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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	14385/24
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Subject:	Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA - Drafting suggestions and comments by Member States and Schengen Associated States

As a follow-up to the COPEN meeting on 9 October 2024, the Presidency organised bilateral meetings with all EU Member States and COMIX countries on 14, 15 and 16 October 2024. Discussions were notably based on the revised text of the Directive, which was distributed on Friday morning 11 October (document 14385/24).

As indicated on the cover page of that document, delegations could also communicate comments in writing to the Presidency and the General Secretariat. The input so received has been set out in the Annex.[1]

[1] In case additional input will be received, a REV version will be made.

Contents

FRANCE

NOTE DES AUTORITÉS FRANÇAISES

(a courtesy translation is set out below)

Objet : Commentaires écrits des autorités françaises sur la proposition de directive du Parlement européen et du Conseil établissant des règles minimales visant à prévenir et à lutter contre l'aide à l'entrée, au transit et au séjour irréguliers dans l'Union, et remplaçant la directive 2002/90/CE du Conseil et la décision-cadre 2002/946 JAI du Conseil - Note des autorités françaises.

Réf. : ST 14385/24

A la suite de la réunion du groupe COPEN trafic de migrants du 9 octobre 2024, la présidence hongroise a sollicité des commentaires écrits de la part des Etats membres, en particulier s'agissant des considérants et des modifications de la version révisée de la proposition de directive visant à prévenir et à lutter contre l'aide à l'entrée, au transit et au séjour irréguliers dans l'Union et s'agissant de l'ensemble des dispositions du texte telles qu'elles figurent dans les documents de travail (13799/24 + COR 1 + ADD 1).

Ainsi, en réponse à la demande de la présidence hongroise, les autorités françaises souhaitent faire valoir les éléments suivants.

A titre liminaire :

Les autorités françaises rappellent soutenir, à titre principal, le maintien du cadre juridique de 2002, dès lors que ses carences n'ont pas été démontrées et qu'il serait judicieux d'attendre les développements du contentieux C-460-23 « Kinshasa » pendant devant la Cour de justice de l'Union européenne[2].

[2] *Ce renvoi préjudiciel italien questionne notamment la sécurité juridique suffisante de la directive de 2002, qui laisse aux Etas membres la possibilité de ne pas prévoir d'exemption de responsabilité pénale en cas d'aide à l'entrée irrégulière pour un motif humanitaire ou familial.*

A titre subsidiaire et dans une perspective de compromis, les autorités françaises peuvent accepter d'introduire le critère tenant à l'avantage matériel ou financier, sous réserve des deux conditions cumulatives suivantes :

- que le caractère minimal de l'harmonisation soit rappelé dans un considérant et que la possibilité pour les Etats membres de prévoir des incriminations plus larges soit explicitement crantée dans les considérants (comme c'est rappelé aux considérants 6, 6a) ;

ET

- qu'il ne soit pas imposé aux Etats membres de prévoir une clause d'exemption humanitaire et familiale obligatoire s'agissant de l'aide à l'entrée irrégulière ; le caractère facultatif de cette clause doit être impérativement préservé s'agissant de l'aide à l'entrée irrégulière.

<u>Sur l'article 3, relatif aux infractions harmonisées et sur les considérants l'assortissant</u> :

Sur la partie opérative du texte :

Au sujet de la mention du « at least » dans la partie opérative du texte, les autorités françaises ont entendu les arguments juridiques développés lors de la réunion du groupe COPEN du 9 octobre par la Commission, la présidence et plusieurs Etats membres, qui ont relevé son caractère superfétatoire et le risque d'interprétation *a contrario* dans d'autres textes.

Elles rappellent toutefois que cinq Etats membres ont fermement soutenu cette mention (Grèce, Roumanie, Pays-Bas, Malte, Croatie) et que onze autres Etats membres ont indiqué pouvoir être flexibles pour cette introduction (Italie, Slovénie, France, Portugal, Irlande -sous réserve du maintien des considérants 6 et 6a-, Autriche, Norvège, Finlande, Chypre, Danemark, Pologne) ; que cette mention a déjà été introduite dans un autre instrument européen, comme la présidence l'avait elle-même indiqué par le passé ; qu'ainsi que les Pays-Bas l'ont fait observer, la nécessité de clarifier le caractère minimal de l'harmonisation avait été particulièrement mise en avant au cours de la négociation de cette directive.

En conclusion, **les autorités françaises estiment préférable de réintroduire ce « at least »,** à ce stade des négociations et au regard des équilibres manifestés au sein du Conseil, afin de clarifier dans la partie opérative du texte, **que l'intention du législateur européen, en restreignant le périmètre de l'infraction harmonisée, n'est pas de prohiber aux législateurs nationaux de prévoir des incriminations plus larges que l'infraction harmonisée a minima.**

- **Sur les considérants 6 et 6 a, relatif aux infractions harmonisées et au principe d'harmonisation a minima :**

Les autorités françaises soutiennent avec force les considérants 6 et 6a ainsi rédigés, pour les motifs exprimés en préambule. Elles remercient la présidence d'avoir introduit, au considérant 6a, la modification qu'elles ont proposé lors du dernier groupe COPEN, tendant à remplacer « smuggling networks » par « migrant smugglers ».

