and serious violence" needs clarification.

It would be useful to give specific examples of gross negligence. Do terms such as recklessness, bad intent fall within this definition? Whether we should define these terms as in the THB Directive.

Article 4 (c)

The term of "serious violence" needs clarification. Differences in the understanding of this term between member states will cause problems in the implementation of the provision.

Article 4 (d)

The term of "particulary vulnerable" needs clarification. What specific persons, apart from unaccompanied minors, will these term include?

ROMANIA

- Regarding art. 3 – Criminal offences

Regarding **art. 3 para. 1**, **RO** believes that the wording of art. 1 let. a) from Directive 2002/90/EC should be maintained, since the adoption of a new directive can be justified to the extent that an improvement of the current legal framework is achieved.

Art. 1 lit. a) of **Directive 2002/90/EC** requires the sanctioning of any person who knowingly helps a person who is not a national of a MS to enter or transit the territory of a MS in violation of the legislation of the State concerned regarding the entry or transit of foreigners. Or, by the fact that the facilitation of illegal entry or exit is criminalized only in the situation where the aim is to obtain a financial or material benefit or, as the case may be, when there is a high probability that the act committed will cause a serious injury to a person, the proposal of the Directive limits the protection afforded by the criminal law.

Regarding the criminal offence of facilitating the stay on the territory of a MS, regulated in art. 1 paragraph (1) let. b) from Directive 2002/90, we note that the proposal for the Directive broadly preserves the regulatory philosophy, in the sense that in order to have a criminal offence committed it is necessary to pursue the profit motive, a fact for which no additional comments are necessary. However, from the perspective of the sanctioning regime and the statute of limitations, which are far too long compared to the national law regarding the modality of facilitating the stay, **RO** is still analyzing whether it can support such an approach proposed by the COM.

PUBLIC

RO regulates the basic form of the criminal offence of migrant trafficking [art. 263 para. (1) Criminal Code] - simple facilitation, manifested in the form of recruiting, guiding, guiding, transporting, transferring or offering shelter to a person, with a view to entering or leaving the territory of Romania, while the aggravated form of the criminal offence concerns (i) obtaining, directly or indirectly, of patrimonial benefits, (ii) the use of means that endanger the life, integrity or health of the migrant and (iii) subjecting the migrant to inhuman or degrading treatment [art. 263 para. (2) Criminal Code]. The criminal offense of facilitating illegal stay in Romania (art. 264 Criminal Code) is designed similarly. Therefore, the criminal legislation of Romania provides a higher standard than the one provided in the present proposal.

PUBLIC

Regarding **art. 3 para. 2**, we appreciate that the regulation raises some problems from the perspective of the need to respect the freedom of expression or, as the case may be, the freedom of the press, for which it is necessary to establish a clear criminalization or, at least, provide some details in the recitals. Even so, we mention that our domestic law already provides for a general regulation under the name "public incitement" - art. 368 para. (1) Criminal Code: "*The act of inciting the public, verbally, in writing or by any other means, to commit criminal offences is punishable by imprisonment from 3 months to 3 years or a fine, without being able to exceed the penalty provided by law for the criminal offence he instigated."*

In the context of the discussions regarding **the humanitarian clause**, **RO** appreciates that the instrument under discussion should not contain a humanitarian clause, being able to maintain, in the alternative, the regulation from art. 1 paragraph (2) of Directive 2002/90/EC.

Such a clause is not necessary, since the removal of criminal liability can be obtained by using an existing institution in most European Criminal Codes. Thus, in the situation where the facilitation of entry, transit or stay on the territory of the MS was carried out for humanitarian reasons, to help some people in a state of need (e.g. people in boats that failed at sea), it is noted, anyway, the justifying cause of the state of necessity, which removes the criminal nature of the deed and therefore the criminal liability.

Moreover, such a clause could even lead to an increase in the phenomenon of criminality in the matter of illegal migration if organized criminal networks could invoke humanitarian reasons to justify the facilitation (transportation, transfer, guiding, etc.) of entry, transit or stay on MS territory in the case of third-country nationals. Therefore, we appreciate that the current form of art. 1 paragraph 2 of Directive 2002/90/EC, which states that: *"Each Member State may decide not to impose sanctions in the case of the conduct defined in paragraph (1) letter (a), applying its own domestic legislation and practice, if the respective conduct aims to provide humanitarian aid to the person in question"*, grants MS sufficient flexibility in the application of already existing criminal law institutions.

