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NOTE

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Subject:	Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA - Written comments and suggestions provided by Member States and Schengen Associated States concerning Articles 7-12

At its meeting on 21 February 2024, the COPEN Working Party, working in COMIX format, discussed the above-mentioned proposal for the second time. Articles 7-12 were examined.

At the end of the meeting the Presidency invited the Member States and the Schengen Associated States to submit comments and drafting suggestions concerning the said Articles in writing. ¹

The input so received has been set out in the Annex. ²

¹ The input provided earlier on Articles 1-6 has been set out in 6237/24.

² If additional input will be provided, a REV version will be made.

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MEMBER STATES

AUSTRIA

Written comments of the Republic of Austria on the 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

Following the COPEN meeting on 21 February 2024 (proposal on smuggling of migrants), the Republic of Austria would like to thank the Belgian Council Presidency for providing the opportunity to submit written comments. With regard to the Articles addressed in the previous COPEN meeting, we would therefore like to take the opportunity to provide the following written comments:

- **On Art. 8**

As already stated with regard to Art. 6, Art. 8 also has a stricter wording concerning additional sanctions in comparison to other legal acts (e.g. the Directive on non-cash means of payment), as it provides for an obligation to introduce all the additional sanctions listed. The Republic of Austria strongly opposes such an obligation. It is not clear for us why the common wording that is used in all other legal instruments should not also be used in the area of smuggling of migrants. Art. 8 para. 2 should therefore read ***"may include other (criminal or non-criminal) measures such as..."***.

Additionally, in para. 2 we suggest the following clarification: ***"Art. 7 para. 1 or 2"***.

From our view, the possibility of permanent exclusion from participation in procurement procedures in Art. 8 para. 2 lit. c is strongly opposed. The procurement Directives always refer to the term *"exclusion periods"* in connection with the exclusion from procurement procedures, which in our opinion has to be understood in the way that only a temporary exclusion is possible. On the other hand, a permanent exclusion is also inadmissible from the perspective of the principle of proportionality in EU law (e.g. ECJ C-30/19, Braathens Regional Aviation AB, para. 38 and C-81/12, Asociația Accept, para. 63). A permanent exclusion for legal persons seems to be too far-reaching. From our perspective, the words ***"temporary or permanent"*** should therefore be deleted from Art. 8 para. 2 lit. c of this Directive.

With regard to para. 2 (i), the Republic of Austria is in favor of deleting this point and instead adding a reference to the Directive on asset forfeiture. It should also be noted that *"freezing"* is a preventive measure and not a penalty.

The Republic of Austria supports para. 3, which, in contrast to the Directive on environmental crimes, is only based on the turnover-based model for sanctions and does not offer an alternative, for example in the form of a fixed level of sanctions.

- **On Art. 9**

The Republic of Austria takes a reserved position towards this provision, as under the national legal system aggravating circumstances are regulated in the general part of the Criminal Code and are applicable to all offenses. In any case, however, a uniform wording should be chosen for the chapeau of this provision in line with other Directives such as violence against women or environmental crime, which would read as follows:

"In so far as the following circumstances do not already form part of the constituent elements of the criminal offenses referred to in Articles XX to XX, Member States shall take the necessary measures to ensure that, in relation to the relevant offenses referred to in Articles X to X, one or several of the

following circumstances may, in accordance with the relevant provisions of national law, be regarded as aggravating circumstances"

In our opinion, the aggravating circumstance regulated in Art. 9 lit. c appears to be too broad. It should be taken into account that convictions are generally expunged after a certain period of time and therefore no longer appear in the criminal record of a person. Therefore, a certain time limit should definitely be set for how long previous convictions have to be taken into account. In Austrian national law, for example, the application to recidivist offenders is limited to a conviction within the last five years.

Furthermore, the Republic of Austria questions the necessity of the aggravating circumstance according to Art. 9 lit. e. The dispossessing of documents with additional elements will usually constitute separate criminal offenses anyway.

In our opinion, the aggravating circumstance of Art. 9 lit. f seems to be too broad, as it would even cover cases, where the perpetrator would carry along a weapon hidden in the pocket of his jeans or in his jacket, of which victims may not even be aware and which therefore does not trigger any (indirect) pressure on them. We therefore suggest a more precise and narrower wording.

- **On Art. 11**

As already provided for in the proposal for a Directive on combating corruption, the Republic of Austria is strongly in favor of providing two alternative connecting factors in para. 3 in order to enable the Member States to bring the provisions on the limitation period for prosecution in line with their national legal systems. A reference to the respective offence for the duration of the statute of limitations for enforcement contradicts the Austrian system, which is based on the level of penalty imposed in each individual case.

