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# Commission proposal for a revised Facilitation Directive

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Targeted  
substitute impact  
assessment

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STUDY

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EPRS | European Parliamentary Research Service

Ex-Ante Impact Assessment Unit  
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EN



# Commission proposal for a revised Facilitation Directive

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## Targeted substitute impact assessment

This study constitutes a targeted substitute impact assessment of the Commission's proposal for a revised Facilitation Directive (COM(2023) 755), presented on 28 November 2023 as part of a package to address migrant smuggling. It provides a critical review of the existing legal and policy framework at EU level and its shortcomings regarding transposition and implementation. It also undertakes a critical and thorough appraisal of the proposed objectives and measures in terms of coherence, effectiveness and efficiency, including with a view to assessing the adequacy of the interplay between this proposal and the related draft regulation on enhancing police cooperation (COM(2023) 754). It highlights the misalignment of the proposal with relevant international and key European Union legal standards. It raises concerns about definitional issues, the lack of sufficient human rights safeguards, and the absence of a clear distinction between facilitation offences and the legitimate provision of services and humanitarian assistance. The study also examines the legality and proportionality of the proposed measures and stresses the need for a thorough evaluation of wider impacts on civic space and democracy at large.

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## Executive summary

### Background

On 28 November 2023, the European Commission presented a package of new legislative proposals to reinforce and modernise the European Union (EU) legal framework on migrant smuggling. The package consists of a proposal for a revised directive to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU ('Facilitation Directive'), and a proposal for a regulation to enhance police cooperation and reinforce Europol's role in the fight against migrant smuggling and human trafficking. No impact assessment was conducted for either initiative. In response to criticism of this omission, the Commission delivered an analytical staff working document for each of the proposals in spring 2024, with additional details on the background underpinning their overall objectives.

The European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) is currently considering both proposals, with Birgit Sippel (S&D, Germany) acting as rapporteur for the Facilitation Directive. Given that an impact assessment is necessary to support its work as co-legislator, on 2 May 2024 the LIBE Committee requested that the European Parliamentary Research Service (EPRS) undertake a targeted substitute impact assessment.

### Methodology

This study relies on desk research of relevant primary and secondary sources regarding the proposed directive, including legal instruments, international treaties, relevant case law, policy documents from EU institutions, bodies and agencies, and Member State authorities, academic literature, non-governmental organisation (NGO) reports, and news articles. The study is also informed by the replies received to questionnaires and semi-structured interviews conducted with 14 key stakeholders, including EU agencies, national authorities, civil society representatives, international organisation officials, and academic experts.

### Review of the proposal

The study provides a comprehensive assessment of the proposal for a revised Facilitation Directive, in particular:

- (1) a critical review of the existing legal framework at EU level and its shortcomings in terms of transposition and implementation;
- (2) a critical and thorough review of the objectives of the Commission proposal;
- (3) a legal analysis of the key provisions of the proposed directive;
- (4) an assessment of the proposal's fundamental rights implications and compliance with relevant international legal standards, considering definitional problems and related challenges;
- (5) the interplay between the two legal instruments proposed under the migrant smuggling package.

Compatibility with the principles of legality and proportionality as well as the presumption of innocence are scrutinised in depth. Effectiveness, efficacy and coherence considerations are also emphasised, including with a view to assessing the adequacy of the interplay between this proposal and the related proposed regulation to enhance police cooperation and reinforce Europol's role. The study devotes specific attention to the issue of criminalisation of humanitarian assistance partly motivating the reform, in light of recent developments.

## Key findings

### *Lack of alignment with the United Nations Smuggling Protocol*

Although the Commission proposal is to a certain extent motivated by the intention to align EU legislation with international standards in the field of migrant smuggling, the draft provisions largely depart from the relevant United Nations (UN) rules. The UN Smuggling Protocol (SoM) is intended to provide the 'universal' definition and the regime applicable to 'all aspects of smuggling of migrants' (SoM Preamble). It defines the crime as 'the procurement' of 'illegal entry' that is 'committed intentionally' and 'in order to obtain' a financial or other material benefit (Articles 3(a) and 6(1) SoM) and as part of an 'organised criminal group' (Article 4 SoM). Although Contracting Parties (including the EU and the Member States) cannot unilaterally modify these terms, this is the result achieved in practice through the adoption of the much broader alternative concept of facilitation of irregular migration in the current Facilitation Directive, dating from 2002. The proposed revision, insofar as it does not retain the UN Protocol elements in the definition of the baseline offence, does not repair this inconsistency.

### *Incoherence vis-à-vis other EU law instruments*

The proposal claims coherence with existing EU instruments in the areas of anti-smuggling, criminal justice and irregular migration. However, no elaboration is provided and important inconsistencies remain. For instance, the protection-oriented directives on victims' rights and human trafficking are not replicated in the proposed reform. The lack of any reference to the asylum *acquis* also obscures the fact that many smuggled migrants are asylum seekers protected under Article 31 of the 1951 Geneva Convention, which affords them immunity against penalisation for their irregular entry or stay.

### *Interplay with the proposed regulation to enhance police cooperation and strengthen Europol's role*

Additional confusion stems from the interplay between the proposal to revise the Facilitation Directive and the proposed regulation to enhance police cooperation and strengthen Europol's role. The new tasks and powers suggested for the agency build on an unclear definition of 'migrant smuggling' that is indirectly equated with facilitation offences, even in cases where they do not entail a profit element or a link to organised crime. Europol's mandate is, however, circumscribed to supporting police cooperation regarding organised crime and other forms of serious crime, including migrant smuggling, but not broader forms of facilitation of irregular migration. The two Commission proposals together may thus lead to the undue indirect expansion of Europol's powers contrary to its core mission.

### *Insufficient fundamental rights safeguards*

The UN Protocol pursues the dual objective of preventing and combating the crime of migrant smuggling, while protecting the rights of smuggled migrants. This is an aspect left underdeveloped in the proposed reform. The fact that smuggled migrants should not be criminalised for having been the object of smuggling offences (Article 5 SoM), and that actors that smuggle non-nationals for charitable or altruistic reasons should equally be exempt has not been reflected in the binding provisions of the proposed directive. Only preambular recitals state these principles, albeit in ambiguous terms, which are left undefined. Otherwise, the proposed directive does not include any specific fundamental rights safeguards. A recital statement pledges compliance with the EU Charter

of Fundamental Rights, but without elaboration or any reflection in legally binding provisions in the operative text of the directive.

#### *No distinction between facilitation offences and the provision of humanitarian assistance*

While the proposed directive includes the requirement of a financial gain or other material benefit as part of the crime of facilitation in certain respects, this is not always necessary. The notion is also so broadly constructed that legitimate service provision under market rates or simply an unfulfilled expectation or even a refused offer of payment can constitute a criminal offence (Article 3(1)(a)). In instances where there is a possibility of causing 'serious harm' (Article 3(1)(b)) or in cases of 'public instigation' (Article 3(2)), the requirement does not apply. This, added to the absence of definitions for these terms, increases the possibility that humanitarian action may be targeted by the proposed directive. Neither under the current rules nor under those proposed in the Commission reform is a distinction clearly made between abusive or exploitative action and action engaged in for humanitarian or solidarity reasons. Facilitation offences are 'defined objectively' and 'irrespective of [the] person's motives', as noted by the Advocate General in the *Kinsa* case (paras 40, 46), which is currently pending before the European Court of Justice. Proposed Recital 7 will not change this situation.

#### *Potential criminalisation of legitimate service providers and NGOs*

In addition to the lack of lucrative intent to commit the crime of facilitation of irregular migration, the risk of over-criminalisation is exacerbated by the proposed provisions on the liability of legal persons. The requirement to criminalise legal persons that formally qualify as such (Articles 2(3) and 7) can in fact only affect incorporated service providers and legally constituted NGOs – rather than organised criminal networks. This, coupled with the proposal to criminalise legal persons in situations where 'the lack of supervision or control' by the person with the power to exert it 'has made possible the commission of the criminal offence' (Article 7(2)), makes for an unduly harsh regime akin to strict liability offences. Indeed, no consideration is given to the specific circumstances, potentially beyond the awareness, will or knowledge of the representative concerned and despite due diligence efforts.

#### *Harshness of the penalty framework*

The penalty scheme proposed appears to be disproportionately harsh (Articles 6 and 8), especially considering that, in certain cases, this concerns NGOs, family members, and migrants facilitating their own journeys, often for the purpose of seeking international protection. The 'permanent' disqualification, 'withdrawal of permits or authorisations' to conduct activities, the seizure of vehicles (including rescue vessels), and the 'permanent closure of establishments' can lead to the dissolution of civil society organisations and the dismantling of legally operating businesses. It also clashes with the rehabilitation purpose of penalties under national systems. The absence of procedural safeguards actionable prior to the adoption of preventive measures, including the freezing of assets or the confiscation of means of transport, also runs the risk that such measures be imposed prematurely, without the opportunity to be heard and appeal the measure concerned, thus violating defence rights.

*Impact on civic space and the well-functioning of democracy at large*

Several provisions in the proposed directive raise concerns of a 'chilling effect' on humanitarian actors and civil society at large. The crime of 'public instigation' has not been defined. Combined with the proposed possibilities for Member States to expand their powers to investigate and prosecute suspects located abroad, the risks for journalists, NGOs and human rights defenders multiply. This is even more so, considering that draft Article 12 allows for such expansion, including where the targeted persons have no connection to the Member State concerned (through nationality or legal establishment); investigations can be undertaken without the permission or collaboration of the relevant third country. The draft provision does not pay attention to customary rules of international law applicable to the delimitation of jurisdiction. The potential use of 'special investigative tools' (Article 16), including in cases where the action has no link to organised crime, exacerbates the situation.

In light of these challenges, Chapter 7 formulates a series of recommendations.



## Table of contents

1. Introduction	1
1.1. Background	1
1.2. Objectives and scope of the study	2
1.3. Methodological approach	3
1.4. Limitations	4
1.5. Structure of the study	4
2. International legal standards applicable with regard to migrant smuggling	6
2.1. Trans-national criminal law	6
2.1.1. The UN definition of migrant smuggling	6
2.1.2. Exclusions, exemptions and saving clauses	7
2.1.3. Status of trans-national anti-smuggling obligations under EU law	8
2.2. International Law of the Sea and Maritime Conventions	9
2.2.1. Duty to render assistance to persons in distress at sea	9
2.2.2. Duty to organise for coast watching, search and rescue services, coordinate rescue operations and allow for disembarkation at a place of safety	11
2.2.3. Status of search and rescue obligations under EU law	12
2.3. International and EU human rights and refugee protection	13
2.3.1. Human dignity, right to life and to the integrity of the person	13
2.3.2. <i>Non-refoulement</i> and the prohibition of ill-treatment	14
2.3.3. Access to asylum and the principle of non-penalisation for irregular entry	15
2.3.4. Right to leave any country including one's own	16
2.3.5. Right to liberty and security	17
2.3.6. Other relevant rights, including in the criminal justice context	18
2.3.7. Procedural safeguards and effective remedies	20
2.3.8. Scope of application of Charter rights	21
3. State of play of EU legislation: Rules, transposition and implementation	23

3.1. The 2002 Facilitators Package	23
3.2. The 2017 REFIT evaluation	25
3.3. The 2020 Guidelines of the European Commission	30
3.4. Problems in transposition and implementation across Member States: the Milieu study	31
3.5. The proposed 2023 reform	34
3.6. Persisting issue: lack of impact assessment	35
4. Review of the proposed objectives and coherence analysis	38
4.1. Objectives of the draft directive	38
4.1.1. Ensuring an effective investigation, prosecution and sanctioning of organised criminal networks responsible for migrant smuggling	38
4.1.2. Harmonising penalties that take account of the seriousness of the offence	39
4.1.3. Improving the jurisdictional reach	39
4.1.4. Reinforcing Member States' resources to tackle and prevent migrant smuggling	39
4.1.5. Improving data collection and reporting	40
4.2. Additional objectives pursued	40
4.3. Coherence assessment	41
4.3.1. Alignment with international law	41
4.3.2. Consistency with other EU laws and policies	44
4.3.3. The interplay of the proposal with the proposed Regulation on enhancing police cooperation and the role of Europol, COM (2023)754	46
5. Effectiveness, efficiency and proportionality assessment	50
5.1. Definitional issues: principle of legality and effectiveness assessment	50
5.1.1. Choice of legal basis	50
5.1.2. Ensuring effective investigation, prosecution and sanctioning of organised criminal networks responsible for migrant smuggling	51
5.1.3. Harmonising penalties	57
5.1.4. Improving the jurisdictional reach	58
5.1.5. Reinforcing Member States' resources to tackle and prevent facilitation	60
5.1.6. Improving data collection, monitoring and reporting	61

5.2. Efficiency assessment	61
5.2.1. Costs	62
5.2.2. Benefits	63
5.3. Subsidiarity and proportionality assessment	64
5.3.1. Penalties	65
5.3.2. Preventive, investigative and prosecuting tools	66
5.3.3. Offences	66
6. Fundamental rights implications, in particular for the provision of humanitarian assistance	70
6.1. The consideration of fundamental rights in the proposal	70
6.1.1. Substantive rights	71
6.1.2. Procedural safeguards	72
6.2. The situation of humanitarian assistance	74
6.2.1. Issues with the regulatory approach adopted	75
6.2.2. Foreseeable impact	77
6.2.3. Alternative avenues	81
7. Key findings and recommendations	83
7.1. Key findings	83
7.2. Recommendations	91
REFERENCES	95

## Table of tables

Table 1 – Table of interviews and questionnaire replies	104
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## List of abbreviations

AMLA	EU Authority for Anti-Money Laundering and Countering the Financing of Terrorism
ARCI	Associazione Ricreativa e Culturale Italiana
BVMN	Border Violence Monitoring Network
CCBE	Council of Bars and Law Societies of Europe
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
CSR51	1951 Convention on the Status of Refugees
ECAMS	European Centre Against Migrant Smuggling
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EDRi	European Digital Rights
EESC	European Economic and Social Committee
EU	European Union
FIDH	International Federation for Human Rights
FRA	Fundamental Rights Agency of the European Union
GLAN	Global Legal Action Network
HRC	United Nations Human Rights Committee
ICCPR	International Covenant for Civil and Political Rights
IMO	International Maritime Organization
IRU	International Road Transport Union
ITLOS	International Tribunal for the Law of the Sea
JHA	Justice and Home Affairs

LIBE	Committee on Civil Liberties, Justice and Home Affairs
NGO	Non-Governmental Organisation
OMCT	World Organisation Against Torture
PACE	Parliamentary Assembly of the Council of Europe
PETI	Petitions Committee
PICUM	Platform for International Cooperation on Undocumented Migrants
QD	Qualification Directive
RCEU	Red Cross EU Office
ReSOMA	Research Social Platform on Migration and Asylum
SAR	Search and Rescue
SLAPP	Strategic Lawsuit Against Public Participation
SOCTA	Serious and Organised Crime Threat Assessment
SoM	[United Nations Protocol on] Smuggling of Migrants
SOLAS	[United Nations Convention for the] Safety of Life at Sea
SRR	Search and Rescue Region
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees (UN Refugee Agency)
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
UNTS	United Nations Treaty Series



# 1. Introduction

This chapter presents the subject matter, providing the general background and rationale for the study. It also introduces the methodological approach and structure applied and provides a brief overview of each chapter.

