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PROPOSAL

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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 755 final
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

Delegations will find attached document COM(2023) 755 final.

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Brussels, 28.11.2023
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2023/0439 (COD)

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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Migrant smuggling is a criminal activity that disrespects human life and strips people of their dignity in the pursuit of profit, violating fundamental rights as well as undermining the migration management objectives of the EU.

Fighting and preventing migrant smuggling is one of the priorities of the European Union and crucial to addressing irregular migration in a comprehensive way. Criminal networks take advantage of people's despair and use land, sea, and air routes to facilitate irregular migration, putting people's lives at risk and seeking in every way to maximise their profits.

In her State of the Union address on 13 September 2023, President von der Leyen called for strengthening of all the tools at disposal of the EU to effectively counter migrant smuggling, by updating the current, more than 20-year-old legislative framework. She also called for strengthening the governance on migrant smuggling and increasing the role of EU agencies, in particular of Europol. She also emphasised the need to work with partners to tackle this global challenge, and this is why the Commission is organising an International Conference, creating a Global Alliance with a Call to Action to fight migrant smuggling.

Migrant smuggling to and within the EU is reaching new heights, fuelled by increasing demand due to emerging and deepening crises, most notably economic recessions, environmental emergencies caused by climate change, as well as conflicts and demographic pressure in many third countries. Migrant smuggling drives the increase of irregular arrivals to the EU: in 2022, around 331 000 irregular entries were detected at the EU external borders, the highest level since 2016, representing a 66% increase compared to the previous year[1]. In 2023, until the end of September, approximately 281 000 irregular border crossings were detected at the external borders of the EU, representing an 18% increase compared to the same period in 2022. This coincides with an increase in the smuggling activities, evidenced by a new record with over 15 000 migrant smugglers reported by Member States to Frontex in 2022[2]. Taking into account the increase in irregular arrivals in 2023 and the various worldwide crises in a range of countries of origin and transit, consistently high and potentially increased migratory flows to Europe[3] and related smuggling criminal activities can be expected.

It is estimated that more than 90% of the irregular migrants who reach the EU make use of the services of smugglers[4], mostly organised in criminal groups. Moreover, smuggling networks make substantial profits from their criminal activities, with estimates ranging between EUR 4.7 – 6 billion worldwide annually[5]. Providing a strong and firm response to smugglers' activities is therefore of primary importance to reducing irregular migration. It is estimated that the activities of ruthless migrant smugglers, especially at sea, resulted in a staggering death toll of over 28 000 people[6] since 2014.

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1 Frontex, Risk Analyses for 2023/2024.
2 Frontex, Risk analyses for 2023/2024.
3 Frontex, Risk Analysis for 2023/2024.
4 Estimates by Europol.
5 United Nations Office on Drugs and Crime, Global study on smuggling of migrants, 2018.
6 International Organisation for Migration, Missing migrants project, available at: https://missingmigrants.iom.int/region/mediterranean.

Around half of the migrant smuggling networks are also involved in other crimes, such as trafficking in human beings, drugs and firearms smuggling, while also facilitating unauthorised movements within the EU. Law enforcement and judicial authorities are faced with multiple and constantly evolving challenges: the rapidly changing and adapting *modi operandi* of smugglers; the increased use of threats and violence vis-à-vis the migrants as well as law enforcement authorities[7]; the difficulties to locate and arrest smugglers who hide in countries outside the EU; the use of a broad variety of means of transport, including unseaworthy, less detectable vessels (such as fishing boats and makeshift metal boats), road vehicles in which migrants are dangerously concealed, as well as commercial and charter flights increasingly used to bring migrants to countries close to or bordering the EU, from where migrants then seek to irregularly enter the EU[8]; the use of digital tools at all stages of the process, with online advertising of smuggling services, routes and prices as well as for forging documents; the use of crypto-currencies, digital money or other unofficial forms of payment (e.g. *hawala*)[9].

Tackling migrant smuggling is essential to dismantling organised crime networks that can cause human rights violations and death, and to countering the increase in irregular migration to the EU. A comprehensive and sustainable approach to migration requires a combination of robust and efficient actions complementing mutually beneficial partnerships with countries of origin and transit, addressing the root causes of migration and in particular irregular migration, and at the same time fighting organised crime including migrant smuggling and trafficking in human beings. The New Pact on Migration and Asylum[10] puts preventing and countering migrant smuggling at the centre of its comprehensive approach to migration.

The existing EU legal and operational framework on migrant smuggling needs to be modernised and reinforced to enhance the tools at the disposal of the European Union to prevent and respond to this continuously evolving crime, including in the context of the legal obligations on the Union and its Member States under international law under the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air.

This proposal for a Directive is part of a set of measures that operationalise the call of President von der Leyen and aim to modernise and strengthen the existing legal framework and provide the Union with rules which are fit for purpose. It updates and modernises the existing EU criminal law rules of the "Facilitators Package", composed of Directive 2002/90/EC establishing a common definition of the offence of facilitation of unauthorised entry, transit, and residence[11], and Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence[12].

This proposal is accompanied by a Commission proposal for a Regulation[13], which enhances police cooperation as well as the powers of Europol in the area of migrant smuggling and trafficking in human beings notably by codifying the establishment of the European Centre Against Migrant Smuggling within the Europol and reinforcing its related powers. The proposal enhances the strategic and operational tasks of Europol on fighting migrant smuggling to steer and support the Centre's activities and to identify and implement

7 Europol, Criminal Networks in Migrant Smuggling, Europol Spotlight, 2023.
8 Frontex, Risk Analyses for 2023/2024.
9 Europol (2023), Criminal Networks in Migrant Smuggling, Europol Spotlight.
10 COM(2020) 609 final.
11 OJ L 328, 5.12.2002, p. 17.
12 OJ L 328, 5.12.2002, p. 1.
13 COM(2023) 754 final.

operational priorities and actions. It establishes a governance framework, which includes Member States' entities responsible for migrant smuggling, the Commission, and other EU agencies. It strengthens inter-agency cooperation with Frontex and Eurojust and reinforces cooperation between Europol and third countries.