- **On Art. 12**

Art. 12 para. 1 lit. c is still subject to a scrutiny reservation by the Republic of Austria. The proposed extension of jurisdiction to offences committed for the benefit of a legal person "*in respect of any business done in whole or in part in its territory*" – without any connection to the underlying substantive legal acts – is not clear to us. In our opinion, the proposed extension is neither linguistically nor conceptually comprehensible. In particular, it remains unclear, whether the relevant business needs to have a connection to the offence or not. A "*business done*" is also more difficult to determine than the establishment. As it seems difficult to predict the practical impact of this provision, we currently take a reserved position on it.

FINLAND

Comments by Finland regarding the COPEN meeting on 21st of February 2024

Finland thanks the Presidency for the chance to submit written comments. As stated in the COPEN meeting on 21st of February, the matter has not yet been resolved in the Finnish Parliament, which means that all the comments made by Finland are only preliminary.

Article 8 Sanctions for legal persons

The fines imposed for legal persons should be in line with other directives. In other directives, such as the Environmental Crime Directive, the level of sanctions of this type has not exceeded 5%. Therefore, the maximum level of fines in migrant smuggling should also be 5%. With reference to other directives, it would be useful to define fixed amounts for the fines alongside the proposed percentage.

Regarding Article 8(2), we are in favor of replacing the word “shall” with the word “may” in order to maintain flexibility, bearing in mind that the directive in question should lay down minimum rules. We believe that this matter is related to the viewpoint that the basic solutions of national legal systems and, in particular, the internal coherence of the sanction system must be respected in the preparation of criminal legislation at EU level.

Article 9 Aggravating circumstances

We are of the preliminary opinion that not all aggravating circumstances should be mandatory and that the wording should be amended to ensure that Member States have sufficient flexibility when defining aggravating circumstances.

At this time, we also have some concerns regarding the relationship between the proposed aggravating circumstances in relation to different national criminal justice systems. In Finland, for example, the grounds for increasing the punishment (aggravating circumstances) may apply to all or most criminal offences defined in the national Criminal Code. These aggravating circumstances are not as specific as in the proposed Article 9.

On the other hand, we have already criminalized acts, such as firearms offences or criminal offences that are committed by a public official, for which there are separate rules. These are not grounds for increasing the punishment, but separate criminal offences. When an offence has been committed while carrying a firearm for example, a firearm offence may also apply and the offender can be charged and prosecuted for this offence as well. For this reason, we see no need to introduce particularly detailed aggravating circumstances if this would mean changing the general principles of national criminal law systems.

Article 10 Mitigating circumstances

We are in favor of securing sufficient national flexibility regarding mitigating circumstances as well. For this reason, we propose at this time that the wording “shall” should be replaced by “may”.

Article 11 Limitation periods for criminal offences

In Finland, limitation periods are linked to the level of criminal penalties of particular offences. In this regard, we refer to our written comment on Article 6. It is practical that the limitation periods correspond to the seriousness of the offence, but we consider the proposed limitation periods to be somewhat long especially when comparing to other similar directives.

FRANCE

(courtesy translations in English inserted)

NOTE DES AUTORITÉS FRANÇAISES

Dans le cadre de la réunion du groupe COPEN trafic de migrants du 21 février 2024, la présidence sollicite des Etats membres des commentaires écrits sur les articles 7 à 12 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.

Article 8, relatif aux sanctions applicables aux personnes physiques :

S'agissant du point 2 qui prévoit plusieurs peines complémentaires applicables aux personnes morales ayant commis des faits relevant du champ de la directive :

Les autorités françaises sollicitent, à titre principal, l'introduction d'une certaine souplesse dans la rédaction. Elles soutiennent la proposition portée par plusieurs Etats membres lors de l'examen du texte en groupe, consistant à l'aligner avec celle retenue dans les directives relatives à la protection de l'environnement par le droit pénal, aux violations des mesures restrictives et à la traite des êtres humains : *"Member States shall take the necessary measures to ensure that sanctions or measures for legal persons held liable pursuant to Article XX or XX for the offences referred to in Articles XX and XX shall include criminal or non-criminal fines and may include other criminal or non-criminal sanctions or measures, such as:"*

Par ailleurs, les autorités françaises sollicitent également l'introduction d'une certaine souplesse dans la rédaction du point h), en l'alignant cette rédaction avec celle qui figure dans les directives mentionnées *supra* :

« (h) withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence; ».