## 1.1. Background

On 28 November 2023, the European Commission adopted new draft legislation to strengthen the EU legal framework to prevent and fight the facilitation of irregular migration. The package contributes to the implementation of the EU's renewed action plan against migrant smuggling (2021–2025).<sup>1</sup> The initiative consists of the present proposal for a directive on preventing and countering the facilitation of unauthorised entry, transit and stay in the EU ('Facilitation Directive'),<sup>2</sup> and a proposal for a regulation on enhancing police cooperation to reinforce Europol's role in the fight against migrant smuggling and trafficking in human beings.<sup>3</sup> Neither proposal was supported by an impact assessment. The Commission indicates in the explanatory memorandum of the proposed directive that the initiative is 'exceptionally presented without an accompanying impact assessment', without however providing any further justification.<sup>4</sup> According to the 2016 Interinstitutional Agreement on Better Law-Making<sup>5</sup> and the Commission's own Better Regulation Guidelines,<sup>6</sup> the Commission is required to carry out impact assessments of initiatives that are expected to have significant economic, environmental or social impacts or which entail significant spending, and where the Commission has a choice of policy options.

The proposed directive intends to update and modernise the existing EU criminal law rules of the 'Facilitators Package', composed of Council Directive 2002/90/EC establishing a common definition of the offence of facilitation of unauthorised entry, transit, and residence,<sup>7</sup> and Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence.<sup>8</sup> The Commission indicated the main sources of evidence for the proposed reform as including: the REFIT evaluation of the Facilitators Package conducted in 2017,<sup>9</sup> the public consultation on the renewed EU action plan against migrant smuggling (2021–

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<sup>1</sup> European Commission, A renewed EU action plan against migrant smuggling (2021–2025), [COM\(2021\) 591](#).

<sup>2</sup> European Commission, Proposal for a Directive 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, [COM\(2023\) 755](#) (hereafter: '2023 Facilitation Directive Proposal').

<sup>3</sup> European Commission, Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794, [COM\(2023\) 754](#) (hereafter: '2023 Europol Regulation Proposal').

<sup>4</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 10.

<sup>5</sup> [Interinstitutional Agreement](#) of 13 April 2016 on Better Law-Making, point 13.

<sup>6</sup> European Commission, Better Regulation Guidelines, [SWD\(2021\) 305](#), p. 30.

<sup>7</sup> [Council Directive 2002/90/EC](#) of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (hereafter: '2002 Facilitation Directive').

<sup>8</sup> [Council framework Decision 2002/946/JHA](#) of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (hereafter: '2002 Facilitation Framework Decision').

<sup>9</sup> European Commission, 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), [SWD\(2017\) 117](#) (hereafter: 'REFIT evaluation').

2025),<sup>10</sup> information and evidence provided by Europol, Eurojust and Frontex, as well as engagement with Member States and civil society stakeholders in the context of monitoring the implementation of the current legal framework.<sup>11</sup>

In response to criticism regarding the lack of an impact assessment, in spring 2024 – thus several months after the adoption of the proposal, the Commission provided an analytical staff working document for each of the two proposals under the migrant smuggling package with more detailed information on the facts and figures that underpin the overall objective of the proposals.<sup>12</sup> This type of staff working document was introduced by the 2021 Better Regulation reform for 'cases where the Commission was unable to produce an impact assessment where one should have been prepared', in order to present 'the evidence behind the proposal and cost estimates',<sup>13</sup> but cannot be considered an impact assessment. Furthermore, in September 2024, the Commission published a supporting study on the implementation of the existing legal framework.<sup>14</sup> A fully-fledged Commission impact assessment would have been particularly relevant, given that, as shown in Chapter 6, the proposal could have significant long-term effects on fundamental rights.

Against this background, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested a substitute impact assessment on the Commission's proposal.<sup>15</sup> Thus, the purpose of this targeted substitute impact assessment is to support the European Parliament's consideration of the proposed directive and to feed into the negotiations between the European Parliament, the Council of the European Union and the European Commission.<sup>16</sup> As requested by the LIBE Committee, this study essentially deals with the original proposal presented by the Commission in November 2023, as contextualised by related relevant materials. The present impact assessment study was carried out between October 2024 and January 2025. This limited timeframe did not allow for a fully-fledged impact assessment.

## 1.2. Objectives and scope of the study

The overall objective of this study is to provide a targeted substitute impact assessment on the proposed directive to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU. The LIBE Committee requested the impact assessment to focus specifically on providing:

- (1) a critical review of the existing legal framework at EU level and its shortcomings in terms of transposition and implementation;

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<sup>10</sup> European Commission, A renewed EU action plan against migrant smuggling (2021-2025), [COM\(2021\) 591](#). The Commission conducted a public consultation from 19 March 2021 to 11 June 2021, see [summary report](#).

<sup>11</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, pp. 8-10.

<sup>12</sup> European Commission, Analytical document accompanying the document Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794, [SWD\(2024\) 94](#); European Commission, Analytical supporting document accompanying the proposal for a Directive 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, [SWD\(2024\) 134](#) (hereafter: 'Analytical supporting document'). To be noted, neither SWD was published on [EurLex](#) nor the [Register](#) of Commission Documents.

<sup>13</sup> European Commission, Better Regulation Guidelines, [SWD\(2021\) 305](#), p. 30.

<sup>14</sup> Milieu, [Study supporting the implementation of the Facilitators Package](#), September 2024 (hereafter: 'Milieu Study').

<sup>15</sup> The LIBE Committee also requested a targeted substitute impact assessment on the proposed regulation under the migrant smuggling package. The study was published in February 2025: Sarah Tas and Flavia Patanè, [Proposal for a Regulation on police cooperation to counter migrant smuggling and human trafficking](#), EPRS, European Parliament, 2025.

<sup>16</sup> Information on the legislative procedure can be found on the European Parliament's [OEIL database](#).



- (2) a critical and thorough review of the proposed objectives of the Commission proposal;
- (3) a legal analysis of the key provisions of the proposed directive;
- (4) an assessment of the proposal's fundamental rights implications and compliance with relevant international legal standards, considering definitional problems and related challenges;
- (5) the interplay between the two legal instruments proposed under the migrant smuggling package.

Compatibility with the principles of legality and proportionality as well as the presumption of innocence are scrutinised in detail. Effectiveness, efficacy and coherence considerations are also emphasised, including with a view to assessing the adequacy of the interplay between this proposal and the related proposed regulation on enhancing police cooperation. The study devotes specific attention to the issue of criminalisation of humanitarian assistance, in part motivating the reform, in light of recent developments.

### 1.3. Methodological approach

The study primarily relies on desk research, drawing on legal analysis and empirical qualitative research of primary and secondary sources. It takes into account relevant information and data on the Facilitators Package and its proposed reform, including problems regarding implementation. Materials from a wide range of sources are scrutinised, including legislation and case law at the international, EU and national levels, policy documents by EU institutions, bodies and agencies, Member States and international organisations, NGO reports, previous studies conducted by the European Parliament covering similar ground, news articles, and academic literature. The material has been subjected to content, discourse and implementation analysis for a thorough understanding of the key instruments and related relevant practice. This allows for a comprehensive, systematic assessment of the diverse legal and policy tools and frameworks, while identifying their effects for stakeholders on the ground.

In respect of the steps to be followed in an impact assessment, the study takes particular account of the Commission's 2021 Better Regulation Guidelines<sup>17</sup> and the related Toolbox,<sup>18</sup> to address questions such as what the problem is, why it is (considered) a problem, why the EU should act, what should be achieved, and what the impacts are (especially from a fundamental rights perspective). To the extent possible, real-world examples are relied upon to provide illustrations of the inferences and conclusions arrived at throughout the study.

The author also gathered input from key stakeholders through detailed questionnaires and semi-structured interviews,<sup>19</sup> including the United Nations Office on Drugs and Crime (UNODC), Frontex, the EU Fundamental Rights Agency (FRA), Europol, Eurojust, civil society organisations (PICUM and Sea Watch), academic experts (especially from the Research Social Platform on Migration and Asylum (ReSOMA) team<sup>20</sup> and among those involved in the 'Fit for purpose' studies<sup>21</sup> commissioned by the European Parliament's LIBE Committee), and lawyers engaged in key litigation (e.g. in the

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<sup>17</sup> European Commission, [Better Regulation Guidelines](#), November 2021 (chapter IV: impact assessment).

<sup>18</sup> European Commission, [Better Regulation Toolbox](#), July 2023 (especially the tools guiding the impact assessment process and Tool#29 – fundamental rights).

<sup>19</sup> See full list in Table 1.

<sup>20</sup> ReSOMA, [team](#).

<sup>21</sup> Sergio Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2016; and [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2018.

*Kinsa* case,<sup>22</sup> currently pending before the European Court of Justice). This has provided valuable insights into existing materials and ongoing debates, nuancing the analysis of definitional issues and implementation modalities, permitting a thorough evaluation of compliance with EU and international legal standards. Interviewees were identified through expert sampling and interviews conducted upon obtaining informed consent from each respondent. Where appropriate and necessary, explicit reference to stakeholder input is made throughout the study.

## 1.4. Limitations

Several challenges were faced, in particular the very limited timeline to conduct the study and complete the background research. Although the questionnaire was disseminated to representatives from all EU Member States, despite follow-up requests, only four responses were received (from Latvia, Czechia, France and Romania).<sup>23</sup> The Council's general approach to the proposal, reached on 13 December 2024,<sup>24</sup> has been integrated in the final version of the manuscript, filling the gaps left by the lack of responses from the other Member States, but in a less systematic fashion due to time constraints. Lack of access to the full set of data on which the Commission proposal is based has somewhat limited the analysis regarding implementation shortcomings across EU jurisdictions. This has been partly addressed through the incorporation of information from news articles and NGO reports to reconstruct the main trends and most recent developments.

## 1.5. Structure of the study

The study is divided in six substantive chapters. **Chapter 2** provides an overview of the main legal standards on migrant smuggling, the law of the sea, refugee protection, and human rights at the international level of relevance to the subject matter of the study. The objective is to provide a baseline for the assessment of compatibility of the provisions contained in the Commission proposal. **Chapter 3** undertakes a critical and comprehensive overview of the existing EU legal framework regarding the facilitation of irregular migration as well as an overview of the main legal and practical shortcomings in relation to transposition and implementation at the national level. This allows for the evaluation, in subsequent chapters, of whether the Commission proposal adequately addresses the main challenges and limitations identified. **Chapter 4** offers an analysis of the main elements of the proposal, critically and thoroughly reviewing the objectives of the Commission's text as formulated therein and in light of coherence considerations. The chapter begins by assessing the relevance of the stated objectives with regard to the legal and implementation challenges established in the previous chapter. It then examines the interplay and compatibility of the proposal's provisions with international rules as well as related EU law and policy. The interplay with the proposed regulation on police cooperation is considered in detail. **Chapter 5** conducts an effectiveness, efficiency, and proportionality analysis. It examines the appropriateness of the proposal's provisions in light of the principles of legality, proportionality, legal certainty, and non-penalisation (of refugees for their illegal entry or stay and of third-country nationals for the fact of

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<sup>22</sup> CJEU, Case C-460/23 *Kinsa* ([preliminary ruling request](#)). The Advocate General delivered his [Opinion](#) on 7 November 2024.

<sup>23</sup> See full list in Table 1.

<sup>24</sup> Council of the EU, General approach to the 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, [Council doc. 16910/24](#), 13 December 2024 ('Council general approach').

being smuggled).<sup>25</sup> Particular attention is paid to whether the proposed legal framework is well suited to address the dynamic environment wherein facilitation offences occur, alongside definitional issues regarding the manner in which the crimes (Articles 3-4), ancillary actions (Article 5), aggravating and mitigating circumstances (Articles 9-10), and limitation periods (Article 11) have been framed. Matters of scope (Article 1), to determine whether activities that have no link with an actual or promised financial or material benefit or are very causally distant from the facilitation of irregular entry, transit or stay risk being criminalised, are considered in detail. The proportionality of investigative and prosecuting tools (Articles 12-17) as well as of the penalties envisaged (Articles 6 and 8) is also addressed. **Chapter 6** assesses the compatibility of the proposal's provisions with the Charter of Fundamental Rights (CFR),<sup>26</sup> paying attention to the fact that it only refers to the protection of fundamental rights in the explanatory memorandum and in the recitals, without introducing any specific safeguards in the main text. In particular, the focus is on key substantive and procedural rights affected by the proposed reform. Special attention is also paid to the presumption of innocence and related protections in the criminal justice context. The situation of humanitarian assistance is also evaluated, taking account of whether the provisions proposed by the Commission are likely to prevent it from being criminalised. The implications for NGOs and other service providers, help provided among family members, and peer-to-peer assistance is considered in detail. Finally, **Chapter 7** summarises the main findings and makes concrete recommendations for the European Parliament's consideration.

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<sup>25</sup> Convention Relating to the Status of Refugees, [1951] 189 UNTS 137 (hereafter: '[CSR51](#)'), Article 31(1); United Nations, Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, supplementing the United Nations Convention against Transnational Crime, [2000] 2241 UNTS 507 (hereafter: '[SoM](#)'), Article 5.

<sup>26</sup> Charter of Fundamental Rights of the European Union (hereafter: '[CFR](#)').

## 2. International legal standards applicable with regard to migrant smuggling

This chapter provides an overview of the main legal standards on migrant smuggling and refugee protection at the international level of relevance to the subject matter of the study to provide a baseline for assessment.

