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NOTE

From:	Presidency
To:	Delegations
No. Cion doc.:	16149/23 + COR 1 + COR 2
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 redraft

On the basis of the input provided by delegations at the recent COPEN meetings, and the written comments and suggestions provided, delegations will find attached a note from the Presidency containing a revised draft of the provisions of the entire proposal.

Modifications in relation to previous drafts are marked by strikethrough or **bold underlined**.

Changes proposed earlier are marked by **bold** only.

The Presidency invites delegations to examine these modifications in view of the COPEN meeting scheduled for 6-7 June 2024.

PRESIDENCY REDRAFT

Article 1 – Subject matter

The Presidency proposes no new changes to this Article, compared to the document ST8775/24 discussed in COPEN on 23 April 2024.

Suggested reformulation of Article 1:

Article 1

Subject matter

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

Article 2 – Definitions

The Presidency has no observations, nor suggestions to share about this article at the moment. So, the text remains as it stands:

Article 2

Definitions

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

1. ‘third-country national’ means any person who is not a citizen of the Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union and who is not a person enjoying the right of free movement under Union law as defined in Article 2, point 5, of Regulation (EU) 2016/399 of the European Parliament and of the Council;
2. ‘unaccompanied minor’ means a third-country national below the age of 18 years who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person, including a minor who is left unaccompanied after he or she has entered the territory of the Member States;
3. ‘legal person’ means any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations.

Article 3 – Criminal offences

After the previous meetings and the written comments, the Presidency understood that there was no support for the inclusion of material and financial benefit for the three actions (facilitation to enter, transit across and stay). Therefore, the Presidency suggested to split the actions and to keep only the condition of financial and material benefit” as a constitutive element for the facilitation of ‘illegal stay’ (Article 3 - new paragraph 1a).

To meet the demand for legal certainty, the Presidency proposes to keep a humanitarian clause in the operative part as well as recital 7 and suggests following changes:

For art. 3(2a) in the operative part, the Presidency proposes 2 possible options. The Presidency would like to invite the Member States to express their views on which of the three options they could support and why.

Option 1 is inspired by art. 4 § 3 of the Council of Europe Convention against Trafficking in Human Organs and based on the wording of article 3 of the EU Charter of Fundamental Rights related to the right to integrity of the person: *Everyone has the right to respect for his or her physical and mental integrity.*

Option 2 is highlighting the fact that Member States shall take the necessary measures to ensure that some conducts relating to humanitarian actions, or any other assistance should not be criminalised.

The Presidency considers there is a broad support to delete Article 3 paragraph 2.

Inspired on art. 19, paragraph 1 of the UN Protocol against the smuggling of migrants, the Presidency proposed some changes to the wording of the recital.

On the wording of «close family members” the Presidency proposes, inspired by the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, to complete the recital by the wording, “*taking into account the different particular circumstances of dependency and the special attention to be paid to the best interests of children*”.

At last, the Presidency proposes to add the following wording “*Third-country nationals should not become criminally liable for having been the subject to such criminal offences*” to Recital 6.

Suggested reformulation of Article 3(1):

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

2.a

Option 1:

The criminal offence shall, for the purpose of paragraph 1, not include humanitarian actions to assist third-country nationals, or any other assistance aimed at meeting their basic human needs, in order to preserve their human dignity or physical and mental integrity.

OR

Option 2:

Member States shall take the necessary measures to ensure that providing humanitarian assistance to third-country nationals, or any other assistance aimed at meeting their basic human needs, in order to preserve their human dignity or physical and mental integrity are not criminalised.

Recital 6

Third-country nationals should not become criminally liable for having been the subject to such criminal offences

Accompanying recital 7:

(7) **Nothing in this directive shall affect the rights, obligations and responsibilities of Member States and individuals to provide assistance** ~~This directive does not oblige Member States to criminalise assistance provided to third-country nationals~~ for humanitarian reasons or aimed at meeting **their** basic human needs, under applicable international law, **including international human rights law and in particular, where applicable, the 1951 Convention relating to the status of refugees as amended by the Protocol of New York of 1967,** the United Nations Convention on the Law of the Sea (UNCLOS), and in compliance with legal obligations.

