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#### NOTE

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From:	Presidency
To:	Delegations
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Subject:	Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA - Presidency discussion paper with a revised text

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#### Introduction

At the COPEN meeting on 11 September 2024, delegations continued the examination of the draft Directive on the basis of a note by the Presidency (12484/24).

At the JHA Counsellors meeting on 23 September, delegations discussed the scope of the draft Directive, in particular Article 3 and the humanitarian clause, on the basis of 13345/24.

Further to a call by the Presidency, several delegations provided comments and drafting suggestions in writing, see 13376/24 and 13600/1/24 REV 1.

In the light of the proceedings at the meeting on 11 and 23 September 2024, and taking into account the comments and drafting suggestions provided by delegations, the Presidency has redrafted the text of the draft Directive, see in the Annex. In several sections, the Presidency inserted questions in order to obtain the positions of the delegations on the points concerned.

The Presidency intends discussing the attached text at the COPEN meeting on 9 October 2024.

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PRESIDENCY REDRAFT<sup>1</sup>

*Article 1 (text provisionally agreed)*

*Subject matter*

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

*Article 2 (text provisionally agreed)*

*Definitions*

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

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

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<sup>1</sup> Additional text in relation to previous drafts is marked by **bold and underlining**. Additional text proposed earlier is marked by **bold** only. Deletions are marked by ~~strikethrough~~.

## Article 3

### Criminal offences

*At the JHA Counsellors meeting on 23 September, it appeared that a majority of delegations can accept the text of Article 3(1) as it stands, together with recitals (6) and (6a) (formerly X) as set out below.*

*As regards recital (6a), the text has been revised in the light of the Directive on trafficking in human beings, recital 26.<sup>2</sup> The freedom for Member States to act is hence underlined.*

*The only issue concerns the words “at least”, which some Member States prefer keeping, and others prefer deleting. The question remains whether the text containing „at least” is acceptable as a compromise. In this regard, the Presidency recalls that while all delegations agree on this Directive being a minimum harmonisation measure, the insertion of the words “at least” into the operative part and/or in the recitals would provide both a clear indication and some margin of manoeuvre at a later stage.*

1. Member States shall ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence **at least** where a) the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct, in order to obtain such a benefit or:  
b) ~~there is a high likelihood of causing serious harm to a person.~~

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<sup>2</sup> Recital 26 of Directive 2011/36/EU, on trafficking in human beings, states the following: “This Directive establishes a minimum legal framework in this regard, and Member States are free to adopt or maintain more stringent criminal rules.”

~~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.~~

Accompanying recital Article 6:

~~“(6) In accordance with the principles of legality and proportionality of criminal law, and in order to address criminal activities that put human life in danger and disrespect the dignity of people for the purpose of obtaining profits, it is necessary to provide a precise and detailed definition of the criminal offences that counter these criminal behaviours. **Facilitation Assistance** of unauthorised entry, transit or stay in the Union should constitute a criminal offence when there is a link with an actual or a promised financial or material benefit. **This is without prejudice to the way in which Member States deal in their national law with facilitation conducts for which an actual or a promised financial or material benefit is not a constituent element of the offence.** This conduct . . . . . as public instigation.”~~

Accompanying recital (6a):

~~“(6a) This Directive is an instrument of minimum harmonisation. As a consequence, the purpose and effect of which is that Member States are not prevented from adopting free to adopt or maintain legislation providing for a broader incrimination than what is set out in this Directive, in the interests of enhancing the effectiveness of the fight against migrant smuggling networks. Member States should ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence at least where the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit. However, since this Directive is an instrument of minimum harmonisation, Member States are not prevented free to criminalise such conduct when no financial or another material benefit has been provided, or when a financial or material benefit cannot be demonstrated.”~~

### Humanitarian clause

*At the meetings on 11 and 23 September, delegations discussed the issue of the humanitarian clause. It appeared that delegations remained divided on the question whether this clause should be inserted in the operative part, or in the recitals. The majority of frontline Member States seemed in favour of keeping the handling of exceptions based on humanitarian law, basic human needs, and sea rescue within national competence, which also corresponds to the original Commission proposal. At the next COPEN meeting, the Presidency would like to try again to find a solution on this issue.*