This package is presented on the day of the International Conference launching a "Global Alliance to counter migrant smuggling". With this Conference, the Commission is creating a framework for strong political cooperation with international partners to jointly counter migrant smuggling globally.

These three initiatives complement the existing initiatives in the area of countering migrant smuggling, implementing the renewed EU action plan against smuggling (2021-2025)[14] by modernising the existing EU legal framework to sanction migrant smugglers acting on the migratory routes, and setting out a renewed legal, operational and international cooperation framework against migrant smuggling for the years to come.

Together, these proposals aim to modernise the legal framework to fight the smuggling of migrants, to ensure that we have the necessary legal and operational tools to respond to the new modus operandi of smugglers, as set out in the Commission work programme 2024 announced on 17 October 2023.

Objectives of the proposal

The current EU legal framework on facilitation of unauthorised entry, transit and residence in the EU was adopted in 2002 under provisions pre-dating the Treaty of Lisbon. The general objective of this proposal for a Directive is to bring about a modern EU criminal law instrument that clearly defines and effectively sanctions the offence of facilitation of unauthorised entry, transit and stay in the EU, in line with the provisions of Article 83 of the Treaty on the Functioning of the European Union and the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air.

This proposal for a Directive serves the following specific objectives:

– *Ensuring an effective investigation, prosecution and sanctioning of organised criminal networks responsible for migrant smuggling*

The 2017 REFIT evaluation of the current Facilitators Package, and the subsequent monitoring of its implementation, pointed to the challenges linked to a broad definition on what constitutes a crime of facilitation of unauthorised entry, transit and residence. Namely, it pointed to the fact that it has not been effective in creating clarity and legal certainty about the distinction between facilitation of irregular migration and humanitarian assistance, due to the broad definition of the offence and the absence of exemptions. This proposal brings clarity on which offences should be criminalised. These include facilitation conducted for financial or material benefit or the promise thereof; facilitation that is highly likely to cause serious harm to a person even though conducted without financial or material benefit; and in cases of public instigation of third-country nationals, for instance through the internet, to enter, transit across or stay irregularly in the European Union. The proposal also clarifies that the purpose of the Directive is not to criminalise third-country nationals for the fact of being smuggled, assistance provided to family members, or humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.

[14] COM(2021) 591 final.

Furthermore, the refined definition also provides that the offence of facilitation can take place within the territory of any Member State, facilitating judicial cooperation between Member States.

– *More harmonised penalties that take account of the seriousness of the offence*

Since the adoption of the Facilitators Package in 2002, criminal networks involved in migrant smuggling have increasingly resorted to violence towards migrants and law enforcement authorities, endangering lives. The proposal introduces the definition of aggravated criminal offences (e.g., offence committed as part of an organised criminal group, causing serious harm or endangering life or health, causing death) to which there are corresponding higher level of criminal penalties. The minimum level of maximum penalties in the proposed Directive are higher than those provided for by the current Facilitators Package (which envisaged a maximum level of imprisonment of at least 8 years) and have been determined taking into account the overall regime of the penalties introduced by EU criminal law instruments. The main offence of facilitation would be punishable by a maximum level of imprisonment of at least 3 years, while aggravated offences (e.g. organised crime, use of serious violence) for at least 10 years and the most serious offences (causing death) 15 years.

– *Improving the jurisdictional reach*

The people who are organising and conducting migrant smuggling activities often reside outside the EU and are therefore outside the reach of the jurisdiction of the Member States. To increase the possibilities of sanctioning high-value targets who are organising smuggling activities and to avoid a situation where no State is able to exercise jurisdiction over serious and tragic smuggling cases happening for instance in international waters, the proposed Directive expands the jurisdiction of the Member States to cases in which the facilitation of unauthorised entry into the EU fails and third-country nationals lose their lives: this is, for instance, the case in which unseaworthy boats sink in international waters, therefore before reaching the territorial waters of a Member State or a third country. The proposed Directive also expands jurisdiction over offences committed on board of ships or aircrafts registered in a Member State or flying it flag, and offences committed by legal persons doing business but not necessarily established in the EU.

– *Reinforcing Member States resources to tackle and prevent migrant smuggling*

To ensure that Member States effectively counter migrant smuggling, the proposed Directive requires Member States to make sure that the relevant law enforcement and judicial authorities are adequately resourced, sufficiently trained and specialised to ensure effective prevention, investigation and prosecution of offenders. In addition, Member States should also work on the prevention of migrant smuggling, through information and awareness-raising campaigns, research and education programmes.

– *Improving data collection and reporting*

Lack of robust, comprehensive and comparable data on migrant smuggling offences and criminal justice responses at national and European level has been identified in the 2017 evaluation[15] as a key element hindering the assessment of the effects of the Facilitators Package in the Member States; furthermore, it prevents national policy makers and practitioners from monitoring and measuring the effectiveness of their measures. To address this shortcoming and ensure better monitoring, the proposal requires Member States to collect and report statistical data on an annual basis. This would contribute to a better understanding

[15] SWD(2017) 117 final.

of the nature and scale of migrant smuggling, the detection of cases and the responses of the criminal justice systems of the Member States, supporting evidence-based policy making.

- **Consistency with existing policy provisions in the policy area**

This proposal is consistent with the New Pact on Migration and Asylum, which provides for a strong European response to migrant smuggling inside and outside the EU as an essential part of the comprehensive approach to migration. It implements the renewed EU action plan against smuggling (2021-2025)[16], by updating and modernising the existing EU legal framework to sanction migrant smugglers acting on the migratory routes. The proposal is consistent and coherent with the EU Action Plans presented by the Commission on the Central Mediterranean, the Eastern Mediterranean, the Western Mediterranean and Atlantic, and the Western Balkans routes, as well as with the Toolbox addressing the use of commercial means of transport to facilitate irregular migration to the EU[17] and the proposal for a Regulation on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union[18]. It is also in line with commitments of comprehensive partnerships on migration undertaken at international level.