Meeting a person's basic needs means that **their** needs, such as food, personal hygiene and a place to stay, are met so that **their** physical or mental health is not impaired, or **they are** not put in a state of degradation incompatible with human dignity.

Moreover, assistance provided to a close family member to meet their basic human needs should not be criminalised. Close family members include **a** spouse or unmarried partner engaged in a stable relationship, parents, children and siblings, **taking into account the different particular circumstances of dependency and the special attention to be paid to the best interests of children. The principle of *ultima ratio* should be applied when establishing whether [other conduct is not included in the criminal offences referred to in this Directive (if the humanitarian clause is Option 1 of the PRES non-paper)] OR [other conduct should not be criminalised under this Directive (if the humanitarian clause is Option 2 of the PRES non-paper)].**

Article 4 - Aggravated criminal offences

The Presidency considers there is a broad support to delete Article 4 on aggravated criminal offences and introduce it in article 6. Therefore, the corresponding references to article 4 will be removed throughout the text.

Article 5 - Incitement, aiding and abetting, and attempt

The Presidency proposes some minor linguistic changes to this article. Furthermore, a reference to new Article 3(1a) was included.

Article 5 is amended as follows:

Article 5

Inciting, aiding and abetting, and attempt

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

Article 6 - Penalties for natural persons

Based on the discussions in the previous meetings and the written comments, the Presidency proposes to lower the level of the penalties as follows:

In paragraph 2, the criminal offence referred to in art. 3(1) and 3(1a) is punishable by a maximum term of imprisonment of at least one year.

A new paragraph 2a refers to the criminal offence, in art. 3(1) which will be punishable by a maximum term of imprisonment of at least three years where the person who carries out the conduct of facilitating the illegal entry or transit across 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.

Furthermore, the Presidency proposes for paragraph 3, a minimum maximum penalty of eight years and for paragraph 4, a minimum maximum penalty of ten years.

Regarding point (b) of paragraph 3, the Presidency proposes to clarify in a recital that the concept of ‘gross negligence’ must be interpreted in accordance with national law.

Regarding point (c) of paragraph 3, the Presidency proposes to include a reference to ‘health’ to the concept of serious harm.

In addition, the Presidency proposes to delete the reference to ‘attempts’ in paragraph 4.

The Presidency proposes two minor linguistic changes in paragraph 5.

Paragraph 5(c) - Several Delegations pointed out that this provision is not consistent with Article 11(2) of the Return Directive. Therefore, the Presidency suggests adapting the time limit of the entry ban accordingly.

Q 6: Delegations are invited to indicate their position on the suggested changes in Article 6.

Suggested reformulation of Article 6:

Article 6

Penalties for natural persons

1. Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3, 4 and 5 are punishable by effective, proportionate and dissuasive criminal penalties.
 2. Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles **3(1) and 3(1a)** are punishable by a maximum term of imprisonment of at least ~~three years~~ **one year**.
- 2.a Member States shall take the necessary measures to ensure that the criminal offences covered by Article 3(1) are punishable by a maximum term of imprisonment of at least three years where the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit.**