*Since there was a discussion about the level of detail in the recitals, some text has been qualified as possible “additional language”: Member States are invited to indicate if they prefer maintaining this additional language, also in light of concerns that an interpretative provision on "close family members" in the recitals may not add clarity but instead raise further concerns.*

### **Option 1** (humanitarian clause in the recitals, building on the Commission proposal):

Recital 7<sup>3</sup>:

**“(7) Nothing in this Directive should be understood as criminalising, on the one hand, assistance provided to family members and, on the other hand, humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations, including, where applicable, with international law.”**

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<sup>3</sup> For ease of reference, this is the text of the original Commission proposal:

(7) It is appropriate to provide for criminal liability where there is a link to a financial or material benefit, or where migrants are highly likely to be subjected to serious harm. These elements will usually not be fulfilled when it comes to assistance among family members or the provision of humanitarian assistance or the support of basic human needs. Third-country nationals should not become criminally liable for having been the subject to such criminal offences. Moreover, it is not the purpose of this Directive to criminalise, on the one hand, assistance provided to family members and, on the other hand, humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.

Possible additional language in this recital 7:

**“Meeting a person's basic needs means, at a minimum, ensuring that essential needs such as food, personal hygiene, and shelter are provided so that their physical or mental health is not endangered, and they are not subjected to conditions of degradation incompatible with human dignity.<sup>4</sup>**

**Moreover, assistance provided to a close family member to meet their basic human needs should not be criminalised. Close family members include a spouse or unmarried partner engaged in a stable relationship, parents, children and siblings, taking into account the different particular circumstances of dependency with ~~and the~~ special attention to be paid to the best interests of children.”**

In addition, delegations are reminded that the international obligations are already referred to in **recital (4)**, which however could contain a more explicit reference to the issues discussed during the last meetings:

“(4) The facilitation of unauthorised entry, transit and stay is a transnational phenomenon, and measures adopted at Union and national levels should recognise its international dimension. Union and national actions should therefore take into account the international commitments of the Union and its Member States, including in relation to the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on maritime Search and Rescue, the United Nations Convention on the Rights of the Child, as well as the work of the United Nations Office against Drugs and Crime.

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<sup>4</sup> Linguistically improved text based on the previous version, with the same content.

**Nothing in this Directive should affect the rights, obligations and responsibilities of Member States and individuals to provide assistance to third-country nationals, for humanitarian reasons or aimed at meeting their basic human needs, under applicable international law, including international human rights law and in particular, where applicable, the 1951 Convention relating to the status of refugees as amended by the Protocol of New York of 1967, the United Nations Convention on the Law of the Sea (UNCLOS), and in compliance with legal obligations.**

**This assistance can also include legal, linguistic or social advice or support.”**

***Option 2 (humanitarian clause in the operative part)***

*Insertion of paragraph 2a (later to be renumbered to paragraph 2) in Article 3:*

- 2a. **Nothing in paragraph 1 shall be understood as criminalising humanitarian assistance for persons in need, or activities in support of basic human needs, provided in accordance with international law.**



No criminal liability for third persons that are merely the subject of facilitation (both in option 1 and 2 set out above)

The proposed Directive addresses persons that commit the criminal offence of migrant smuggling, by facilitating the unauthorised entry, transit across, or stay within the territory of any Member State. While the Directive does not address the conduct of persons that are merely the subject of that criminal offence, unauthorised entry and stay is in most Member States a sui generis infringement, often sanctioned by criminal or administrative measures. Therefore, should the majority wish to retain this sentence of the original Commission proposal for recital 7, it should be slightly adapted in the recitals (e.g. a recital 7a), see below. In addition, the Presidency asks Member States whether the sentence should be kept or deleted.