This proposal is also consistent with the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime to which the European Union is party. The UN Protocol includes financial or other material benefit as a constituent element of the crime and provides that third-country nationals are not to become liable to criminal prosecution under the Protocol for having been subject to the offence.

The proposal supports the objectives of the EU Security Union Strategy[19], the EU strategies to tackle Organised Crime 2021-2025[20] and on Combating Trafficking in Human Beings 2021-2025[21], as well as the revised EU Maritime Security Strategy[22].

The proposal is consistent with the Commission's 2020 Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence[23], which asserts that humanitarian assistance mandated by law (for example in the framework of search and rescue operations) cannot and must not be criminalised, that criminalisation of any non-state actors that carry out search and rescue operations at sea, complying with the relevant legal framework, amounts to a breach of international law and is therefore not permitted by EU law and that, where applicable, an assessment of whether an act falls within the concept of 'humanitarian assistance' – a concept that cannot be construed in a manner that would allow an act mandated by law to be criminalised – should be carried out on a case-by-case basis, taking into account all the relevant circumstances.

- **Consistency with other Union policies**

The proposal for a Directive is in line with the policy aims pursued by the Union, and in particular with:

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16 COM(2021) 591 final.
17 Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3057.
18 COM(2021) 753 final.
19 COM(2020) 605 final.
20 COM(2021) 170 final.
21 COM(2021) 171 final.
22 Council Conclusions 14280/23 of 24 October 2023 on the Revised EU Maritime Security Strategy (EUMSS) and its Action Plan.
23 OJ C 323, 1.10.2020, p. 1.

- Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union and the Proposal for a Directive on asset recovery and confiscation[24];
- Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union;
- Directive 2014/41/EU regarding the European Investigation Order in criminal matters;
- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA;
- Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA;
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities;
- Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol);
- Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA;
- Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act);
- Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals;
- Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings and the proposal for a Regulation on the transfer of proceedings in criminal matters[25].

This proposal is without prejudice to Directive 2004/38/EC[26] and the EU-UK Withdrawal Agreement[27]. The proposal does not in any respect amend Directive 2004/38/EC or the EU-UK Withdrawal Agreement.

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24 COM(2022) 245 final.

25 COM(2023) 185 final.

26 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The legal basis for this proposal is Article 83(2) of the Treaty on the Functioning of the European Union (TFEU), which sets out the EU's competence to establish minimum rules if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. The area of common immigration policy, notably the conditions of entry and residence, illegal immigration and unauthorised residence, and the management of the external borders of the EU, has already been subject to harmonisation by virtue of the Union *acquis* in the area of Title V TFEU on Freedom, Security and Justice, Chapter 2 policies on border checks, asylum and immigration, and it is essential to ensure its effective implementation through the approximation of criminal laws and regulations of the Member States.

• Subsidiarity

Migrant smuggling is a cross-border crime directly affecting the Union, its external borders and often more than one Member State at the time. Member States acting alone cannot successfully address this cross-border crime successfully. Further approximation in the definition of the offence, the levels of sanctions and the applicable preventive measures in the Member States can ensure more effective action in detecting, investigating and prosecuting migrant smuggling and preventing forms of "forum shopping" by criminals taking advantage of systems where penalties are less severe.

To increase the deterrent effect of the sanctions in the Union, the proposal introduces aggravated offences, to which there are corresponding higher penalties, as well as aggravating circumstances, for instance in case of recidivism, if the offence is committed by a public official or by a person carrying a firearm. At the moment, according to the information at the Commission's disposal, maximum level of criminal penalties for facilitation of unauthorised entry and transit in the Member States range from up to one year in Belgium and Spain to up to 10 years in Bulgaria, Cyprus, Ireland and Slovenia. Criminal penalties for facilitation of residence in the Member States range from up to one year in Austria, Belgium, Czechia, Estonia and Spain to up to 15 years in Cyprus for facilitation of residence. Fifteen Member States[28] since 2015 have found it relevant to amend their national legislation (amendments are currently pending in three Member States[29]) with the changes including stricter penalties[30], criminalisation of smuggling[31] attempt and the exemption of humanitarian assistance of unauthorised transit[32].

In accordance with the principles of subsidiarity and proportionality as set out in Article 5(3) of the Treaty on European Union, the objectives of the proposal cannot be sufficiently achieved by Member States and can thus be better achieved at the Union level. Due to the transnational dimension of migrant smuggling, and considering already existing EU

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27 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01, OJ C 384 I, 12.11.2019, p. 1.

28 Belgium, Bulgaria, Cyprus, Greece, France, Croatia, Hungary, Ireland, Italy, Malta, the Netherlands, Poland, Portugal, Slovenia and Slovakia.

29 France, the Netherlands, Slovakia.

30 Cyprus, Italy, the Netherlands, Slovenia.

31 Belgium.

32 France.

legislation, action at EU level is expected to be more effective and efficient and to bring a tangible added value compared to action taken by Member States individually. EU intervention would create added value by further approximating criminal law of Member States and contributing to ensuring a common playing field between Member States.

- **Proportionality**

In accordance with the principle of proportionality, as set out in Article 5(4) of the Treaty on European Union, the proposed Directive is limited to what is necessary to reinforce the EU framework on preventing and countering migrant smuggling and does not go beyond what is necessary to achieve the policy objectives at stake.

In order to specifically address serious forms of migrant smuggling, for instance those that result in serious harm or loss of life, which are currently not explicitly mentioned in the Facilitators Package, the proposal for a Directive is introducing the definition of aggravated criminal offences, as well as a set of aggravating and mitigating circumstances, which ensure the proportionality of the criminal penalties, in line with the principle of proportionality of criminal penalties as enshrined in Article 49(3) of the Charter.