S'agissant du point 3 qui prévoit l'imposition d'amendes proportionnées à des seuils de pourcentages du chiffre d'affaires de la personne morale :

Les autorités françaises soutiennent l'introduction d'une alternative entre un montant fixé en fonction du chiffre d'affaires mondial ou un montant établi par la loi, selon le modèle retenu dans le cadre des négociations portant sur la directive relative à la violation des mesures restrictives et la directive relative à la protection de l'environnement par le droit pénal.

Elles proposent d'introduire la précision suivante, après le point 5 :

5. The amount of criminal or non-criminal fines shall be proportionate to the 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 [... % 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, for criminal offences referred to in Article ...]

or, alternatively

(b) an amount corresponding to EUR X million for offences referred to in Article...

Article 9, relatif aux circonstances aggravantes :

Les autorités françaises souhaitent interroger la Commission sur la portée de la circonstance prévue au point (d) – « *l'infraction pénale a impliqué ou entraîné l'exploitation ou l'instrumentalisation d'un ressortissant d'un pays tiers qui a fait l'objet de l'infraction pénale* » et sur sa potentielle redondance avec la circonstance prévue à l'article b) « *l'infraction pénale a impliqué ou entraîné l'implication de ressortissants de pays tiers faisant l'objet de l'infraction pénale dans l'emploi illégal tel que visé dans la directive 2009/52/CE du Parlement européen et du Conseil* ».

Elles sollicitent l'introduction d'une mention (identique à celle qui a été introduite dans la directive relative à la protection de l'environnement par le droit pénal), afin de prévoir que l'harmonisation n'est imposée que pour « une ou plusieurs » circonstances aggravantes mentionnés dans l'article :

Article 9

Aggravating circumstances

Member States shall take the necessary measures to ensure that **one or several** of the following circumstances may be regarded as aggravating circumstances, in relation to the criminal offences referred to Articles 3, 4 and 5 : [...]

Article 10, relatif aux circonstances atténuantes :

Les autorités françaises sollicitent l'assouplissement de la rédaction, comme cela a déjà été accepté dans le cadre d'autres instruments (dont la directive (UE) 2017/541 du Parlement européen et du Conseil du 15 mars 2017 relative à la lutte contre le terrorisme), afin de laisser une marge de manœuvre aux Etats membres permettant de tenir compte de la diversité des systèmes juridiques.

Article 10

Mitigating circumstances

Member States ~~shall~~ **may** take the necessary measures to ensure that, in relation to the criminal offences referred to in Articles 3, 4 and 5, 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) identify or bring to justice other offenders; or
- (b) find evidence.

Article 11, relatif à la prescription des infractions pénales :

Les autorités françaises indiquent que de façon générale, la France n'est pas favorable à la multiplication de régimes de prescription dérogatoires, qui sont susceptibles de déstabiliser la cohérence générale du régime de prescription.

Elles précisent que cette cohérence doit être assurée, en matière de prescription de l'action publique comme de prescription de la peine, au regard de la gravité des faits et des peines encourues en répression de ces faits.

Elles indiquent également que le dispositif proposé à l'article 11 paraît excessivement complexe et lui semble mériter quelques ajustements. Elles sollicitent une diminution des durées des délais de prescription prévus aux points 2 et 3, en vue d'obtenir :

- un délai de prescription d' « au moins cinq ans » s'agissant de la prescription de l'action publique et de la peine, relative aux infractions punies d'une peine allant jusqu'à dix ans d'emprisonnement ;
- un délai de prescription d' « au moins dix ans » s'agissant de la prescription de l'action publique et de la peine, relative aux infractions punies d'une peine supérieure à dix ans d'emprisonnement.

Elles relèvent que ces délais paraissent cohérents avec les possibilités matérielles de recueillir utilement des éléments de preuve.

Article 12, relatif aux règles de compétence :

S'agissant du point 1 c) qui prévoit que chaque Etat membre établit sa compétence à l'égard des infractions pénales prévues par la directive, commises au profit d'une personne morale, lorsque celle-ci est établie sur son territoire ou pour une activité commerciale exercée en tout ou en partie sur son territoire :

Les autorités françaises ne sont pas favorables à l'introduction d'un tel critère de compétence. D'une part, si la personne morale est établie ou a son siège sur le territoire national, le critère tenant à l'établissement sur le territoire national risque d'être redondant avec d'autres critères de compétence (lieu des faits ou compétence personnelle active). D'autre part, le critère tenant à l'existence d'activités commerciales exercées en tout ou partie sur le territoire national paraît trop flou et risque de donner lieu à d'importants conflits positifs de compétence entre les droits pénaux des Etats.