### 2.1. Trans-national criminal law

The international community has developed rules in the UN Protocol on Migrant Smuggling 'to prevent and combat the smuggling of migrants', designing a 'comprehensive international approach' that includes 'cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels'.<sup>27</sup> The Protocol constitutes the first 'universal instrument' that intends to 'address ... all aspects of smuggling of migrants and other related issues'.<sup>28</sup> The purpose is to provide a common response to 'the significant increase in the activities of organized criminal groups in smuggling of migrants and other related criminal activities', which are considered to 'bring great harm to the States concerned' and to 'endanger the lives or security of the migrants involved'.<sup>29</sup> The Protocol was adopted in 2000 with a view to supplementing the UN Convention against Transnational Organized Crime (UNTOC).<sup>30</sup> Against this background, the Protocol states its twofold objective to 'prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end', and to do so 'while protecting the rights of smuggled migrants'.<sup>31</sup>

#### 2.1.1. The UN definition of migrant smuggling

Key to the Protocol is the definition of 'smuggling of migrants', commonly agreed by all parties, enshrined in Article 3(a) thereof. This is characterised by 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'. Contracting Parties are thus obliged to criminalise such behaviour that entails 'the procurement' of 'illegal entry' of a migrant that is 'committed intentionally' and precisely 'in order to obtain' a financial or other material benefit.<sup>32</sup> The Protocol's use of the term 'shall' in this context, according to which "'smuggling of migrants" shall mean' what Article 3(a) specifically provides, is indicative of an absence of flexibility in the framing of the definition. The main objective of the Protocol is indeed to adopt a harmonised approach.

The UN Office on Drugs and Crime (UNODC), in charge of overseeing the application of the Protocol, has clarified that the definition is inextricably related to the very purpose of the Protocol. It confirms this perspective by highlighting that the 'financial or other material benefit' factor is key in this regard. Such benefit is 'the reason behind the growing involvement of organized criminal groups in

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<sup>27</sup> SoM, Preamble para. 1.

<sup>28</sup> SoM, Preamble para. 4.

<sup>29</sup> SoM, Preamble paras 5 and 6.

<sup>30</sup> SoM, Preamble para. 8 and art 1(1), referring to the United Nations Convention against Transnational Organized Crime, [2000] 2225 UNTS 209 (hereafter: [UNTOC](#)).

<sup>31</sup> SoM, Article 2.

<sup>32</sup> SoM, Article 3(a) in light of Article 6(1).

conduct that often puts the lives of vulnerable migrants in great jeopardy ... fuelling a trade that turns human suffering ... into enormous and unscrupulously procured profits'.<sup>33</sup>

The Protocol's goal is, therefore, to provide effective tools to combat the transnational organised crime networks behind migrant smuggling. This is why it 'shall apply' to 'the offences established in accordance with ... this Protocol ... [that] are transnational in nature and involve an organized criminal group'.<sup>34</sup> This is the specific scope of application of the instrument, intended to complement UNTOC.<sup>35</sup> This is why UNTOC provisions 'shall apply, mutatis mutandis, to this Protocol',<sup>36</sup> and why the offences established by the Protocol 'shall be regarded as offences established in accordance with the Convention'.<sup>37</sup> The target are high-ranking smugglers organised and operating as profit-seeking criminal groups rather than small-scale occasional perpetrators — even less so if acting for selfless reasons. UNODC confirms that, even though 'the Protocol does not prevent States from creating criminal offences outside its scope — for example 'facilitation of illegal entry or illegal stay', the text 'does not provide a legal basis for the prosecution of facilitation of illegal entry or illegal stay where there is no purpose to obtain a financial or other material benefit'.<sup>38</sup> While Article 6(4) establishes that '[n]othing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law', the terms of the 'smuggling of migrants' definition must be preserved, since the entire design of the Protocol, and the UNTOC regime as a whole, depend on Contracting Parties retaining a common understanding as a basis to cooperate.

### 2.1.2. Exclusions, exemptions and saving clauses

The Protocol is not intended to target behaviour that does not match the definition of 'smuggling of migrants' and it is supposed to be implemented in line with the rights of the persons concerned. This much is clear from the several exclusions, exemptions and saving clauses the text contemplates.

The objective of the instrument, as per its 'statement of purpose' clause in Article 2, is to 'prevent and combat smuggling ... while protecting the rights of smuggled migrants'. Contracting Parties are explicitly required to exclude from liability '[m]igrants ... for the fact of having been the object of [smuggling]'.<sup>39</sup> Preparatory work on Article 5 confirms smuggled migrants to be victims who 'should therefore not be criminalised'.<sup>40</sup> According to UNODC, the same approach applies in relation to 'groups that smuggle migrants for charitable or altruistic reasons',<sup>41</sup> who should equally be excluded from criminalisation. UNODC explicitly urges Contracting Parties 'to include safeguards' to this end,

<sup>33</sup> UNODC, [The concept of 'financial or other material benefit' in the Smuggling of Migrants Protocol](#), Issue paper 2017, p. iii

<sup>34</sup> SoM, Article 4.

<sup>35</sup> SoM, Articles 4 and 1(1). Some experts make a distinction between the elements of the definition that constitute the baseline crime targeted by the instrument and the elements of transnationality and organised criminal group which instead relate to the scope of application of the SoM as a whole (interview with academic expert #3, 19.11.2024, transcript on file with the author, p. 2).

<sup>36</sup> SoM, Article 1(2).

<sup>37</sup> SoM, Article 1(3).

<sup>38</sup> UNODC, [The concept of 'financial or other material benefit' in the Smuggling of Migrants Protocol](#), Issue paper 2017, p. 71.

<sup>39</sup> SoM, Article 5.

<sup>40</sup> UNODC, [Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto](#), 2006, p. 483.

<sup>41</sup> UNODC, [Legislative guide for the implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime](#), 2005, p. 333, para. 19.

in order to effectively 'ensure that faith-based organizations, civil society and individuals' within that category are actually exempt.<sup>42</sup>

In addition, Article 16 of the Protocol mandates Contracting Parties to take account of their 'obligations under international law' when implementing the instrument. They are required to adopt 'all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of [smuggling]'.<sup>43</sup> Particular attention must be paid to 'the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.<sup>44</sup> Recognising their condition as victims, specific measures 'to afford migrants appropriate protection against violence that may be inflicted upon them' are required as well.<sup>45</sup> In cases where 'lives or safety are endangered by reason of being the object of [smuggling]', Contracting Parties 'shall afford appropriate assistance' and thus adopt specific measures to this effect.<sup>46</sup> The 'special needs of women and children' must be taken into account through tailored safeguards.<sup>47</sup>

Whatever the approach adopted when implementing the Protocol, it is imperative that the rights of individuals under international law are preserved. 'Nothing' in the text of the instrument 'shall affect' the entitlements and protections derived from 'international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention [on] Refugees and the principle of *non-refoulement*'.<sup>48</sup> What is more, the Protocol requires that its clauses 'be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of [smuggling]', so implementing measures 'shall be consistent with internationally recognized principles of non-discrimination'.<sup>49</sup> Migrant status does not diminish the level of protection to be afforded.

### 2.1.3. Status of trans-national anti-smuggling obligations under EU law

All EU Member States, except for Ireland,<sup>50</sup> as well as the EU itself, which acceded in 2006,<sup>51</sup> are parties to the Protocol. They are, hence, bound by its provisions in the exercise of their respective competences.<sup>52</sup> The Protocol has become 'an integral part' of EU law and must, accordingly, be

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<sup>42</sup> UNODC, [The concept of 'financial or other material benefit' in the Smuggling of Migrants Protocol](#), Issue paper 2017, p. 71.

<sup>43</sup> SoM, Article 16(1).

<sup>44</sup> Ibid.

<sup>45</sup> SoM, Article 16(2).

<sup>46</sup> SoM, Article 16(3).

<sup>47</sup> SoM, Article 16(4).

<sup>48</sup> SoM, Article 19(1).

<sup>49</sup> SoM, Article 19(2).

<sup>50</sup> Ireland signed the Protocol on 13 December 2000, but has not yet ratified it. The ratification process is currently ongoing.

<sup>51</sup> [Council Decision 2006/616/EC](#) of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community; and [Council Decision 2006/617/EC](#) of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community.

<sup>52</sup> Article 216(2) TFEU: 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'. See also CJEU, Case C-286/90 *Poulsen* [1992] ECR I-6019, para. 9; CJEU, Case C-405/92 *Mondiet*

observed and implemented within the EU legal order, according to its position in the system of sources that is superior to EU legislation — albeit inferior to primary law.<sup>53</sup> In this respect, the Court of Justice of the EU (CJEU) has recognised a general obligation for the Union 'to observe international law in its entirety ... which is binding upon the institutions of the EU',<sup>54</sup> as implicit in Article 3(5) TEU.

Although the text of the 2002 Facilitators Package<sup>55</sup> does not make explicit mention of the Protocol, the European Commission has emphasised the relationship between them in its 2023 proposal for a revised Facilitation Directive, claiming that the EU regime is 'consistent' with its UN counterpart.<sup>56</sup> According to the Commission, they 'remain coherent with each other, despite some differences'.<sup>57</sup> Even if the Facilitators Package was not adopted with a view to implementing the Protocol, the Commission recognises that 'as Parties to [it], both the EU and its Member States are bound to apply it *including when passing or implementing legislation within its scope*'.<sup>58</sup> Why the Protocol has never been explicitly implemented by a dedicated EU instrument remains unclear.<sup>59</sup>

## 2.2. International Law of the Sea and Maritime Conventions<sup>60</sup>

Similarly to trans-national criminal law, the international law of the sea is significant to the design of anti-smuggling regulations with regard to the maritime context. The UN Convention on the Law of the Sea (UNCLOS),<sup>61</sup> the Search and Rescue (SAR) Convention,<sup>62</sup> and the Safety of Life at Sea (SOLAS) Convention<sup>63</sup> are of relevance for both flag and coastal States.<sup>64</sup>

### 2.2.1. Duty to render assistance to persons in distress at sea

Article 98(1) UNCLOS obliges 'every State' to require all ships flying its flag 'to render assistance to any person found at sea in danger of being lost' and 'to proceed to the rescue of persons in distress'.

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[1993] ECR I-6133, paras 13–15; CJEU, Case C-162/96 *Racke* [1998] ECR I-3655, para. 45; CJEU, Case C-308/06 *Intertanko* [2008] ECR I-4057, para. 51.

<sup>53</sup> CJEU, Case 181/73 *Haegeman* [1974] ECR 449, para. 5; CJEU, Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 52; CJEU, Case C-311/04 *Dordrecht* [2006] ECR I-609, para. 25.

<sup>54</sup> CJEU, Case C-366/10 *Air Transport Association of America (ATAA)*, ECLI:EU:C:2011:864, para. 101.

<sup>55</sup> The package comprises the [2002 Council Facilitation Directive](#) and [2002 Council Facilitation Framework Decision](#).

<sup>56</sup> 2023 Facilitation Directive Proposal, p. 5.

<sup>57</sup> [Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence](#), [2020] OJ C 323/1 (hereafter: 'Facilitators Package Guidance '), p. 4.

<sup>58</sup> *Ibid.* (emphasis added), referring to the Commission's [REFIT evaluation](#), p. 31.

<sup>59</sup> This is in contrast to the approach followed, e.g., in relation to the MARPOL Convention in [Directive \(EU\) 2019/883](#) of 17 April 2019 on port reception facilities for the delivery of waste from ships, amending Directive 2010/65/EU and repealing Directive 2000/59/EC, Preamble para. 4, explicitly stating that: 'The Union has *pursued the implementation* of parts of the MARPOL Convention through Directive 2000/59/EC' (emphasis added). *Cf.* 2023 Facilitation Directive Proposal, Recital 4: 'Union and national actions should ... *take into account* the international commitments of the Union and its Member States, including in relation to the [SoM] Protocol...' (emphasis added).

<sup>60</sup> This section is based on Violeta Moreno-Lax, 'Protection at sea and the denial of asylum', in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford handbook of international refugee law*, Oxford University Press, 2021, p. 483.

<sup>61</sup> Convention on the Law of the Sea, [1982] 1833 UNTS 3 (hereafter: '[UNCLOS](#)').

<sup>62</sup> International Convention on Maritime Search and Rescue, [1979] 1405 UNTS 119 (hereafter: '[SAR Convention](#)').

<sup>63</sup> International Convention for the Safety of Life at Sea, [1974] 1184 UNTS 278 (hereafter: '[SOLAS Convention](#)').

<sup>64</sup> The 'flag state' denotes the jurisdiction under whose laws a vessel is registered, it represents the nationality of the ship. The flag state has the power to enforce rules over vessels flying its flag, including in relation to inspection, certification, and the issuance of pollution prevention and navigational safety documents. In turn, 'coastal state' refers to non-land-locked countries, which can extend their jurisdiction over several maritime zones according to UNCLOS rules.

The only limitation foreseen is that the captain intervene 'in so far as he can do so without serious danger to the ship, the crew, or the passengers'. The SOLAS Convention reiterates the obligation in similar terms, the trigger being the receipt of 'a signal from any source that persons are in distress'.<sup>65</sup>

The personal scope of application of the obligation is universal. It benefits 'any person' irrespective of nationality or legal status, which includes migrants.<sup>66</sup> Discrimination on other grounds, such as race, age or gender, is also prohibited. The territorial ambit extends 'throughout the ocean'.<sup>67</sup> The use of the generic 'at sea' in the relevant provisions does not allow for geographical restrictions. This means that, regardless of where a vessel encounters a ship in distress, it is duty-bound to assist it.

As regards the material object of the obligation, the notions of 'distress' and 'rescue' are key. 'Distress' is defined as 'a situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger', which is the reason for it requiring 'immediate assistance'.<sup>68</sup> The interpretation of these terms that best aligns with the object and purpose of the rescue obligation<sup>69</sup> is one that focuses on the likelihood of the danger materialising. This also takes account of the positive obligations ensuing from the right to life.<sup>70</sup> Accordingly, unseaworthiness *per se* may entail distress, making migrants' vessels in need of assistance by default.

Whether migrants put themselves in peril by 'voluntarily' undertaking a voyage does not release shipmasters from their duty to assist. There is no indication to this effect in the relevant UN Conventions. Moreover, this would require a retrospective subjective assessment on moral premises, outside the objective appraisal of the situation at hand, which may amount to indirect discrimination.<sup>71</sup>

Like 'distress', 'rescue' is not defined in UNCLOS, although the 2004 amendments to the SAR and SOLAS Conventions have clarified the term.<sup>72</sup> It is now accepted to entail an operation in three steps: 'to retrieve persons in distress', to 'provide for their initial medical or other needs', and 'to deliver them to a place of safety', where rescue terminates.<sup>73</sup> Since survivors are to be 'disembarked from the assisting ship and delivered to a place of safety',<sup>74</sup> this implies a place on dry land.<sup>75</sup>

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<sup>65</sup> SOLAS Convention, chapter V, reg 33(1).

<sup>66</sup> SAR Convention, annex, para 2.1.10.

