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Submission by Council of The Bar of Ireland to the Joint Committee on Justice on the General Scheme of The Smuggling of Persons Bill 2020

19 February 2021

Introduction

1. The Smuggling of Persons Bill 2020 ("**the 2020 Bill**") is a welcome legislative initiative. The 2020 Bill is intended to transpose Council Directive 2002/90/EC ("**the Directive**") defining the facilitation of unauthorised entry, transit and residence, and Council Framework Decision 2002/946/JHA ("**the Framework Directive**") on the strengthening of the penal framework to prevent the facilitation of un-authorised entry, transit and residence (together "**the Facilitators Package**"). It is also intended to ratify the UN Protocol Against Smuggling of Migrants by Land, Sea and Air ("**the Protocol**"). These are laudable goals.

2. The Council of the Bar of Ireland ("**the Council**") is of the view, however, that a number of elements of the General Scheme of the 2020 Bill give rise to concerns. Amongst other issues, certain of the provisions proposed in the 2020 Bill might be open to constitutional challenge if enacted in their current form. Others are unclear in their wording and might be unworkable in practice. Particular aspects of the Bill have the potential to lead to unduly onerous consequences.

3. This submission highlights these areas of concern. It makes suggestions as to the manner in which they might be addressed and highlights additional provisions which the Committee may wish to consider including.

General Observations

4. Before turning to consider the individual heads of Bill, the Council notes that the 2020 Bill omits to deal with key aspects of the Facilitators Package and the Protocol despite being intended to implement or transpose same. There are three omissions of concern.

5. Firstly, the Bill is entirely silent on the rights and protections of smuggled persons. The Council is of the view that, in order to properly transpose the Facilitators Package, and implement the Protocol, the 2020 Bill ought to specifically provide for the rights and protections of smuggled persons in terms similar to those provided for at Article 16(1) of the Protocol.

6. Secondly, Article 5 of the Protocol provides that migrants shall not become liable to criminal prosecution for the fact of having been smuggled. This is an important provision for the protection of smuggled persons. However, the 2020 Bill does not include such a provision. The Council is of the view that this should be redressed.

7. Thirdly, it is noted that the Bill is silent on the identification procedure for smuggled persons. There is a risk that inadequate procedures for the identification of smuggled persons may place individuals at risk of abuse and exploitation resulting in such persons being unable to access their legal right to protection and assistance as the victims of trafficking.

8. By way of further general observation, the Council stresses that while penalisation of smugglers is important, it should be viewed as only one component of the solution needed to address the issue of the cross-border smuggling of persons. Smuggling generally arises in circumstances where there are insufficient legal means of entry to the jurisdiction. This means that to tackle the root causes of smuggling, it is essential to give consideration to an expansion of the legal avenues for entry to the State. This might take the form of a review of visa and entry requirements, or consideration of circumstances in which applications for international protection within the State may be made by a person outside of its territorial jurisdiction.

Section 4 – Repeals

9. This section repeals most provisions of the Illegal Immigrants (Trafficking) Act 2000. This is sensible, given that the 2020 Bill re-enacts many of the Act's provisions and reframes the key offence contained at its heart. That said, consideration should be given to the proposal to repeal s. 7 of the 2000 Act without any replacement in the 2020 Bill.

10. Section 7 of the 2000 Act provides that a District Court judge may issue a search warrant for any "*place"* if there are reasonable grounds for suspecting that evidence of or relating to a trafficking offence under s. 2 of the 2000 Act is to be found there.

11. Section 4 of the 2020 Bill proposes that s. 7 of the 2000 Act be repealed in its entirety. It does not provide for the re-enactment of a similar section allowing for the issuance of search warrants to facilitate the investigation of trafficking offences. The only search powers provided for in the 2020 Bill are those contained in ss. 9 and 10, which permit enforcement officers to search certain ships without a warrant.

12. Gardaí would still be able to obtain warrants to investigate trafficking under the general provisions of s. 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 ("**the 1997 Act**"), as amended. This allows a District Court judge to issue a warrant for the search of a place where there are reasonable grounds for suspecting that evidence of or relating to the "*commission of an arrestable offence*" is to be found. The offence proposed in s. 5 of the 2020 Bill would amount to an "*arrestable offence"* within the meaning of this legislation.