- **Sur le contenu et l'emplacement de la clause humanitaire :**

Les autorités françaises rappellent que le contenu de la clause humanitaire - dans un considérant ou dans le dispositif du texte - importe plus que son emplacement. Elles sont par principe plutôt favorable à introduire cette clause dans un considérant, tout comme la Suède, la République-Tchèque, la Lettonie et la Lituanie, qui, tout en se montrant souples, préfèrent l'introduction de la clause humanitaire dans un considérant et l'Italie, la Roumanie, Malte et Chypre (qui en font une ligne rouge), les Pays-Bas, l'Estonie, la Croatie, le Liechtenstein, le Danemark et l'Autriche, qui soutiennent également l'introduction de la clause humanitaire dans un considérant.

S'agissant du contenu de la clause, elles soulignent qu'il importe que le traitement des exceptions fondées sur le droit humanitaire, les besoins humains fondamentaux et le sauvetage en mer, reste de la compétence nationale et chaque situation doit être appréciée au cas par cas par les autorités de poursuite et de jugement.

La proposition de rédaction de la présidence apparaît encore trop ambigüe. Pour mémoire, les autorités françaises ont fait une proposition de clarification, pour préciser le caractère facultatif de cette clause (**"*Nothing in this directive should be understood as ~~criminalising~~ imposing Member States to criminalise on the one hand, assistance provided by (…).*"**).

Les autorités françaises ont compris des positions exprimées lors de la réunion du groupe COPEN du 9 octobre, que plusieurs Etats membres avaient exposé la même volonté de flexibilité pour les Etats membres dans le traitement des comportements s'inscrivant dans le cadre de l'aide humanitaire ou familiale au niveau national, en particulier les Pays-Bas, l'Autriche, la Roumanie, Chypre, Malte et la Grèce.

Elles soutiennent ainsi la proposition rédactionnelle roumaine, qui lui semble d'ailleurs aller dans le même sens que leur propre proposition rédactionnelle initiale :

- « ***Nothing in this directive should be understood as imposing Member states to prosecute or impose penalties on persons who committed the offences referred to in article 3 if the acts were committed in order to provide humanitarian assistance.*** »

Plus généralement, les autorités françaises se montrent ouvertes à examiner d'autres propositions et de poursuivre le travail avec la présidence et les Etats membres partageant leurs préoccupations, en vue de stabiliser un contenu satisfaisant.

Sur le considérant 7, relatif à la clause d'exemption humanitaire et familiale :

Les autorités françaises soutiennent le retrait des précisions relatives à la définition des besoins humains basiques et des membres de la famille dans le considérant 7, dont l'encadrement mérite d'être renvoyé à la législation nationale.

Sur le considérant 7a, relatif à la responsabilité pénale du ressortissant d'Etat tiers :

Les autorités françaises estiment que ce considérant n'apporte pas de plus-value et pourrait être supprimé.

A défaut, elles soutiennent la rédaction proposée par la présidence hongroise, qui permet de préciser que le ressortissant d'Etat tiers ne devrait pas être responsable pénalement du seul fait d'avoir été sujet des infractions relevant de la directive, sans préjudice d'éventuelles poursuites d'autres chefs d'infractions qui ne relèvent pas de ce champ.

Sur l'article 6 relatif aux peines applicables aux personnes physiques :

Au **paragraphe 2**, qui prévoit un quantum de peine de trois ans encourus pour l'infraction harmonisée d'aide à l'entrée, au séjour et au transit irrégulier sur le territoire, les autorités françaises peuvent se montrer flexibles sur la proposition de suppression de la présidence.

Au **paragraphe 3**, qui prévoit des circonstances aggravantes obligatoires, élevant la peine encourue à huit ans d'emprisonnement, les autorités françaises remercient la présidence d'avoir d'une part, supprimé les mentions de « *or of other persons* » aux literas b et c, et d'autre part, scindé les circonstances aggravantes prévues aux literas b et c ainsi qu'elles l'avaient suggéré.

Les autorités françaises sont réservées sur la dernière mention introduite, qui précise que les Etats membres peuvent décider si ces dispositions s'appliquent également s'agissant de l'aide au séjour irrégulier. Il leur semble en effet que ces circonstances aggravantes peuvent s'avérer pertinentes s'agissant de l'aide au séjour irrégulier, et qu'elles peuvent aussi contribuer au renforcement de l'efficacité de la lutte contre le trafic de migrants.

Sur l'article 8, relatif aux peines applicables aux personnes morales :

Les autorités françaises soutiennent l'approche de la présidence, qui va dans le sens d'une plus grande proportionnalité et de la cohérence horizontale avec les autres textes européens.

Sur l'article 10 et sur le considérant 15, relatifs aux circonstances atténuantes :

Les autorités françaises soutiennent les propositions de clarification de la présidence, qui simplifient le dispositif proposé. Elles rappellent être très attachées au considérant 15, qui permet de rappeler que l'examen de ces conditions relève des juridictions, en application du principe d'individualisation des peines.

Sur l'article 11 et le considérant 16, relatif à la prescription :

Les autorités françaises soutiennent les modifications apportées par la présidence, notamment la modification du seuil de « cinq ans », qui ne correspondait à aucun seuil de peine encourue, pour le porter à « trois ans ».

<u>Sur l'article 12, relatif aux règles de compétence</u> :

Au regard des développements favorables obtenus à l'article 12 et dans une perspective de compromis, les autorités françaises peuvent faire preuve de flexibilité s'agissant du maintien au troisième paragraphe, des dispositions qui prévoient que les poursuites ne doivent pas être soumises à une dénonciation officielle de la part de l'Etat où les faits ont été commis.