<sup>67</sup> Satya Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982: A commentary*, Vol. III, Nijhoff, 1995, p. 177.

<sup>68</sup> SAR Convention, annex, para 1.3.13.

<sup>69</sup> SOLAS Convention, annex, chapter V, reg 7(1); SAR Convention, Preamble, paras 1 and 3, and annex, para. 2.1.1.

<sup>70</sup> See further, Lisa-Marie Komp, 'The duty to assist persons in distress: an alternative source of protection against the return of migrants and asylum seekers to the high seas' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat refugees' and migrants at sea: a comprehensive approach*, Brill, 2016, p. 222.

<sup>71</sup> Cf. Human Rights Committee (HRC), [General comment No 36, Article 6: Right to life](#), (2018)CCPR/C/GC/36.

<sup>72</sup> IMO, Amendment to the International Convention on Maritime Search and Rescue, (2004)MSC.155(78); IMO, Adoption of Amendments to the International Convention for the Safety of Life at Sea, Res MSC.153(78), 20 May 2004. See also IMO, Guidelines on the Treatment of Persons Rescued at Sea, (2004)MSC.167(78), 20 May 2004 (hereinafter: '[IMO Guidelines](#)'). Although IMO Guidelines are not strictly binding, they must 'be taken into account' by SAR and SOLAS Conventions parties accepting of the 2004 amendments to both instruments. See SAR Convention, annex, para 3.1.9.

<sup>73</sup> SAR Convention, annex, para 1.3.2.

<sup>74</sup> SAR Convention, annex, chapter 3, para 3.1.9; SOLAS Convention, annex, chapter V, reg 33 (1–1).

<sup>75</sup> See further Martin Ratcovich, 'The concept of "place of safety": yet another self-contained maritime rule or a sustainable solution to the ever controversial question of where to disembark migrants rescued at sea?', *Australian Yearbook of International Law*, Vol. 33, 2015, p. 81.



## 2.2.2. Duty to organise for coast watching, search and rescue services, coordinate rescue operations and allow for disembarkation at a place of safety

In addition to the duty to render assistance, coastal States have an obligation to ensure that necessary arrangements are made for coast watching and for both the searching and rescuing of persons in distress around their coasts. These arrangements include the operation and maintenance of adequate SAR facilities.<sup>76</sup> The SAR Convention provides, in addition, for inter-State coordination of SAR services and for the delimitation of SAR regions (SRR) in cooperation between the parties.<sup>77</sup> The objective is to develop a SAR system that can effectively respond to emergencies at sea. This requires the establishment of adequate communication and operational infrastructure, including a Rescue Coordination Centre responsible for recording distress signals and coordinating assistance.<sup>78</sup> Rescue units attached to them must, in turn, be suitably equipped, staffed, and managed.<sup>79</sup>

Awareness of a distress situation through whatever means — including satellite imagery, drone surveillance or radar detection — triggers the obligation to assist.<sup>80</sup> The objective is to ensure the preservation of human life at sea. The State responsible for the SRR in which assistance is rendered retains 'primary responsibility' to ensure the cooperation necessary for the survivors to be 'delivered to a place of safety'.<sup>81</sup> Although the duty on the coastal State is limited to ensuring cooperation, rather than disembarkation in its own territory, the 2004 amendments nonetheless establish an obligation of result, in that survivors must be taken to landfall.<sup>82</sup> The SAR operation will not be considered accomplished unless survivors are effectively disembarked.

Neither the 'place of safety' nor the concept of 'safety' have been defined. Yet, the amendments do indicate that in determining such a location, both the individual circumstances of the case and the International Maritime Organization (IMO) Guidelines have to be taken into account.<sup>83</sup> According to the Guidelines, this must be 'a place where the survivors' safety of life is no longer threatened and where their basic human needs ... can be met'.<sup>84</sup> Any risk of *refoulement* is a consideration in the case of asylum-seekers and refugees recovered at sea,<sup>85</sup> which States cannot circumvent.<sup>86</sup>

Within these parameters, the identification of a precise port of disembarkation depends on State cooperation. There is no residual rule in the maritime conventions, but an IMO circular recommends

<sup>76</sup> UNCLOS, Article 98(2); SOLAS Convention, ch V, reg 7(1).

<sup>77</sup> SAR Convention, annex, chapters 2, 3.

<sup>78</sup> SAR Convention, annex, paras 2.1.3, 2.3, 2.1.8, 3.1.

<sup>79</sup> SAR Convention, annex, paras 2.4.1.1, 2.5.

<sup>80</sup> SAR Convention, annex, paras 4.2.1, 4.3; Efthymios Papastavridis, 'The ECHR and migration at sea: reading the "jurisdictional threshold" of the Convention under the law of the sea paradigm', *German Law Journal*, Vol. 21(3), 2020, p. 417.

<sup>81</sup> SAR Convention, annex, para 3.1.9; SOLAS Convention, chapter V, reg 33 (1–1).

<sup>82</sup> Seline Trevisanut, 'Search and rescue operations in the Mediterranean: factor of cooperation or conflict?', *International Journal of Marine and Coastal Law*, Vol. 25, 2010, pp. 523–524.

<sup>83</sup> SAR Convention, annex, para 3.1.9; SOLAS Convention, chapter V, reg 33 (1–1).

<sup>84</sup> IMO Guidelines, para 6.12.

<sup>85</sup> IMO Guidelines, para 6.17. See also IMO and UNHCR, [Rescue at sea: a guide to principles and practices as applied to migrants and refugees](#), 2015.

<sup>86</sup> ECtHR, *Hirsi Jamaa and Others v. Italy*, App 27765/09, 23.2.2012.

that '[i]f disembarkation ... cannot be arranged swiftly elsewhere', the SRR State 'should accept the disembarkation of the persons rescued ... into a place of safety under its control'.<sup>87</sup>

### 2.2.3. Status of search and rescue obligations under EU law

SAR obligations must be taken into account by the EU and its Member States when designing anti-smuggling mechanisms. Although not all Member States have ratified the SAR and SOLAS Conventions,<sup>88</sup> or subscribed to the 2004 amendments,<sup>89</sup> all of them as well as the EU itself have acceded to UNCLOS,<sup>90</sup> which makes them bound by Article 98 within the scope of their respective powers. The fact that maritime transport, safety of shipping, or immigration, asylum and border policy are areas of shared competence does not relieve the Parties from their duty to comply with SAR provisions in these contexts. The Convention makes clear that all 'Parties shall fulfil in good faith the obligations assumed ... and shall exercise the rights, jurisdiction and freedoms recognized [therein] in a manner which would not constitute an abuse of right'.<sup>91</sup> They are bound to interpret and implement them also in conformity with 'other rules of international law',<sup>92</sup> including human rights. An integrated reading is called for in these situations, considering all relevant rules applicable.<sup>93</sup>

The EU has transposed the core content of SAR obligations in the Maritime Borders Regulation 656/2014.<sup>94</sup> The instrument, however, is considered to apply solely to operations that are coordinated by Frontex and there has been significant criticism as to how the standards therein have been implemented in practice.<sup>95</sup> The European Commission has, nonetheless, recognised the relevance of SAR obligations, acknowledging that rescue is 'an obligation under international law' and highlighting that '[t]he EU is a contracting party to UNCLOS'.<sup>96</sup> In its 2020 SAR Recommendation the Commission endorsed the IMO's approach, affirming that SAR operations 'require coordination and rapid disembarkation in a place of safety, and respect for the fundamental rights of rescued people, in conformity with the EU Charter of Fundamental Rights obligations, including the principle of *non-refoulement*', in line with 'IMO ... Guidelines on the treatment of persons rescued at sea'.<sup>97</sup>

<sup>87</sup> IMO, [Principles relating to administrative procedures for disembarking persons rescued at sea](#), 2009, FAL.35/Circ.194.

<sup>88</sup> See [status of ratifications of the SAR Convention](#) (non-parties: Austria, Bulgaria, Czechia, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia, and Slovenia) and [status of ratifications of the SOLAS Convention](#) (all EU Member States).

<sup>89</sup> All Parties to the SAR and SOLAS Conventions have accepted the 2004 amendments except Malta, which communicated to IMO on 22 December 2005 that it 'is not yet in a position to accept [them]'. See IMO, [Status quo of IMO Treaties - Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions](#), 20 November 2023, p. 451.

<sup>90</sup> [Council Decision 98/392/EC](#), of 23 March 1998, concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof.

<sup>91</sup> UNCLOS, Article 300.

<sup>92</sup> UNCLOS Articles 2(3) and 87(1).

<sup>93</sup> See further, Violeta Moreno-Lax, 'Seeking asylum in the Mediterranean: against a fragmentary reading of EU Member States' obligations accruing at sea', *International Journal of Refugee Law*, Vol. 23(2), 2011, p. 174.

<sup>94</sup> [Regulation 656/2014](#) of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex.

<sup>95</sup> Violeta Moreno-Lax et al., [The EU approach on migration in the Mediterranean](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2021, chapter 4 and references therein.

<sup>96</sup> [Commission Recommendation \(EU\) 2020/1365](#) of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities (hereafter: 'Commission SAR Recommendation'), Preamble para. 1.

<sup>97</sup> *Ibid.*, Preamble para. 7.

The text also recalled that this 'obligates contracting parties to participate in the development of search and rescue services and to take urgent steps to ensure that the necessary assistance is provided to any person ... in distress at sea'. To this effect, 'the relevant parties should coordinate and cooperate so that those assisted are disembarked from the assisting ship and delivered to a place of safety as soon as reasonably practicable'.<sup>98</sup> The role of private ships, including those operated by NGOs, in 'significantly contributing to the rescue of persons at sea', was acknowledged, along with the 'need to avoid criminalisation of those who provide humanitarian assistance to people in distress at sea'.<sup>99</sup> This is important because, as noted in the explanatory memorandum of the proposed Facilitation Directive, the maritime context is where many of the smuggling operations are estimated to take place.<sup>100</sup>

## 2.3. International and EU human rights and refugee protection

Several international human rights and refugee protection standards are of relevance to the design of anti-smuggling regulations, which are binding on the EU and its Member States via the Charter of Fundamental Rights (CFR),<sup>101</sup> as general principles of EU law, or as international obligations.<sup>102</sup> A selection of the key international and EU human rights is elaborated upon in the next subsections.<sup>103</sup>

### 2.3.1. Human dignity, right to life and to the integrity of the person

As the explanations to the Charter indicate,<sup>104</sup> human dignity is both 'a fundamental right in itself' as well as the 'real basis' of all other fundamental rights.<sup>105</sup> It is 'inviolable' and must be 'respected and protected' at all times.<sup>106</sup> The CJEU has confirmed that the fundamental right to human dignity 'is part of Union law'.<sup>107</sup> Consequently, none of the other rights recognised in the Charter or elsewhere in the legal order 'may be used to harm the dignity of another person'.<sup>108</sup> This means that human dignity 'must therefore [always] be respected even where [another] right is restricted'.<sup>109</sup>

Closely linked to the right to human dignity are the rights to life and to physical and mental integrity, enshrined in Articles 2 and 3 CFR. The right to life is recognised to 'everyone', reflecting the correlative provision of the European Convention on Human Rights (ECHR).<sup>110</sup> The right to respect

<sup>98</sup> Ibid., Preamble para. 10.

<sup>99</sup> Ibid., Preamble para. 5.

<sup>100</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 1. See also Europol, [Spotlight: Criminal networks in migrant smuggling](#), 2023, pp. 5–6, 8; and Europol, [Tackling threats, addressing challenges: Europol's response to migrant smuggling and trafficking in human beings in 2023 and onwards](#), July 2024, p. 11.

<sup>101</sup> CFR, Article 51.

<sup>102</sup> Article 6 TEU.

<sup>103</sup> This section relies and expands upon Violeta Moreno-Lax, [EU external migration policy and the protection of human rights](#), Policy Department for External Relations, European Parliament, 2020, chapter 2.

<sup>104</sup> Article 6(1) TEU, 3<sup>rd</sup> indent: 'The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and *with due regard to the explanations referred to in the Charter*, that set out the sources of those provisions' (emphasis added).

<sup>105</sup> [Explanations relating to the Charter of Fundamental Rights](#), [2007] OJ C 303/17 ('CFR explanations'), p. 17.

<sup>106</sup> CFR, Article 1.

<sup>107</sup> CJEU, Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079, paras 70–77.

<sup>108</sup> CFR explanations, p. 17.

<sup>109</sup> Ibid.

<sup>110</sup> CFR explanations, p. 17, referring to the European Convention on Human Rights, [1950] ETS 5 (hereafter: '[ECHR](#)').

physical and mental integrity has specifically emerged as 'part of Union law'.<sup>111</sup> These provisions impose both negative duties of non-interference as well as positive obligations for the adoption of protective measures that preserve life and integrity in all relevant contexts, including at sea.<sup>112</sup> One key consequence is that they forbid the unreasonable, unjustifiable and disproportionate use of force in actions that implement migration or border controls, including for anti-smuggling purposes.<sup>113</sup>

### 2.3.2. *Non-refoulement* and the prohibition of ill-treatment

Article 4 CFR prohibits in unqualified terms any form of torture and inhuman or degrading treatment or punishment. Article 19 CFR complements this protection by forbidding collective expulsions and by encapsulating an explicit prohibition of *refoulement*. 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.<sup>114</sup> The meaning and scope of these provisions is 'the same' as the equivalent absolute prohibition contained in Article 3 ECHR, as interpreted by the European Court of Human Rights (ECtHR).<sup>115</sup> The Charter standard thus 'incorporates' the international human rights law standard,<sup>116</sup> allowing for no conditions, no limitations and no derogations of any kind.<sup>117</sup> The principle forbids in absolute terms all measures that may expose 'any person' – not just refugees – to ill-treatment and other irreversible harm. This includes expulsion and rejection at the border, in both territorial and extra-territorial settings. In fact, 'the ordinary meaning of *refouler* is to drive back, repel, or re-conduct, which does not presuppose a presence in-country',<sup>118</sup> thereby encompassing measures such as interdiction on the high seas or forcible containment within foreign territory, thus creating a positive duty to prevent harm from materialising in those situations.<sup>119</sup> The prohibition covers scenarios of direct and indirect (also called 'chain') *refoulement*<sup>120</sup> and it protects individuals whether alone or within a group.<sup>121</sup>

Both the prohibition of torture and the principle of *non-refoulement* are therefore particularly relevant in the context of anti-smuggling measures. Firstly, they are important because they can be breached not only in the country to which the migrant concerned may be forcibly removed or forced to 'remain in',<sup>122</sup> but also because they may be violated if the measure *itself* is conducted through

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<sup>111</sup> CFR explanations, p. 18, referring to CJEU, Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR-I 7079, paras 70, 78-80.