- Regarding art. 4 - Aggravated criminal offences

As regards the issue of how to increase the penalty, it is necessary to mention, in advance, that according to Romanian criminal law, an increase in the special limits of the penalty can be achieved either by applying an aggravating circumstance (general or special), or by applying the sanctioning rules of the plurality of criminal offences (concurrent offences, post-conviction recidivism, post-execution recidivism or, as the case may be, intermediate plurality). To the extent that said aggravating circumstance even represents an autonomous criminal offence, according to national legislation [e.g. establishment of an organized criminal group - by reference to the aggravation provided for in art. 4 let. a), bodily injury caused by negligence - by reference to the aggravation provided for in art. 4 let. b), c), manslaughter - by reference to the aggravation provided for in art. 4 let. e), by applying the rules of concurrent offences will always lead to a mandatory aggravation of the punishment.

Under these conditions, we appreciate that by using a phrase such as, for example, *"in accordance with the relevant provisions of national law"*, in the operative part of art. 4 or, as the case may be, in the recitals, a use of these circumstances is allowed (by applying the rule of concurrent offences), without the need for an express (separate) regulation of them in the transposition act, in which case would also raise the issue of a double use of such rule. To the extent that such an interpretation is not the correct one, we would kindly ask the COM to clarify the regulatory intent.

PUBLIC

Moreover, regarding the circumstances provided for in **art. 4 let. b)**, **RO** appreciates that the premeditated immediate follow-up can concern any person who falls within the scope of action of the material element, not only the one who is the object of migrant trafficking, therefore, we propose the elimination of such a circumstance regarding the secondary passive subject of the criminal offence.

- Regarding the form of art. 5 – Incitement, aiding and abetting, and attempt

a. In relation to the sanctioning of the attempt at the autonomous criminal offence provided for in **art. 4**, we mention the following:

As this offense is currently defined by referring to the sanctioning limits imposed by art. 6, we can see that it is configured by the initiator as a complex absorbing criminal offence that is committed with the guilt form of *praeterintention* (exceeded intention). This implies that the act of assisting the third party in the action of entering, transiting or remaining on the territory of a MS (provided in art. 3 para. 1) is committed with [direct intention, this being qualified by the purpose pursued in letter a)], while the more serious result – bodily injury, endangering the person's life or the death of the victim [more serious consequences provided for in art. 4 let. b) and e)] - is imposed on the active subject by way of negligence.

Under these conditions, as is well known from a conceptual point of view, the attempt will not be possible in the case of actual premeditated criminal offence (simple premeditated or premeditated based on the basic content), the classic example in criminal law being that of blows or causing injuries of death[2], since in their case the existence of the criminal offence based on the basic content is conditioned even by the actual occurrence of the more serious result and which can only be due to the subsequent negligence of the perpetrator.

[2] Intentionally hitting a person, and accidentally tripping and hitting his head against the concrete, resulting in his/her death.

PUBLIC

Instead, in the context of the provisions of art. 36 para. (3) of the Romanian Criminal Code[3], the attempt will be possible in the case of those premeditated complex crimes with aggravated content when, although the main action was not completed, the more serious result (due to negligence) occurred through the secondary action (e.g. the criminal offence of rape/robbery that led to bodily injury/death of the victim, in the conditions where the main action – the infringement of a person's freedom or patrimony did not occur).

The same reasoning will be applicable in the case of the premeditated complex criminal offence of migrant trafficking, provided for in art. 4 let. b) and e), when the main action - assisting the third party in the action of entering, transiting or remaining in the territory of a MS - has not been consumed, but the more serious material consequence (e.g. bodily injury or death of the victim) has occurred. Under these conditions, the sanctioning of such an attempt will be possible from a criminal point of view, our domestic law assimilating the sanctioning regime of the attempt with the situation when the complex criminal offence has been consumed.

b. On the other hand, if the intention is not to regulate an autonomous complex aggravating criminal offence, considering that the aggravating circumstances in art. 4 already trigger criminal liability for a plurality of criminal offence (such as those against the person), an attempt to commit an offence of culpable injury or manslaughter will, of course, no longer be possible. On the other hand, if the volitional factor of intent was to harm the person's life or bodily integrity, which is an intentional criminal offence, the attempt will be punishable under the rules applicable to criminal offences against the person. Having regards to the aforementioned, **RO** considers that there is no longer a need for a norm for sanctioning the attempt within the scope of art. 5.