Elles acceptent la proposition de considérant additionnel 19a, qui encourage les Etats membres à étendre leurs règles de compétence en matière d'aide au séjour, à l'entrée ou au transit irréguliers.

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COURTESY TRANSLATION

By way of introduction:

The French authorities reiterate their support for maintaining the 2002 legal framework, since its shortcomings have not been demonstrated and it would be wise to await developments in the C-460-23 "Kinshasa" case pending before the Court of Justice of the European Union[3].

Alternatively, and as a compromise, the French authorities may agree to introduce the criterion of material or financial advantage, subject to the following two cumulative conditions:

- that the minimum character of harmonization is recalled in a recital, and that the possibility for Member States to provide for broader incriminations is explicitly notched out in the recitals (as recalled in recitals 6, 6a);

AND

- Member States should not be obliged to introduce a mandatory humanitarian and family exemption clause for the facilitation of unauthorized entry; the optional nature of this clause must be preserved for the facilitation of unauthorized entry.

Article 3 on harmonized infringements and the accompanying recitals:

- On the operative part of the text:

On the subject of the reference to "at least" in the operative part of the text, the French authorities have heard the legal arguments put forward at the COPEN meeting on October 9 by the Commission, the Presidency and several Member States, who pointed out its superfluous nature and the risk of *a contrario* interpretation in other texts.

[3] This Italian reference for a preliminary ruling questions the legal certainty of the 2002 directive, which gives Member States the option of not providing for exemption from criminal liability in cases of aid to illegal entry on humanitarian or family grounds.

They point out, however, that five member states strongly supported this reference (Greece, Romania, Netherlands, Malta, Croatia), and that eleven other member states indicated that they could be flexible about its introduction (Italy, Slovenia, France, Portugal, Ireland - subject to the retention of recitals 6 and 6a-, Austria, Norway, Finland, Cyprus, Denmark, Poland); that this reference has already been introduced in another European instrument, as the Presidency itself has indicated in the past; and that, as the Netherlands pointed out, the need to clarify the minimal nature of harmonization had been particularly emphasized during the negotiation of this directive.

In conclusion, the French authorities consider it preferable to reintroduce this "at least", at this stage of the negotiations and in the light of the balances struck within the Council, in order to clarify in the operative part of the text that the intention of the European legislator, in restricting the scope of the harmonized infringement, is not to prohibit national legislators from providing for incriminations broader than the a minima harmonized infringement.

- Recitals 6 and 6a, concerning harmonized infringements and the principle of minimum harmonization:

The French authorities strongly support recitals 6 and 6a as drafted, for the reasons given in the preamble. They thank the Presidency for introducing in recital 6a the amendment they proposed in the COPEN group, to replace "smuggling networks" by "migrant smugglers".

- On the content and location of the humanitarian clause:

The French authorities reiterate that the content of the humanitarian clause - in a recital or in the operative part of the text - is more important than its location. As a matter of principle, they are in favor of introducing this clause in a recital, as do Sweden, the Czech Republic, Latvia and Lithuania, who, while flexible, prefer the introduction of the humanitarian clause in a recital, and Italy, Romania, Malta and Cyprus (who make it a red line), the Netherlands, Estonia, Croatia, Liechtenstein, Denmark and Austria, who also support the introduction of the humanitarian clause in a recital.

With regard to the content of the clause, they stress that it is important that exceptions based on humanitarian law, fundamental human needs and rescue at sea remain within national competence, and that each situation should be assessed on a case-by-case basis by the prosecuting and judging authorities.

The Presidency's drafting proposal is still too ambiguous. For the record, the French authorities have put forward a proposal for clarification, to specify the optional nature of this clause (**"*Nothing in this directive should be understood as ~~criminalising~~ imposing Member States to criminalise on the one hand, assistance provided by (…).*"**).

The French authorities understood from the positions expressed at the COPEN meeting on October 9, that several Member States had expressed the same desire for flexibility for Member States in dealing with behavior falling within the scope of humanitarian or family aid at national level, in particular the Netherlands, Austria, Romania, Cyprus, Malta and Greece.

They therefore support the Romanian drafting proposal, which seems to be along the same lines as their own initial drafting proposal:

- ***"Nothing in this directive should be understood as imposing Member states to prosecute or impose penalties on persons who committed the offences referred to in article 3 if the acts were committed in order to provide humanitarian assistance."***

More generally, the French authorities are open to examining other proposals and continuing to work with the Presidency and Member States sharing their concerns, with a view to stabilizing a satisfactory content.

- Recital 7 on the humanitarian and family exemption clause:

The French authorities support the withdrawal of the details relating to the definition of basic human needs and family members in recital 7, the framing of which should be referred to national legislation.

- Recital 7a on the criminal liability of third-country nationals:

The French authorities consider that this recital offers no added value and could be deleted.

Failing that, they support the wording proposed by the Hungarian Presidency, which makes it clear that third-country nationals should not be held criminally liable solely on the grounds of having been the subject of offences covered by the directive, without prejudice to possible prosecution for other offences outside the scope of the directive.

Article 6 on penalties applicable to natural persons:

In **paragraph 2,** which provides for a quantum of sentence of three years for the harmonized offence of facilitation of unauthorized entry, residence and transit on the territory, the French authorities are flexible on the Presidency's proposed deletion.