Sur le point 3, qui prévoit notamment l'abandon des conditions de double incrimination et de dénonciation officielle pour la poursuite des infractions commises en-dehors d'un Etat membre :

Les autorités françaises se demandent quel est l'objectif poursuivi et indiquera être très réservée quant à l'abandon de ces critères, qui permettent de garantir l'articulation des lois pénales nationales dans le respect du principe de souveraineté de chaque Etat.

GERMANY

Written Comments - Germany

COPEN (Migrant smuggling) - 21 February 2024

Article 7

- We have taken note of the Commission's explanation in the Working Group on February 21 that the aim of the proposal is to hold transport entities responsible whose business model is aimed at transporting illegal immigrants. We ask for explanation whether the prerequisite that the business model has to be aimed at transporting illegal immigrants is already reflected in the wording and where this is the case. Could for example a transportation entity be held liable for the transportation of third country nationals from a third country to another third country closer to the EU and on a known migration route, if the relevant persons according to Art. 7 para. 1 lit. a) to c) know that it is likely that persons use this transportation in order to subsequently migrate illegally to the EU? If not, which prerequisite according to the wording would not be fulfilled? What about a transportation entity which transports TCNs to another third country via the EU in transit, if some TCNs use the transit to apply for asylum and this practice is known to the relevant persons? Would the knowledge of the relevant migration practices and the continuation of the transportation offer despite this knowledge suffice for a liability? From our point of view it is important that the wording is clear.
- Paragraph 2: In paragraph 2, it is important that further sanctions can be imposed in addition to criminal or non-criminal monetary sanctions (optional design). However, their detailed design must be left to the member states. Article 11 of Directive 2019/713 on combating fraud and counterfeiting in connection with non-cash means of payment serves as a model. Moreover, the additional penalties imposed on natural persons (Article 6(5)) must also be optional (modelled on Article 5(3) new proposal on Environmental Criminal Law).
- Paragraph 2 lit. i: Assurance and confiscation should be regulated in a separate article. For example, Article 10 of the PIF Directive (2017/1371) could be a model.
- Paragraphs 3 and 4: If necessary, in addition to a turnover-related percentage fine, the possibility of setting a maximum rate should also be granted in accordance with the model set out in Article 7(3) of the new Environmental Criminal Law Directive, which is currently being finalised.

Article 9

- General: Member states need more flexibility in implementation. The definition of compulsory aggravating circumstances leads to a far-reaching interference

with the punitive accreditation practice of the member states. From a DEU perspective, an optional design is required, subject to national law. We therefore ask that “shall” be replaced by “may take the necessary measures to”.

- To lit. d: From our point of view, there is a need for concretisation in the article which specific forms of “exploitation” are meant. Is it a prerequisite that the offender knows about the subsequent exploitation at the time of the basic offence (Article 3)? This should be made explicitly clear so that there are no misunderstandings during implementation of the directive. To lit. f: In Germany, the carrying of a firearm in the assistance of unauthorised entry already meets an aggravated criminal offence. DEU therefore asks to move this aggravating circumstance from Article 9 to to the aggravated criminal offences in Article 4. Also, we ask for a limitation of the offence to the case of unauthorised entry. Because the provision is intended to counteract the dangers posed by armed perpetrators during the smuggling process.

Article 10

- Member states need sufficient flexibility in implementation. From a DEU perspective, an optional design is required, subject to national law. Again, we ask you to replace “shall” with “may take the necessary measures to”. Incidentally, we insert a test reservation

Article 11

- Regulations on the limitation period for prosecutions are generally linked to the criminal framework in the DEU – regardless of the respective crime area. We see no need to make separate arrangements at EU level specifically for smuggling crime, which would call into question the coherence of the MS’s limitation regimes. In particular, the deadlines of 7 and 15 years referred to in Article 11(2)(a) and (c) respectively are problematic for DEU and appear to us to be too high in part (for example with regard to Article 3).

Article 12

- Justifications for jurisdiction in foreign offences should be based on the usual requirements in other criminal law directives. In this respect, paragraph 1(b) [in part] and points (c) and (e) go beyond what is customary in other EU Directives (and also in DEU law) and are problematic. Unlike nationality, the habitual residence of the perpetrator in subsection (b) is not a link generally recognised under international law. The same applies to points (c) and (e), where the additional question arises as to whether they would be sufficiently determined. It is therefore requested to specify that the offence was committed by a third-country national who has his habitual residence on his territory (b); the offence has been committed for the benefit of a legal person established in its territory or has been committed in connection with a business carried out wholly or partly

on its territory (c); the offence results in third-country nationals affected by the offence entering, transiting through or residing in its territory (e) being made optional only, as is also the case in Article 11(3) of the PIF Directive or Article 12(3) of the Non-Cash-Directive or Article 10(2) of the Money Laundering Directive.