“(7a) Third-country nationals should not become criminally liable for **the sole fact of** having been the subject to the criminal offence **of facilitating the unauthorised entry, transit across, or stay within the territory of any Member State.**”

*Article 4 (deletion provisionally agreed)*

*Aggravated criminal offences*

*This Article 4 on aggravated criminal offences was deleted; elements were introduced in Article 6. The corresponding references to Article 4 will be removed throughout the text.*

*Article 5 (text provisionally agreed)*

***Inciting, aiding and abetting, and attempt***

Member States shall ensure that inciting, aiding and abetting, and ~~the attempting~~ to commit any of the criminal offences referred to in Article 3(1) <sup>5</sup> ~~and Article 4~~ are punishable as criminal offences.

<sup>5</sup> The references in all Articles after Article 3 to “Article 3(1a)”, which had been introduced by the previous Presidency, have been deleted.

## Article 6

### Penalties for natural persons

#### Article 6

Article 6 was extensively debated during the meetings on 11 and 23 September 2024. In light of these discussions, the Presidency has made several changes to the text, accompanied by questions where appropriate. In cases where the way forward was not yet clear, the Presidency has also included a question.

1. Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3, 4 and 5 are punishable by effective, proportionate and dissuasive criminal penalties.

#### Paragraph 2 and 2a:

*Further to a call by Member States, the Presidency proposes to revert, for the basic offence mentioned in paragraph 2, to a penalty with a minimum term of imprisonment of three years. As a consequence, paragraph 2a can be deleted.*

*The Presidency hopes that this is agreeable to all.*

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

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

Paragraph 3

Points (a)-(d) in this paragraph were transferred from the (deleted) - Article 4 on aggravated offences.

To recall, Article 1 of Framework Decision 2002/946/JHA provides for the following:

“3. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than **eight** years where they are committed in any of the following circumstances:- the offence was committed as an activity of a **criminal organisation** as defined in Joint Action 98/733/JHA(8), - the offence was committed while **endangering the lives of the persons** who are the subject of the offence.”

In order to keep a coherent approach with regard to sanction levels, reference is also made to the Envicrime Directive, Article 5 (2): “Member States shall take the necessary measures to ensure that: (a) criminal offences covered by Article 3(2), points (a) to (d), and points (f), (j), (k), (l) and (r), are punishable by a maximum term of imprisonment of at least 10 years if they cause the death of any person;”

Furthermore, the Presidency also observes that points (b) and (c) in the proposal are rather similar and could be possibly merged:

**(b) was committed by the use of serious violence or caused serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence or of other persons;**

Member States are invited to express their opinion on this merge.

Delegations are invited to indicate their exact preferences.

3. Member States shall take the necessary measures to ensure that the criminal offences ~~referred to in Article 4, points (a) to (d)~~ by Articles **3(1)** are punishable by a maximum term of imprisonment of at least ~~ten~~ **eight** years **where that offence:**
- (a) was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA;**
  - (b) deliberately or by gross negligence caused serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence or of other persons;**
  - (c) was committed by the use of serious violence or has caused serious harm to the health of the third country national or of other persons;**
  - (d) the third-country national who was subjected to the criminal offence was particularly vulnerable, including such as unaccompanied minors.**

Paragraph 4

*Further to a suggestion by delegations, the reference to ‘other persons’ was brought back, thus including also the police.*

*One delegation suggested adding a new recital accompanying paragraph 4, which is inspired by recital 30 of the Envicrime Directive (2024/1203).<sup>6</sup>*

*In line with the Envicrime Directive, 10 years seems to be an adequate penalty when the conduct causes death.*

*The Presidency would like to know whether delegations can accept the revised paragraph 4, and recital (11a).*

4. Member States shall take the necessary measures to ensure that the criminal offences ~~referred to in Article 4 point (e)~~, by Articles **3(1)**, ~~including attempts to commit this criminal offence referred to in that provision~~, are punishable by a maximum term of imprisonment of at least ~~fifteen~~ **ten** years **where that offence caused death of any person.**

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<sup>6</sup> It is recalled that recital 30 of the Envicrime Directive (2024/1203) reads as follows:

*“Penalties for the criminal offences defined in this Directive should be effective, dissuasive and proportionate. To that end, minimum levels for the maximum term of imprisonment should be set for natural persons. The maximum terms of imprisonment provided for in this Directive for the criminal offences committed by natural persons should apply at least to the most serious forms of such offences. The criminal law of all Member States includes provisions on homicide, either committed intentionally or with serious negligence. Member States should be able to have recourse to those general provisions, including provisions on aggravating circumstances, when transposing the provisions in this Directive that relate to criminal offences that cause the death of a person, whether committed intentionally or with serious negligence.”*

Proposed accompanying recital 11a:

**“The maximum terms of imprisonment provided for in this Directive for the offences committed by natural persons should apply at least to the most serious forms of such offences. The criminal law of all Member States includes provisions on murder or manslaughter. Member States may rely on those provisions, including provisions on aggravating circumstances, when transposing the provisions in this Directive that relate to offences that cause the death of a person.”**

Paragraph 5

*The Presidency observes that the language of the chapeau of this paragraph is very similar to that of Article 5(3) of the Envicrime Directive (2024/1203). Further to a comment by delegations, point (c) was made more concise.*

*Delegations that cannot accept the text are invited to indicate this.*

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

- (b) ~~return after the enforcement of the penalty in a Member State, or to serve the penalty imposed, or part of it, in the third country of return, without prejudice to more favourable provisions that may be applicable by virtue of Union or national law;~~
- (c) ~~prohibition to enter and stay on the territory of the Member States for an appropriate period of maximum 10 years, without prejudice to more favourable provisions that may be applicable by virtue of Union or national law;~~
- (d) exclusion from access to public funding, including tender procedures, grants and concessions.
- (e) *(moved to aa)*
- (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.~~

Recital 11

*Further to a comment by delegations, recital 11 was put in line with the text in 10569/24.*

*Delegations are invited to indicate if they can accept the revised text.*

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

**Gross negligence may be considered in the context of criminal offences as an autonomous concept to be defined in accordance with national law.**

**Member States should criminalise conduct that deliberately or by gross negligence endangers the life of a third country national. It is appropriate to expand the scope of the relevant provision to include offences that caused serious harm to, or endangered the life of, other individuals, such as members of law enforcement. The increasing violence perpetrated by smugglers against them justifies this expansion.**

Considering the possible risk to public policy and public security that they may pose, third-country nationals who committed the offences defined in this Directive should be subject to return in accordance with Directive 2008/115/EC of the European Parliament and of the Council<sup>5</sup> or in accordance with national law where Member States have made use of Article 2(2), point (b), of that Directive, either after having served the prison sentence in a Member State or in view of serving the prison sentence, or part of it, in a third country, without prejudice to more favourable provisions applicable by virtue of Union or national law; furthermore, without prejudice to more favourable provisions applicable by virtue of Union or national law, those third-country nationals should be prohibited to re-enter the territory of the Member States for an appropriate period of time to be determined on a case-by-case basis, and that can reach 10 years in the most serious cases. This should not affect the discretion of judges or courts in criminal proceedings to impose appropriate sanctions in the individual cases.

*Article 7 (text provisionally agreed)*

**Liability of legal persons**

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

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



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

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

#### Article 8

*The Presidency observes that the language of the chapeau of this Article is very similar to that of Article 7 of the Envicrime Directive (2024/1203).*

*The term “sanctions” was replaced with “penalties”, in line with the Envicrime Directive and indication of lawyer-linguists. The Presidency will check if further replacements of these words will have to be made in the text.*

*Further to comments by delegations, the references in paragraph 3 to Article 7(2) and Article 3(1a) were deleted.*

*The physical amounts set out in this Article are drafted along the ‘Czech formula’: 1% of total worldwide turnover equals 8.000.000 euro. Delegations are invited to indicate if this horizontal approach to keep consistency across directives is acceptable.*

#### Article 8

##### Penalties ~~Sanctions~~ for legal persons

1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 **(1) or (2)** is ~~subject to~~ **punishable by** effective, proportionate and dissuasive criminal **or non-criminal penalties** ~~sanctions or measures~~.