In **paragraph 3,** which provides for mandatory aggravating circumstances, raising the penalty to eight years' imprisonment, the French authorities thank the Presidency for deleting the references to "or of other persons" in literas b and c, and for splitting the aggravating circumstances provided for in literas b and c, as they had suggested.

The French authorities have reservations about the latter, which specifies that Member States may decide whether these provisions also apply in the case of aiding illegal residence. It seems to them that these aggravating circumstances may also be relevant in the case of aiding illegal residence.

Article 8 on penalties applicable to legal persons:

The French authorities support the Presidency's approach, which goes in the direction of greater proportionality and horizontal consistency with other European texts.

On article 10 and recital 15, concerning extenuating circumstances:

The French authorities support the Presidency's proposals for clarification, which simplify the proposed mechanism. They reiterate their attachment to recital 15, which recalls that the examination of these conditions is a matter for the courts, in application of the principle of individualization of penalties.

Article 11 and recital 16, on the statute of limitations:

The French authorities support the changes made by the Presidency, in particular the modification of the "five-year" threshold, which did not correspond to any penalty threshold, to "three years".

Article 12, on the rules of jurisdiction:

In view of the favorable developments obtained in Article 12, and with a view to reaching a compromise, the French authorities are able to demonstrate flexibility with regard to the retention in the third paragraph of the provisions stipulating that prosecutions need not be subject to official denunciation by the State where the acts were committed.

They accept the proposed additional recital 19a, which encourages Member States to extend their rules on jurisdiction in cases of facilitation of unauthorized residence, entry or transit.

GREECE

We can accept the deletion of the wording «at least» in order to include it in the recital 6 and 6a if the last sentence of recital 6a remains as proposed, i.e. **However, since this Directive is an instrument of minimum harmonisation, Member States are free to criminalise such conduct when no financial or another material benefit has been provided.**

As far it concerns the humanitarian clause we can accept to proposed recital 7, we the following amendment (in red): **Nothing in this Directive should be understood as criminalising, on the one hand, assistance provided to family members and, on the other hand, humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations, and the relevant legal framework including, where applicable, with international law."**

This wording is familiar to the European legal order, since it is used in the "Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence" (doc C(2020) 6470 final).

We do not want the option 2, i.e. include the humanitarian clause in article 3.

As far it concerns the recital 4, we can accept it under the same conditions:

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

IRELAND

Ireland thanks the Presidency for facilitating the discussion of this proposal both in person at COPEN, bilateral meetings and by way of written observation.

We thank the Presidency for its continued work on this measure, with particular regard to the humanitarian clause exception.

As discussed at today's bilateral meeting, please find below Ireland's position on the following outstanding issues:

Humanitarian clause exception

Ireland has articulated its position on this provision throughout discussions at COPEN, most recently on 9 October, and further reiterated at the bilateral meeting with the Presidency on 16 October.

Use of terms Facilitation/Assistance

Ireland expressed concerns over the replacement of facilitation with assistance in the text of Recital 6. However, having consulted with national experts, we can now accept the replacement of "facilitation of" with "assistance to" in the latest draft of Recital 6.

Article 6

At the COPEN meeting on 9 October, Ireland expressed concerns over paragraph 4 in document 13799/24 in that it introduced a very significant change in the penalty grounded solely in an external consequence (death being caused) without a corresponding mental culpability. A relatively minor smuggling offence may cause death and unless the danger involved in the offence was foreseeable in some way, or some particular risk was run, the penalty should not be elevated in this way.

We maintain our concerns on this particular paragraph as laid out in document 14385/24.

We appreciate the Presidency's drafting of recital 11a, however it is not sufficient to alleviate such reservations.

In light of this, we suggest the following alternative wording for the last section of Article 6(4) as follows:

4. "… where the conduct constituting the criminal offence endangered the life of a third-country national who was subject of the criminal offence, and the death of the third-country national occurred as a consequence of that conduct".

Ireland thanks the Hungarian Presidency for its leadership on this proposal and we look forward to working with the Presidency to progress this important file.

POLAND

Poland's wording suggestions for gross negligence in Article 6(3).

OPTION I

Paragraph 2a – ADD

Member States shall take the necessary measures to ensure that the criminal offences referred to Article 3 are punishable by a maximum term of imprisonment of at least five years where that offence was committed by gross negligence caused serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence.

Recital 11) Penalties for the criminal offences should be effective, dissuasive and proportionate. To this end, minimum levels for the maximum term of imprisonment should be set for natural persons. Accessory measures are often effective and, therefore, should be also available in criminal proceedings. Gross negligence ~~should~~ may be considered in the context of criminal offences as an autonomous concept to be defined in accordance with national law.

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

Option II

Paragraph 3 - ADD

The conduct referred to in paragraph 3, points (b) shall constitute a criminal offence also if committed with serious negligence are punishable by a maximum term of imprisonment of at least five years.

Recital 11) Penalties for the criminal offences should be effective, dissuasive and proportionate. To this end, minimum levels for the maximum term of imprisonment should be set for natural persons. Accessory measures are often effective and, therefore, should be also available in criminal proceedings. Gross negligence ~~should~~ may be considered in the context of criminal offences as an autonomous concept to be defined in accordance with national law.

