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From: Presidency

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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
- Presidency non-paper

Presidency non-paper on Articles 3, 4 and 9 of the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union

Introduction

At the COPEN meetings on 30 January and 21 February 2024, delegations examined Articles 1 to 12 of the proposal. At the end of these meetings, the Presidency invited Member States to submit written comments on general issues as well as on the specific Articles¹. On 5 March 2024 the proposal, more specifically the criminalisation of migrant smuggling and the humanitarian clause, was discussed at the meeting of the Council (Justice and Home Affairs).

¹ The comments relating to Articles 1-6 and Articles 7-12 have been compiled in 6237/24 and 7459/24, respectively (see also revised versions).

Based on the outcome of the above-mentioned meetings, the written comments received from Member States and the outcome of the Council meeting, the Presidency is of the opinion that several substantial issues should be clarified.

Delegations are therefore invited to reply to the following questions relating to **Articles 3, 4 and 9**.

Commission proposal

In the Commission proposal (16149/23), Articles 3, 4 and 9 read as follows:

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

Member States shall ensure that the conduct referred to in Article 3 constitutes an aggravated criminal offence 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.*

Article 9

Aggravating circumstances

Member States shall take the necessary measures to ensure that the following circumstances may be regarded as aggravating circumstances, 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 of criminal offences of the same nature under 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.*

Questions by the Presidency

1) Criminal offence and the humanitarian clause: Article 3(1), point a)

Background

During the COPEN meetings, as well as in written comments, questions were raised about what should be included in the constitutive elements of the offence set out in Article 3. From the opinions that were expressed – but these do not cover all Member States – the following can be distilled:

Some Member States find the element of a ‘financial or material benefit’ essential to target migrant smugglers and more serious cases on migrant smuggling.²

If the ‘benefit’ remains as a constitutive element of the offence, the question would be whether it should be a financial or material benefit or whether it should be broadened to cover also ‘any other benefit’, e.g. sham marriages. In this context, the Presidency acknowledges that the text should be legally clear and that it may not be clear what ‘other benefit’ entails (although explanations in the recitals might help in this respect).

A few Member States have suggested including the concept of ‘financial or material benefit’ or ‘any benefit’ as an aggravating circumstance, to punish organised criminal groups more severely for the profit they make.

Finally, some other Member States are of the opinion that the constitutive element of ‘a financial or material benefit’ is too restrictive. They propose that any act of intentionally assisting unauthorised entry to, transit across or stay within the territory of any Member State, should be criminalised regardless of whether a financial or material benefit is obtained. The rationale behind this is that an effective investigation and prosecution are hindered by the difficulty of proving the existence of any financial or material benefit. For example, reference was made to payment by cryptocurrencies, digital money or other unofficial forms of payment (e.g. hawala).

Keeping in mind that the objective of the proposal is to tackle migrant smuggling, and particularly the criminal networks involved, the Presidency considers that the profit-making objective should anyhow be addressed. Whatever the outcome of the discussions, it will have consequences for how the idea of a humanitarian clause will be developed in the proposal.

Facilitating entry in the Union for humanitarian reasons is now addressed by recital (7), which reads as follows:

² The Commission observed that the idea of ‘financial or material benefit’ is that this instrument covers conduct related to organised crime and that is carried out for benefit; other forms of facilitation could be criminalised at national level but do not need to be included in a EU instrument.

(7) *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.*

Including a humanitarian clause in the *operative part* of the text could provide more clarity and legal certainty about the distinction between facilitation of irregular migration and humanitarian assistance.

Some Member States believe that including a humanitarian clause in the operative part of the text is unnecessary when a benefit is a critical element of the offence. Nevertheless, they are flexible about including it in the recitals.

If a benefit is not included as a constitutive element, there is a variety of opinions among the Member States concerning the inclusion of a humanitarian clause. Some Member States are in favour of including this clause in the operative part of the text to make a clear distinction with the offence defined in Article 3. Others are of the opinion that a reference in the recitals will suffice.

The Presidency would like to point out that if the existence of a [financial or material] benefit or the promise of such a benefit is no longer a condition for criminalisation, then there are strong arguments to include an explicit humanitarian exemption for intentional assistance to irregular entry, transit or stay within the territory of any Member State in the operative part of the text. The inclusion of a humanitarian exemption would promote legal certainty and prevent confusion between illegal immigration facilitated by criminal networks and humanitarian aid provided to people fleeing their country. This would ensure that individuals, including migrants themselves in some cases, and organisations providing humanitarian assistance are not subject to criminal prosecution.

In addition, it will be crucial to guarantee that this humanitarian clause cannot be used by smugglers. Therefore, it will be important to clarify what the exemption for humanitarian reasons entails.