2. Member States shall take the necessary measures to ensure that **penalties** ~~sanctions~~ or measures for legal persons **held** liable pursuant to Article 7 **(1) or (2)** for the criminal offences referred to in Articles 3, 4 and 5 **shall include criminal or non-criminal fines and may include other criminal or non-criminal penalties** ~~sanctions~~ or measures, such as ~~may include~~:
- (a) ~~criminal or non-criminal fines~~;
  - (b) exclusion from entitlement to public benefits, **or** aid ~~or subsidies~~;
  - (c) ~~temporary or permanent~~ exclusions from access to public funding, including tender procedures, grants, ~~and concessions~~ **and licences**;
  - (d) temporary or permanent disqualification from the practice of **business** ~~commercial~~ activities;
  - (e) placing under judicial supervision;
  - (f) judicial winding-up;
  - (g) ~~temporary or permanent~~ closure of establishments ~~which have been~~ used for committing the ~~criminal~~ offence;
  - (h) withdrawal of permits and authorisations to pursue activities **that** ~~which have~~ resulted in ~~committing~~ the **relevant** criminal offence;
  - (i) ~~freezing and confiscation of the proceeds derived from, and instrumentalities used for, the commission of the offence, in accordance with Directive 2014/42/EU of the European Parliament and of the Council.~~

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

**(a) for criminal offences covered by ~~referred to in Article 3(1)~~ where the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit:**

**(i) 1% of the total worldwide turnover of the legal person, either in the business year preceding ~~that the one~~ in which the criminal offence was committed, or in the business year preceding ~~that of the fining~~ decision **to impose the fine**, ~~for criminal offences referred to in Article 3.~~ **or****

**(ii) *an amount corresponding to EUR 8 000 000.***

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

**(i) 3% of the total worldwide turnover of the legal person, either in the business year preceding the one in which the criminal offence was committed, or in the business year preceding the ~~fining~~ decision **to impose the fine**, ~~for criminal offences referred to in Article 4, points (a) to (d), or~~**

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

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

(i) **5%** of the total worldwide turnover of the legal person, either in the business year preceding ~~that the one~~ in which the criminal offence was committed, or in the business year **preceding that of the fining** decision, for criminal offences referred to in Article 4, ~~point (e)~~ **6(4)**, or

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

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

Article 8a

*As agreed at the meeting on 11 September, this Article has been deleted.*

*Article [8a] Freezing and confiscation*

~~Member States shall take the necessary measures to enable the freezing and confiscation of instrumentalities and proceeds from the criminal offences referred to in Articles 3 and 5. Member States bound by Directive 2024/1260/EU of the European Parliament and of the Council shall do so in accordance with that Directive.~~

Article 9

*This text is based on Article 8 of the Envicrime Directive (2024/1203) and Article 8 of the Directive on restrictive measures (2024/1226).*

*Further to a comment by delegations, in paragraph 1 under d, 'exploitation' was deleted. The accompanying recital was also deleted.*

*Delegations which consider that the text of the Article is not agreeable yet, are invited to indicate this.*

*Article 9*

*Aggravating circumstances*

1. **To the extent that the following circumstances do not form part of the constituent elements of the criminal offences referred to in Article 3**, Member States shall take the necessary measures to ensure that **one or more of** the following circumstances ~~may~~ **can, in accordance with national law**, be regarded as **an** aggravating circumstances, in relation to the criminal offences referred to Articles 3,4 and 5:
  - (a) the criminal offence was committed by a public official when performing his or her duties;
  - (b) the criminal offence entailed or resulted in the involvement of third-country nationals who were subject to the criminal offence in illegal employment as referred to in Directive 2009/52/EC of the European Parliament and of the Council;
  - (c) the offender has previously been ~~definitively~~ convicted **by a final judgment** of criminal offences of the same nature ~~under~~ **as those referred to in** Articles 3,4 or 5;

- (d) the criminal offence entailed or resulted in ~~[the exploitation or]~~ instrumentalisation of a third-country national who was subject to the criminal offence;
- (e) dispossessing the third-country nationals who are subject to the criminal offence of their identity or travel documents;
- (f) the criminal offence was ~~carried out while carrying a firearm~~ **committed with the use of a weapon or the threat of using a weapon;**
- (g) **the criminal offence was committed involving cruel, inhuman, or degrading treatment of a third-country national who was subject to the criminal offence.**