13. There are two distinctions between s. 7 of the 2000 Act and s. 10 of the 1997 Act, however. Both sections provide that it is an offence for a person to obstruct a search under a warrant, but obstruction of a search carried out under a 2000 Act warrant is punishable by up to 12 months imprisonment, whereas 6 months is the maximum penalty for obstructing a 1997 Act search. Further, s. 7 of the 2000 Act provides that a warrant may be issued to search a "*place",* including any dwelling, any building, and any vehicle, vessel, structure or container used or intended to be used for the carriage of goods by road. Though similar in scope, s. 10 of the 1997 Act does not expressly provide for the issuance of a warrant to search a structure or container.

14. The decision to repeal s. 7 of the 2000 Act without replacement is not explained in the notes to the 2020 Bill. The Committee may wish to consider whether it is appropriate to do so. Notwithstanding the issues set out above, the Council's view is that it is not necessary to re-enact s. 7 of the 2000 Act. The warrant regime under the 1997 Act is broad enough to allow for effective investigation of trafficking offences. The distinctions highlighted above are minor in nature. Finally, there is much to be said for condensing the criminal law, with a small number of general provisions for searches rather than specific provisions for specific offences.

Section 5 – Facilitation of Unlawful Entry, Transit and Presence

15. This section sets out two core offences. It is notable that an intention to gain or lack of humanitarian purpose on the part of the accused are not elements of these offences which need to be proved by the prosecution in order to secure a conviction. However, s. 5(4) indicates that a defence is available if an accused can prove on the balance of probabilities that the actions were done as part of work with a *bona fide* organisation, or for humanitarian purposes and without the intention to gain.

16. The offences proposed in the 2020 Bill are fundamentally different to the offence contained in s. 2 of the Illegal Immigrants (Trafficking) Act 2000, which provides that a lack of humanitarian purpose is an essential component of the offence which must actually be proved by the prosecution. The decision to cast the offences in these terms represents a fundamental departure from Article 6(1) of the Protocol, which provides that state parties are required to criminalise smuggling where done "*in order to obtain, directly or indirectly, a financial or other material benefit".* It also goes beyond the terms of Directive 2002/90/EC, which requires that assistance to a non-national to reside within the territory of a state be an offence only where done for "*financial gain*" (although financial gain is not necessary in relation to assistance to a person to enter or transit across a territory).

17. It should be further noted that the United Nations Office of Drugs and Crime has stated that the financial and material benefit element of the crime is a key component of the international definition, explaining that it was intended by the drafters to ensure that those who provided support for smuggled persons for humanitarian and family reasons were not prosecuted. The EU Fundamental Rights Agency has also stated that legislation to fight smuggling at Member State level should always include financial and material benefit as a requirement for punishment and/or explicitly exclude punishment for facilitation of un-authorised entry and stay based on humanitarian assistance grounds, in order to avoid risks of punishment for humanitarian assistance provided by NGOs to smuggled migrants and asylum seekers.

18. The notes to the 2020 Bill suggest that the decision to cast the offences in these terms is intended to ease the difficulties in proving a lack of intention to gain or absence of humanitarian purpose to the standard of beyond a reasonable doubt. In that light, it appears to be a policy choice aimed at facilitating prosecutions. The desirability of this choice should be carefully assessed in light of the fact that it represents a fundamental step away from the requirements of the Protocol and the Council Directive. Enacting offences in these terms may also lead to the prosecution of individuals who assist with people smuggling for humanitarian reasons, and who may even be rescuers.

19. The Council notes that the potential difficulties in proving intention to gain or lack of humanitarian purpose could be dealt with through simpler means than excluding these as elements of the offences. One potential solution is the inclusion of rebuttable statutory presumptions in the legislation. It could, for instance, be provided that it is presumed that actions are taken for gain and without a humanitarian purpose unless the contrary is shown. The use of such presumptions is the standard approach taken in criminal legislation to ease the task of proving states of mind or a matter lying within the accused's knowledge. Adopting such an approach here might strike a suitable compromise between the public interest in the effective prosecution of those who smuggle people for personal gain and ensuring that those who act for benevolent motives do not face sanctions, whilst maintaining the important principle that intention to gain or lack of humanitarian purpose are essential components of the offences.

