



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MIGRATION AND HOME AFFAIRS

Directorate C – Migration & Asylum
C.4 – Migration Management Response and Counter-Smuggling
Directorate D – Internal Security
D.1 – Law Enforcement Cooperation

Brussels, 3 September 2024
HOME.C.4/EGV

Chloé Berthélémy
<chloe.berthelemy@edri.org>

Dear Ms Chloé Berthélémy,

Thank you for your email of 19 August 2024 (Ares(2024)5895510) concerning the legislative initiatives on migrant smuggling presented by the Commission in November 2023.

As explained in the letter of 9 April 2024 we sent you in reply to your letter addressed to Ms Silvena PESTA and Mr Rob ROZENBURG, the Commission has dispensed with an impact assessment at the time of the presentation of the legislative proposals due to the urgency to prepare the two proposals and the need to act swiftly on tackling migrant smuggling.

In accordance with the Better Regulation Guidelines, “an impact assessment is required for Commission initiatives that are likely to have significant economic, environmental or social impacts or which entail significant spending, and where the Commission has a choice of policy options”⁽¹⁾. The Guidelines also provide that “where an impact assessment is required in principle, but this is not possible and a derogation is granted, an analytical document in the form of a staff working document” should be prepared⁽²⁾. This was the case for the two analytical supporting documents accompanying the proposal for a Regulation⁽³⁾ and the proposal for a Directive⁽⁴⁾.

As recalled in your email, these analytical documents are based on the evidence collected in the evaluation of the Facilitators Package⁽⁵⁾, the Study on the implementation of the Facilitators Package⁽⁶⁾, the public consultation on the Renewed EU Action Plan against migrant smuggling, information provided by Europol, Eurojust and Frontex, the European Court of Auditors Special Report on Europol’s support to fight migrant smuggling⁽⁷⁾, and targeted consultations. In preparation of the proposal, following discussions in the

⁽¹⁾ Better Regulation Guidelines, November 2021, page 30, available at: https://commission.europa.eu/document/download/d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en?filename=swd2021_305_en.pdf.

⁽²⁾ Ibid.

⁽³⁾ SWD(2024) 94 final, 15.4.2024.

⁽⁴⁾ SWD(2024) 134 final, 14.5.2024.

⁽⁵⁾ SWD(2017) 117 final, 22.3.2017.

⁽⁶⁾ <https://op.europa.eu/en/publication-detail/-/publication/550fa489-18cf-11ef-a251-01aa75ed71a1/language-en7>.

⁽⁷⁾ https://www.eca.europa.eu/Lists/ECADocuments/SR21_19/SR_migrant_smuggling_EN.pdf.

Council's Law Enforcement Working Party, the Commission also consulted Member States at expert level through a dedicated virtual workshop on 14 November 2023 which was attended by experts from EU Member States and EU institutions. Experts provided their views on: (1) the operational needs and gaps when it comes to Europol's support on migration smuggling, and (2) on any other needs and opportunities when it comes to strengthening Europol's mandate.

As regards the proposal for a Directive, our policy choices were limited by the legal basis set by the Treaty (Article 83(1) TFEU), the latest standards in the EU criminal law and the instruments tackling organised crime and the need to further align EU legislation to the UN Protocol to provide more legal clarity to Member States in navigating the multi-layered legal framework on smuggling.

The Better Regulation Guidelines do not require that the analytical documents should have the same characteristics of an impact assessment (i.e., to present the different policy options), but that it should present "the evidence behind the proposal and cost estimates" ⁽⁸⁾. The abovementioned analytical documents present such information.

The proposal for a Directive aims to further align the EU legislation with the international obligations stemming from the UN Protocol against the Smuggling of Migrants by Land, Sea and Air. The Union is bound by these international obligations, as it is a party to the Protocol. However, this does not preclude that the legislative initiatives proposed by the Commission (and thus the legislative instruments adopted by the European Parliament and the Council) may go beyond the content of the relevant international instruments, provided that they are not in breach of the relevant international provisions and that they fall within Union competences.

The proposal for a Directive was presented in accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty on European Union, which, when adopted, will need to be transposed by the Member States. Member States will have to transpose the Directive in full respect of the Charter of Fundamental Rights of the European Union. The Directive would not apply in isolation, and the fundamental rights and freedoms enshrined in the Charter are relevant in the context of countering migrant smuggling. As recalled in Recital 28 of the proposal, these include 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. As per Recital 10 of the proposal, when applying the Directive, Member States should also comply with obligations related to international protection, in particular the principle of non-refoulement, and fundamental rights.

To ensure strengthened safeguards and increased accountability, the amendments to the Europol Regulation as adopted by the co-legislators in 2022 introduced an independent Fundamental Rights Officer (FRO). The FRO is responsible for supporting Europol in safeguarding the respect for fundamental rights in all its activities as the Agency executes its mandate. The FRO's tasks have a particular emphasis on the Agency's operational work and activities.

⁽⁸⁾ Better Regulation Guidelines, November 2021, page 30, available at: https://commission.europa.eu/document/download/d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en?filename=swd2021_305_en.pdf.

Article 3(2) of the proposal for a Directive aims to expand the ways to address the conduct of smugglers that operate in the EU and abroad, instigating persons to enter, transit or stay in the EU without authorisation, for example by recruiting migrants in key hubs where they are present in large numbers or by advertising routes and prices on social media platforms. Recital 6 clarifies that providing objective information or advice on legal entry and stay in the Union, and on international protection, should not be understood as public instigation. In applying this provision, Member States are bound to comply with Article 11 of the Charter, which protects the freedom of expression, to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.

Member States should ensure that effective investigative tools are available for migrant smuggling investigations, including for instance the interception of communications, covert surveillance including electronic surveillance, monitoring of bank accounts and other financial investigation tools. The article aligns this instrument to other EU criminal law Directives that focus on serious forms of organised crime, while at the same time adding a criterion of proportionality to the use of such tools.

For the reasons above, the Commission considers that the Better Regulation requirements have been met, and that the proposals address the main concerns raised in your email. The proposals are currently under negotiation with the European Parliament and the Council, and this co-decision procedure will determine the final text of both instruments.

Yours faithfully,

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Head of Unit HOME C4

Julian SIEGL
Head of Unit HOME D1