Questions

Q 1a) ‘financial or material benefit’

Member States are invited to confirm that they want to keep the criterion of ‘financial or material benefit’ in the text of Article 3(1) point a).

In case Member States want to keep the criterion in the text, they are also invited to indicate whether it would be appropriate to enlarge this criterion, e.g. to ‘financial, material or any other benefit’.

If Member States do not want to keep the criterion of ‘financial or material benefit’ in the text of Article 3(1) under a), they are invited to indicate the reasons. They could also indicate if they see merit in transferring the said criterion to Article 4 on aggravated criminal offences – but see Q4 below – or to Article 9 on aggravating circumstances.³

Q 1b) ‘humanitarian clause’

Member States are invited to indicate whether recital 7 (see above) is sufficient, or whether they want to include a humanitarian clause in the operative part of the text

2) Criminal offence: Article 3(1), point b)

Background

The proposal criminalises the offence of facilitation of unauthorised entry, transit and stay in the European Union which is **highly likely to cause serious harm to a person**. Various Member States requested the deletion of this constitutive element of ‘highly likely to cause serious harm to a person’ from Article 3.

³ E.g. as follows: “(a) the criminal offence was committed by a person who 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.”

According to some Member States, this condition should not be a constitutive element of the offence and should instead be considered as an aggravating circumstance or as an aggravated criminal offence, depending on how the discussions around Articles 4 and 9 develop.

Other Member States highlighted that the constitutive elements of the offence, namely ‘high likelihood’ and ‘serious harm’, should be defined more precisely.

The Presidency notes that recently the wording ‘likely to cause [serious harm]’ has been used and accepted in the draft Directive on the protection of the environment through criminal law and in the draft Directive on combating violence against women and domestic violence.

Questions

Q 2a) Member States are invited to indicate if Article 3(1), point b), would be more acceptable to them if ‘high likelihood of causing serious harm to a person’ would be replaced by ‘likely to cause serious harm to a person’.⁴

Q 2b) Member States are also invited to reflect on the idea of deleting Article 3(1), point b) and incorporating ‘likely to cause serious harm’ in Article 4 or 9, either as a separate aggravated offence or aggravating circumstance⁵ (depending on the outcome of the debate around Articles 4 and 9, see also Q4 below), or by (slightly) modifying the text of those Articles.⁶

⁴ The text of Article 3(1), under b), could then read as follows:

“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) (...)

b) ***the conduct is likely to cause serious harm to a person.***”

⁵ E.g. as follows:

(x) the criminal offence was likely to cause serious harm to a person.

⁶ E.g. as follows:

“(X) the criminal offence deliberately or by gross negligence ~~caused serious harm to, or endangered the life of,~~ was likely to cause serious harm to the third-country nationals who were subject to the criminal offence;”

In case Member States agree with using the notion of ‘likely to cause serious harm’, the Presidency suggest clarifying this notion in a recital or the operative part (see e.g. Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims).

3) Criminal offence: Article 3(2)

Background

Several questions were raised by Member States about the notion of public instigation. Member States emphasised the importance of a better definition of the constitutive elements of this offence – specifically the wording ‘publicly instigating’ – and the need to respect the fundamental right of freedom of expression.

One of the Member States’ fears was that this provision would lead to the criminalisation of information spread by governments, the press, humanitarian organisations, NGOs, etc. to inform the public at large – including migrants – on the situation at Europe’s borders and on the migrants’ rights.

The Commission clarified that the chosen wording of this paragraph was designed to target, among other things, open private conversations on social media (e.g. WhatsApp and Telegram group chats), rumours being shared on those social media platforms, the promotion of false university scholarships, etc.

Some Member States also drew the Presidency’s attention to the fact that this article criminalises the instigating of third-countries nationals to enter or transit across, or stay within the territory of any Member State, even though entering is not constitutive of an offence in all Member States.

Besides, some Member States found it difficult to establish a clear distinction between Article 3(2) and Article 5 on incitement, aiding and abetting, and attempt. Regarding the wording of those articles and drawing on the explanations given by the Commission, the Presidency would like to highlight that whilst Article 5 focuses on inciting, aiding and abetting smugglers to commit or to attempt to commit the offence, Article 3(2) is to be read as inciting migrants to enter, transit or cross the territory of any Member States. The focus in Article 5 is thus on the smuggler, whilst the object of Article 3(2) is the migrant.

In addition, some Member States stated that they would like to redraft this article in order to focus on the instrumentalisation of migrants. Other Member States called for this paragraph to be deleted.