- **Choice of the instrument**

In accordance with Article 83(2) of the Treaty on the Functioning of the European Union, the approximation of criminal laws and regulations of the Member States that is essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, can only be achieved by means of a Directive of the European Parliament and the Council adopted in accordance with the ordinary legislative procedure.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

An evaluation of the Facilitators Package was carried out in the framework of the Commission's Regulatory Fitness and Performance Programme (REFIT) in 2017. It aimed at assessing whether the Facilitators Package was fit-for-purpose. To this effect, the effectiveness, efficiency, relevance, coherence and EU added value of the existing provisions were evaluated. The evaluation showed that all Member States transposed the Facilitators Package and amended their legislation accordingly. The adoption of the Facilitators Package clarified the distinction between the offences of migrant smuggling and trafficking in human beings and allowed for further approximation of the definition of the offence with all Member States introducing sanctions for the facilitation of unauthorised entry, transit and residence.

The evaluation findings pointed to a serious lack of reliable and comparable data on migrant smuggling offences and criminal justice responses at national and European level, affecting almost all evaluation criteria. Due to the limited availability of data, it is not possible to assess how and to what extent increases in detection and prosecution of facilitators, or the enhanced cooperation between Member States, are directly linked to the implementation of the Facilitators Package. Collecting and analysing reliable and timely submitted statistical data on crime and criminal justice is indispensable for developing evidence-based policy at EU level.

Available data and stakeholders' views highlighted both critical and satisfactory elements in relation to the effectiveness of the Facilitators Package in reaching its objectives. For example, while the deterrent effect of this legislation was questioned against the background of increasing migrant smuggling to the EU, the approximation of the penal framework was assessed more positively.

Differences were noted also across the different categories of stakeholders, who expressed diverse and sometimes contradicting views on different aspects of the Facilitators Package. Most of the individuals and organisations consulted were strongly in favour of a modification of the existing definition of the offence. Despite the fact that the current Article 1(2) of the Facilitation Directive leaves the choice to the Member States to exempt from criminal sanctions the facilitation of unauthorised entry and transit when it is conducted on humanitarian grounds, this provision was criticised for its optional character, entailing a lack of clarity and legal certainty. Concerns were raised by the representatives of civil society about the perceived risks of criminalisation of assistance provided by civil society organisations or individuals assisting and/or working with irregular migrants.

These perceptions and criticisms concerned both humanitarian assistance provided within the territory of a Member State as well as at the borders or on the high seas, despite the different legal frameworks that apply to such conducts. The analysis of the implementation of the Facilitators Package revealed the existence of varied approaches to what constitutes a crime across Member States: whereas in certain Member States the practice of the authorities is to focus on cases of facilitation when committed with a lucrative intent or by organised criminal groups, in others, due to the broad definition of the offence, people providing services to irregular migrants in the context of their professional activities or providing assistance for selfless reasons have also been prosecuted.

- **Stakeholder consultations**

The Commission had a series of targeted consultations with a wide range of stakeholders on the implementation of the Facilitators Package. These consultations included Member States law enforcement and judicial authorities, relevant EU Agencies (Eurojust, Europol, the European Border and Coast Guard Agency, the Fundamental Rights Agency) and civil society representatives who were consulted in the framework of the preparation of the evaluation of the Facilitators Package in 2017, in the preparation of the Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence in 2020, in the preparation of the renewed EU action plan against smuggling (2021-2025) and in the course of 2023 as part of the monitoring and mapping of the implementation of the Facilitators Package in the Member States.

In general, stakeholders positively assessed the approximation of the criminal framework in the Member States. Divergent views were expressed by different categories of stakeholders on the definition of the offence and the optional character of exempting actions conducted on humanitarian grounds. Representatives of civil society organisations highlighted that a wide definition of the offence leads to a lack of clarity and legal certainty as well as to risks of criminalisation of humanitarian assistance by civil society organisations or individuals assisting and/or working with irregular migrants, whereas Member States did not refer to a need to narrow the definition of the offence or to introduce a mandatory exemption from criminalisation. However, due to the varied national approaches to the crime of facilitation that the effectiveness of common EU action, and in order to focus on offences committed with a lucrative intent in particular by organised criminal groups, it is necessary to clearly define the offence of facilitation. Consultation of Europol and Eurojust also pointed to the same approach because it would facilitate operational cooperation and response.

In the preparation of this proposal, the Commission consulted the Member States as well as Eurojust, Europol and the European Border and Coast Guard Agency on the main gaps in the EU legal and operational framework and on the possible response to those.

- **Impact assessment**

The proposal is exceptionally presented without an accompanying impact assessment. This proposal nevertheless builds on the evidence gathered through the REFIT evaluation of the Facilitators Package conducted in 2017, the public consultation on the renewed EU action plan against migrant smuggling (2021-2025), the information and evidence provided by Europol, Eurojust and Frontex, as well as on the engagement with the Member States and civil society stakeholders in the framework of monitoring the implementation of the current legal framework. The information and evidence gathered from these consultations pointed to shortcomings concerning a serious lack of reliable and comparable data on migrant smuggling offences and criminal justice responses at national and European level, the need to further align the definition of the offence and to more clearly define the criminal offence under EU legislation, in particular with regard to the element of financial gain, the optional character of the exemption from criminal sanctions of conduct aimed at providing humanitarian assistance, the perceived risks of criminalisation and the deterrent effect of the existing legislation.

- **Regulatory fitness and simplification**

In compliance with the Commission's Regulatory Fitness and Performance Programme (REFIT), all initiatives aimed at revising existing EU legislation should seek to simplify and deliver stated policy objectives more efficiently, i.e. by reducing unnecessary regulatory costs and the administrative burden on Member States. The proposed Directive aims at improving the Member States' capability to counter migrant smuggling efficiently, notably in relation to threats and trends that have emerged and evolved over the past two decades since the entry into force of the Facilitators Package.

The proposal will approximate the legal landscape addressing the criminalisation and sanctioning of migrant smuggling across the Member States. The new rules are expected to establish more legal certainty regarding criminalised conducts and to adapt criminal penalties to the seriousness of the offences.

- **Fundamental rights**

This proposal respects the fundamental rights and observes the principles recognised by Articles 2 and 6 of the Treaty on European Union and enshrined in the Charter of Fundamental Rights of the European Union ('Charter').