<sup>112</sup> Lisa-Marie Komp, 'The duty to assist persons in distress: an alternative source of protection against the return of migrants and asylum seekers to the high seas' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *Boat refugees' and migrants at sea*, Brill, 2016), p. 222 and references therein.

<sup>113</sup> Samuel Cogolati, Nele Verlinden and Pierre Schmitt, [Migrants in the Mediterranean: protecting human rights](#), Policy Department for External Relations, European Parliament, 2015, p. 23.

<sup>114</sup> CFR, Article 19(2).

<sup>115</sup> CFR explanations, p. 18, citing CFR, Article 52(3).

<sup>116</sup> CFR explanations, p. 24.

<sup>117</sup> ECtHR, *Soering v. UK*, App 14038/88, 7.7.1989.

<sup>118</sup> Hersch Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement', in Erika Feller, Volker Türk and Frances Nicholson, *Refugee protection in international law: UNHCR's global consultations on international protection*, Cambridge University Press, 2003, p. 87.

<sup>119</sup> ECtHR, *Hirsi Jamaa and Others v. Italy*, App 27765/09, 23.2.2012; *Al-Saadoon and Mufdhi v. UK*, App 61498/08, 2.3.2010; *Al-Skeini v. UK*, App 55721/07, 7.7.2011.

<sup>120</sup> ECtHR, *M.S.S. v. Belgium and Greece*, App 30696/09, 21.1.2011.

<sup>121</sup> ECtHR, *N.D. and N.T. v. Spain*, Apps 8675/15 and 8697/15, 13.2.2020.

<sup>122</sup> UNHCR, [UNHCR comments on the Commission proposal for a Facilitation Directive \(Anti-Smuggling Directive\) – COM\(2023\) 755](#), 14 March 2024, para. 8.

excessive force or without due regard to the specific vulnerabilities of the person,<sup>123</sup> such as trauma, ill health, disability, or age in the case of children or elderly individuals.<sup>124</sup> Secondly, the additional context in which they become significant relates to the conditions of detention. Both according to ECHR case law<sup>125</sup> and the jurisprudence of the UN Human Rights Committee,<sup>126</sup> it is a well-established principle under human rights law that all detained persons – including those at borders – must 'be treated with humanity and with respect for the inherent dignity of the human person'.<sup>127</sup> The CJEU has adopted this standard in its own case law.<sup>128</sup> Detention conditions need to be in conformity with this standard. Beyond the avoidance of mistreatment, there is a positive duty of care, with which compliance is obligatory independently from 'the material resources available' to the State concerned.<sup>129</sup> Detention without provision for essential needs and without an opportunity to contact family or counsel or without access to adequate medical attention is in breach of this obligation.<sup>130</sup>

### 2.3.3. Access to asylum and the principle of non-penalisation for irregular entry

According to Article 18 CFR, the right to asylum must be guaranteed with due respect for the rules of the 1951 Geneva Convention and in accordance with the EU Treaties.<sup>131</sup> Although the Geneva Convention does not include an explicit clause in this regard, 'the right to seek and be granted asylum' or 'to seek and obtain asylum' have been included in two regional instruments,<sup>132</sup> following the Universal Declaration on Human Rights.<sup>133</sup> In the EU, the right to asylum has been recognised as a right of the individual, 'follow[ing] from the general principles of [EU] law'.<sup>134</sup> Prior to the Charter's codification, the right to asylum was recognised in domestic legislation and in national constitutions, granting international protection to persons who qualify as refugees under the 1951 Convention criteria.<sup>135</sup> This was understood as the only meaningful way of complying with the principle of *non-refoulement*. The Qualification Directive – and the 2024 Qualification Regulation, in harmonising Member States' practice, follow this approach, using refugee and subsidiary protection qualification criteria as a basis to grant international protection in the EU.<sup>136</sup> International protection is hence

<sup>123</sup> CJEU, Case C-578/16 PPU C.K. ECLI:EU:C:2017:127.

<sup>124</sup> ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App 13178/03, 12.10.2006.

<sup>125</sup> ECtHR, *Abdi Mahamud v. Malta*, App 56796/13, 3.5.2016, para. 89.

<sup>126</sup> HRC, *C v. Australia*, Comm 900/1999, 28.10.2002.

<sup>127</sup> International Covenant on Civil and Political Rights, [1966] 999 UNTS 171 (hereafter: '[ICCPR](#)'), Article 10.

<sup>128</sup> CJEU, Case C-474/13 *Pham* ECLI:EU:C:2014:2096, para. 21. See further Cathryn Costello, *The human rights of migrants and refugees in European law*, Oxford University Press, 2015, chapter 7.

<sup>129</sup> HRC, [General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant](#), 26.5.2004, paras 3 and 4.

<sup>130</sup> HRC, *Madafferi v Australia*, Comm 1011/2001, 26.7.2004 (detention against medical opinion); *Luyeye v. Zaire*, Comm 90/1981, 21.7.1983 (obligation to sleep on the floor in a small cell with no permission for family contact); *Parkanyi v. Hungary*, Comm 410/1990, 22.3.1991 (very reduced daily time for personal hygiene and outdoor exercise).

<sup>131</sup> CFR, Article 18.

<sup>132</sup> American Convention on Human Rights [1969] 1144 UNTS 123, Article 22(7); African Charter on Human and Peoples' Rights [1981] 1520 UNTS 217, Article 12(3).

<sup>133</sup> Universal Declaration on Human Rights, UNGA Res 217/A(1948), Article 14.

<sup>134</sup> CJEU, Opinion of Advocate General Maduro in Case C-465/07 *Elgafaji* ECLI:EU:C:2008:479, para. 21.

<sup>135</sup> Violeta Moreno-Lax, *Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law*, Oxford University Press, 2017, p. 365; William Thomas Worster, 'The contemporary international law status of the right to receive asylum', *International Journal of Refugee Law*, Vol. 26(4), 2014, p. 477.

<sup>136</sup> [Qualification Directive 2011/95/EU](#) (hereafter: 'QD'), Articles 13 and 18; [Qualification Regulation \(EU\) 2024/1347](#) (applicable as from 1 July 2026), Articles 13 and 18, using the imperative 'shall grant'.

defined as *territorial* protection, in the form of refugee status or subsidiary protection,<sup>137</sup> including a permit authorising the person concerned to 'reside on [the] territory' of the issuing Member State.<sup>138</sup>

The term 'international protection' is indeed used synonymously with 'asylum', a field on which the EU 'shall develop' a harmonised policy per Article 78(1) TFEU, specifically 'with a view to offering appropriate status to any third-country national [fearing persecution or serious harm] and ensuring compliance with the principle of *non-refoulement*'. With this in mind, anti-smuggling measures must be designed in a way such as not to preclude access to and the effective exercise of the right to asylum.

Irregular entry for the purpose of seeking asylum should, therefore, not be criminalised.<sup>139</sup> For refugees, it contravenes the explicit exoneration clause in the 1951 Convention, according to which Contracting Parties 'shall not' (in imperative terms) 'impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ... enter or are present in their territory without authorization'.<sup>140</sup> The only condition – which should not be interpreted so strictly as to render the clause without effect – is that 'they present themselves without delay to the authorities and show good cause for their illegal entry or presence'. In this context, attempting to escape persecution, ill-treatment, or serious harm should be considered a 'good cause'.<sup>141</sup> So, measures that penalise refugees upon arrival or while en route, be it legally or in practice, whether through criminal law or the imposition of administrative requirements that generate an insurmountable obstacle to reaching safety, should be considered incompatible with this provision. In fact, the Schengen Borders Code stipulates that penalties for irregular entry and refusals of entry must be 'without prejudice to the application of special provisions concerning the right of asylum and to international protection'.<sup>142</sup>

### 2.3.4. Right to leave any country including one's own

An aspect of the right to asylum that constitutes a vital element in ensuring the effectiveness of migrant rights, and especially those of the forcibly displaced, is the right to leave any country including one's own.<sup>143</sup> The right is contained in legally-binding form in Article 12(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of Protocol 4 ECHR with universal scope and not conditioned on lawful residence within a State party. The right applies to

<sup>137</sup> QD, Article 2(a), (e) and (g). See the equivalent provisions in the Qualification Regulation, Article 3.

<sup>138</sup> QD, Articles 2(m) and 24. See the equivalent provisions in the Qualification Regulation, Articles 3 and 24.

<sup>139</sup> Sergio Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2018, p. 102.

<sup>140</sup> [CSR51](#), Article 31(1).

<sup>141</sup> Guy S. Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: non-penalization, detention and protection' in Erika Feller, Volker Türk and Frances Nicholson, *Refugee protection in international law: UNHCR's global consultations on international protection*, Cambridge University Press, 2003, p. 185. See also UNHCR, [Guidelines on international protection No. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees](#), 23 September 2024.

<sup>142</sup> [Regulation \(EU\) 2016/399](#) of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)(codification), Article 14(1). See also Article 5(3): 'Without prejudice to ... their international protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders...'. This provision remains unchanged after the latest amendment to the Code, [Regulation \(EU\) 2024/1717 of 13 June 2024](#).

<sup>143</sup> European Parliament, [Resolution](#) of 18 April 2018 on progress on the UN Global Compacts for safe, orderly and regular migration and on refugees (2018/2642(RSP)), para. A.

'everyone', regardless of their legal status and whether the person meets the specific criteria for international protection. Its extra-territorial relevance has been recognised, inter alia, in the 'Passport cases' by the UN Human Rights Committee,<sup>144</sup> condemning both the State of residence and the State of nationality for unduly obstructing the right by denying renewal of a passport.<sup>145</sup>

Although justifiable and non-discriminatory restrictions can be imposed on the right to leave on grounds of security or public order, 'the application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality'.<sup>146</sup> This means that restrictions must be provided for by law and 'must not impair the essence of the right' by rendering it ineffective in practice.<sup>147</sup> Most crucially, restrictions must remain 'consistent with the other rights recognised in the ... Covenant',<sup>148</sup> which makes the intersection with the prohibition of torture and the principle of *non-refoulement* particularly significant. If restrictions on the right to leave entail exposure to ill-treatment or persecution, they must be considered to be in breach of the 'right to flee', emerging from the intersection between these provisions. Precluding departures through anti-smuggling programmes implemented in collaboration with third countries constitutes a case in point. When the right to leave is used to escape persecution or serious harm, the absolute nature of the prohibition of ill-treatment and the principle of *non-refoulement*, with which it converges, disallows considerations of proportionality and triggers instead a duty to take positive action to avoid its occurrence. Any limitations adopted directly or by a proxy third actor, which impinge on the right to leave/flee and preclude access to asylum, become incompatible with Article 18 CFR.<sup>149</sup>

### 2.3.5. Right to liberty and security

The right to liberty and security in Article 6 CFR is tailored on Article 5 ECHR, so that 'the limitations which may legitimately be imposed on [it] may not exceed those permitted by the ECHR'.<sup>150</sup> This means that detention is not allowed on account simply of the person's condition as a migrant in an irregular situation. Under Article 5(1)(f) ECHR, only 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition' are permitted, but subject to several conditions. Detention must be provided for by law; it must pursue a legitimate aim and be appropriate for achieving it; and it must be necessary in the particular case. Hence, where other less intrusive measures can be adopted to attain the objective pursued, they have preference. Detention is justified as a last resort. In addition, detention must have a sufficient legal basis warranting the deprivation of liberty; an effective remedy must be available for the detainee to contest the

<sup>144</sup> HRC, *El Ghar v. Libyan Arab Jamahiriya*, Comm. 1107/2002, (2004)CCPR/C/82/D/1107/2002; *El Dernawi v. Libyan Arab Jamahiriya*, Comm. 1143/2002, (2007)CCPR/C/90/D/1143/2002; *Solo Tarlue v. Canada*, Comm. 1551/2007, (2009) CCPR/C/95/D/1551/2007; *Batyrova and Batyrov v. Uzbekistan*, Comm. 1585/2007, (2009)CCPR/C/96/D/1585/2007.

<sup>145</sup> Colin Harvey and Robert P. Barnidge Jr., 'Human rights, free movement, and the right to leave in international law', *International Journal of Refugee Law*, Vol. 19(1), 2007, p. 1.

<sup>146</sup> HRC, [General comment No 27: Article 12 \(Freedom of movement\)](#), (1999)CCPR/C/21/Rev.1/Add.9, para. 16.

<sup>147</sup> *Ibid.*, para. 13.

<sup>148</sup> ICCPR, Article 12(3); ECHR, Article 2(3) Prot 4.

<sup>149</sup> Violeta Moreno-Lax, *Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law*, Oxford University Press, 2017, pp. 391-393. See also Violeta Moreno-Lax, 'Intersectionality, forced migration and the jus-generation of the right to flee: theorizing the composite entitlement to leave to escape irreversible harm', in Basak Çalı, Ledi Bianku and Iulia Motoc (eds), *Migration and the European Convention on Human Rights*, Oxford University Press, 2021, p. 43.

<sup>150</sup> CFR Explanations, p. 19.

measure; and the duration and conditions of detention must be adequate and ensure 'dignified standards of living'.<sup>151</sup> The overall objective is to ensure protection against arbitrariness.<sup>152</sup>

Non-individual, large-scale, automatic or long-term detention does not meet these criteria and is incompatible with the Charter, including at border areas and in extra-territorial situations. The protection of Article 5 ECHR has been explicitly extended to the high seas<sup>153</sup> and to foreign territory,<sup>154</sup> which holds particular relevance when cooperating with third countries for anti-smuggling purposes. Custodial measures adopted in this context risk breaching Article 6 CFR, unless accompanied with appropriate legal safeguards along with prompt and effective judicial review. The saturation of facilities does not constitute 'a justification for any derogation from [the relevant] standards'.<sup>155</sup>

### 2.3.6. Other relevant rights, including in the criminal justice context

The purpose of the Charter is to 'reaffirm ... the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States'.<sup>156</sup> It, therefore, encompasses multiple **other rights of relevance to migrants and those who engage with them**. The rights to private and family life,<sup>157</sup> to data protection,<sup>158</sup> to equality before the law,<sup>159</sup> to non-discrimination,<sup>160</sup> to child-specific safeguards,<sup>161</sup> to health care,<sup>162</sup> or to access to services,<sup>163</sup> whether to cater for basic needs or more broadly, are of relevance in the context of anti-smuggling policies.

