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From:	Presidency
To:	Permanent Representatives Committee/Council
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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 - Orientation debate

Introduction

Migrant smuggling to and within the EU is reaching new heights, with a significant increase in irregular entries at the EU's external borders each year¹. It is estimated that more than 90% of irregular migrants who reach the EU use the services of smugglers, most of whom are organised in criminal groups. These smuggling networks make substantial profits from their criminal activities, which disrespect human life and the dignity of migrants.

¹ In 2022, around 331 000 irregular entries were detected at the EU's external borders – the highest level since 2016. Between January and end-September 2023, 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.

It is important to note that around half of the migrant smuggling networks are also involved in other crime, 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, constantly evolving challenges, such as the rapidly changing and adapting *modi operandi* of smugglers, and the increased use of threats and violence against migrants and law enforcement authorities.

Tackling migrant smuggling is essential to dismantling these organised crime networks, which can cause human rights violations and death, and to countering the increase in irregular migration to the EU.

On 28 November 2023, the Commission presented a legislative package which includes a proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union.

The objectives of the proposal

The purpose of the proposal, as a part of the comprehensive approach underpinning the New Pact on Migration and Asylum, is to prevent and counter migrant smuggling by clearly defining and effectively sanctioning the offence of facilitating unauthorised entry, transit and stay in the EU, and the United Nations' Protocol against the Smuggling of Migrants by Land, Sea and Air.

The proposal for a directive aims to update the existing EU criminal law framework (the 'Facilitators Package', composed of Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, and Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence). This includes minimum rules on the definition of criminal offences and sanctions and provisions on prevention, investigative tools, training and data collection.

The examination of the proposal by the Council

The proposal for a Directive is being discussed in the Working Party on Judicial Cooperation in Criminal Matters (COPEN), in COMIX format.

The COPEN Working Party started its examination by presenting the initiative on 20 December 2023 under the Spanish Presidency. It has continued its work under the Belgian Presidency, examining the first 12 articles in detail at its meetings on 30 January and 21 February. The examination has revealed broad support from the Member States for the objectives of the proposal.

The Presidency has identified some matters which may require political guidance for future work at expert level.

Issues to be debated at the Council meeting

1. Criminalisation

With a view to strengthening the fight against migrant smuggling, one of the key elements of the proposal is to provide more legal clarity by introducing a more precise and detailed definition of the relevant criminal offences in Article 3 of the Directive.

Article 3 of the Directive proposes to criminalise the act of intentionally assisting unauthorised entry, transit or stay when a financial or material benefit is at stake or where there is a high likelihood of causing serious harm to a person.

The Presidency would like to have a clear understanding of Member States' views on which acts should be qualified as migrant smuggling.

2. Humanitarian clause

Council Directive 2002/90/EC introduced an optional humanitarian clause in Article 1(2). Member States could decide not to impose sanctions in cases where a person assists a third country national to enter or cross the territory of a Member State without any benefit and for humanitarian reasons. However, the 2017 REFIT evaluation of the current Facilitators Package, and the subsequent monitoring of its implementation, pointed to the challenges linked to the definition in the Facilitators Package in general and of the humanitarian assistance exemption in particular.

As a result, the aim of the Commission's proposal, as mentioned in recital 7, is to clarify which offences should or should not be criminalised. In particular, it should provide more clarity on the fact that the purpose of the directive is not to criminalise family members or other persons/NGOs who provide assistance or humanitarian assistance, or support for the basic human needs of third-country nationals in compliance with legal obligations, but to focus on migrant smuggling organised networks that profit from this.

Questions for ministers

1. Criminalisation

In your opinion, for the offence of migrant smuggling, should the EU set minimum rules on the facilitation of unauthorised entry, transit or stay requiring a financial or material benefit, and if so, should such benefit be disproportionate to the service rendered by the smugglers?

Furthermore, the increased use of threats and violence against migrants and law enforcement authorities calls for a stronger law enforcement and judicial response. Therefore, based on your experience, is it appropriate to also criminalise the offence of 'facilitation of unauthorised entry, transit and stay in the EU which is highly likely to cause serious harm to a person'?

2. Humanitarian clause

Ministers are kindly invited to provide their views on whether the legal instrument should have a humanitarian clause and whether the proposal should explicitly mention (in the operational part of the text) that the criminal provision does not apply when the assistance is offered for primarily humanitarian reasons?