Several fundamental rights and freedoms enshrined in the Charter are relevant in the context of countering migrant smuggling. These include the rights to respect for human dignity (Article 1), the right to life and physical integrity (Articles 2 and 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), the right to personal liberty (Article 6 of), the respect for private and family life (Article 7), the right to protection of personal data (Article 8), the right to property (Article 17), the right to asylum (Article 18), the rights of the child (Article 24), the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defence (Article 48), the principles of legality and proportionality of criminal offences and penalties (Article 49), and the right not to be tried or punished twice in criminal proceedings for the same offence (Article 50).

This proposal for a Directive, through the inclusion of aggravated criminal offences, aggravating and mitigating circumstances, the regime of sanctions on legal persons and the requirement of preventive measures, would increase the effectiveness of tackling the crime of migrant smuggling and ensuring a proportionate response. This also increases the protection of all relevant fundamental rights of the third-country nationals concerned.

The provisions introducing new offences or sanctions or amending the definition of the crime were thoroughly analysed in the light of the right to an effective remedy and to a fair trial, the

presumption of innocence and the right of defence, the principles of legality and proportionality of criminal offences and penalties, and the right not to be tried or punished twice in criminal proceedings for the same criminal offence. They were also analysed from the perspective of the respect of the freedom of assembly and of association and the right to family life.

This Directive will have to be transposed into national law respecting fundamental rights. In particular, Member States should ensure that the imposition of penalties respects the principles of the Charter, including the privilege against self-incrimination, the right to remain silent and the prohibition of being tried or punished twice in criminal proceedings for the same offence. Member States should also ensure that the procedural rights of suspected or accused persons in criminal proceedings are respected, as enshrined in the six EU Procedural Rights Directives, i.e. Directives 2010/64/EU[33], 2012/13/EU[34], 2013/48/EU[35], (EU) 2016/343[36], (EU) 2016/800[37] and (EU) 2016/1919[38] of the European Parliament and of the Council.

4. BUDGETARY IMPLICATIONS

This proposal has budgetary implications for the Union, notably additional human resources needed for the European Commission (4 FTEs) to ensure support to the Member States in the transposition and correct implementation of the legislative package that includes this Directive and the proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes.

The annex to the Legislative Financial Statement accompanying this proposal and the proposal for a Regulation further details and justifies these needs.

5. OTHER ELEMENTS

• Implementation plans and monitoring, evaluation and reporting arrangements

In accordance with this proposal for a Directive, Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with it by one year after its entry into force at the latest and to communicate to the Commission the text of those provisions. The corresponding national provisions need to explicitly refer to this Directive.

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33 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1.

34 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1.

35 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1.

36 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1.

37 Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1.

38 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297 4.11.2016, p. 1.

- **Explanatory documents (for directives)**

No explanatory documents on the transposition are considered necessary.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 – Subject matter: this provision 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.

Article 2 – Definitions: this provision contains definitions of the main terms used in the Directive, namely 'third-country national', 'unaccompanied minor' and 'legal person'.

Article 3 – Criminal offences: this provision 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. Moreover, the recitals 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.

Article 4 – Aggravated criminal offences: this provision 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.

Article 5 - Incitement, aiding and abetting, and attempt: this provision requires Member States to criminalise forms of aiding and abetting, inciting and attempting the offences referred to in this Directive.

Article 6 – Penalties for natural persons: this provision 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.

Article 7 – Liability of legal persons: this provision 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.

Article 8 – Sanctions for legal persons: this provision 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.

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

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

Article 11 – Limitation periods for criminal offences: this provision 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.

Article 12 – Jurisdiction: this provision 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.

Article 13 – Prevention: this provision requires Member States to take preventive actions to reduce the commission of the offences defined in this Directive, for instance through information and awareness raising campaigns and education programmes.

Article 14 – Resources: this provision aims at ensuring that national authorities which detect, investigate, prosecute and adjudicate on facilitation criminal offences have an adequate number of qualified staff and sufficient financial, technical and technological resources necessary to perform their tasks effectively.

Article 15 – Training: this provision requires Member States to provide specialised training for competent authorities and their staff and to ensure that there are adequate resources for this.

Article 16 – Investigative tools: this provision aims at ensuring that investigative tools which are provided for in national law for organised crime or other serious crime cases can also be used in cases of facilitation of irregular migration.

Article 17: Data collection and statistics: this provision addresses the need to systematically collect information on efforts to counter the facilitation of irregular migration and to provide statistical data on this crime for developing evidence-based policy at EU level. It requires Member States to collect, publish and send every year the relevant statistical data to the Commission.

Article 18: Replacement of Council Directive 2002/90/EC and Council Framework Decision 2002/946/JHA: this provision replaces the current provisions in the area of the criminalisation of facilitation of unauthorised entry, transit and stay in relation to Member States bound by this Directive.

Article 19 – Transposition: this provision sets out the conditions of transposition, notably that Member States have to transpose the Directive into the national legal order within one year after the entry into force.

2023/0439 (COD)

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[1],

Having regard to the opinion of the Committee of the Regions[2],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The facilitation of unauthorised entry, transit and stay in the Union are criminal activities that put human life in danger and disrespect the dignity of people for the purpose of obtaining high profits, undermining fundamental rights. These criminal activities contribute to irregular migration, undermining the migration management objectives of the Union. The commission of such criminal activities is driven by increasing demand and the high profits obtained by criminal organisations. Preventing and countering those offences remains a priority for the Union.

(2) Directive 2002/90/EC[3] and Council Framework Decision 2002/946/JHA[4] (the 'Facilitators' Package') constitute the Union legal framework to counter the facilitation of unauthorised entry, transit and stay of third-country nationals. It establishes a common definition of the offences of facilitation of unauthorised entry, transit and residence, and sets up the penal framework for the sanctioning of such offences. To address evolving trends, and to further enhance the effectiveness of the Union framework to prevent and counter these offences, it is necessary to update the existing legal framework.

(3) The European Council Conclusions of 9 February 2023 affirmed the need to reinforce Union action to prevent irregular migration and loss of life, notably by intensifying

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1 OJ C , , p. .

2 OJ C , , p. .

3 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 17., ELI: http://data.europa.eu/eli/dir/2002/90/oj).