There are among these several rights of particular relevance to civil society organisations, volunteers, activists, journalists, and defenders of migrants' rights that may unintendedly or — as suggested by Europol — 'inadvertently becom[e] facilitators by unknowingly transporting or hosting irregular migrants'.<sup>164</sup> Besides their rights to privacy, to the protection of personal data, and to property,<sup>165</sup> their **freedom of thought and conscience**, that they can exercise 'either alone or in community with others and in public or in private',<sup>166</sup> may be compromised. **Freedom of expression and information**, which includes the rights to 'hold opinions' (that do not necessarily need to be objective), 'to receive and impart information and ideas without interference by public authority and regardless of frontiers', and to the 'pluralism of the media',<sup>167</sup> are also at risk. Also **freedom of**

<sup>151</sup> CJEU, Case C-79/13 *Saciri* ECLI:EU:C:2014:103, paras 39–40.

<sup>152</sup> Violeta Moreno-Lax, 'Beyond Saadi v UK: Why the "unnecessary" detention of asylum seekers is inadmissible under EU law', *Human Rights and International Legal Discourse*, Vol. 5, 2011, p. 166.

<sup>153</sup> ECtHR, *Rigopoulous v. Spain*, App 37388/97, 12.1.1999; *Medvedyev v. France*, App 3394/03, 29.3.2010.

<sup>154</sup> ECtHR, *Al-Saadoon and Mufdhi v. UK*, App 61498/08, 2.3.2010; *Al-Skeini v. UK*, App 55721/07, 7.7.2011.

<sup>155</sup> CJEU, Case C-79/13 *Saciri* ECLI:EU:C:2014:103, para. 50.

<sup>156</sup> CFR, preamble para. 5.

<sup>157</sup> CFR, Article 7.

<sup>158</sup> CFR, Article 8.

<sup>159</sup> CFR, Article 20.

<sup>160</sup> CFR, Article 21.

<sup>161</sup> CFR, Article 24.

<sup>162</sup> CFR, Article 35.

<sup>163</sup> CFR, Article 36.

<sup>164</sup> Europol, [European Union serious and organised crime threat assessment: crime in the age of technology](#), SOCTA 2017, p. 50.

<sup>165</sup> CFR, Articles 7, 8, and 17.

<sup>166</sup> CFR, Article 10(1).

<sup>167</sup> CFR, Article 11(1) and (2).



**assembly and association**, which applies in respect of 'political, trade union and civic matters' and include the 'right of everyone to form and to join [organisations] for the protection of his or her interests',<sup>168</sup> may be threatened. Although none of these freedoms is absolute,<sup>169</sup> any limitations that may be imposed on their exercise 'must be provided for by law and respect the[ir] essence'.<sup>170</sup> Restrictions remain 'subject to the principle of proportionality' and can be made 'only if they are necessary and genuinely meet objectives of general interest recognised by the Union or ... to protect the rights and freedoms of others'.<sup>171</sup>

In cases where the person or organisation concerned is to be investigated or charged with a criminal offence, including of facilitation of irregular entry, transit or stay, the Charter envisages specific guarantees. Article 48 CFR provides that 'everyone', regardless of citizenship or other status, 'shall be **presumed innocent** until proved guilty according to law' and that their 'rights of the defence ... shall be guaranteed' in that context. This includes the same level of protection as derived from Article 6(2) and (3) ECHR,<sup>172</sup> which involves a series of specific safeguards, including 'to be informed promptly, in a language which [the person] understands and in detail, of the nature and cause of the accusation against [them]'.<sup>173</sup> It also means that they 'have [to be given] adequate time and facilities for the preparation of [their] defence'.<sup>174</sup> They must equally be guaranteed the possibility of defence 'in person or through legal assistance of [their] own choosing', or relying on *free* legal assistance provided for by the State if they lack 'sufficient means to pay'.<sup>175</sup> They must also be accorded the possibility to 'examine or have examined witnesses against [them] and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions'.<sup>176</sup> Finally, they should be provided 'the free assistance of an interpreter if [they] cannot understand or speak the language used in court'.<sup>177</sup>

The **principles of legality and proportionality of criminal offences and penalties** are also important in this regard. These have been recognised in Article 49 CFR, establishing that nobody can be held liable for a criminal offence that had not been codified as such at the time the relevant action or omission was committed. Nor can a harsher penalty be applied than that which was foreseen at the time the offence was perpetrated. The only retroactivity allowed is that of 'the law [that] provides for a lighter penalty' or exonerates the conduct altogether.<sup>178</sup> In addition, the Charter embraces the general principle of proportionality between penalties and criminal offences that is enshrined in the common constitutional traditions of the Member States and recognised in CJEU case law<sup>179</sup> by determining that 'the severity of penalties must not be disproportionate to the criminal offence'.<sup>180</sup>

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<sup>168</sup> CFR, Article 12(1).

<sup>169</sup> The CFR Explanations, pp. 21-22, confirm that their scopes are commensurate with ECHR equivalents, which may be subject to limitations in compliance with the principles of legitimacy, proportionality, and non-discrimination.

<sup>170</sup> CFR, Article 52(1).

<sup>171</sup> *Ibid.*

<sup>172</sup> CFR Explanations, p. 30.

<sup>173</sup> ECHR, Article 6(3)(a).

<sup>174</sup> ECHR, Article 6(3)(b).

<sup>175</sup> ECHR, Article 6(3)(c).

<sup>176</sup> ECHR, Article 6(3)(d).

<sup>177</sup> ECHR, Article 6(3)(e).

<sup>178</sup> CFR, Article 49(1). See also CFR Explanations, p. 30.

<sup>179</sup> CJEU, Case C-42/17 *Criminal proceedings against M.A.S. and M.B* ECLI:EU:C:2017:936; CJEU, Case C-534/16 *BB* ECLI:EU:C:2017:820; CJEU, Case C-218/15 *Paoletti and Others* ECLI:EU:C:2016:748.

<sup>180</sup> CFR, Article 49(3). See also CFR Explanations, p. 31.

Finally, the Charter also acknowledges the ***ne bis in idem* principle**. Article 50 CFR, indeed, recognises the right not to be tried or punished twice in criminal proceedings for the same criminal offence. The Charter explanations clarify that Article 4 of Protocol No.7 to the ECHR is the basis for this provision. The principle is intended as an absolute protection that cannot be derogated from under any circumstances.<sup>181</sup> The principle has been adapted to the EU context and the Schengen area, so that it applies 'between the jurisdictions of several Member States'.<sup>182</sup>

### 2.3.7. Procedural safeguards and effective remedies

In addition to substantive rights, the Charter also provides procedural guarantees. The **rights to good administration** and to an effective remedy are codified in Articles 41 and 47 CFR with a general remit, entailing a range of ancillary safeguards.<sup>183</sup> Under Article 41 CFR, 'every person' (including migrants) has the right to have their affairs handled fairly, impartially and within a reasonable time frame by every EU institution, body or agency – including Frontex, Europol, Eurojust, etc. This includes: the right to be heard *before* any measure which may adversely affect them is taken; the right to have access to their file; the obligation to provide reasons for any decisions<sup>184</sup>; and the duty to repair any damage caused as a result.<sup>185</sup> This is a direct consequence of the EU being subject to the rule of law.<sup>186</sup>

The **right to an effective remedy**, laid down separately in Article 47 CFR, is an important aspect of the right to good administration.<sup>187</sup> It purports to ensure that, in the event of a violation of any right guaranteed by EU law,<sup>188</sup> 'everyone' is given access to judicial protection and is afforded appropriate redress. The right under EU law is 'more extensive' than under Article 13 ECHR, from which it draws inspiration, 'since it guarantees the right to an effective remedy before a court' and generalises protections normally confined to civil and criminal lawsuits under Article 6 ECHR.<sup>189</sup> To this effect, the provision ensures that 'everyone' is given a fair, public hearing within a reasonable time by an impartial, independent tribunal, 'previously established by law', having access to legal advice, defence and representation, if necessary through the provision of legal aid, so as to ensure effective access to justice. Moreover, accessing and exercising appeal rights must be practicable and proactively facilitated, especially via linguistic and legal assistance.<sup>190</sup> Furthermore, in cases where there may be a risk of irreversible harm, remedies must have 'automatic suspensive effect',<sup>191</sup> capable of halting execution of the measure concerned *before* it takes place.<sup>192</sup>

<sup>181</sup> CFR Explanations, p. 31, referring to ECHR, Article 4(3) Prot 7.

<sup>182</sup> CFR Explanations, p. 31, referring to C-187/01 *Gözütok* [2003] ECR I-1345.

<sup>183</sup> Paul Craig, 'Article 41 – the right to good administration' in Steve Peers et al. (eds), *The Charter of Fundamental Rights of the European Union: a commentary*, Hart, 2<sup>nd</sup> ed., 2021, p. 1125; and Angela Ward, 'Article 47 – the right to an effective remedy and to a fair trial', in Steve Peers et al. (eds), *The Charter of Fundamental Rights of the European Union: a commentary*, Hart, 2<sup>nd</sup> ed., 2021, p. 1245.

<sup>184</sup> Cf. Article 296 TFEU.

<sup>185</sup> Cf. Article 340 TFEU.

<sup>186</sup> CFR Explanations, p. 28, referring to CJEU, Case 294/83 *Les Verts* v. *European Parliament* [1986] ECR 1339.

<sup>187</sup> *Ibid.*

<sup>188</sup> CFR Explanations, p. 29.

<sup>189</sup> CFR Explanations, pp. 29–30.

<sup>190</sup> ECtHR, *M.S.S. v. Belgium and Greece*, App 30696/09, 21.1.2011, para. 319.

<sup>191</sup> ECtHR, *Gebremedhin v. France*, App 25389/05, 26.4.2007, para. 66.

<sup>192</sup> ECtHR, *Conka v. Belgium*, App 51564/99, 5.2.2002, para. 79.

### 2.3.8. Scope of application of Charter rights

In the EU's constitutional context, there is a pervasive requirement for the Union and its Member States to comply with fundamental rights in all spheres governed by EU law.<sup>193</sup> Within the Charter specifically, there is no territorial-jurisdictional clause, like Article 1 ECHR or Article 2 ICCPR, on which its applicability depends. Instead, Article 51(1) makes clear that the Charter applies whenever EU entities exercise their competences and whenever Member States implement EU law.

Accordingly, if any of the EU institutions, bodies or agencies act outside the Member States' territories, the extra-territoriality of the action is immaterial to establishing the Charter's applicability. Article 51 CFR reflects a general understanding that EU fundamental rights obligations are intended to track all EU activities.<sup>194</sup> The Union, as a non-State entity, does not possess sovereign territory of its own, which makes recourse to territorial parameters in defining the reach of its legal order ill-suited. Rather, the Charter's field of application is autonomously defined by the 'general provisions governing the interpretation and application of the Charter'.<sup>195</sup> The rationale is to track powers and competences, irrespective of geographical location. The Charter's scope of application is thus to be determined by reference to the scope of application of EU law as a whole, and in relation to the specific instrument/policy under consideration. The Charter applies whenever EU institutions, bodies and agencies exercise their powers according to the provisions of EU law.

This is why, for example, in relation to extra-territorial migration and border control activities, Article 71 of the Frontex Regulation sets out that 'the Agency and Member States shall comply with Union law ... including where cooperation with third countries takes place on the territory of those third countries'.<sup>196</sup> Frontex must, 'in the performance of its tasks', including when acting abroad, 'guarantee the protection of fundamental rights ... in accordance with relevant Union law, in particular the Charter, and relevant international law, including the 1951 [Refugee] Convention ... and obligations related to access to international protection, in particular the principle of *non-refoulement*'.<sup>197</sup>

The Charter also applies to Member States when they 'are implementing EU law'.<sup>198</sup> According to the CJEU, this covers 'all situations where Member States fulfil their obligations under ... EU law',<sup>199</sup> which includes: (1) when they transpose EU legislation; (2) when they apply or restrict provisions of primary or secondary law; or (3) when they derogate from EU legal requirements.<sup>200</sup> Exercising a discretionary option under EU law has also been considered as 'implementing EU law'.<sup>201</sup> Even where EU rules defer to Member State preferences, the CJEU has clarified that such references 'do not mean that the Member States may undermine the effectiveness of [EU law]'.<sup>202</sup> To the contrary, all implementing decisions 'must comply with the rights and observe the principles provided for under

<sup>193</sup> Articles 2 and 6 TEU; CFR, art 51 CFR.

<sup>194</sup> Violeta Moreno-Lax, *Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law*, Oxford University Press, 2017, pp. 290–292.

<sup>195</sup> CFR, Title VII, chapeau.

<sup>196</sup> [Regulation \(EU\) 2019/1896](#) of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (hereafter: 'Frontex Regulation').

<sup>197</sup> Frontex Regulation, Article 80(1).

<sup>198</sup> CFR, Article 51(1).

<sup>199</sup> Koen Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review*, Vol. 8(3), 2012, pp. 375, 378.

<sup>200</sup> CFR Explanations, p. 32.

<sup>201</sup> CJEU, Joined Cases C-411/10 and C-493/10 *N.S. and M.E.* [2011] ECR I-13905, paras 64–68.

<sup>202</sup> CJEU, Case C-571/10 *Kamberaj*, ECLI:EU:C:2012:233, para. 78.

the Charter'.<sup>203</sup> Member States are not permitted to jeopardise the exercise of fundamental rights conferred on individuals by EU law or to nullify their substance.<sup>204</sup> Furthermore, as the Charter requires EU rights to be 'observed and promoted',<sup>205</sup> failures to act are also relevant, with omissions being equally answerable to fundamental rights.

There are already examples of the Charter being applied to extra-territorial action within the Common Foreign and Security Policy (CFSP). In the *Bank Saderat Iran* case, for instance, the obligation to provide reasons, the rights of the defence and the right to effective judicial protection were considered to apply (and to have been violated) by a series of restrictive measures adopted by the Council as part of the programme against Iran aiming at the prevention of nuclear proliferation.<sup>206</sup> The bank had been included in a list of organisations supporting the government, based on undisclosed evidence, which led to the freezing of its funds. The CJEU found in favour of the bank, establishing the applicability of EU law and of the Charter, without considering whether the Union or its Member States had exerted 'jurisdiction' or 'effective control' (as would have been preceptive under Article 1 ECHR).

The key question, therefore, is not whether the Charter applies territorially or extra-territorially, but whether or not a particular situation is governed by EU law.<sup>207</sup> If that is so, whether in the area of border management, migration control, or anti-smuggling measures, the Charter's application follows automatically. There are no places where powers conferred by EU law on its institutions, bodies and agencies, or Member States can be exercised without due regard for fundamental rights. '[S]ituations cannot exist which are covered ... by [EU] law without ... fundamental rights being applicable'; '[t]he applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter'.<sup>208</sup>

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<sup>203</sup> Ibid., para. 80.