20. If the decision is made to frame the offences in the manner currently proposed in the 2020 Bill, with a type of humanitarian purpose "*defence",* the Council would suggest that certain refinements are needed.

21. The first is to the standard of proof required for the defence. In its current form, s. 5(4) requires proof of the defence on the "*balance of probabilities".* This requirement is not unseen in criminal legislation: see, for example, the Criminal Law (Insanity) Act 2006. However, it is a departure from the usual situation in which a statute creates a defence: typically, the accused need only adduce evidence suggesting a reasonable possibility that the defence arises. This latter standard should be adopted as it is more congruent with the ordinary principles of criminal law and other criminal statutes. Moreover, it

lowers the risk of a person who has genuinely acted for benevolent and laudable motives being convicted of a serious crime because he or she does not have hard evidence to prove that to a judge or jury – a risk which cannot be discounted if proof is needed on the "*balance of probabilities".*

22. In addition, the wording of the defence should be modified. Section 5(4) provides that a defence arises only where (i) the act or omission was for the purposes of assisting a person seeking protection in the course of work done on behalf of a *bona fide* organisation which has a purpose *of "giving assistance without charge to persons seeking such protection",* or (ii) *"for humanitarian purposes and otherwise than for gain*". The language used here could be simplified whilst preserving the underlying intention. Indeed, there is no reason why the language from the 2000 Act could not be used with minor modifications. In the Council's view, the defence should apply to acts done or omissions made otherwise than for gain, or to assist a person seeking international protection in the course of work done on behalf of a *bona fide* organisation.

23. Whatever the structure adopted, it would be helpful to include a definition of the key terms used here, such as "*humanitarian purposes"* and "*gain".*

24. In relation to the offences themselves, s. 5(1)(a) creates the offence of "*organising or knowingly facilitating*" the entry into, or presence in, the State of a person who is not an Irish citizen or a citizen of a designated state in breach of the Immigration Act 2004 . Section 5(2)(a) creates the offence of organising or knowingly facilitating unlawful entry into, unlawful transit across, or unlawful presence in a designated state of a person who is not a citizen of a designated state. There are two issues which arise with both of these offences.

25. Firstly, there are issues with the *mens rea* component of the offences, *i.e.* the requirement for a guilty mind on the part of the accused. *Mens rea* is a fundamental component of any criminal offence, and a statutory provision which allows a person to be convicted on a strict liability basis or without any adequate appreciation that his or her actions were wrongful is susceptible to constitutional challenge: see *C.C. v. Ireland*

[2006] IESC 33, [2006] 4 I.R. 1. The limb of the offence of "*knowingly facilitating*" a breach of immigration law clearly contains a *mens rea* requirement. However, there does not appear to be such a similar *mens rea* requirement for "*organising*" entry or presence in the State. Under the 2000 Act, such a *mens rea* requirement was provided by the stipulation that the accused knew or had reasonable cause to believe the person was an illegal immigrant. This has been removed from the 2020 Bill. Further, the *mens rea* standards differ from Directive 2002/90/EC, which provides that "*intentional"* assistance is required. It is suggested that the offences be reframed so as to criminalise either "*intentionally organising or facilitating*" or "*knowingly organising or facilitating".*

26. Secondly, it is noted that the sections criminalise "*organising or facilitating",* rather than criminalising "*assisting"* as required by Directive 2002/90/EC. Although a legitimate drafting choice, the concept of organising or facilitating the "*presence*" of a person may be too vague in practice. The legislation might well benefit from a definitional section, providing examples of activities included in the ambit of this term.

27. There are further specific issues with the s. 5(2)(a) offence. One issue arises from the fact that there is no reference to Irish citizens in the offence, and the term "*designated state*" does not include Ireland. This creates an anomaly: it means that s. 5(2)(a) criminalises action in organising or knowingly facilitating unlawful entry, transit or presence of an Irish citizen in or to a designated state, whereas liability would not arise in identical circumstances if the person was a citizen of another Schengen state.