GREECE

On article 8, (Sanctions for legal persons) the calculation of the amount of the fine based on the total worldwide turnover of the legal person (para 3) must be optional, because it is not always possible to know the total worldwide turnover. It is suitable to provide for a fine regardless of the worldwide turnover but in relation to the seriousness of the crime.

On article 10, para “a”, (Mitigating circumstances) there can be a misunderstanding on the meaning of the wording “other offenders”. Thus, it is appropriate to provide for a recital clarifying that “other offenders” mean “other offenders in other cases”. This is because the greek text is understood as mentioning “co-perpetrators” (“other offenders in the same case”). The same problem appears on the French translation.

If other m.s. insist that the wording will cover both situations, i.e. “other offenders in other cases” but also the “co-perpetrators”, then it is suitable to leave the choice to the national law, since according to greek law, a “co-perpetrator” cannot be found guilty on the sole testimony of the other “co-perpetrator”. As a result, in that case, the information provided by an offender cannot be used as a mitigating circumstance.

LATVIA

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

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

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

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

Article 3 of the Directive defines that intentionally assisting a third-country national to enter, transit across or stay within the territory of any Member State constitutes a criminal offence when there is an actual or promised financial or material benefit, or where the offence is highly likely to cause serious harm to a person. Publicly instigating third-country nationals, for instance through the internet, to enter, transit or stay in the Union irregularly is also considered to be an offence. The proposal also highlights in recitals that the purpose of the Directive is not to criminalise third-country nationals for the fact of being smuggled. It also clarify that it is not the purpose of this Directive to criminalise, on the one hand, assistance provided to family members and, on the other hand, humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.

Latvia does not support the proposal which defines Criminal offences. Latvia does not support Directives Article 3, paragraph 1, in Latvia's view, a definition of illegal transfer of person is too narrow. In Latvia's opinion criminal liability for criminal offences described in Directives Article 3, paragraph 1 should be for fact that person intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence. Obtaining a financial or material benefit should be aggravating circumstances with more severe punishment.

Directives Article 3, paragraph 2 does not provide aggravating circumstances, but it is less harmful offence. Latvia points out that according to Directives Article 3, paragraph 2 - Member States shall ensure that publicly instigating third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence. Instigating to commit criminal offence which is contained in Directives Article 5, so Latvia calls for withdrawal Directives Article 3, paragraph 2.

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

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

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

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

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

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

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

According to Article 6, paragraph (b) there is determined punishment - return after the enforcement of the penalty in a Member State, or to serve the penalty imposed, or part of it, in the third country of return, without prejudice to more favourable provisions that may be applicable by virtue of Union or national law. This type of punishment is not clear to Latvia.

Article 7 of the Directive contains obligations to ensure the liability of legal persons for offences referred to in this Directive where such offences have been committed for their benefit. The provision also provides that Member States ensure that legal persons can be held accountable for lack of supervision and control that has made possible the commission of a criminal offence for the benefit of the legal person. Moreover, the liability of the legal person should not exclude criminal proceedings against natural persons.

Latvia has no objections in general to the obligation to ensure the liability of legal persons for offences referred to in this Directive where such offences have been committed for their benefit.

Article 8 of the Directive sets out the sanctions applicable to legal persons involved in the criminal offences covered by this proposal. Such sanctions must be proportionate to the seriousness of the offence. Imposed fines should range from 3% of the total worldwide turnover for the basic criminal offence, to 5% for aggravated offences, to 6% for the aggravated criminal offence causing death.

Latvia supports the need to set out the sanctions applicable to legal persons involved in the criminal offences by Article 7 of the Directive.

Latvia does not support Directive's article 8, paragraph 3 which provides the calculation of the amount of money, by calculating it using as a reference point the annual turnover of the legal entity in the world one year before the commission of a criminal offense or before the adoption of a decision on a fine. The Criminal Code of Latvia provides that, when determining the amount of money to be recovered from a legal entity, the property status of the legal entity must also be taken into account, but based on the amount of minimum monthly wages established in the Republic of Latvia. For example, for a serious crime (which provides for a prison sentence of up to 8 years for natural persons), money recovery can be determined in the amount of twenty to seventy-five thousand monthly salaries, i.e. in 2024, the maximum amount to be recovered is 52 500 000 euros.