<sup>204</sup> CJEU, Case C-502/10 *Singh*, ECLI:EU:C:2012:636, para. 51; CJEU, Case C-508/10 *Commission v. The Netherlands*, ECLI:EU:C:2012:243, paras 69.

<sup>205</sup> CFR, Article 51(1).

<sup>206</sup> CJEU, Case T-494/10 *Bank Saderat Iran*, ECLI:EU:T:2013:59 (appeal dismissed in Case C-200/13 P, ECLI:EU:C:2016:284).

<sup>207</sup> Michael Dougan, 'Judicial review of Member State action under the general principles and the Charter: defining the "scope of Union law"', *Common Market Law Review*, Vol. 52(5), 2015, p. 1201.

<sup>208</sup> CJEU, Case C-617/10 *Fransson*, ECLI:EU:C:2013:105, para. 21.

### 3. State of play of EU legislation: Rules, transposition and implementation

This chapter undertakes a critical and comprehensive overview of the existing EU legal framework regarding the facilitation of irregular migration as well as an overview of the main legal and practical shortcomings in relation to transposition and implementation at the national level. This allows for the assessment, in subsequent chapters, of whether the Commission's proposal adequately addresses the main challenges and limitations identified.

#### 3.1. The 2002 Facilitators Package

The Facilitators Package, which consists of the Facilitation Directive 2002/90/EC and its accompanying Framework Decision 2002/946/JHA, was adopted in the pre-Lisbon era. The then first pillar instrument defines the crime of facilitation of irregular entry, transit and residence, while the complementary third pillar measure establishes the corresponding penalties that apply. Their common goal is to provide tools to more effectively address unauthorised immigration.<sup>209</sup> The purpose is not only to counter migrant smuggling as such, but more broadly also 'to combat the aiding of illegal immigration 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>210</sup> This is why the definitional elements of the transnational crime of migrant smuggling, as formulated at UN level, have not been retained. In contrast to the UN Protocol on Migrant Smuggling,<sup>211</sup> intentionally assisting a foreigner to enter/stay without authorisation through whatever means, whichever the purpose, with or without the intermediation of a financial or other material benefit, suffices for criminalisation under EU law.<sup>212</sup> The requisite of a financial gain is only necessary for the crime of facilitation of irregular residence.<sup>213</sup>

This represents a departure, not only from the UN definition, but also from the previous approach adopted in the Schengen Convention (CISA),<sup>214</sup> which the Facilitation Directive expressly repealed.<sup>215</sup> Article 27 therein did require Contracting Parties to 'impose appropriate penalties on any person who, *for financial gain*, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens'.<sup>216</sup> This means that, under the Directive, there is no distinction between abusive or exploitative action and action engaged in for humanitarian or solidarity reasons, whether by civil society organisations, individual volunteers, or family members assisting each other. The offence is 'defined objectively' and 'irrespective of [the] person's motives'.<sup>217</sup> As noted by the Advocate General in the *Kinsa* case, the 2002 Facilitation Directive defines a 'general infringement'

<sup>209</sup> 2002 Facilitation Directive, Recital 1.

<sup>210</sup> *Ibid.*, Recital 2.

<sup>211</sup> SoM, Article 3.

<sup>212</sup> 2002 Facilitation Directive, Article 1(1)(a).

<sup>213</sup> *Ibid.*, Article 1(1)(b).

<sup>214</sup> [Convention Implementing the Schengen Agreement](#) of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (hereafter: 'CISA').

<sup>215</sup> 2002 Facilitation Directive, Article 5.

<sup>216</sup> CISA, Article 27(1) (emphasis added).

<sup>217</sup> CJEU, [Opinion](#) of Advocate General De la Tour in Case C-460/23 *Kinsa*, ECLI:EU:C:2024:941, para. 40.

aiming to cover 'all actions intended to facilitate unauthorised entry [transit or stay] including where such acts are committed disinterestedly, out of altruism, compassion or solidarity for humanitarian reasons or because of the existence of family ties'.<sup>218</sup> 'Attempts', 'instigation' or 'complicity' in the acts concerned also attract criminalisation<sup>219</sup> – although these terms have not been given any harmonised definitions in the text of the instrument.

Council Framework Decision 2002/946/JHA complements the Facilitation Directive regulating the regime of penalties, liability and sanctions for legal persons, jurisdiction, and cooperation between Member States. It contains the only human rights safeguard in the package. Article 6 – modelled on Article 26(1) of the Schengen Convention – establishes that the Framework Decision must apply 'without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 [Geneva] Convention', hence highlighting the importance of the principle of non-penalisation for irregular entry and the prohibition of *refoulement*. However, the clause applies only with regard to the Framework Decision, rather than the Facilitators Package as a whole, thus restricting its effect.

The risk of over-criminalisation was flagged by the European Parliament at the time of the debate on the adoption of the Facilitators Package.<sup>220</sup> Making use of its consultative powers at the time, it proposed several amendments that would have introduced safeguards for smuggled migrants, service providers, especially carriers, as well as persons and organisations providing humanitarian assistance. The European Parliament underlined the need to make 'a clear distinction ... between unauthorised entry and the act of aiding unauthorised entry', particularly on consideration that '[m]any illegal immigrants are refugees who are granted political asylum in the Union after entering it'.<sup>221</sup> Thus, 'for this reason they should be immune from prosecution'.<sup>222</sup> As a result, migrants 'whose illegal entry is assisted by this offence shall not be prosecuted as parties to that offence'.<sup>223</sup> This is also why 'legal persons ... shall not be held liable ... in cases where aliens ... who have been transported to an EU Member State wish to seek the protection provided under the 1951 Geneva Convention'.<sup>224</sup> As the Parliament further highlighted, commercial transport companies, in particular, could not 'in any way be held liable for transporting persons who request asylum immediately upon arrival within the territory of a Member State, since we would otherwise be requiring them to prevent asylum-seekers from travelling and from requesting the protection provided under the 1951 Geneva Convention'.<sup>225</sup> In addition, 'carriers have neither the ability nor the authority to assess the admissibility of an application for asylum and hence under no circumstances can they be directly or indirectly persuaded to carry out an assessment of suitability'.<sup>226</sup> So, criminalisation in these circumstances was deemed unreasonable and contrary to State obligations under international

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<sup>218</sup> Ibid., para. 46, referring in para. 47 to CJEU, Case C-83/12 PPU *Vo* ECLI:EU:C:2012:202.

<sup>219</sup> 2002 Facilitation Directive, Article 2.

<sup>220</sup> European Parliament, Report on the initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence (10675/2000 – C5 0427/2000 – 2000/0821(CNS)) and on the initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence (10676/2000 – C5-0426/2000 – 2000/0820(CNS)), 25 October 2000, [A5-0315/2000](#).

<sup>221</sup> Ibid., Amendment 9, p. 9, Justification.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid., Amendment 9, p. 9.

<sup>224</sup> Ibid., Amendment 6, p. 15.

<sup>225</sup> Ibid., Amendment 6, Justification, p. 16.

<sup>226</sup> Ibid.

refugee law. Finally, the Parliament demanded that '[a]ssociations, organisations or other legal persons acting for humanitarian reasons shall be immune from criminal prosecution'.<sup>227</sup> What was to be understood by 'humanitarian reasons' was explained by the Parliament broadly as including aims such as 'defending, protecting and promoting aliens who are not nationals of an EU Member State'.<sup>228</sup>

The Parliament's misgivings overall concentrated on the lack of legal certainty for those concerned and the overriding focus on punishment and deterrence. During the plenary debate on the French proposal behind the Directive,<sup>229</sup> the rapporteur insisted on the need to clearly distinguish 'the criminal networks trading in human beings [which] must be combated' from others, including the 'NGOs or churches and other similar organisations which offer humanitarian aid to persecuted human beings [and] must not be treated as criminals'.<sup>230</sup> The originally proposed exemption clause, based solely on family ties, was deemed insufficient. Draft Article 4 of the Directive would have granted Member States the possibility to 'exempt from criminal prosecution' (rather than from punishment alone) 'persons whose link to the alien who has benefited from the aiding ... is ... a relative in the ascending or descending line, brothers and sisters and their spouses, his spouse or the person who is known to cohabit with him'. However, none of the amendments suggested by the Parliament, nor draft Article 4 were eventually retained in the final text of the Directive.

Instead, an optional provision was introduced following which '[a]ny Member State *may* decide not to impose sanctions with regard to ... cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned'.<sup>231</sup> This allows Member States the possibility (without imposing an obligation) to exclude from penalties (rather than from incrimination or prosecution) persons or entities considered to provide humanitarian assistance — a term left undefined by the Directive.

### 3.2. The 2017 REFIT evaluation

The European Parliament has over the years maintained its position on the need to revisit the EU regime on facilitation, in particular to avoid 'sanctioning people assisting migrants in distress at sea'.<sup>232</sup> It has called on the Commission explicitly to 'review Council Directive 2002/90/EC ... in order to clarify that providing humanitarian assistance to migrants at sea who are in distress is to be welcomed and not an action which should ever lead to any form of sanctions'.<sup>233</sup> The EU's Fundamental Rights Agency (FRA) has also drawn attention to the problem, focusing on the criminalisation of migrants themselves and the 'criminalisation of solidarity' offered by others, targeting service providers, humanitarian and mutual assistance, and sea rescue including by fishermen.<sup>234</sup> The LIBE Committee commissioned a dedicated study on the subject in 2015, which corroborated these issues, concluding that the over-broad definition of the offence of facilitation negatively affects migrants as well as family members, humanitarian actors, service providers, and society at large.<sup>235</sup> In 2016, a petition submitted to Parliament's Committee on Petitions (PETI) by

<sup>227</sup> Ibid., Amendment 11, p. 10.

<sup>228</sup> Ibid., Amendment 12, p. 10.

<sup>229</sup> [Initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence](#), [2000] OJ C 253/01.

<sup>230</sup> European Parliament, [Verbatim report of proceedings](#), 14 February 2001, Ozan Ceyhun (PSE, DE), rapporteur.

<sup>231</sup> 2002 Facilitation Directive (emphasis added), Article 1(2).

<sup>232</sup> European Parliament, [Resolution](#) of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)), para. 39. See further below for other relevant resolutions.

<sup>233</sup> Ibid.

<sup>234</sup> FRA, [Criminalisation of migrants in an irregular situation and of persons engaging with them](#), 2014.

<sup>235</sup> Sergio Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2016.

the lawyer representing several Spanish firefighters volunteering on Lesbos, who had been prosecuted in Greece on the basis of the Directive, reflected similar concerns.<sup>236</sup>

Similar findings were also reached by a separate external evaluation study conducted in 2017 for the European Commission,<sup>237</sup> adding to the evidence base on the problem of over-criminalisation. This study informed the Commission's 2017 REFIT evaluation on the Facilitators Package which aimed to assess whether the framework was still 'fit-for-purpose'.<sup>238</sup> The assessment highlighted the context in which the rules operate, 'marked by a severe migratory and refugee crisis', rendering the 'better tackling [of] migrant smuggling ... one of the priorities set at European and national level'.<sup>239</sup> Although the reasons for the increase in irregular migration were identified to be 'geo-political instability ... poverty, lack of socio-economic development and global inequalities', which constituted push factors 'in the flows of asylum seekers', the Commission acknowledged that the package 'does not address the root causes of the demand for facilitation of irregular border crossing or residence in the EU'.<sup>240</sup> The focus, instead, was 'on the role of the smugglers and the penal framework to tackle this form of crime'.<sup>241</sup> The main preoccupation was on 'organised criminal networks or individuals, who generate substantial profits from migrant smuggling',<sup>242</sup> with an estimated yearly turnover of several billions.<sup>243</sup>

In the REFIT evaluation, the fact that the criminalisation framework does not focus on organised criminal networks, but targets 'any person',<sup>244</sup> while it does not include a profit element in the definition of the baseline crime, except for the facilitation of unauthorised stay,<sup>245</sup> was not perceived as a significant mismatch between the objectives pursued by the Facilitators Package and the provisions therein. The same applies to the observation that, according to the Commission, '[t]he priority afforded to reducing irregular migration stems from two essential needs'.<sup>246</sup> These comprise not only the 'need to protect Member States' territorial integrity, social cohesion and welfare through well-managed migration flows', but also 'the need to tackle human rights abuse and violence' to which smuggled migrants are exposed.<sup>247</sup> Yet the lack of human rights safeguards in the Facilitators Package was not raised as a problem in this regard. References to the UN Protocol, to which the Facilitators Package is said to 'relate', did not prompt any remarks in this sense either.<sup>248</sup> The fact that the Protocol is seen as having 'an encompassing nature, aiming at preventing and combating

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<sup>236</sup> European Parliament, Committee on Petitions, [Notice to Members - Subject: Petition No 1247/2016 by Paula Schmid Porras \(Spanish\) on behalf of NGO Professional Emergency Aid \(PROEM-AID\) concerning the criminalisation of persons engaging with migrants in an irregular situation and the criminalisation](#), 31 July 2017.

<sup>237</sup> Nick Bozeat et al., [Evaluation and impact assessment study on a proposal for a revision of the EU legal framework related to the facilitation of irregular migration \(migrant smuggling\)](#), ICF International, European Commission, 2017.

<sup>238</sup> [REFIT Evaluation](#), p. 1.

<sup>239</sup> *Ibid.*, p. 2.

<sup>240</sup> *Ibid.*, p. 4.

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*, p. 5. See also European Commission, A renewed EU action plan against migrant smuggling (2021-2025), [COM\(2021\) 591](#), p. 3.

<sup>244</sup> 2002 Facilitation Directive, Article 1(a).

<sup>245</sup> *Ibid.*, Article 1(b).

<sup>246</sup> REFIT Evaluation, p. 5.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*, p. 7.



the smuggling of migrants, as well as promoting cooperation among State parties *and protecting the rights of smuggled migrants*' was merely stated, but not further elaborated upon.<sup>249</sup>

The over-reach of the facilitation offence was justified by the broader objective of the Facilitators Package to largely 'contribute to the fight against irregular migration' *as such*, thus penalising the aiding of unauthorised movement and residence of non-nationals, '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>250</sup> Against this background, the fact that facilitation is criminalised 'irrespective of whether it is conducted for the purpose of a financial or material benefit' was seen as unproblematic.<sup>251</sup> The 'cash intensive' nature of smuggling transactions was perceived to make a focus on profit – and in particular on tracing illicit financial flows – difficult, as it might 'disproportionately hamper the investigation and prosecution of this crime'.<sup>252</sup> Deterrence, prevention, and prosecutorial effectiveness appear to have justified this approach.