Based on the different opinions, the Presidency has put forward a drafting suggestion on Article 3(2) to test possible alternative wording. Two changes are proposed:

- Replacing ‘instigating’ by ‘intentionally encouraging’;

The Presidency noted the difficulties and confusion that occurred for Member States with the translation of ‘instigating’. Therefore, it suggests replacing the wording by ‘intentionally encouraging’ to clarify the constitutive elements of this offence and to avoid confusion with Article 5. The purpose of this wording is also to avoid criminalisation of humanitarian aid, as to be compliant with the right to freedom of expression.

- Adding ‘by any means, whether online or offline’.

The Presidency suggests adding ‘by any means, whether online or offline’ to make clear that all possible means could be used. This can be explained in greater detail in the recitals.

The third-country nationals may be encouraged by joining open private conversations on social media, by rumours (including rumours broadcasted on social media), by promoting false travel agencies or false university scholarships, etc. Nevertheless, as mentioned in the proposal for recital 6, providing objective information or advice to third-country nationals on the conditions for legal entry and stay in the Union, and on international protection, should not be understood as intentionally encouraging third-country nationals.

The alternative wording could be as follows:

Article 3

Criminal offences

2. *Member States shall ensure that publicly ~~instigating~~ **intentionally encouraging** third-country nationals **by any means, whether online or offline**, 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.*

Question

Q 3) Member States are invited to indicate whether this redrafted text for Article 3(2), as set out above, would address their concerns.

4) Aggravated criminal offences: Article 4

Background

A vast majority of Member States have stressed the importance of a more coherent and consistent approach with other European Union criminal law instruments.

The proposal introduces the definition of aggravated criminal offences, to which heavier criminal penalties correspond. However, the distinction between ‘aggravating circumstances’ and ‘aggravated criminal offences’ does not exist as such in EU law, nor in the national criminal law systems of all the Member States.

Therefore, the Presidency suggests deleting Article 4 on aggravated criminal offences and amending Article 6 on penalties as follows:

New text of Article 6(3):

Member States shall take the necessary measures to ensure that an offence referred to in Article 3 is punishable by a maximum penalty of at least 10 years of imprisonment where that offence:

- a) was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA;*
- b) 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) 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.*

New text of Article 6(4):

Member States shall take the necessary measures to ensure that an offence referred to in Article 3, including attempts to commit the criminal offence referred to in that provision, is punishable by a maximum penalty of at least 15 years of imprisonment where that offence caused the death of third-country nationals who were subject to the criminal offence.

Question

Q 4) Member States are invited to indicate if they can accept this solution for Article 4 (read together with Article 6(3) and (4)).

5) Aggravating circumstances: Article 9

Background

The Presidency suggests aligning the approach of aggravating circumstances to the recent political agreements between Council and the European Parliament on the Directive on the protection of the environment through criminal law, the Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures and the Directive on combating violence against women and domestic violence. This would entail optional aggravating circumstances.

Two options are proposed:

Option 1: mix of obligatory and optional aggravating circumstances

Article 9 is amended as follows:

Article 9

Aggravating circumstances

- 1. In so far as the following circumstances do not already 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 the following circumstances may, in accordance with the relevant provisions of national law, be regarded as aggravating circumstances, 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) *(moved to para 2)*
- (c) *the offender has previously been definitively convicted of criminal offences of the same nature under Articles 3, [4] or 5;*
- (d) *(moved to para 2)*
- (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.*

2. ***In addition, Member States may decide to take the necessary measures to ensure that one or several of the following circumstances may, in accordance with the relevant provisions of national law, be regarded as aggravating circumstances, in relation to the criminal offences referred to Articles 3, [4] and 5:***

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

The aggravating circumstances of paragraph 1 are fairly common and uncontested (especially with a recital that allows them to be covered by self-standing offences, see below).

Option 2: fully optional aggravating circumstances

Article 9 is amended as follows:

Article 9

Aggravating circumstances

In so far as the following circumstances do not already 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 several of the following circumstances may, in accordance with the relevant provisions of national law, be regarded as aggravating circumstances, 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 of criminal offences of the same nature under 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.*

To address the concern that some of the aggravating circumstances constitute separate criminal offences in national law. The Presidency proposes adding the following wording to recital 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 the penalty. Therefore, Member States should not be obliged to provide for specific aggravating circumstances where national law provides for separate criminal offences, and this may lead to more severe penalties.'*⁷

Question

Q 5) Member States are invited to indicate which option – Option 1 or Option 2, or any other option – they prefer for Article 9. Member States are also invited to confirm that they can accept the addition to recital 14.

⁷ See similarly e.g. recital 40 in the Environmental Crime Directive (PE-CONS 82/23).