3. Member States shall take the necessary measures to ensure that the criminal offences referred to in Article 4, points (a) to (d) by Articles **3(1) and 3(1a)** are punishable by a maximum term of imprisonment of at least ~~ten~~ **eight** years **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 the use of serious violence or has caused serious harm to the health of the third country national;**
 - (d) **the third-country national who was subjected to the criminal offence was particularly vulnerable, including such as unaccompanied minors.**
4. Member States shall take the necessary measures to ensure that the criminal offences referred to in Article 4 point (e), by Articles **3(1) and 3(1a)**, ~~including attempts to commit this criminal offence referred to in that provision,~~ are punishable by a maximum term of imprisonment of at least ~~fifteen~~ **ten** years **where that offence has led to the death. ~~of the third-country nationals who were subject of the criminal offence, or of other persons.~~**
5. In addition to criminal penalties imposed in accordance with paragraphs 1 to 4, Member States shall take the necessary measures to ensure that natural persons ~~who that have been convicted of committing~~ **committed** one of the criminal offences referred to in Articles 3, 4 and 5 may be subject to **accessory** criminal or non-criminal sanctions or measures imposed by a competent authority, ~~including~~ **which may include the following:**
- (0a) fines;
 - (a) withdrawal of permits or authorisations to pursue activities **that** resulted in the relevant criminal offence, or prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the criminal offence was committed;

- (b) ~~return after the enforcement of the penalty in a Member State, or to serve the penalty imposed, or part of it, in the third country of return, without prejudice to more favourable provisions that may be applicable by virtue of Union or national law;~~
- (c) prohibition to enter and stay on the territory of the Member States for an appropriate period of ~~maximum 10 years, without prejudice to more favourable provisions that may be applicable by virtue of Union or national law;~~ **The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.**
- (d) exclusion from access to public funding, including tender procedures, grants and concessions.
- (e) *(moved to 0a)*
- (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.¹~~

Rewording of recital 11

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

Member States should criminalise the conduct “endangers or is likely to endanger, the lives or safety of the persons concerned”.

¹ Suggested new Article 8a on Freezing and confiscation

~~Considering the possible risk to public policy and public security that they may pose, third country nationals who committed the offences defined in this Directive should be subject to return in accordance with Directive 2008/115/EC of the European Parliament and of the Council⁵ or in accordance with national law where Member States have made use of Article 2(2), point (b), of that Directive, either after having served the prison sentence in a Member State or in view of serving the prison sentence, or part of it, in a third country, without prejudice to more favourable provisions applicable by virtue of Union or national law; furthermore, without prejudice to more favourable provisions applicable by virtue of Union or national law, those third country nationals should be prohibited to re-enter the territory of the Member States for an appropriate period of time to be determined on a case by case basis, and that can reach 10 years in the most serious cases. This should not affect the discretion of judges or courts in criminal proceedings to impose appropriate sanctions in the individual cases.~~

Article 7 - Liability of legal persons

The Presidency proposes some minor linguistic changes in paragraph 3.

Suggested reformulation of Article 7:

Article 7

Liability of legal persons

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

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person;
- (c) an authority to exercise control within the legal person.

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

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

Article 8 - Sanctions for legal persons

The Presidency considers there is a broad support to align this provision with Article 7 of the Envicrime Directive.

The Presidency suggests including a reference to Article 7(1) or (2) in paragraphs 1, 2 and 3.

Furthermore, the PCY suggests deleting ‘temporary or permanent’ from Article 8(2) letter (c) and (g).

Regarding paragraph three, the Presidency introduced alternative maximum fixed amounts for fines alongside the proposed percentages, based on the Envicrime model.

In paragraph 4, some minor technical changes, were introduced.

Article 8 is amended as follows:

Article 8

Sanctions for legal persons

1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 **(1) or (2)** is ~~subject to~~ **punishable by** effective, proportionate and dissuasive criminal **or non-criminal** sanctions **or measures**.
2. Member States shall take the necessary measures to ensure that sanctions or measures for legal persons **held** liable pursuant to Article 7 **(1) or (2)** for the criminal offences referred to in Articles 3, 4 and 5 **shall include criminal or non-criminal fines and may include other criminal or non-criminal sanctions or measures, such as** ~~may include:~~
 - (a) ~~criminal or non-criminal fines;~~
 - (b) exclusion from entitlement to public benefits, **or aid or subsidies;**
 - (c) ~~temporary or permanent~~ exclusions from access to public funding, including tender procedures, grants, ~~and~~ concessions **and licences;**
 - (d) temporary or permanent disqualification from the practice of **business** ~~commercial~~ activities;
 - (e) placing under judicial supervision;
 - (f) judicial winding-up;
 - (g) ~~temporary or permanent~~ closure of establishments ~~which have been~~ used for committing the ~~criminal~~ offence;
 - (h) withdrawal of permits and authorisations to pursue activities **that** ~~which have~~ resulted in ~~committing~~ the **relevant** criminal offence;

