



Council of the
European Union

Brussels, 9 February 2024
(OR. en)

6237/24

**Interinstitutional File:
2023/0439(COD)**

LIMITE

**COPEN 59
DROIPEN 21
MIGR 48
COSI 14
COMIX 59
JAI 198
CODEC 317**

NOTE

From:	General Secretariat of the Council
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 - 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.

Contents

MEMBER STATES	3
CYPRUS	3
DENMARK	6
FINLAND	7
FRANCE	8
GERMANY	20
GREECE	23
 COMIX	 24
SWITZERLAND	24

MEMBER STATES

CYPRUS

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 risk 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.

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 abetting* 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.

FRANCE

(courtesy translations in English inserted)

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 États 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.

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.

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.

Courtesy translation

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

On paragraph 1, 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.

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.

With regard to paragraph 2, 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:

(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.

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.

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.

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 consummated.

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 may 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;

(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.

GERMANY

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?).

- 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.

GREECE

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.

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.