4 Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 1., ELI: http://data.europa.eu/eli/dec_framw/2002/946/oj).

cooperation with countries of origin and transit, and by ensuring stronger cooperation between Member States and with Europol, Frontex and Eurojust. The renewed Action Plan against migrant smuggling (2021-2025) sets out the policy response to migrant smuggling, as an essential part of the comprehensive approach to migration set out in the New Pact on Migration and Asylum. It sets out actions in four priority areas: reinforcing cooperation with partner countries and international organisations; sanctioning migrant smugglers and preventing the exploitation of migrants; reinforcing cooperation and supporting the work of law enforcement and judicial authorities; and increasing the knowledge base.

(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.

(5) Taking account of the evolution of the activities aimed to facilitate unauthorised entry, transit and stay in the Union, as well as the legal obligations of the Union and the Member States under international law, the definition of the criminal offences should be further approximated in all Member States so that it covers the relevant conducts more comprehensively.

(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. 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 conduct should also be criminalised provided that this is highly likely to cause serious harm to the third-country nationals who were subject to the criminal offence or to any other person, even though there is no financial or material benefit or no promise of such benefit. It is necessary to establish a criminal offence in order to discourage the *modus operandi* of persons who publicly instigate, for instance through the internet, third-country nationals to enter, transit or stay in the Union without authorisation. Providing objective information or advice to third-country nationals on the conditions for the legal entry and stay in the Union, and on international protection, should not be understood as public instigation.

(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.

(8) The impact of facilitation of unauthorised entry, transit and stay extends beyond the Member State of unauthorised entry. Minimum rules concerning the definition of the criminal offences should encompass conducts taking place in the territory of any Member State, to allow Member States other than those of unauthorised entry to act on such offences, provided that the Member States concerned establish jurisdiction over these offences.

(9) There is a need to distinguish between the criminal offence of facilitation of unauthorised entry, transit and stay in the Union and the aggravated criminal offences that create higher harm to individuals and to society. The levels of penalties should reflect the higher social concern regarding more serious and harmful conducts, therefore aggravated offences should be sanctioned by more severe criminal penalties.

(10) Member States should apply this Directive in accordance and in full compliance with the 1951 Convention Relating to the Status of Refugees as amended by the Protocol of New York of 1967, obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights.

(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. 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[5] 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.

(12) The assessment of the seriousness of the offence should also extend to attempts to committ the offence that do not result in unauthorised entry in the Union. Attempts thatcause the death of one or more third-country nationals should be sanctioned with more severe penalties than other types of attempts. Setting minimum rules on the maximum level of penalties at Union level for such attempts is justified and proportionate in view of the transnational dimension of the offence, and the fact that an attempt to committ the offence resulting in the death of third-country nationals bears the same gravity as a committed offence resulting in death.

(13) Where national law provides for it, legal persons should be held criminally liable for the facilitation of unauthorised entry, transit and stay in the Union. Member States whose national law does not provide for the criminal liability of legal persons should ensure that their administrative sanctioning systems provide for effective, dissuasive

[5] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98, ELI: http://data.europa.eu/eli/dir/2008/115/oj).

and proportionate sanction types and levels, as laid down in this Directive in order to achieve its objectives. They should be accompanied by accessory measures. The financial situation of legal persons should be considered to ensure the dissuasiveness of the sanction imposed with criminal and non-criminal fines taking into account worldwide turnover of the legal persons.

(14) Effectiveness of sanctions imposed in practice should be fostered through providing for aggravating circumstances that reflect the severity of the criminal offence. Graver circumstances should include situations conducive to other unlawful activities, such as exploitation, including sexual exploitation, instrumentalisation, dispossession of identity documents, and involvement in illegal employment.

(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.

(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.

(17) To counter the facilitation of unauthorised entry, transit and stay in the Union, it is of outmost importance to ensure the effective seizure of the proceedings of the crime, as well as of the instrumentalities that are used to commit the criminal offences, including for instance boats, engines and other boat components and vehicles. For this purpose, full use should be made of existing instruments on the freezing and confiscation of proceeds and instrumentalities of crime, such as Directive 2014/42/EU of the European Parliament and of the Council[6].

(18) Considering the cross-border nature of the criminal offences referred to in this Directive, the mobility of perpetrators of illegal conducts and the possibility of cross-border investigations, it is necessary to lay down rules on the establishment of jurisdiction by Member States in order to counter such conduct effectively. The unauthorised transit or stay taking place in whole or in part in the territory of a Member State should allow a Member State different from the Member State of first unauthorised entry to establish jurisdiction. The gravity and the cross-border nature of the offences referred to in this Directive require that jurisdiction be established not only on natural persons who are nationals of the Member State concerned, but also on third-country nationals habitually residing in its territory. Jurisdiction over legal persons should be established when these are established in the Member State concerned or in respect of any business carried out in whole or in part in its territory. For the same reasons, it is necessary that a Member State establishes jurisdiction over criminal offences committed on board of ships and aircrafts registered in the Member State or flying its flag. Member States, including those other than that of first unauthorised entry, should establish jurisdiction in relation to criminal offences

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6 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39 ELI: http://data.europa.eu/eli/dir/2014/42/oj).

referred to in this Directive when this results in the entry, transit or stay of the third-country nationals subject to the offence in the concerned Member State.

(19) Where assistance is provided for a third-country national to reach the territory of a Member State, the concerned Member States may also be able to establish their jurisdiction with regard to attempts, even if the third-country national does not enter their territory. Member States should at least establish their jurisdiction with regard to the attempt of an offence that caused the death of a third-country national..

(20) Where a criminal offence falls within jurisdiction of more than one Member State, the Member States concerned should cooperate to determine which Member State is best placed to prosecute. Where the competent authorities of the Member States concerned decide, following cooperation or direct consultations under Council Framework Decision 2009/948/JHA[7], to centralise criminal proceedings in a single Member State through the transfer of criminal proceedings, the Regulation (EU) …/… [*proposed Regulation on the transfer of proceedings in criminal matters*][8] should be used for such a transfer. For this purpose, the relevant criteria of Article 5 of that Regulation should be duly taken into account. The priority and weight of such criteria should be based on the facts and merits of each individual case.