Corresponding recital 14:

*“The notion of aggravating circumstances should be understood either as facts allowing the judge to pronounce a higher sentence for the same offence than the one normally incurred without these facts, or as the possibility of retaining several offences cumulatively in order to increase the level of sanction. Therefore, Member States should not be obliged to provide for specific aggravating circumstances where national law provides for separate criminal offences or a general ability for national courts to weigh all relevant aggravating circumstances, and this may lead to more severe sanctions.”*

[Recital X concerning exploitation]: (deleted)

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

Recital 14a concerning instrumentalisation:

**(14a) The notion of ‘instrumentalisation’ should be understood as a situation where a third country or hostile non-state actor, encourages or facilitates the movement of third country nationals and stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security, as referred to in Article 1(4) point (b) and recitals 14, 15, 16 and 20 of Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.**

Article 10 and corresponding recital 15

*Following requests by Member States, “one or more” and “can” (as a replacement for “may”) was inserted in the text, in line with e.g. Article 9 of the Envicrime Directive (2024/1203) and Article 9 of the Directive on restrictive measures (2024/1226).*

*Delegations that cannot accept the text are invited to indicate their objections.*

#### *Article 10*

##### *Mitigating circumstances*

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

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

Suggested wording for corresponding recital 15:

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

Article 11 and corresponding recital 16

*This Article is very similar in structure as Article 11 of the Envicrime Directive (2024/1203).*

*Recital 16 was slightly revised, further to a suggestion from delegations.*

*Delegations that cannot accept the text as it stands are invited to indicate their objections.*

*Article 11*

*Limitation periods ~~for criminal offences~~*

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Revised text of corresponding Recital 16:**

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

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

Article 12

*Further to a comment from delegations, point (a) in paragraph 4 was deleted.*

*The Presidency hopes that the text as it stands is agreeable to all. Delegations that cannot accept the text are invited to indicate their objections.*

*Article 12*

*Jurisdiction*

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

(a) ~~the offence was~~ is committed in whole or in part **within** its territory;

(b) ~~the offender is committed by~~ one of its nationals ~~or a third-country national who is a habitual resident in its territory~~;

(c) ~~is committed for the benefit of a legal person~~

(i) ~~established in its territory~~;

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

~~(d)~~ (c) ~~the offence was~~ is committed on board of a ship or an aircraft registered in **the Member States concerned** ~~it~~ or flying its flag;

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

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

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

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

**(i) established in its territory;**

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

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

~~3. 2. Each Member States shall take the necessary measures to establish its jurisdiction over attempts the attempt to commit a criminal offence referred to in Articles 3(1) 4 point (e), where the conduct would have constituted a criminal offence over which jurisdiction would have been established pursuant to paragraph 1.<sup>7</sup>~~

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

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

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

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<sup>7</sup> In view of comments by delegations, this paragraph 3 has been deleted.

5. 4. Where a criminal offence referred to in Articles 3,-4 and 5 falls within the jurisdiction of more than one Member State, ~~those~~ these Member States shall cooperate to determine which Member State is to conduct ~~the~~ criminal proceedings. The matter shall, where appropriate and in accordance with Article 12 (2) of Framework Decision 2009/948/JHA<sup>8</sup>, be referred to Eurojust.

#### Article 13

“Action” was replaced with “measures”, in line with Article 16 of the Envicrime Directive (2024/1203).

Further to comments from delegations, the text was further refined. Lawyer-linguists could further improve the language at a later stage.

Delegations that cannot accept the text are invited to indicate this.

#### *Article 13*

#### *Prevention*

1. Member States shall take appropriate measures ~~action~~, such as information and awareness-raising campaigns, and research and education programmes, **where relevant with specific attention to the online dimension and with respect for national competence and national law**, aimed at raising public awareness and reducing the commission of the criminal offences referred to in Articles 3,-4 and 5.

2. Where appropriate, Member States shall take the necessary measures to carry out the activities referred to in paragraph 1 in cooperation with other Member States, relevant Union agencies, ~~and~~ third countries **and relevant civil society organisations and other stakeholders such as the private sector**.