Latvia points out that Article 8, paragraph 4 of the Directive already substantiates Latvia's concerns about the procedure for calculating money recovery, namely that there are situations where it will not be possible to determine the amount of a fine based on the total turnover of a legal entity in the world one year before the commission of a criminal offense or before the decision on the acceptance of fines, and the member states will also have to look for other solutions in the procedure for calculating fines. In Latvia's view, it would be more useful to determine a single calculation of the amount of money, namely, a specific number of units, where one unit is the amount of the minimum monthly salary of each country, thus establishing uniform calculation criteria, while also individually taking into account the financial status of each legal entity.

Article 9 of the Directive sets out the aggravating circumstances to be considered by the judicial authorities when imposing sanctions in relation to the offences defined in this Directive.

Latvia has no objections in general to the set out the aggravating circumstances to be considered by the judicial authorities.

Regarding Article 9, paragraph f of the Directive, Latvia expresses objection, that an aggravating circumstance of a criminal offense is carrying a firearm. Latvia's Criminal Law defines such an aggravating circumstance as the commission of a criminal offense by using weapons or explosive substances or in another generally dangerous way. Namely, by using a firearm or threatening to use it, a danger has arisen to society as a whole. However, in the regulation proposed by the Directive, there is no clear harm if a person carries a firearm, but has not used it or threatened to use it. Such a regulation can be interpreted in such a way that even if the State Border Guard officials or other persons who have the right to carry a firearm do not use it, the offense is qualified as aggravated.

Regarding Article 9, paragraph e of the Directive, where determining an aggravating circumstance, if third-country nationals are deprived of their identity and travel documents, Latvia also cannot agree to establish this as an aggravating circumstance, because in Latvia, such a criminal offense is subject to criminal liability according to Article 274 of the Criminal Law, which will make an aggregation of Criminal Offences.

Article 10 of the Directive sets out the mitigating circumstances to be considered by the judicial authorities when imposing sanctions in relation to the offences defined in this Directive.

Latvia has no objections in general to the set out the mitigating circumstances to be considered by the judicial authorities.

However, the requirement included in the Directive is debatable if the competent authorities are not able to obtain this information themselves. Mitigating circumstances must be evaluated from the point of view of the accused/suspect person, that is, there could not be a situation where the person has cooperated and contributed to the investigation, but this would not be recognized as a mitigating circumstance because the institution itself had the opportunity to obtain such information. If this Article of the Directive is to be interpreted as mentioned above, then Latvia cannot support such a provision.

Article 11 of the Directive lays down the limitation periods to allow the competent authorities to investigate, prosecute and adjudicate the criminal offences covered by this proposal, as well as the execution of relevant sanctions, for a sufficient time. This proposal sets the minimum length of the limitation periods between seven (with a derogation to five) to fifteen years, depending on the seriousness of the offence.

Latvia has no objections in general to lay down the limitation periods to allow the competent authorities to investigate, prosecute and adjudicate the criminal offences.

According to Article 56 of the Latvian Criminal Law, the day of the end of the limitation periods is defined as the day when is initiated criminal prosecution and in this moment limitation period is interrupted. The wording in Article 11, paragraph 1 of Directive does not explain the end of limitation periods.

Article 11, paragraph 3 of the Directive defines the statute of limitations for the execution of a judgment, which in Latvia is regulated in Article 62 of the Criminal Law as the statute of limitations for the execution of a conviction. In Latvia, the statute of limitations of a conviction is calculated depending on the imposed sentence, where both aggravating and mitigating circumstances have already been taken into account, and not depending on the composition of the committed criminal offense, without assessing the sentence specifically imposed on the person. Therefore, Latvia cannot support Article 11, paragraph 3 of the Directive in the proposed wording.

Article 12 of the Directive requires Member States to establish jurisdiction for the criminal offences defined in this proposal. Each Member State should establish its jurisdiction over offences committed partially or entirely in its territory, or committed by a national or habitual resident, or committed on a ship or aircraft registered in its territory, or for the benefit of a legal person established or operating on its territory. The provision also establishes that Member States should establish jurisdiction over attempts when it resulted in the death of the third-country nationals concerned.

Latvia has no objections in general to proposal of Article of the Directive. According Latvia's Criminal Law Code it is not Latvia's jurisdiction for criminal offence is committed for the benefit of a legal person in respect of any business done in whole or in part in its territory (Article 12, 1 paragraph (c(ii))).