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

3. **Member States shall take the necessary measures to ensure that, at least for legal persons held liable pursuant Article 7(1) or (2), criminal offences covered by Articles 3(1), 3(1a), 6(3) and 6(4) are punishable by criminal or non-criminal fines, the amount of ~~criminal or non-criminal fines~~ **which** shall be proportionate to the gravity ~~seriousness~~ of the conduct and to the individual, financial and other circumstances of the legal person concerned. Member States shall take the necessary measures to ensure that the maximum level of such fines is not less than:**

(a) for criminal offences covered by referred to in Article 3(1) and 3(1a):

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

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

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

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

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

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

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

(ii) an amount corresponding to EUR 48 000 000.

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

Article [8a]

Freezing and confiscation

Member States shall take the necessary measures to enable the freezing and confiscation of instrumentalities and proceeds from the criminal offences referred to in Articles 3 and 5. Member States bound by Directive 2014/42/EU of the European Parliament and of the Council shall do so in accordance with that Directive.

Article 9. Aggravating circumstances

The Presidency considers there is broad support to have fully optional aggravating circumstances for a) till g), in line with the Envicrime, VRUM and VAW Directives and include an additional optional aggravating circumstance under letter g) namely: ‘cruel, inhuman, or degrading treatment’.

The Presidency proposes no new changes to the content of letters a) until g), recital 14 and new recital x (clarifying the concept of exploitation) compared to the document ST 9733/24 discussed in COPEN on 15 May 2024.

However, the recital X1 concerning the concept of instrumentalisation has been slightly changed. The Presidency proposes to add a reference to recitals 17 and 20 of the Crisis and Force majeure Regulation regarding the concept of instrumentalisation and the specific situation of Cyprus.

Suggested reformulation of Article 9:

Article 9

Aggravating circumstances

1. **To the extent that the following circumstances do not form part of the constituent elements of the criminal offences referred to in Article 3**, Member States shall take the necessary measures to ensure that **one or more of** the following circumstances ~~may~~ **can, in accordance with national law**, be regarded as **an** aggravating 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 **by a final judgment** of criminal offences of the same nature ~~under as those referred to in~~ Articles 3, ~~4~~ or 5;
 - (d) the criminal offence entailed or resulted in [the exploitation or] instrumentalisation of a third-country national who was subject to the criminal offence;
 - (e) dispossessing the third-country nationals who are subject to the criminal offence of their identity or travel documents;
 - (f) the criminal offence was ~~carried out while carrying a firearm~~ **committed with the use of a weapon or the threat of using a weapon;**
 - (g) **the criminal offence was committed involving cruel, inhuman, or degrading treatment of a third-country national who was subject to the criminal offence.**

The Presidency proposes to add the following wording to corresponding **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 sanction. Therefore, Member States should not be obliged to provide for specific aggravating circumstances where national law provides for separate criminal offences or a general ability for national courts to weigh all relevant aggravating circumstances, and this may lead to more severe sanctions.”

[Recital X concerning exploitation]:

(X) In the context of the aggravating circumstances set out in this Directive, the notion of ‘exploitation’ should be understood as the exploitation of other persons through prostitution, or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs, or the exploitation of surrogacy, of forced marriage, or of illegal adoption, as defined in Article 2(3) of Directive (EU) XX/YY of the European Parliament and of the Council [Proposed Directive amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victim].