28. Sections 5(2)(c) and 5(2)(d) limit the circumstances in which liability can arise under s. 5(2)(a) for extraterritorial activities. The sections are unobjectionable in principle; however, s. 5(2)(d) needs to be revised. It appears that a prosecution can take place in the circumstances set out in s. 5(2)(d) without any requirement for the consent of the DPP under s. 6(2). Conversely, there is a need for the DPP's consent for an extraterritorial prosecution in the circumstances set down in s. 5(2)(c). It is not clear why this difference should exist. The Council suggests that DPP consent should be needed for prosecutions in a s. 5(2)(d) situation. Further, the language used in s. 5(2)(d) is confusing. The section allows a prosecution for extraterritorial actions where the act or omission in question "*constitutes an offence for which a person would*

be liable to extradition or surrender but extradition or surrender has been refused". On one interpretation, this is inherently contradictory: a person could never be liable to surrender for an offence where surrender has been refused. It seems however that the section is intending to capture the idea of correspondence of offences contained in the European Arrest Warrant Act 2003. The language might be revised to better reflect this.

29. The prosecution of offences under s. 5(2)(a) is facilitated by s. 5(3). This section provides that the "*unlawful*" nature of the entry, transit or presence in the designated state can be proved in criminal proceedings by "*a document issued by the government of a designated state certifying a matter of law in that state*". The section says that such a document "*shall be admissible"* and "*shall be conclusive as to the matter certified".*

30. Section 5(3) allows a key element of the offence to be proved conclusively by a document written by a government of a designated state. It does not allow a judge or jury to reject the evidence when deciding on the guilt or innocence of an accused. The Council submits that this provision may conflict with a key principle of constitutional law provided for in Article 34 of the Constitution. Article 34 ensures that the trial of criminal offences is exclusively the function of the courts and it is those courts alone which can determine whether the essential ingredients of an offence have been proved. For that reason, legislation providing that a certificate was to be "*conclusive evidence"* of certain matters in criminal proceedings has been deemed unconstitutional: see *Maher v. Attorney General* [1973] I.R. 140, where the Supreme Court struck down a section of the Road Traffic Act 1968 which provided that a certificate that a blood specimen contained a particular concentration of alcohol was "*conclusive evidence"* of that fact.

31. Further, the provision that the document is "*conclusive"* could potentially breach the right to a fair trial under Article 38.1 of the Constitution. It would prevent an accused person from making the argument that there was no illegality in the designated state and allow an accused to be convicted based on what is asserted by the government of a designated state in a written document without any possibility of challenging same. This would apply even where the "*matter of law"* certified by the designated state goes beyond some routine issue – such as whether a particular statutory provision is in place

in the designated state – but deals with a far more contentious issue such as whether certain actions constituted an offence under the laws of that state.

32. The solution to the above issues is for s. 5(3) to provide that the document is proof of the matters of law certified therein "*unless the contrary is proved*". This is the usual formula used in statutory provisions dealing with certificate evidence: see, for example, the provisions dealing with certificates of drug analysis (s. 10 of the Misuse of Drugs Act 1984); medical certificates relating to an examination by a doctor (s. 25 of the Non-Fatal Offences Against the Person Act 1997); and certificates dealing with the analysis of breath, blood and urine specimens in road traffic cases (s. 20 of the Road Traffic Act 2010). A similar formula is used in s. 7 of the 2020 Bill, which deals with other forms of certificate evidence. It would also be appropriate to provide a clear definition of the term "*matter of law",* which is currently capable of very expansive interpretation.

33. Section 5(5) of the 2020 Bill provides that a court must treat certain matters as aggravating factors, and "*impose a sentence that is greater than that which it would have imposed in the absence of such an aggravating factor",* unless there are "*exceptional circumstances justifying its not so doing".* There is no issue in principle with legislation specifying aggravating factors in this way: see, for example, s. 11 of the Criminal Justice Act 1984, as amended by the Bail Act 1997, and s. 40 of the Domestic Violence Act 2018.

34. However, the requirement to treat "*inhuman or degrading treatment"* as an aggravating factor give rise to potential issues. Inhuman or degrading treatment is a complex legal concept which features in Irish constitutional law and the Article 3 case law of the European Court of Human Rights. This case law makes clear that ill-treatment only amounts to "*inhuman or degrading treatment"* where a minimum threshold of severity is crossed, and it can be very difficult to determine what is and what is not inhuman or degrading treatment. A concern is that a sentencing judge will be obliged to engage in a complex legal examination of whether there has been inhuman or degrading treatment in a specific case. If the judge determines that there has been and imposes an aggravated sentence (as is required under the 2020 Bill), that sentence might well be susceptible to appeal on the basis that the judge erred in determining that inhuman or degrading treatment, within the legal meaning of the term, had occurred.