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<sup>8</sup> Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ L 328, 15.12.2009, p. 42).

*Article 14 (text provisionally agreed)*

*Resources*

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

Article 15

*At the meeting on 11 September, the solution of revising the text of the operative part (and not of the recitals) was favoured. In this way, the wording of this Article would be aligned with that of the Directive on combating trafficking in human beings.*

*The text concerned has been set out below. The Presidency hopes that the text as it stands is agreeable to all. Delegations that cannot accept the text are invited to indicate their objections.*

*Article 15*

*Training*

1. Member States shall take the necessary measures to ensure adequate resources for and the provision of **regular and specialised training at regular intervals** for the members of the law enforcement, ~~the judiciary~~ and the staff of authorities **including court staff, assistance and support services, border guards** tasked with criminal investigations and proceedings of criminal offences referred to in Articles 3, 4 and 5.
2. Without prejudice to judicial independence **and differences in the organisation of the judiciary across the Union**, Member States shall **encourage both general and specialised training for judges and prosecutors** ~~take the necessary measures to ensure that specialised regular training is provided to judges, prosecutors, law enforcement and judicial staff and competent authorities' staff~~ involved in criminal proceedings and investigations with respect to the objectives of this Directive.

Article 16

*Further to comments from delegations, the wording was clarified.*

*The Presidency hopes that the text as it stands is agreeable to all. Delegations that cannot accept the text are invited to indicate their objections.*

*Article 16*

*Investigative tools*

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

Accompanying recital 24:

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



## Article 17

*This Article is very similar in structure as Article 17 of the Envicrime Directive (2024/1203).*

*Further to requests by delegations, some changes were made in this Article:*

*In the chapeau of paragraph 2, the word “existing” was added.*

*In paragraph 2, point e), it is said again that this concerns “decisions to prosecute or not to prosecute” (so excluding decisions on pre-trial detention, house searches, surveillance measures etc).*

## *Article 17*

### *Data collection and statistics*

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

- d) the number of legal persons prosecuted for criminal offences referred to in this Directive, ~~disaggregated by place of establishment;~~
- e) the number of **prosecution decisions** of the prosecution services ~~disaggregated by type of decision~~ (**decisions** to prosecute or not to prosecute);
- f) the number of ~~final court~~ **judgements** ~~disaggregated by type of decision~~ (i.e. conviction, acquittal, ~~dismissal on the substance or not, and including non trial resolutions~~);
- g) the number of natural persons convicted of criminal offences referred to in this Directive, ~~disaggregated by sex and citizenship;~~
- h) the number of natural persons subjected to penalties disaggregated by the type and level of penalty (imprisonment, fines, others) sex and citizenship;
- i) the number of legal persons convicted for criminal offences referred to in this Directive and sanctioned;
- j) the number of legal persons sanctioned disaggregated by ~~place of establishment and~~ type of sanction (fines, others);
- k) ~~the average length of courts proceedings of cases in first instance, second instance and cassation.~~

3. Member States shall, ~~on an annual basis and by 1 July each year~~ **transmit annually to the Commission, in principle by 30 September and, where not possible, at the latest by 31 December, each year, the statistical data referred to in paragraph 2 for the previous year in a standard, easily accessible and comparable format basis.** ~~publish, in a machine-readable and disaggregated format, the statistical data referred to in paragraph 2 for the previous year and transmit it to the Commission.~~

*Article 18 (text provisionally agreed)*

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

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

*Article 19 (text provisionally agreed)*

*Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [~~one~~ **two years from after the date of entry into force of this Directive**] ~~at the latest~~. They shall **immediately inform** ~~forthwith communicate~~ to the Commission ~~thereof text of those provisions~~.
2. When Member States adopt those ~~measures provisions~~, they shall contain a reference to this Directive or **shall** be accompanied by such a reference on the occasion of their official publication. **The methods of making such reference shall be laid down by Member States** ~~shall determine how such reference is to be made~~.
3. Member States shall communicate to the Commission the text of the main ~~measures provisions~~ of national law which they adopt in the field covered by this Directive.