Regarding Article 12, paragraph 1 (e) of the Directive, Latvia cannot agree to such a basis of jurisdiction if, the criminal offence 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. In Latvia's view, such a basis indicates the place where the criminal offense was committed, judging from the principle of occurrence of consequences, which is recognized in international law. Likewise, countries can transfer and take over criminal proceedings from another country if they consider that it is useful and to ensure criminal procedural interests that the criminal proceedings should be conducted in the country where the person who suffered from a criminal offense resides.

With regard to Article 12, paragraph 2 of the Directive, which provides that for an attempt to commit the criminal offense referred in Article 4, paragraph e if, in case of success, the relevant conduct would constitute a criminal offense for which jurisdiction should be determined in accordance with the aforementioned jurisdictional provisions, Latvia the practical application of such a rule is not clear. An attempt to commit a criminal offense in Latvia is prosecuted according to the general rules of jurisdiction, taking into account the place where the actions were committed. It is not clear to Latvia how to determine jurisdiction based on an assumption or presumption, where consequences would probably have occurred if the offense was carried out to the end.

THE NETHERLANDS

Article 3

- The Netherlands wants to iterate that the directive concerns minimum norms that member states may exceed positively, for instance in relation to which acts they do additionally criminalise and consider migrant smuggling. Nationally, we intend to go further than only criminalizing migrant smuggling for financial or material gain, and opt to not include this as a separate element of the criminalization. This is to avoid placing an additional burden on law enforcement authorities to motivate this element. In light of the extensive discussion that took place in relation to this element, we could support the removal of financial or material benefit in the article.
- We further emphasize the importance of not penalizing cases involving humanitarian assistance. An explicit humanitarian clause in the operational part of the text is however not necessary or effective and can be addressed through other means. This would spare law enforcement agencies the burden of refuting these grounds each time, even in cases of obvious criminal migrant smuggling. Inclusion in the recitals of the directive stating that the aim of criminalization cannot be to punish humanitarian cases seems in our opinion a suitable solution.
- Even though the directive is laying out minimum norms, we wonder if it is desirable to limit the minimum criminalisation under the directive to the entry, transit, or stay in relation to ‘the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned’. The UN protocol’s definition of migrant smuggling namely already stipulates a broader criminalization, in relation to the illegal entry of a person into one of the States Parties to the Protocol. As many European states have also ratified the UN protocol, this is a consideration to take into account in the European framework.

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

Article 4

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

Article 6

- The Netherlands suggest that we change the title of this article to ‘Penalties and measures for natural persons’.
- Furthermore, paragraph 4 talks of 'attempts to commit the criminal offence referred to in that provision [being with death as a consequence]’. To us it is not sufficiently clear in which cases 'the attempt of an offense that caused the death' applies. It is of course conceivable that no entry is made as the migrant e.g. drowns before entry. Yet this attempt of an offense that inherently entails a consequence from it being *completed* feels odd legally (in our national system).
- Paragraph 5 should be formulated more clearly and in line with other instruments, vividly pointing out that these measures are facultative rather than that all of the measures should be available nationally. Also, we feel that ‘(f) freezing and confiscation’ has no place in this list and could rather use its own provision.

Article 8

- Paragraph 2 should be formulated more clearly and in line with other instruments, vividly pointing out that these measures are facultative rather than that all of the sanctions should be available nationally.

Article 9

- The relation between article 9 and 4 at this point is not satisfactory. We consider it more useful when the directive encapsulates that member states should be able to weigh all these instances in articles 4 and 9 as aggravations, but that it is up to member states which instances they actually codify as aggravating offenses, and which ones they consider aggravating circumstances. Perhaps they can be combined in one single article that provides for the above?
- Moreover, regarding sub (d), it is not sufficiently clear what is precisely meant with 'exploitation' and 'instrumentalisation'. Exploitation is too vague and instrumentalisation needs further contextualisation (perhaps in the definitions in article 1). Also, the Netherlands does not support intertwining both offenses of migrant smuggling and THB, as exploitation is a central element of THB and not necessarily of migrant smuggling.
- The Netherlands moreover thinks the current manifestation of the migrant smuggling phenomenon and the often cruel situations that migrants have to endure warrants an additional aggravating circumstance to be spelled out in the directive, namely: *(g) the criminal offence was committed involving cruel, inhuman or degrading treatment of a third-country national who was subject to the criminal offence.*