(21) To counter the facilitation of unauthorised entry, transit and stay in the Union, both criminal justice and preventive mechanisms should be used. The prevention of the criminal offences referred to in this Directive should mitigate the need for criminal justice response and should have wider benefits in crime reduction. Such measures should aim at raising public awareness, and include information campaigns, research and education programmes. These should be carried out in cooperation with other Member States, relevant Union agencies and third countries.

(22) Lack of resources and enforcement powers for national authorities which detect, investigate, prosecute or adjudicate the criminal offences referred to in this Directive creates obstacles for the effective prevention and punishment thereof. In particular, a shortage of resources may prevent authorities from taking action or limit their enforcement actions, allowing offenders to escape liability or to receive punishment that does not correspond to the gravity of the criminal offence. Minimum criteria concerning resources and enforcement powers should therefore be established.

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

(24) To ensure successful enforcement, Member States should make available effective investigative tools for the criminal offences referred to in this Directive, such as those included in their national law for combating organised crime or other serious crimes, including for instance the interception of communications, covert surveillance

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[7] 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, ELI: http://data.europa.eu/eli/dec_framw/2009/948/oj).

[8] COM(2023) 185 final.

including electronic surveillance, monitoring of bank accounts and other financial investigation tools. These tools should be 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.

(25) Online content constituting or facilitating criminal offences referred to in this Directive, notably providing assistance to or publicly instigating unauthorised entry, transit and stay in the EU through the internet, will be subject to measures pursuant to Regulation (EU) 2022/2065 of the European Parliament and of the Council[9] as regards illegal content.

(26) To effectively tackle the facilitation of unauthorised entry, transit and stay in the Union, it is necessary that competent authorities in the Member States collect accurate, consistent and comparable data on the scale of and trends in the criminal offences referred to in this Directive, the efforts to combat them and their results. Member States should collect and report to the Commission relevant statistical data on such offences. The Commission should regularly assess and publish the results based on data transmitted by the Member States. Member States should also regularly collect and disseminate statistical data and information on the application of this Directive to allow for the monitoring of its implementation. Statistical data and information should be comparable between the Member States and collected on the basis of common minimum standards.

(27) Since the objective of this Directive, namely to lay down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effect of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

(28) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the respect and protection of human dignity, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security, the rights of the child, the freedom of association, the right to an effective remedy and to a fair trial, the principles of legality and proportionality of criminal offences and penalties, and the prohibition of *ne bis in idem*.

(29) This Directive aims to amend and expand the provisions of Directive 2002/90/EC and Framework Decision 2002/946/JHA. Since the amendments to be made are of substantial nature, Directive 2002/90/EC and Framework Decision 2002/946/JHA should, in the interests of clarity, be replaced in their entirety in relation to the Member States bound by this Directive.

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[9] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ L 277, 27.10.2022, p. 1, ELI: http://data.europa.eu/eli/reg/2022/2065/oj).

(30) This Directive is without prejudice to the application of Directive 2004/38/EC of the European Parliament and of the Council[10] and the EU-UK Withdrawal Agreement[11].

(31) Ireland is taking part in this Directive, in accordance with Article 5(1) of Protocol No 19 on the Schengen *acquis* integrated into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and Article 6(2) of Council Decision 2002/192/EC[12].

(32) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds upon the Schengen *acquis*, Denmark should, in accordance with Article 4 of that Protocol, decide within a period of six months after the Council has decided on this Directive whether it will implement it in its national law.

(33) As regards Iceland and Norway, this Directive constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*[13] which fall within the areas referred to in Article 1, point A of Council Decision 1999/437/EC[14].

(34) As regards Switzerland, this Directive constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*[15] which fall within the areas referred to in Article 1, point A of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC[16].

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10 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77, ELI: http://data.europa.eu/eli/dir/2004/38/oj).

11 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 (OJ C 384 I, 12.11.2019, p. 1, ELI: http://data.europa.eu/eli/treaty/withd_2019(3)/oj).

12 Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20, ELI: http://data.europa.eu/eli/dec/2002/192/oj).

13 OJ L 176, 10.7.1999, p. 36, ELI: http://data.europa.eu/eli/agree_internation/1999/439(1)/oj.

14 Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis (OJ L 176, 10.7.1999, p. 31, ELI: http://data.europa.eu/eli/dec/1999/437/oj).

15 OJ L 53, 27.2.2008, p. 52.

16 Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19, ELI: http://data.europa.eu/eli/dec/2011/350/oj).

(35) As regards Liechtenstein, this Directive constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*[17] which fall within the areas referred to in Article 1, point A of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU[18].

(36) As regards Cyprus, Bulgaria and Romania, this Directive constitutes an act building upon, or otherwise related to, the Schengen *acquis* within, respectively, the meaning of Article 3(1) of the 2003 Act of Accession and Article 4(1) of the 2005 Act of Accession,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

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

Article 2

Definitions

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

1. 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union and who is not a person enjoying the right of free movement under Union law as defined in Article 2, point 5, of Regulation (EU) 2016/399 of the European Parliament and of the Council[19];

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

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17 OJ L 160, 18.6.2011, p. 21.

18 Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, relating to the abolition of checks at internal borders and movement of persons, (OJ L 160, 18.6.2011, p. 19, ELI: http://data.europa.eu/eli/dec/2011/350/oj).

19 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 077 23.3.2016, p. 1, ELI: http://data.europa.eu/eli/reg/2016/399/oj).

person, including a minor who is left unaccompanied after he or she has entered the territory of the Member States;

3. 'legal person' means any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations.

Article 3

Criminal offences

1. Member States shall ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence where:

a) the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit; or

b) there is a high likelihood of causing serious harm to a person.

2. Member States shall ensure that publicly instigating third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence.

Article 4

Aggravated criminal offences

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

(a) the criminal offence was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA[20];

(b) the criminal offence deliberately or by gross negligence caused serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence;

(c) the criminal offence was committed by use of serious violence;

(d) the third-country nationals who were subject to the criminal offence were particularly vulnerable, including unaccompanied minors;

(e) the criminal offence caused the death of third-country nationals who were subject to the criminal offence.