Recital X1 concerning instrumentalisation:

(X1) The notion of ‘instrumentalisation’ should be understood as a situation where a third country or hostile non-state actor, encourages or facilitates the movement of third country nationals and stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security, as referred to in Article 1(4) letter b and recital (15, 16, **17 and 20**) of the Regulation (EU) XX/YY of the European Parliament and of the Council [Proposed Regulation addressing situations of crisis and force majeure in the field of migration and asylum].

Article 10 Mitigating circumstances

The Presidency proposes to align this provision with Article 9 Envicrime Directive and Article 9 Restrictive measures Directive. This would entail optional mitigating circumstances.

Some Delegations asked to mention the general ability for the national courts to weigh all relevant mitigating circumstances. The Presidency proposes to address this concern in recital 15.

Article 10 is amended as follows:

Article 10

Mitigating circumstances

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

(a) **the offender provides the competent authorities with information they would not otherwise have been able to obtain, helping them to** identify or bring to justice other offenders; or

(b) **the offender provides the competent authorities with information they would not otherwise have been able to obtain, helping them to** find evidence.

The Presidency proposes to add the following wording to corresponding **recital 15**:

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

Art. 11 Limitation Periods for criminal offences

The Presidency notes that the discussion on limitation periods (Article 11) is linked to discussion on the level of criminal penalties of particular offences (Article 6).

In general, delegations requested a more coherent and consistent approach with other EU criminal law instruments. Furthermore, various delegations consider the proposed limitation periods to be too long. Therefore, the Presidency suggests to align the approach of limitation periods for criminal offences to Article 11 Envicrime Directive.

Paragraph 2: The Presidency suggests, to adapt these limitation periods to the outcome of the debate on the level of the criminal penalties. The level of the limitation periods will be aligned to the level of the penalties. Except for the criminal offences punishable by a maximum term of imprisonment of at least one year, where the Presidency proposes no harmonisation of the limitation periods.

Paragraph 3: The Presidency suggests to provide for two alternative connecting factors, aligning this paragraph with art. 11.3 of the Envicrime Directive. This allows Member States to bring the provisions on the limitation periods in line with their national systems.

Q 11a: Delegations are invited to indicate whether they can accept the proposed changes.

Suggested reformulation of Article 11:

Article 11

Limitation periods ~~for criminal offences~~

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

Member States shall take the necessary measures to provide for a limitation period that enables the enforcement of penalties imposed following a final conviction for criminal offences referred to in Articles 3(1), 3(1a), 4, 5, 6(3) and 6(4) for a sufficient period of time after that conviction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) a penalty of imprisonment of up to one year, or alternatively

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

(b) at least eight years from the date of the final conviction in the following cases:

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

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

(c) at least ten years from the date of the final conviction in the following cases:

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

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

4. By way of derogation from paragraphs 2 and 3, Member States may establish a shorter limitation period, provided that the period may be interrupted or suspended in the event of specified acts. This period shall not be shorter than:
- (a) ~~two five~~ years for the criminal offences ~~referred to in Article 3~~ **punishable by a maximum term of imprisonment of at least three years;**
 - (b) six years for the criminal offences ~~referred to in Article 4, points (a) to (d)~~ **punishable by a maximum term of imprisonment of at least eight years;**
 - (c) eight years for the criminal offences ~~referred to in Article 4, point (e), including attempts to commit the criminal offence referred to in Article 4, point (e)~~ **punishable by a maximum term of imprisonment of at least ten years.**

The Presidency considers there is broad support to specify the starting point of the limitation periods in recital 16.

Proposed revised text of Recital 16:

- (16) Member States should lay down rules concerning limitation periods in order to enable them to counter the criminal offences referred to in this Directive effectively, without prejudice to national rules that do not set limitation periods for investigation, prosecution and enforcement.