Article 12

- The Netherlands wants to stress the necessity of linking the criminalization of migrant smuggling to a more broad and far reaching extraterritorial jurisdiction. This would improve the upstream approach to tackling migrant smuggling and facilitate cooperation in international investigations. This is necessary if European countries want to truly take significant steps in combating smuggling networks. We have identified this concrete need from the experiences of law enforcement and the Public Prosecution Service in upstream cases.
- A broad expansion of extraterritorial jurisdiction is of great importance and can be illustrated through two examples. It happens for instance that migrant smugglers in Libya detain, abuse, and mistreat individuals attempting to flee to the EU, in order to coerce ransom payments from their families already residing in Europe. Sometimes, migrants manage to escape from these camps and seek assistance from UNHCR, which then relocates them to camps in other countries. From these camps, migrants are subsequently dispersed to receiving countries (including the Netherlands). Although these migrant smugglers did not physically transport the involved migrants to the EU and its member states, their crimes do affect EU interests and that of the member states. After all, the migrants indirectly ended up in member states due to their actions. Public Prosecution Services thus have an interest in jurisdiction over these migrant smugglers because they involved migrants subject to the offense who are now in e.g. the Netherlands or other member states, while jurisdiction might not (always) be established on existing grounds.
- Moreover, when coercive measures need to be employed (early) in an investigation, it is undesirable for there to be a debate about jurisdiction. There may be information available indicating that the actions of certain migrant smugglers will result in people coming to the EU. At the same time, there may be intermediary steps involved. Consider the actions of smugglers in countries such as Iraq, Syria, Sudan, Mali, Niger, Chad - all countries through which migrants travel to a non-EU state. Both member states and the EU have an interest in addressing migrant smuggling in those countries because the migrants ultimately arrive in the EU and member states through those countries.

- Naturally, such a broadening of extraterritorial jurisdiction should not mean that all migrant smuggling outside of the EU, with no link to EU and its member states should be prosecuted every time. Factors such as the presence of a significant national interest, the seriousness of the case, the usability of the available evidence, and the likelihood of successful prosecution should be taken into account, as well as the importance of fair trial. Having the additional jurisdictional room could however be very useful in addressing this inherently cross-border crime for which many preparatory acts happen outside of the EU.
- In this regard we have also recently submitted a bill to our own national parliament to broaden the extraterritorial jurisdiction for migrant smuggling nationally.
- Either way, on the text in article 12 of the proposal as it currently is we want to make the remark that paragraph 2 in our opinion is not phrased sufficiently clearly.

POLAND

Thank you for the opportunity to provide written comments. Below, we outline Poland's key comments in relation to the specific articles.

Article 8

Sanctions for legal persons should be formulated in line with the solutions adopted in the draft Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC (Article 7 - ENVI Crime Directive). In particular, Poland considers that Article 8(3) should contain alternative maximum fixed amounts for fines.

Article 9

The article referring to aggravating circumstances should be optional and not mandatory. Therefore, "shall" should be changed to "may". Alternatively, it should follow Article 8 of the ENVI Crime Directive and Article 8 of the Restrictive Measures Directive and be replaced by "one or several of the following circumstances may, in accordance with the relevant provisions of national law, be regarded as aggravating circumstances" .

Poland also asks the Presidency to clarify the concept of "public official" referred to in point (a) or, alternatively, will this issue remain a matter for the national law of the Member State concerned? Furthermore, what is meant by the "exploitation or instrumentalization of a third country national" referred to in point (d)?

Article 10

By analogy with aggravating circumstances, this Article should be optional rather than mandatory. Alternatively, it should be aligned with Article 9 of the ENVI Crime Directive and Article 9 of the Restrictive Measures Directive by adding the words "one or several of the following circumstances may, in accordance with the relevant provisions of national law, be regarded as a mitigating circumstances" .

Article 11

The limitation period for the execution of the sentence, in particular in Article 11(3)(c), should not exceed 10 years, as it depends on the sentence imposed by the court. We therefore propose to keep the above article in line with Article 11(3) of the ENVI Crime Directive and the Restrictive Measures Directive.

Article 12

We propose to split paragraph 1 into two sub-paragraphs 1 and 2 referring to mandatory and optional jurisdiction. By analogy with Article 12(1) and (2) of the ENVI Crime Directive and Restrictive Measures Directive.

COMIX

SWITZERLAND

Article 8 – Sanctions for legal persons

- With regard to Article 8 point 2, 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.

Article 9 – Aggravating circumstances

- With regard to Article 9 letter (b), Switzerland would like to point out that Directive 2009/52/EC 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. A possible alternative to the reference to Directive 2009/52/E could be to include the definition in Article 2.

Article 12 – Jurisdiction

- With regard to Article 12 (4), Switzerland would like to point out that Council Framework Decision 2009/948/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.