35. A potential solution would be to replace the term "*inhuman or degrading treatment*" with another term: perhaps "*humiliating treatment or treatment that infringes the dignity of another".* The term could be given a clear and specific definition within the meaning of the Act, so that a trial judge can make a simple determination during a sentencing hearing as to whether such treatment has taken place.

36. It might also be sensible in this context to include the fact that the offence was committed as an activity of a criminal organisation as an aggravating factor. Article 1(3) of EU Framework Decision 2002/946/JHA appears to envisage this as a factor which should give rise to more severe punishment.

37. Section 5(6) of the 2020 Bill provides the penalties for offences under the section. These would appear to be effective, proportionate and dissuasive criminal penalties which meet the requirements of Article 1 of EU Framework Decision 2002/946/JHA. However, it may be worth considering the adoption of the other potential measures in Article 1(2) of the Framework Decision, including a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed. Consideration might also be given to increasing the maximum fine which could apply on summary conviction, as well as designating a maximum fine for conviction on indictment. It would be helpful to make express provision allowing for the imposition of punishments in respect of each person who has been smuggled.

38. Finally, s. 5 of the 2020 Bill does not expressly provide that it is an offence to attempt to commit the offences created by ss. 5(1) and (2), to be an accomplice to those offences, or to organise the commission of those offences by others. Article 2 of Council Directive 2002/90/EC specifically requires criminalisation of instigators and accomplices in trafficking offences as well as those who attempt to commit such offences. Article 6(2) of the Protocol requires criminalisation of those who attempt to commit offences, those who participate as accomplices, and those who organise or direct other persons to commit an offence. It may well be that such activities are criminalised by virtue of the general provisions of Irish law dealing with inchoate offences and aiding or abetting offences (see, for example, s. 7 of the Criminal Law Act 1997). However, given the

express terms used within the Directive and Protocol, it would be appropriate to make express provision for criminalisation of those activities within s. 5 itself.

Section 10 – Enforcement Officers and Enforcement Powers in Respect of Ships

39. Section 10 provides an "*enforcement officer*" with certain powers which can be exercised onboard certain ships without a warrant where he or she has reasonable grounds to suspect that an offence under s. 5 has been committed on the ship.

40. One such power is the ability to "*require any person on the ship to give information concerning himself or herself, any other person on the ship or anything on the ship".* Section 10(8) goes on to provide that where a person fails without reasonable excuse to comply with a requirement by an enforcement officer, intentionally fails to disclose any material particular, or knowingly or recklessly makes a statement which is false in a material particular, that person commits a criminal offence which is punishable by a maximum term of up to five years imprisonment.

41. These provisions may be susceptible to constitutional challenge as they allow an officer to demand information from a person under the compulsion of a criminal offence carrying a substantial prison sentence. This might breach the constitutional right to silence and the privilege against self-incrimination. The courts have recognised that these rights are not absolute and that there is no constitutional bar *per se* to a legislative provision allowing an agent of the State to demand information under force of penal sanction. However, the constitutionality of such a provision depends on whether it satisfies a proportionality test. A key factor in that test is the gravity of the penalty which might apply if there is a failure to provide information. It should be recognised in that context that the penalty for the offence created by s. 10(8) – up to five years if the offence is tried on indictment – is a significant one that would make it more difficult for a court to be satisfied that the infringement with the Constitution is proportionate. For these reasons, careful consideration should be given to the framing of this provision to ensure that it is proportionate and constitutional. In addition, consideration should be given to the inclusion of a requirement for an enforcement officer to give a statutory warning as to the penal consequences of failing to answer.

42. It is also notable that under s. 10(5)(a)(iv), an enforcement officer may be accompanied by any other person with specialised or technical knowledge or skill who the enforcement officer considers may be of assistance to him or her in the performance of his or her functions. Section 10(5)(b) provides that such a person shall "*have and be conferred with… the powers and duties of the enforcement officer concerned",* other than the power of arrest provided under s. 10(3)(a)(i). This provision is problematic insofar as it would appear to confer wide-reaching powers of search and questioning on laypeople. It is questionable whether this is appropriate or necessary. Further, the provision is also drafted too loosely. It says that the person enjoys the "*powers and duties of the enforcement officer"* but does not specify that this is limited to those powers under s. 10. It would be extremely problematic if s. 10 inadvertently gave a layperson all powers of, for example, a member of An Garda Síochána or an immigration officer.