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

Option III

Regarding the wording from Directive 2011/36/EU of the European Parliament and of The Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA**,** article 4 paragraph 2 point (c), where the concept of gross negligence also appears and includes the word *"or",* **we can be flexible and accept this as a possible solution to our problem.**

ROMANIA

Article 3 – Criminal offences

Regarding the phrase "*at least*", RO supports art. 3 para. 1 only with the addition of this phrase, article accompanied by the explanatory recital proposed for at least (6a)

We believe that the addition of "*at least*" creates a minimum obligation for the MS to criminalize the facilitation of illegal entry, transit and stay for the purpose of obtaining material advantages, leaving it up to the MS to criminalize the acts of facilitating entry, illegal transit or stay on its territory, including in the situation where obtaining a financial or material benefit is not sought.

This regulatory intention is reinforced by the last paragraph of recital 6, understanding that this purpose can be fulfilled also under the conditions where the criterion of material or financial benefit is regulated as an **aggravating circumstance, and not as a constituent element of the offence**: *This is without prejudice to the way in which Member States deal in their national law with facilitation conducts for which an actual or a promised financial or material benefit is not a constituent element of the offence*.

Regarding recital **6a**, RO can accept it. This is in accordance with the new approach of art. 3 regarding the material benefit, reinforcing the minimum harmonization principle.

But, although RO can accept the proposed version, as already mentioned during previous meetings, regarding the configuration of the future offence, RO would still prefer the distinction between the facilitation of "*illegal entry or illegal transit*", on the one hand (art. 3 para. 1), and the facilitation of "*illegal stay*", on the other hand, as currently provided in the 2002 Directive (art. 3 para. 1.a).

RO supports option 1 - the humanitarian clause in the recitals (this is a RL), based on the Commission's proposal

Also, regarding recital 7, we welcome the removal of the additional clarifications that refer to *basic human needs* and *close family members*. In the same logic, we believe that the additional clarifications regarding *legal, linguistic or social advice or support* are also not necessary.

RO can support the clarifications in recital 7a. Additionally, RO proposes the following redrafting text:

„Nothing in this directive should be understood as ~~criminalising~~ imposing Member States to prosecute or impose penalties on persons who committed the offences referred to in article 3 if the acts were committed in order to provide humanitarian assistance."

Article 6 – Penalties for natural persons

In the light of what has been discussed in relation to **art. 3 para. 1**, but also those set out in **recital 6, last paragraph**, namely - this is without prejudice to the way in which MS deal in their national law with facilitation conducts for which an actual or a promised financial or material benefit is not a constituent element of the offence, RO considers that the limit in para. 2 is not dissuasive for the hypothesis in which this penalty considers the criterion of financial or material benefit, especially in the context of the fact that the declared objective of the amendment of the current framework is to increase the effectiveness of the fight against migrant smuggling networks, namely organized crime. Therefore, RO welcomes the return to the simple form of para. 2 of Art. 6, without the reference to material benefit.

Also, regarding **para. 3**, RO would propose keeping let. b) and deleting let. c), which raises problems of transposition from the point of view of the clarity of the legal text.

As regards **para. 3 (b),** RO cannot support the word "***deliberately***". Causing bodily injury or endangering the life of a person can only be imputed subjectively, as an aggravating circumstance, if committed by negligence. **To the extent that someone deliberately intends to cause more serious consequences** of this kind, **there will automatically be a concurrence** of offences between one of the offences referred to in art. 3 in the basic form and an autonomous intentional offence, namely bodily injury or attempted murder[4]. In the circumstances of the proposal, bodily injury or endangering the life of a person as a result of the act of facilitation of entry/transit/residence can only be committed with ***preterintention*** (the intent exists in relation to the more easily accepted result - primum delictum in art.3 - and the negligence is established in relation to the more serious consequence - bodily injury or endangering the life of a person - which is also imputable to the perpetrator). To the extent that such aggravated conducts are committed by negligence, a single aggravated criminal offence shall be prosecuted based on the circumstance in art. 6(3)(b).

Regarding the new configuration of **para. 4**, the rationale of which is explained in the new accompanying **recital 11a**, RO can support this flexibility left to MS, which, in our opinion, allows MS to apply aggravating circumstances, but also the general rules of concurrent offences.

On the other hand, regarding **recital 11a**, it is not clear what the first sentence refers to: "*The maximum terms of imprisonment provided for in this Directive for the offences committed by natural persons should apply at least to the most serious forms of such offences*." First of all, we do not understand what "***the most serious forms of such offenses***" are. Secondly, if these offences are the aggravated forms of the offence provided for in art. 6 para. 3, we do not understand the purpose of such a provision or the added value it brings since such forms already provide for a special maximum of the penalty of at least 8 years, while in the case of the death of a person the maximum is at least 10 years. This phrase seems to be copied from the Envicrime Directive (EU) 1203/2024, without a specific harmonization of the text according to the offences of the current Directive.

[4] It is the same situation when, by committing an act of rape/assault/illegal deprivation of liberty, the perpetrator also intends or accepts causing of bodily harm or death of a person. In the latter case, the rule of concurrent offences shall apply (basic form of the offence of rape/assault/illegal deprivation of liberty in conjunction with the autonomous offence against body integrity or life (committed intentionally)). To the extent that such aggravated conducts are committed by negligence, a single aggravated criminal offence shall be prosecuted based on the circumstance in art. 6(3)(b).