As a general rule, the start of a limitation period should be the moment when the offence was committed. However, as this Directive sets minimum rules, Member States could provide in their national legislation that the limitation period starts later, at the moment when the offence was discovered, provided that such moment is clearly defined in accordance with national law. Where Member States are permitted to derogate from the limitation periods, provided that the period may be interrupted or suspended in the event of specified acts, such acts may be defined in accordance with the legal system of each Member State.

Article 12 Jurisdiction

The Presidency considers there is a broad support to split paragraph 1 into two provisions, referring to mandatory and optional grounds of jurisdiction. In alignment with recently adopted criminal law instruments, the Presidency proposes to include jurisdiction based on the habitual residence of an offender as an optional ground. In addition, the Presidency redrafted paragraph 3 on jurisdiction with regard to attempts. The revised text is set out below.

Suggested reformulation of Article 12:

Article 12

Jurisdiction

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

- (a) **the offence was** ~~is~~ committed in whole or in part **within** its territory;
- (b) **the offender** ~~is committed by~~ one of its nationals ~~or a third country national who is a habitual resident in its territory;~~
- (c) ~~is committed for the benefit of a legal person~~
- (d) ~~established in its territory;~~
- (e) ~~in respect of any business done in whole or in part in its territory;~~
- (f) ~~(c) the offence was~~ **is** committed on board of a ship or an aircraft registered in **the Member States concerned** ~~it~~ or flying its flag;
- (g) ~~results in the entry, transit or stay in the territory of that Member State of third country nationals who were subject to the criminal offence.~~

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

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

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

(i) established in its territory;

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

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

3. ~~2.~~ Each Member States shall **take the necessary measures to** establish its jurisdiction over ~~attempts~~ the attempt to commit a criminal offence referred to in Articles 3(1) ~~4 point (e)~~, where the conduct would have constituted a criminal offence over which jurisdiction would have been established pursuant to paragraph 1. **that conduct causes the death of a person in the cases where the attempt does not fall under the jurisdiction provided under paragraphs 1 and 2.**

4. ~~3.~~ For the prosecution of the criminal offences referred to in Articles 3, ~~4~~ and 5 committed outside the territory of a Member State, each Member State shall take the necessary measures to ensure that **the exercise of** its jurisdiction is not subject to either of the following conditions:

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

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

5. ~~4.~~ Where a criminal offence referred to in Articles 3, ~~4~~ and 5 falls within the jurisdiction of more than one Member State, ~~those~~ ~~these~~ Member States shall cooperate to determine which Member

State is to conduct **the** criminal proceedings. The matter shall, where appropriate and in accordance with Article 12 **(2)** of Framework Decision 2009/948/JHA², be referred to Eurojust.

Article 13 Prevention

The Presidency proposes one minor change to this Article, compared to the document ST9733/24 discussed in COPEN on 15 May 2024.

Suggested reformulation of Article 13:

Article 13

Prevention

1. Member States shall take appropriate action, such as information and awareness-raising campaigns, and research and education programmes, **where relevant with specific attention to the online dimension**, aimed at raising public awareness and reducing the commission of the criminal offences referred to in Articles 3, 4 and 5.
2. Where appropriate, Member States shall take the necessary measures to carry out the activities referred to in paragraph 1 in cooperation with other Member States, relevant Union agencies, ~~and~~ third countries **and relevant civil society organisations and other stakeholders such as the private sector**.

Article 14 Resources

The Presidency has no observations, nor suggestions to share about this Article at the moment. So the text remains as it stands:

² Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ L 328, 15.12.2009, p. 42).

Article 14

Resources

Member States shall ensure that national authorities competent for the detection, investigation, prosecution or adjudication of the criminal offences referred to Articles 3, ~~4~~ and 5 have a sufficient number of qualified staff and sufficient financial, technical and technological resources necessary for the effective performance of their functions related to the implementation of this Directive.

Article 15 Training

The Presidency proposes some changes to clarify the concept of “staff authorities”.