43. Finally, it is notable that s. 10(12) provides an enforcement officer with complete civil and criminal immunity "*for anything done in the purported performance of his or her functions under this Part if the court before which the proceedings are being heard is satisfied that the act was done in good faith and that there were reasonable grounds for doing it".* It is respectfully suggested that it is not appropriate to provide for such sweeping immunity. From a public policy perspective, it is simply not appropriate for an enforcement officer to be able to step outside the ordinary constraints of civil or criminal law wherever it is felt that there are "*reasonable grounds"* for doing so.

Section 12 – Power to Detain Certain Vehicles

44. The Council acknowledges the meritorious objective in providing for the detention of vehicles suspected of having been used for the purpose of smuggling persons. However, the provisions may merit revision when one considers the large scale vehicles which may be the subject of such an order. The evidence suggests that large scale commercial vehicles may be used in the smuggling of persons. It is submitted that there are insufficient safeguards against the scale of economic losses that would be suffered by third parties, in the event that a commercial aeroplane or cargo ship was detained.

45. Section 12(2)(c) exemplifies the cause for revisiting this section. For example, in ordering the detention of the vehicle for a period not exceeding three months, one of the considerations of the court is whether there are "*grounds for believing that the vehicle would be removed from the State*". If the vehicle in question is a cargo ship, fishing trawler or commercial aeroplane, for example, it would habitually be removed from the State. Thus, it is submitted that the said consideration may have unintended consequences.

46. Section 12(4)(a) provides that the vehicle in question may be detained for a maximum period of two years. Given that the typical delays encountered in criminal trials may mean that a prosecution extends well beyond two years, this provision might well render the forfeiture provisions ineffective. At present, by way of example, in the Dublin Circuit Criminal Court it would be at least two years from the date of the first appearance to the conclusion of a trial. The Committee may wish to consider mirroring the provisions of s. 38 of the Criminal Justice Act, 1994 which deals with the detention of cash and provides "*the cash shall not be released until any proceedings pursuant to the application or, as the case may be, the proceedings for that offence have been concluded*".

47. As outlined above, the provisions appear to be drafted from the perspective that the vehicles which may be detained are likely to be small personal use cars, vans or boats. However, it is submitted that one ought to consider the other end of the scale, where this section may be used to detain cargo ships or commercial aeroplanes. Does the State intend to take on the burden of detaining a cargo ship with hundreds of containers, which may have perishable or chemical contents onboard? What is to occur if the vessel has onboard the cargo of another sovereign state or indeed the vessel itself is owned or part owned by another sovereign state? Does the State intend to apply its resources to store cargo ships or aeroplanes for up to two years, taking into consideration the high costs and potential environmental hazards?

48. Section 12(5)(c) provides that the court may order the release of a vehicle subject to conditions. However, it is not clear whether it is a mandatory condition that the vehicle is not removed from the State or whether the court has discretion regarding the conditions imposed. It is likely that many of the commercial vehicles to which this

provision will apply will routinely leave the State and thus the release of the vehicle may be futile.

49. The cumulative effect of these concerns is to suggest that the Committee may wish to consider safeguards against an order being made to detain a vehicle which may have an inordinate economic impact on the owner or operator of the said vehicle. For example, one may consider providing that where there are more than 20 victims, or the vehicle is less than 5,000kg (if a boat) or a maximum take-off weight of 50,000kg (if an aeroplane) then where an application is made for the detention of said vehicle, the National Treasury Management Agency (or other appropriate State agency) must consent to the application and the entity entitled to operate the said vehicle must be heard prior to any order being made.

50. Article 9(2) of the United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention Against Transitional Organised Crime requires that "*where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained provided that the vessel has not committed any act justifying the measures taken*". The Bill does not address the potential for compensation in such circumstances. The Committee may feel that it is appropriate to make some inclusion in this regard, but to shape any provision in a way that ensures the State does not unwittingly become liable to inordinate claims for compensation. One limitation that could be included is that where an interested party does not make an application to be heard by the Court when considering the making of an order under this section it shall forfeit any claim for losses suffered.