Moreover, in order to clearly illustrate that the rule of concurrent offences can also be applied in order to aggravate the sanctioning regime, RO would propose **an amendment of the last sentence of recital (11a) with the inclusion of a reference to the multiple offences, so that the new text should read as follows**: ***"...including provisions on aggravating circumstances or the possibility of retaining several offenses cumulatively in order to increase the level of sanctions."***

RO can accept the new configuration of **para. 5**, as well as the addition in recital 11 regarding ***gross negligence***, a concept that is viewed differently by the MS depending on the applicable legal system.

Article 8 – Penalties for legal persons

RO supports the alignment with Envicrime Directive regarding the uniform language – s*anctions* have been replaced by *penalties*.

Regarding the approach on determining the fines for legal persons, RO can support it from a conceptual point of view, because it also offers the alternative of fixed amounts.

However, regarding the maximum level determined according to the "Czech formula": 1% of the total worldwide turnover is equal to 8,000,000 euros, justified by ensuring the coherence between directives, this is not an acceptable criterion for RO, having regard to the scope of the current Directive. Hence, coherence does not mean providing for the same amounts, but determining the level of penalties based on the dangerousness of the perpetrator, the nature of the offence, the way such offence was committed and the means used. To this end, it is obvious that Envicrime Directive has a different scope, and the offences provided for in this legal act have the ability to cause damage to the environment and, at the same time, to other people, damage that has harmful effects on the environment indefinitely. Also, as already mentioned before, migrant smuggling is unlikely to be facilitated by companies with such profit.

Article 10 – Mitigating circumstances

RO welcomes the removal of the phrase - *they would not otherwise have been able to obtain.*

As expressed at previous meetings, such circumstances require, in order to be applicable, that the information provided by the suspect could not have been obtained by the judicial bodies in another way, a condition that involves a subjective assessment and, at the same time, it is discouraging for those who could benefit from a reduced sentence in this regard. RO believes that such a regulation could also call into question the principle of the legality of the penalty, which also refers to the individualization of penalties. Thus, the application of the mitigating circumstance - the fact that the perpetrator provides the competent authorities with information that they could not have obtained otherwise - requires an assessment of the skills and abilities of the law enforcement bodies, which could not have obtained this information without the cooperation of the accused. However, these elements are not inherent to the perpetrator, elements that must be considered when applying certain mitigating circumstances, for example, the circumstances related to the committed deed, which reduce the seriousness of the offence or the dangerousness of the perpetrator, the efforts made by the latter to remove or reduce the consequences of the offence.

SLOVENIA

(comments are highlighted by yellow)

Article 3

Criminal offences

Accompanying recital (6a):

"(6a) This Directive is an instrument of minimum harmonisation. As a consequence, Member States are free to adopt or maintain legislation providing for a broader incrimination than what is set out in this Directive, in the interests of enhancing the effectiveness of the fight against migrant smugglers ~~smuggling networks~~. Member States should ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence at least where the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit. However, since this Directive is an instrument of minimum harmonisation, Member States are free to criminalise such conduct when no financial or another material benefit has been provided."

We still consider the last sentence ("However …. Provided") to be repetitive and unnecessary, going beyond the goal of minimum harmonization (as it is providing initiative for MS to go beyond), but we will not object to its inclusion if it is needed for reaching consensus.

Humanitarian clause

At the meetings on 9 October, delegations discussed again the issue of the humanitarian clause. While a majority of delegations prefers option 1 (a recital), other delegations continue to favour option 2 (text in the operative part).

In any case, it seems that Member States have a preference for having less detail on the 'content' of the humanitarian clause. Hence, part of recital 7 was deleted.

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

Recital 7:

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

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

Insertion of paragraph 2 in Article 3:

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

We can be flexible about the humanitarian clause in the operative part of the directive; however, it must be aligned with recital 7. We can also support going with option 1 (recital) as long as the criminalization obligations for MS and exceptions are clearly described in the recitals.

Possible additional language in this recital 7:

~~"Meeting a person's basic needs means, at a minimum, ensuring that essential needs such as food, personal hygiene, and shelter are provided so that their physical or mental health is not endangered, and they are not subjected to conditions of degradation incompatible with human dignity.~~[5]

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

We can support a shorter recital 7, as proposed now. We can also support keeping this sentence (we do not insist on it) but we believe that its highlighted part should be deleted as such assistance is already covered by the existing part of recital 7; reference to assistance provided to a close family member should therefore go beyond meeting basic human needs – to be aligned with the rest of recital 7.

[5] Linguistically improved text based on the previous version, with the same content.

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

At the meeting on 9 October, delegations expressed support for recital 7a.

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

We do not find the last part ("of facilitating ..... Member State") sufficiently clear; its deletion could be a way out.

Article 6

Penalties for natural persons

(…..)

3. Member States shall take the necessary measures to ensure that the criminal offences referred to in ~~Article 4, points (a) to (d)~~ ~~by~~ Article~~s~~ **3~~(1)~~** are punishable by a maximum term of imprisonment of at least ~~ten~~ **eight** years **where ~~that offence~~:**

(a) <u>that offence</u> was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA;

(b) <u>that offence</u> deliberately or by gross negligence caused serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence ~~or of other persons~~;

(c) <u>that offence</u> was committed by ~~the~~ use of serious violence, ~~or has caused serious harm to the health of the third country national or of other persons~~;

(d) the third-country national who was subjected to the criminal offence was particularly vulnerable, such as <u>an</u> unaccompanied minor.

<u>It shall be within the discretion of Member States to decide whether this provision also applies in situations of</u> intentionally assisting a third-country national to stay within the territory of a Member State.

We support the amendments proposed.