Two options are proposed:

Option 1: an adjustment of paragraph 1 inspired by the Directive on THB or;

Option 2: clarifying the notion of ‘staff authorities’ in the context of this directive in recital 23.

Suggested reformulation of Article 15:

Article 15

Training

Option 1

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

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

Option 2

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

Article 16 Investigative tools

The Presidency proposes no new changes to this Article, compared to the document ST9733/24 discussed in COPEN on 15 May 2024.

Suggested reformulation of Article 16:

Article 16

Investigative tools

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

Suggested reformulation of Recital 24:

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

Article 17 Data collection and statistics

Several delegations requested more flexibility. Therefore, the Presidency suggests aligning this provision further with the THB Directive.

Based on the discussion and the written comments the Presidency proposes to limit the list of data in paragraph 2 and suggests following amendments:

- Paragraph 1 – delete the reference to disaggregated by the type of criminal offence;
- Letter (e) – delete the reference to disaggregated by the type of decision;
- Align (f) with the THB directive – deleting the reference to ‘final’ judgment.

Q 17: Delegations are invited to indicate whether they can accept the proposed changes.

Suggested reformulation of Article 17:

Article 17

Data collection and statistics

1. Member States shall ~~collect~~ **ensure that a system is in place for the recording, production and provision of anonymised** statistical data ~~disaggregated by~~ **on** the type of criminal offence referred to in Articles 3, 4 and 5 **in order to monitor the effectiveness of their systems to combat offences referred to in this Directive.**
2. The statistical data referred to in paragraph 1 shall ~~include, at least, the following, as a minimum, include data available at the central level on:~~
 - a) The number of **registered** third-country nationals who were subject to the criminal offence, disaggregated by citizenship, sex and age (child/adult) **in accordance with national law and practices;**
 - b) ~~the average length of the criminal investigation of cases;~~

- c) the number of natural persons prosecuted for criminal offences referred to in this Directive, disaggregated by sex and citizenship;
 - d) the number of legal persons prosecuted for criminal offences referred to in this Directive, ~~disaggregated by place of establishment;~~
 - e) the number of **prosecution decisions** of the prosecution services disaggregated by type of decision (to prosecute or not to prosecute);
 - f) the number of final court **judgements** decisions disaggregated by type of decision (i.e. conviction, acquittal, ~~dismissal on the substance or not, and including non trial resolutions~~);
 - g) the number of natural persons convicted of criminal offences referred to in this Directive, ~~disaggregated by sex and citizenship;~~
 - h) the number of natural persons subjected to penalties disaggregated by the type and level of penalty (imprisonment, fines, others) sex and citizenship;
 - i) the number of legal persons convicted for criminal offences referred to in this Directive and sanctioned;
 - j) the number of legal persons sanctioned disaggregated by ~~place of establishment and~~ type of sanction (fines, others);
 - k) ~~the average length of courts proceedings of cases in first instance, second instance and cassation.~~
3. Member States shall, ~~on an annual basis and by 1 July each year~~ **transmit annually to the Commission, in principle by 30 September and, where not possible, at the latest by 31 December, each year, the statistical data referred to in paragraph 2 for the previous year in a standard, easily accessible and comparable format basis.** ~~publish, in a machine-readable and disaggregated format, the statistical data referred to in paragraph 2 for the previous year and transmit it to the Commission.~~

Article 18 Replacement of Directive 2002/90/EC and Framework Decision 2002/946/JHA

The Presidency has no observations, nor suggestions to share about this Article at the moment. So, the text remains as it stands:

Article 18

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

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

Article 19 Transposition

The Presidency proposes no new changes to this Article, compared to the document ST9733/24 discussed in COPEN on 15 May 2024.

Suggested reformulation of Article 19:

Article 19

Transposition

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

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

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

Concluding remarks

The Presidency would like to thank the Member States and Schengen Associated States in advance for their careful examination of this Presidency paper and looks forward to a fruitful discussion on 6 and 7 June.