51. As a final consideration, the Committee may wish to consider the scale of security which may be ordered in the case of a commercial aeroplane or cargo ship and the effect of negative interest rates on same.

Section 13 – Forfeiture of Ship, Aircraft or Other Vehicles

52. The Council is of the view that it is an appropriate penalty that vehicles used in the commission of such offences be forfeited by the owners. However, there is concern regarding the unintended consequences of the provisions as drafted.

53. Sections 13(1) and 13(2)(a) provide that forfeiture may be ordered of a share in a vehicle. The logical corollary of this is that the State will become a co-owner of a vehicle. If for example, the vehicle was owned by two people, both of whom were prosecuted, but only one prosecution resulted in a conviction, the State may find itself part-owner of a vehicle in an undesirable situation. If that vehicle was subsequently involved in an accident or in the commission of an offence, conceivably the State could be held liable.

54. Section 13(2)(b) provides that a vehicle may be forfeited where the person convicted is a director or manager of a company that is the owner of, or of a share in, the vehicle concerned. Thus, conceivably, a regional manager in a global airline who is convicted of an offence under the Act could cause the global airline's property worth >€100m to be forfeited to the State. It is submitted that such a provision could attract constitutional challenges. It is suggested that the term management be defined and limited to the controlling management of a company.

55. Consideration ought to be given to the definition provided of the term "*owner*". It appears that the definition has been drafted with private small vehicles in mind (see reference to hire-purchase). Even private vehicles such as yachts or private planes can be held in complex ownership structures which, although legal, would not necessarily mean the person prosecuted is the legal owner of the vehicle. It is submitted that consideration ought to be given to including beneficial owners within a definition of "*owner*".

56. Section 13(3) provides that the vehicle shall not be forfeited unless the prosecution can prove that the owner/directors/management knew or could with reasonable diligence have discovered the vehicle was being used for the purpose of the commission of an offence. Thus, the court will be required to make a finding regarding the state of knowledge of a third party who is not a party to the proceedings. Such a provision may impede the right to a fair trial of the said third parties.

57. Section 13(4) provides that An Garda Síochána may seize and detain the vehicle which is the subject of such an order. It is not clear whether An Garda Síochána may seize and detain a vehicle where an order is made only in respect of a share of same.

58. Section 13(5) provides that the person claiming to be the owner or to be otherwise interested in the vehicle must apply to be heard by the Court. In order to avoid the issues raised above, one may consider providing that, where the person convicted is not the full legal and beneficial owner of the vehicle, the other interested parties must be invited to be heard by the court.

Section 19 – Offences By Bodies Corporate etc.

59. The Council welcomes the inclusion of bodies corporate and their governors as those who may be prosecuted for the offences outlined in the Bill. There is evidence that bodies corporate play a role in facilitating the smuggling of people[1]. It is, therefore, appropriate to criminalise bodies corporate for the smuggling of persons.

60. Ordinarily, an "*unincorporated body*" does not have the legal capacity to bring or defend court proceedings. It is unclear whether it is the intention of the Bill to create a statutory exception to that general rule, as was created by s. 50A of the Planning and Development Act 2000. Such an exception would be required in order to ensure that proceedings can be brought against an unincorporated body. In addition, in the absence of a definition, the term "*unincorporated body*" is unduly wide.

61. This section allows those directing the affairs of a body corporate to be charged. However, save for the imposition of a fine, there are no specific penalties applicable to bodies corporate. For example Article 3 of the Framework Decision[2] suggests the following additional sanctions for bodies corporate a) exclusion from entitlement to public benefits or aid, b) temporary or permanent disqualification from the practice of

[1] https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Migrant_Smuggling_by_Air.pdf and https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0946&from=EN

commercial activities, c) placing under judicial supervisions, and d) a judicial winding-up order.

Concluding Comments

62. The above comments reflect certain issues that have been identified by the Council within the General Scheme of the Smuggling of Persons Bill 2020. For the most part, the issues which have been raised can be addressed through straightforward amendments or additions. Addressing these issues would reduce the potential for constitutional challenges, avoid unduly onerous consequences for individuals and companies, and make the legislation easier to apply in practice. Overall, it is the Council's hope that the proposed changes may assist the Committee in strengthening and improving this important and welcome piece of legislation.

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