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

As regards "caused the death": we would welcome a recital explaining that some kind of foreseeability between the offence and the death should (or could) be envisaged by MS. We do not want an objective criminal responsibility or an automatic application of higher penalty for the death to be established where such result could objectively not be foreseen by the perpetrator.

Recital 11

Recital 11 is in line with the text in 10569/24. It has been slightly refined to enhance clarity.

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

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

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

As regards "other individuals, such as members of law enforcement" This is now not part of the core provision, the text must be aligned.

As regards "such other individuals" : consequently, this part should be aligned as well (e.g., ..."third country nationals as well as other persons, such as members of law enforcement"...).

Article 11

Limitation periods ~~for criminal offences~~

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

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

It is necessary to align the provision with other instruments in the area of criminal law. Therefore some amendments to paragraphs 2 and 3 are necessary.

As it might be difficult to bring paragraph 3, especially 3(b), fully in line with those instruments (see the changes below), we could also support the deletion of paragraph 3 and the deletion of relevant parts of paragraph 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) a penalty of imprisonment of more than ~~four~~ one year~~s~~, or alternatively

Without this amendment, there is no harmonization for sentences between 1 and 4 years.

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

This is inconsistent with the usual approach, yet, it is the most convenient way forward (in order to address the issue described in the comment above).

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

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

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

4. By way of derogation from paragraphs 2 **b)-c)** and 3 **b)-c)**, Member States may establish a shorter limitation period, **but not shorter than five years,** provided that the period may be interrupted or suspended in the event of specified acts. ~~[This period shall not be shorter than:~~

~~(a) **two** five years for the criminal offences referred to in Article 3 **punishable by a maximum term of imprisonment of at least three years;**~~

~~(b) **six** years for the criminal offences referred to in Article 4, points (a) to (d) **punishable by a maximum term of imprisonment of at least eight years;**~~

~~€ **eight** years for the criminal offences referred to in Article 4, poi€(e), including attempts to commit the criminal offence referred to in Article 4, €nt (e) **punishable by a maximum term of imprisonment of at least ten years.]**~~

Accompanying recital 16:

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

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

Article 12

Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

(i) established in its territory;

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

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

We find this ground unclear and propose reverting to the previous wording.

~~**3.** 2. **Each** Member States shall **take the necessary measures to** establish **its** jurisdiction over attempts the attempt to commit a criminal offence referred to in Articles **3(1)** 4 point (e), **where** the conduct would have constituted a criminal offence over which jurisdiction would have been established pursuant to paragraph 1.~~ [6]

4. ~~3.~~ For the prosecution of the criminal offences referred to in Articles 3, ~~4~~ and 5 committed outside the territory of a Member State, each Member State shall take the necessary measures to ensure that **the exercise of** its jurisdiction is not subject to ~~either of~~ the ~~following~~ conditions ~~that~~ **the prosecution can be initiated only following a denunciation from the State of the place where the criminal offence was committed.**

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

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

[6] In view of comments by delegations, this paragraph 3 has been deleted.

5. ~~4.~~ Where a criminal offence referred to in Articles 3, ~~4~~ and 5 falls within the jurisdiction of more than one Member State, **those** ~~these~~ Member States shall cooperate to determine which Member State is to conduct **the** criminal proceedings. The matter shall, where appropriate and in accordance with Article 12 **(2)** of Framework Decision 2009/948/JHA[7], be referred to Eurojust.

Accompanying additional recital (19a):

"(19a) Member States are encouraged to extend the geographical scope of the criminalisation of migrant smuggling, and the manner in which jurisdiction for migrant smuggling can be exercised outside of their territories, beyond the minimum rules set forth in this Directive, in order to further enhance the investigation and prosecution of migrant smuggling."

We do not support the wording of this recital as it goes beyond the aim of minimum harmonization. We propose its deletion or at least replacing the words "are encouraged to" with "may"/"can".

[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).

Article 17

Data collection and statistics

1. Member States shall ~~collect~~ **ensure that a system is in place for the recording, production and provision of anonymised** statistical data ~~disaggregated by~~ **on** the type of criminal offence referred to in Articles 3~~,~~ ~~4~~ and 5 **in order to monitor the effectiveness of their systems to combat offences referred to in this Directive.**

2. The statistical data referred to in paragraph 1 shall ~~include, at least, the following~~**, as a minimum, include existing data available at the central level on:**

   a) The number of **registered** third-country nationals who were subject to the criminal offence, disaggregated by citizenship, sex and age (child/adult) **in accordance with national law and practices;**

   ~~b) the average length of the criminal investigation of cases;~~

   c) the number of natural persons prosecuted for criminal offences referred to in this Directive, ~~disaggregated by sex and citizenship~~;

   d) the number of legal persons prosecuted for criminal offences referred to in this Directive, ~~disaggregated by place of establishment;~~

   e) the number of **prosecution decisions** ~~of the prosecution services~~ ~~disaggregated by type of decision~~ (**decisions** to prosecute or not to prosecute)~~;~~

   f) the number of final-court **judgements** ~~decisions~~ ~~disaggregated by type of decision~~ **(i.e**. conviction, acquittal, ~~dismissal on the substance or not, and including non-trial resolutions~~);

   g) the number of natural persons convicted of criminal offences referred to in this Directive, ~~disaggregated by sex and citizenship~~;

h) the number of natural persons subjected to penalties disaggregated by the type and level of penalty (imprisonment, fines, others) sex and citizenship;

i) the number of legal persons convicted for criminal offences referred to in this Directive ~~and sanctioned~~;

j) the number of legal persons sanctioned **following a conviction**, disaggregated by ~~place of establishment and~~ type of sanction (fines, others);

~~k) the average length of courts proceedings of cases in first instance, second instance and cassation.~~

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

As raised by some delegations during the meeting, this does in fact make only 31 December the relevant deadline – should therefore this clearly be stated? Also, there is no such deadline in other criminal law instruments. We propose following the approach already agreed upon.