[3] According to art. 36 para. (3) Criminal code: *„The complex criminal offence committed with an exceeded intention, if only the more serious result of the secondary action occurred, is sanctioned with the punishment provided by law for the completed complex criminal offence."*

PUBLIC

- Regarding art. 6 – Penalties for natural persons

Regarding **para. 5**, **RO** appreciates that greater flexibility should be granted to MS. As an example, we would like to mention that Romanian domestic law provides that the application of additional penalties in the case of natural persons can be done for a period of between 1 and 5 years from the moment of execution of the main punishment, while, during the execution of the penalty, the courts order the execution of ancillary penalties with the same content as that applicable to additional penalties.

Regarding **para. 5 let. f)**, since *Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union* applies to all criminal offences committed in the EU, it becomes superfluous to specify the application of such an instrument also for the criminal offences provided by the present proposal. Therefore, **RO** proposes to delete such reference.

PUBLIC

SWEDEN

PUBLIC

Written comments from Sweden on the Directive 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, Articles 1 - 6.

Article 1

As declared in the meeting of the working party for judicial cooperation on January 30, Sweden maintains a general scrutiny reservation for the whole proposal. However, we welcome the initiative to strengthen the current legislation in this field.

Article 2

No comments.

Article 3

Paragraph 1: Sweden accepts this wording.

Paragraph 2: We find this paragraph problematic. Like some Member States raised in the working party meeting, we see that there is a problem with jurisdiction since publicly instigating irregular migration to the union is typically made outside the common territory. We also see a risk that this paragraph may interfere with our national legislation on free speech. Therefore, we suggest deleting paragraph 2.

Article 4

Regarding article 4, Sweden is of the opinion that it should be voluntary for member states to introduce aggravated criminal offences in order to keep flexibility, especially in relation to national provisions on aggravating circumstances. We also see that it is possible to apply other criminal legislation that may be better suited for several of the aggravated offences listed in the article, not at least regarding point (e).

As for point (e), Sweden questions how the prerequisite "the criminal offence caused the death" should be interpreted. The proposed wording seems to require a causation between the criminal offence and the death. The fact that a third-country national dies while being smuggled into the EU does not mean that it was the crime itself – the assistance when it comes to entering the EU – that caused the death but rather circumstances relating how this was done (bad boats, no life vests etc.) As mentioned above, such actions can often constitute other criminal offences e.g., murder or causing the death of another, and we would argue that it is better to apply these provisions in such situations. This would mean that the offender could be convicted of both migrant smuggling and e.g. murder. Sweden would also like to raise the issue if it is even possible to establish such a relationship in relation to art. 3(2). Notwithstanding the section above, we would prefer to delete section (e).

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Article 5

Sweden can accept the article, except for the requirement to criminalise incitement, aiding and abetting, and attempt in relation to the aggravated criminal offence referred to under Article 3(2). Article 5 refers to Article 3(1) and 4, and Article 4 refers to both 3(1) and 3(2). This appears to be a mistake, since incitement, aiding and abetting, and attempt to the criminal offence referred to in Article 3(2) are not criminalised.

Article 6

Section 1

Sweden can accept the wording.

Section 2

Sweden can accept a minimum maximum term of imprisonment of at least three years.

Section 3

As stated above, Sweden suggest that aggravated criminal offences are on a voluntary basis. With that said, article 4 covers a wide range of criminal offenses. Sweden questions whether a maximum term of imprisonment of ten years is adequate for all the criminal offences that could be relevant, especially when considering other crimes of equal seriousness. We would therefore suggest five years as the maximum term of imprisonment.

Section 4

Please see comment under Article 4.

Section 5

Our position is that additional criminal or non-criminal sanctions or measures should be optional for the Member States and would suggest using wording from e.g. the ENVI directive.

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~~ **penalties** or measures ~~imposed by a competent authority, including~~ **which may include the following**:

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COMIX

SWITZERLAND

Article 3

With regard to Article 3(1)(b), Switzerland considers that "likelihood" and "serious harm" are rather vague legal terms that it might be better to define more precisely.

Article 4

With regard to Article 4(a), Switzerland would like to point out that Council Framework Decision 2008/841/JHA is not part of the Schengen acquis, and therefore neither the Framework Decision as such nor references to it are legally binding on Switzerland.

Switzerland is keen to find appropriate ways to nonetheless ensure the well-functioning of Schengen cooperation.

Article 6

With regard to Article 6(5)(f), Switzerland would like to point out that Directive 2014/42/EU of the European Parliament and of the Council is not part of the Schengen acquis, and therefore neither the Directive as such nor references to it are legally binding on Switzerland.

Switzerland is keen to find appropriate ways to nonetheless ensure the well-functioning of Schengen cooperation.

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