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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)

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Delegations will find attached document SWD(2017) 120 final.

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**COMMISSION STAFF WORKING DOCUMENT**

**EXECUTIVE SUMMARY OF THE REFIT EVALUATION**

**of the**

**EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)**

The main purpose of this evaluation is to assess whether the EU legal framework against facilitation of unauthorised entry, transit and residence or "Facilitators Package", adopted in 2002, is still fit-for-purpose. To this effect, it examines the effectiveness, efficiency, relevance, coherence and EU added-value of the existing provisions.

The Facilitators Package was adopted with the specific aim to contribute to curbing irregular migration by strengthening the penal framework on the aiding of unauthorised transit, entry and residence in the EU, "both in connection with unauthorised crossing of the border in the strict sense, and for the purpose of sustaining networks which exploit human beings"<sup>1</sup>. To do so, it sets out the definition of the offence of facilitation of irregular migration, as well as minimum rules on penalties, liability of legal persons and jurisdiction.

This evaluation is based on a variety of sources, including evidence collected through external studies, desk research, review of publicly available jurisprudence as well as opinions of national authorities, experts, civil society organisations and other stakeholders. These were gathered both through targeted exchanges of views as well as a 12-week open public consultation online.

The evaluation findings primarily show a serious lack of reliable and comparable data on migrant smuggling offences and criminal justice responses at national and European level<sup>2</sup>, affecting almost all evaluation criteria. This limited the capacity to draw conclusive remarks, in particular on the effectiveness and efficiency criteria. The expansion of Eurostat crime statistics database to include data on migrant smuggling as of 2017 should contribute to address this weakness.

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

Differences were noted also across the different categories of stakeholders, who expressed diverse and sometimes contradicting views on different aspects of the Package. The wide majority of the consulted individuals and organisations were strongly in favour of a modification of the existing definition of the offence. Despite the fact that EU law allows not to criminalise the facilitation of irregular entry when it is conducted on humanitarian grounds, this provision was criticised for its optional character, entailing a lack of clarity and legal

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<sup>1</sup> Recital (2) of Directive 2002/90/EC and Framework Decision 2002/946/JHA.

<sup>2</sup> As regards limitations and availability of comparable and reliable statistics and ensuing consequences on the robustness of findings, see Annex III on "Methods and Sources", as well as Annex II on "Stakeholder consultation" to the Commission Staff Working Document on the evaluation.

certainty. Perceived risks of criminalisation of actions by civil society organisations or individuals assisting and/or working with irregular migrants were raised.

These perceptions and criticisms seemed to concern both humanitarian assistance given within a Member State territory as well as at borders or even on the high seas, despite the different legal frameworks that apply to such conducts. For example, EU law already foresees a difference between facilitation of unauthorised entry and facilitation of irregular residence, whereby the latter is only criminalised when carried out for financial gain. The majority of Member States did not express the need to narrow the definition of the offence, for example to require criminalisation of facilitation of irregular entry only when conducted for a financial or material gain, or to introduce a mandatory exemption from criminalisation. Among the arguments provided were those that such a mandatory clause could be exploited by smugglers or would hamper prosecution, whereas a broad definition would be better suited to EU law, leaving the necessary margin of interpretation to national judicial systems.

At this point in time, the information collected does not allow to draw an accurate picture pointing to actual and repeated prosecution and conviction of individuals or organisations facilitating irregular border crossings for reasons of humanitarian assistance across EU Member States.

In terms of **efficiency**, a solid quantification of the costs and administrative burden of the Package is severely hindered by available evidence. While the evaluation suggests the costs of increased migrant smuggling to the society as being high and the costs of the Package at EU level rather low, it is difficult to disentangle different types of costs at EU and national level, and their relations with other external factors. Hence, no firm conclusions can be drawn.

Despite migrant smuggling remains a highly profitable activity with relatively low risk, the evaluation findings highlighted the persisting **relevance** and **EU added-value** of this European legislation and its main aims in the current context of a refugee and migratory crisis. The Facilitators Package remains necessary to help law enforcement and judicial cooperation between Member States and should be implemented in complementarity with other actions.

Its **coherence** with other relevant parts of the EU *acquis* was also considered satisfactory. This assessment extended to the interplay with the UN Protocol against migrant smuggling, an instrument also concluded by the EU and whose differences with the Package were not regarded as problematic.

The European response to the migratory and refugee crisis included the adoption in May 2015, further to the European Agenda on Migration, of the first comprehensive and multidisciplinary policy framework to address migrant smuggling through an EU Action Plan against migrant smuggling (2015-2020). The policy context and the wider actions set out in the Action Plan are taken into account as the relevant setting with which the Package interplays.

In this sense, general agreement seemed to emerge on a number of non-legislative measures, which can bring added-value to the EU action to counter migrant smuggling and avoid criminalisation of those providing genuine humanitarian assistance. These could include support to Member States authorities, civil society organisations or other stakeholders through capacity building, financial instruments, handbooks or guidelines on specific aspects of the applicable policy and legal framework, enhanced cooperation with third countries including information campaigns, and more. They mostly correspond to actions that are already prioritised in the EU Action Plan or new policy initiatives, such as the Partnership Framework with third countries under the European Agenda on Migration adopted in June 2016.

In conclusion, there is no sufficient evidence to draw firm conclusions against the evaluation criteria about the need for a revision of the Facilitators Package at this point in time. Although certain possibilities to improve it have been identified and while it clearly emerged that an EU legal framework addressing migrant smuggling remains necessary in the current context, at present there is no solid evidence that its review would bring more added value than its effective and full implementation, in the context of the EU Action Plan.

Further consideration to the need for a legislative revision could be given once the implementation of the Plan has reached greater maturity and data availability has improved, enabling a thorough evaluation.