SWEDEN

Article 1-2

Sweden accepts these articles.

Article 3

Sweden supports the deletion of the wording “at least” in article 3. Regarding the condition of “financial or material benefit” Sweden accepts to keep that in the text.

Also, regarding the humanitarian clause, Sweden has a flexible approach and can accept both options but we would prefer option 1, to keep the clause in the recitals.

Article 4

Sweden accepts the deletion of Article 4.

Article 5

Sweden accepts this article.

Article 6

Paragraph 3

On Article 6 we have two remaining concerns. If our concerns are met, we can show flexibility and possibly accept the maximum term of imprisonment of at least 8 years in Article 6.3.

Point b)

Regarding point b), Sweden is still of the opinion that the subjective prerequisites (deliberately or by gross negligence) should be deleted. It is not suitable, in the case of an intentional criminal offence, that the fact that the offender is grossly negligent in relation to an aggravating circumstance, should mean that a more severe sanction is to be used. The fact that different forms of culpability are used for the same offence deviates from how criminal offences are generally composed in Swedish criminal law. In the case of an intentional offence, it is generally required that the aggravating circumstances are covered by intent in order for the circumstances to have an impact on determining the penalty scale.

Thus, it would, with the current proposition, be necessary for Sweden to introduce a specific criminal liability on smuggling when causing serious harm or endangering the life of a third-country national in cases where the offence is committed by gross negligence. It would be unproportionate to accept a maximum term of imprisonment of at least eight years in that case. Sweden therefore asks for the deletion of "deliberately or by gross negligence".

This adjustment could be combined with an addition to the recitals saying that Member States may, when implementing article 6, paragraph 3, point b) criminalise conducts that deliberately or by gross negligence causes serious harm to, or endangers the life of a third country national who were subject to the criminal offence.

Point c)

Regarding point c) we have concerns on the requisite "use of serious violence". As explained in the bilateral it appears that the intention from the Presidency was to delete the last word "persons" as well. The provision would then entail that the use of serious violence can be directed towards anyone in order for this prerequisite to be met. In our opinion it is positive that "other persons" have been deleted from point b). We agree with the Presidency that such other persons are already protected under other criminal conducts punishable as part of national criminal codes. It is our opinion that the same applies to point c). With the current proposal, acts that are committed against any person with the use of serious violence (paragraph c)) is to be criminalised as a smuggling offence, whereas causing serious harm or endangering life of other persons than third-country national is not seen as a smuggling offence (paragraph b). The reason for the distinction between point b and c is difficult to understand.

Furthermore, the scope of application in this part may cover acts of violence that are far on the periphery of what migrant smuggling is intended to cover, so that the provision in this part risks being diffuse and difficult to apply. As the proposal stands, there is therefore a risk that the application of the provision will not have sufficiently clear boundaries and may appear arbitrary.

Therefore, we would suggest that the wording in point c) is aligned with point b), as follows:

> **that offence was committed by ~~the~~ use of serious violence~~, or has caused serious harm to the health of the third country national or of other persons~~ against the third-country nationals who were subject to the criminal offence;**

Furthermore, in our view it is not an adequate solution to include point c) in recital 11 a, as proposed in the bilateral, mostly because the nature of the crimes that could be relevant differs from e.g. crimes relating to the possession of weapons to assault, and it is not possible for us to accept a maximum term of imprisonment of at least eight years for all such crimes (this must be compared with the acts mentioned in the said recital, limited to murder and manslaughter).

An alternative to our suggestion above is to move point c) to article 9.

Added subparagraph below point d)

Given that the words "this provision" in the first row refers to whole paragraph 3 of article 6, as explained during the bilateral, we welcome this addition. As mentioned by us in the bilateral we suggest to further emphasize this by moving the line indentation of this subparagraph further to the left, to the same level as the first sub paragraph of paragraph 3. In order to streamline the text we would also suggest to the delete the word "also" in the second row as follows:

It shall be within the discretion of Member States to decide whether this provision ~~also~~ applies in situations of intentionally assisting a third-country national to stay within the territory of a Member State.

Paragraph 4

As mentioned earlier we warmly welcome the added recital 11a. This should remedy our previous concerns regarding aggravated offences that cause the death of a person in cases of illegal stay. As also mentioned above, unfortunately we don't see that an expansion of this recital to also cover paragraph 3 of article 6 will solve our issues with point b) or c).

Article 5-7

Sweden accepts these articles.

Article 8

Sweden welcomes the intention to reduce and adapt the fixed sanctions to corresponding directives within the EU, such as ENVI and the Directive on Protected Measures.

Article 8a-11

Sweden accepts these articles.

Article 12

First of all, Sweden welcomes the deletion of Article 12.3.

In paragraph 2 it is unclear to us what the change in point c means, a clarification is therefore required.

Furthermore, Sweden questions the need for the accompanying additional recital 19 a.

Article 13-19

Sweden accepts these articles.