[20] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300, 11.11.2008, p. 42, ELI: http://data.europa.eu/eli/dec_framw/2008/841/oj).

Article 5

Incitement, aiding and abetting, and attempt

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

Article 6

Penalties for natural persons

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

2. Member States shall take the necessary measures to ensure that the criminal offences referred to in Article 3 are punishable by a maximum term of imprisonment of at least three years.

3. Member States shall take the necessary measures to ensure that the criminal offences referred to in Article 4, points (a) to (d) are punishable by a maximum term of imprisonment of at least ten years.

4. Member States shall take the necessary measures to ensure that the criminal offences referred to in Article 4 point (e), including attempts to commit the criminal offence referred to in that provision, are punishable by a maximum term of imprisonment of at least fifteen years.

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 that have been convicted of committing one of the criminal offences referred to in Articles 3, 4 and 5 may be subject to criminal or non-criminal sanctions or measures imposed by a competent authority, including:

   (a) withdrawal of permits or authorisations to pursue activities which have resulted in committing the criminal offence, or prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the criminal offence was committed;

   (b) return after the enforcement of the penalty in a Member State, or to serve the penalty imposed, or part of it, in the third country of return, without prejudice to more favourable provisions that may be applicable by virtue of Union or national law;

   (c) prohibition to enter and stay on the territory of the Member States for an appropriate period of maximum 10 years, without prejudice to more favourable provisions that may be applicable by virtue of Union or national law;

   (d) exclusions from access to public funding, including tender procedures, grants and concessions;

   (e) fines;

(f) freezing and confiscation of the proceeds derived from, and instrumentalities used for, the commission of the offence, in accordance with Directive 2014/42/EU of the European Parliament and of the Council[21].

Article 7

Liability of legal persons

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for the criminal offences referred to in Articles 3, 4 and 5 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, 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 also 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 shall not exclude criminal proceedings against natural persons who are perpetrators of, inciters of, or accessories in the criminal offences referred to in Articles 3, 4 and 5.

Article 8

Sanctions for legal persons

1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 is subject to effective, proportionate and dissuasive sanctions.

2. Member States shall take the necessary measures to ensure that sanctions or measures for legal persons liable pursuant to Article 7 for the criminal offences referred to in Articles 3, 4 and 5 may include:

   (a) criminal or non-criminal fines;

   (b) exclusion from entitlement to public benefits, aid or subsidies;

   (c) temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions;

   (d) temporary or permanent disqualification from the practice of commercial activities;

   (e) placing under judicial supervision;

   (f) judicial winding-up;

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21 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39 ELI: http://data.europa.eu/eli/dir/2014/42/oj).

(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 which have resulted in committing the 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[22].

3. 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:

(a) 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, for criminal offences referred to in Article 3;

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

(c) 6% 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 4, point (e).

4. When providing for criminal or non-criminal fines pursuant to paragraph 3, Member States may 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 the one in which the criminal offence was committed, or in the business year preceding the fining decision.

Article 9

Aggravating circumstances

Member States shall take the necessary measures to ensure that the following circumstances may be regarded as aggravating circumstances, in relation to the criminal offences referred to Articles 3, 4 and 5:

(a) the criminal offence was committed by a public official when performing his or her duties;

(b) the criminal offence entailed or resulted in the involvement of third-country nationals who were subject to the criminal offence in illegal employment as referred to in Directive 2009/52/EC of the European Parliament and of the Council[23];

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22 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39 ELI: http://data.europa.eu/eli/dir/2014/42/oj).

23 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ L 168, 30.6.2009, p. 24, ELI: http://data.europa.eu/eli/dir/2009/52/oj).

(c) the offender has previously been definitively convicted of criminal offences of the same nature under Articles 3, 4 or 5;

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

(e) dispossessing the third-country nationals who are subject to the criminal offence of their identity or travel documents;

(f) the criminal offence was carried out while carrying a firearm.

Article 10

Mitigating circumstances

Member States shall 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

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 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.

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.

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.

4. By way of derogation from paragraphs 2 and 3, Member States may establish a shorter limitation period, provided that the period may be interrupted or suspended in the event of specified acts. This period shall not be shorter than:

(a) five years for the criminal offences referred to in Article 3;

(b) eight years for the criminal offences referred to in Article 4, points (a) to (d);

(c) ten 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).

Article 12

Jurisdiction

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

(a) is committed in whole or in part in its territory;

(b) is committed by one of its nationals or a third-country nationals 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) is committed on board of a ship or an aircraft registered in 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. Member States shall establish jurisdiction over attempts to commit a criminal offence referred to in Article 4 point (e), where the conduct would have constituted a criminal offence over which jurisdiction would have been established pursuant to paragraph 1.

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

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

Article 13

Prevention

1. Member States shall take appropriate action, such as information and awareness-raising campaigns, and research and education programmes, 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.

Article 14

Resources

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

Article 15

Training

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

2. Without prejudice to judicial independence, Member States shall 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

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, these tools shall include special investigative tools, such as those which are used in countering organised crime or other serious crime cases.

Article 17

Data collection and statistics

1. Member States shall collect statistical data disaggregated by the type of criminal offence referred to in Articles 3, 4 and 5.

2. The statistical data referred to in paragraph 1 shall include, at least, the following:

(a) the number of third-country nationals who were subject to the criminal offence, disaggregated by citizenship, sex and age (child/adult);

(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 decisions of the prosecution services, disaggregated by type of decision (to prosecute or not to prosecute);

(f) the number of final court decisions, disaggregated by type of decision (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, publish, in a machine-readable and disaggregated format, the statistical data referred to in paragraph 2 for the previous year and transmit it to the Commission.

Article 18

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

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

2. With regard to the Member States bound by this Directive, references to Directive 2002/90/EC and Framework Decision 2002/946 JHA shall be construed as references to this Directive.

Article 19

Transposition

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

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

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

Article 20

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 21

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*