Although the 'limited availability and comparability of data related to facilitation'<sup>253</sup> challenged the possibility of reaching firm conclusions, the Commission remained overall satisfied with the effectiveness, efficiency, relevance, coherence, and added value of the Facilitators Package on the whole. The fact that the Facilitators Package instruments are part of 'a much wider array of policy measures to prevent and tackle migrant smuggling' made it 'difficult to assess the[ir] direct impact ... in achieving its objectives as compared to the combined action of many other factors'.<sup>254</sup>

Findings on **effectiveness** are, nonetheless, important. The Commission asserted that the Package 'has not significantly contributed to reducing irregular migration' and that it has had 'little deterrent effect'.<sup>255</sup> In light of the data available, 'neither the definitions and sanctions nor their approximation ... have [had] an impact on the magnitude of the flows ... nor on the smuggling routes and methods'.<sup>256</sup> Nevertheless, the Commission was satisfied that the definition of the offence is 'sufficiently broad'<sup>257</sup> to allow prosecutions on different grounds and that it 'has been transposed by all Member States'.<sup>258</sup> Sanctions, 'both criminal and administrative', have been adopted, although their range 'varies significantly'.<sup>259</sup> Some Member States have increased them '[i]n the wake of the ... [2015] refugee crisis'.<sup>260</sup> Although the Commission noted Article 6 of the Framework Decision, and the rights of asylum seekers to non-penalisation and to *non-refoulement*,<sup>261</sup> it did not reach any conclusions on the adequacy of the course adopted by 'several courts' imposing stricter penalties or not applying mitigating circumstances vis-à-vis migrants 'steering the vessels trying to reach European shores'.<sup>262</sup>

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<sup>249</sup> Ibid. (emphasis added).

<sup>250</sup> Ibid., p. 5.

<sup>251</sup> Ibid., p. 8.

<sup>252</sup> Ibid., p. 9.

<sup>253</sup> Ibid., pp. 12 and 18.

<sup>254</sup> Ibid., p. 13.

<sup>255</sup> Ibid., pp. 18 and 19.

<sup>256</sup> Ibid., p. 19.

<sup>257</sup> Ibid., p. 19.

<sup>258</sup> Ibid., p. 14.

<sup>259</sup> Ibid., pp. 16 and 23.

<sup>260</sup> Ibid., p. 23.

<sup>261</sup> Ibid., p. 10.

<sup>262</sup> Ibid., p. 23.

As regards the humanitarian clause, only seven Member States had transposed it in their national legislation, with different meanings and following different thresholds.<sup>263</sup> For instance, while Spain and Belgium had adopted nearly *verbatim* the phrasing of the directive,<sup>264</sup> France only exonerated from punishment the facilitation of irregular transit and stay but not of irregular entry,<sup>265</sup> an approach by and large also followed in Italy, which only exonerated conduct vis-à-vis migrants already 'present' on national territory.<sup>266</sup> In Greece, although rescue activities of persons in need of international protection were formally not punishable by law, the application of this norm was inconsistent in practice.<sup>267</sup> In many jurisdictions there was no consensus on what constitutes 'humanitarian assistance', leaving it up to national courts to ultimately determine on a case-by-case basis whether conduct was punishable in typically long and protracted proceedings.<sup>268</sup> The humanitarian clause has, in fact, not been effective in creating legal certainty, with the Commission noting 'ongoing criticism from scholars, European and International institutions and NGO[s]' in this regard.<sup>269</sup> Nonetheless, the Commission evaluation concluded that there was 'no significant evidence' confirming the criminalisation of humanitarian assistance to warrant a revision of the Package on this point.<sup>270</sup>

In terms of cost **efficiency**, the Commission did not undertake any detailed analysis, merely stating that 'costs at EU level are low since the Facilitators Package does not set up any particular structure or programme bearing on the Union budget',<sup>271</sup> although this disregards for instance the cost generated for justice and home affairs (JHA) agencies involved in anti-smuggling efforts. Regarding costs at the national level, it declared that 'it has not been possible to single [them] out',<sup>272</sup> the lack of statistical and other data on prosecutions, convictions, etc. limiting the range of conclusions. The cost-intensiveness of efforts to tackle low-ranking facilitation<sup>273</sup> — by service providers, family members, or migrants themselves — was not identified as a potential waste of resources. Nor did the Commission take account of related law-enforcement, investigation, detention, processing, adjudication, and removal costs — some of which it listed explicitly as 'several aspects of the costs of migrant smuggling to the EU'.<sup>274</sup> The wider 'social costs' to the migrants, their families, and humanitarian actors that engage with them were merely mentioned, but not further specified, as they were deemed impossible to quantify.<sup>275</sup> This is why inferring that 'against the backdrop of estimated low costs of transposition of the Package, its potential benefit in contributing, even only

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<sup>263</sup> Ibid., pp. 14–15.

<sup>264</sup> Ibid., p. 15.

<sup>265</sup> Sergio Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, December 2018, pp. 41–42.

<sup>266</sup> REFIT Evaluation, p. 15, fn 66.

<sup>267</sup> Sergio Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, December 2018, p. 41.

<sup>268</sup> See, as an example, the case of Salam Aldeen, founder of SAR NGO Team Humanity, and his ordeal through the Greek courts until final acquittal in 2018, '[Greece's crackdown on humanitarian organisations](#)', Global Legal Action Network (GLAN) and the related application to the ECtHR, *Kamal-Aldeen v. Greece*, Appl. No. 21759/19, rejected on 9 April 2019 by a single-judge formation (with Moreno-Lax acting as lead counsel).

<sup>269</sup> REFIT Evaluation, p. 20.

<sup>270</sup> Ibid., pp. 22, 23 and 35.

<sup>271</sup> Ibid., p. 25.

<sup>272</sup> Ibid., p. 25.

<sup>273</sup> Ibid., p. 27.

<sup>274</sup> Ibid., p. 26 and fn. 122 on rescue-related costs on private shipping companies.

<sup>275</sup> Ibid., p. 27.

partially, to cracking down on facilitation of irregular immigration could be high' is difficult to establish.<sup>276</sup> Without any specific evidence, such estimates do not provide a sufficient basis to reach accurate findings.

The Commission's assessment of the **relevance** of the Facilitators Package presented similar shortcomings. The 'low effectiveness' of the instruments in deterring facilitation did not involve a diminished relevance of the aim to criminalise such activity *per se*.<sup>277</sup> The reasoning deployed is seemingly circular: 'in a context of very high occurrence of migrant smuggling ... the relevance of an EU-wide [regime] remains high',<sup>278</sup> which amounts to affirming that *any* measure intended to counter the phenomenon, whether suitable or not to *actually* tackle it, would by default be relevant. What should have been assessed is the relevance of the measures in place, rather than the relevance of the objective they intend to pursue.

The **coherence** evaluation was also unsatisfactory. The Commission merely asserted that the Facilitators Package 'fits' with the wider *acquis* on irregular migration, without explaining complementarity or undertaking a detailed appraisal of links to the relevant instruments. For instance, while the Victims' Rights Directive<sup>279</sup> was said to be 'complementary' to the Facilitators Package, as it is formally 'applicable to all victims without discrimination and independently of the victims' legal status',<sup>280</sup> the Commission did not evaluate whether Member States indeed extended such protection to smuggled migrants, nor did it take issue with the lack of any explicit reference to the instrument in the Package provisions or to similar guarantees. Moreover, the Commission affirmed that '[t]he protection of the fundamental rights of migrants and seekers of international protection is a basic principle at the core of any EU legislation', to then recognise that the anti-facilitation instruments 'do ... not focus on the migrants', but on facilitators.<sup>281</sup> The presence of Article 6 of the Framework Decision, reminding Member States that the anti-facilitation regime is 'without prejudice' to their obligations under international human rights and refugee law, was considered enough to guarantee effective compliance by itself, without further elaboration.<sup>282</sup>

When it came to the UN Migrant Smuggling Protocol and the different scopes of the crime of 'smuggling of migrants' vis-à-vis the offence of 'facilitation of unauthorised entry, transit and residence' under EU law, the Commission maintained that, '[d]espite some differences', the two 'remain coherent'.<sup>283</sup> The fact that the Protocol incorporates, as the Commission notes, 'obligatory' safeguard clauses which the EU instruments either disregard or replace with 'optional' exemption provisions was not seen as a conflict.<sup>284</sup>

Finally, considering the **EU added value** of the package, the Commission also concluded in the affirmative. The objective of approximating the national laws of the Member States with a view to obtaining a common understanding and minimum rules on offences related to migrant smuggling is considered to be only 'partially fulfilled', given persisting variation. According to the Commission,

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<sup>276</sup> Ibid., p. 25.

<sup>277</sup> Ibid., p. 27.

<sup>278</sup> Ibid., p. 27.

<sup>279</sup> [Directive 2012/29/EU](#) of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>280</sup> REFIT Evaluation, p. 29.

<sup>281</sup> Ibid., p. 30.

<sup>282</sup> Ibid.

<sup>283</sup> Ibid., p. 31. See also the table on the main differences between the Facilitators Package and the UN Protocol on pp. 31-32 of the REFIT Evaluation.

<sup>284</sup> Ibid., pp. 31-32, comparative table.

this objective 'remains fully valid today and could not be attained by Member States alone'.<sup>285</sup> However, what the Commission should have assessed is the specific added value of the various provisions in the package, rather than the added value of the objective of approximation of national law per se. When focusing on 'the distinction between migrant smuggling and facilitation of irregular migration for humanitarian assistance', the Commission conceded that 'the added value brought by the EU framework pertaining to legal certainty ... is limited'.<sup>286</sup> Although it invoked the package's contribution to preventing 'forum shopping by criminals',<sup>287</sup> it did not provide any evidence that there actually is any such strategy being employed by smuggling networks and that forum shopping may be averted by the kind of approximation of national laws undertaken in the EU anti-facilitation legislation.

### 3.3. The 2020 Guidelines of the European Commission

The REFIT evaluation led the European Parliament to commission an update of its 'Fit for Purpose' study focussing specifically on the criminalisation of humanitarian assistance, which produced significant additional evidence of the over-reach of the anti-facilitation provisions.<sup>288</sup> The study drew on academic research, case studies from a selection of Member States (including some that had and some that had not transposed the humanitarian clause), previous available reports commissioned by the European institutions and other actors, and a media monitoring exercise. Its results confirmed the need to reform the Facilitators Package. It demonstrated that criminalisation of humanitarian assistance results from design flaws in the legal framing of the offence at EU level, rather than from the inefficient implementation of the anti-facilitation provisions by the Member States.<sup>289</sup> In addition, the decision by the Commission not to revise the package, as a result of the REFIT evaluation, is shown to be at odds with the stated priorities of the Union.<sup>290</sup> According to the EU action plan against migrant smuggling (2015–2020), in place at the time of the evaluation, 'it is essential to disrupt the business model of criminal groups ... ensur[ing] that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress'.<sup>291</sup>

To address some of these problems, and prompted by an explicit call of the European Parliament,<sup>292</sup> in 2020, the Commission issued a set of non-binding guidelines on the implementation of the EU's

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<sup>285</sup> Ibid., p. 33.

<sup>286</sup> Ibid.

<sup>287</sup> Ibid. The assertion is repeated, without any evidence, in the analytical document supporting the 2023 Facilitation Directive proposal, [SWD\(2024\) 134](#), p. 13.

<sup>288</sup> Sergio Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, December 2018.

<sup>289</sup> Ibid., p. 43.

<sup>290</sup> Ibid.

<sup>291</sup> European Commission, EU action plan against migrant smuggling (2015 – 2020), [COM\(2015\) 285](#), pp. 2–3.

<sup>292</sup> European Parliament, [Resolution](#) of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised (2018/2769(RSP)), para. 7.

Facilitators Package.<sup>293</sup> These were attached to the new legislative framework on migration and asylum introduced by the New Pact on Migration and Asylum.<sup>294</sup>

The Guidance acknowledged the views of UNODC, that concluded that the Protocol 'does not seek and cannot be used as the legal basis for the prosecution of humanitarian actors'.<sup>295</sup> However, the Guidance interprets the Facilitation Directive in a way that only 'humanitarian assistance that is mandated by law' should be excluded from criminalisation.<sup>296</sup> No definition of 'humanitarian assistance' is provided, nor a specification of when it should be considered as 'mandated by law'. The Commission further stated that 'the criminalisation of NGOs ... that carry out search and rescue operations at sea ... amounts to a breach of international law, and therefore is not permitted by EU law'.<sup>297</sup> Yet, it caveated the assertion to cover only rescue operations conducted 'while complying with the relevant legal framework',<sup>298</sup> leaving ample margin for interpretation. The Commission held that '[e]veryone involved in [SAR] activities *must* observe the instructions received from the coordinating authority when intervening in [SAR] events',<sup>299</sup> without taking account of incidents of orders provided to stand-by or collaborate with the Libyan coastguard,<sup>300</sup> which have eventually been judicially condemned as in contravention of the right to life and the principle of *non-refoulement*.<sup>301</sup>

Instead of clarifying the specific conduct to be punished and the conditions under which it should be prosecuted – in line with the principle of legality – the final assessment, according to the Commission's Guidance, pertains to the judicial authorities to be carried out 'on a case-by-case basis'.<sup>302</sup> They – rather than the EU legislator – are the ones designated 'to strike the right balance between the different interests and values at play'.<sup>303</sup> The only specific recommendation made by the Commission is to 'invite' Member States 'to use the possibility provided for in Article 1(2) of the Facilitation Directive' to exonerate humanitarian assistance from the scope of criminalisation.<sup>304</sup>

### 3.4. Problems in transposition and implementation across Member States: the Milieu study

The most up-to-date and detailed evaluation of the transposition and implementation of the Facilitators Package has been undertaken by Milieu Consulting on behalf of the Commission, as part

<sup>293</sup> European Commission, [Facilitators Package Guidance](#). For analysis, see Violeta Moreno-Lax, 'Towards a thousand little Morias: the EU (non-)rescue scheme - criminalising solidarity, structuralising defection' in Daniel Thym (ed.), *Reforming the Common European asylum system*, Nomos, 2022, p. 161.

<sup>294</sup> European Commission, New Pact on Migration and Asylum, [COM\(2020\) 609](#). For an overview and access to all related files: [Migration and Asylum Package](#): New Pact on Migration and Asylum documents adopted on 23 September 2020.

<sup>295</sup> Facilitators Package Guidance, para. 2.1, p. 3.

<sup>296</sup> *Ibid.*, para. 4(i), p. 6.

<sup>297</sup> *Ibid.*, para. 4(ii), p. 6.

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.*, para. 3, p. 5 (emphasis added).

<sup>300</sup> See e.g. OHCHR, ['Lethal disregard': search and rescue and the protection of migrants in the central Mediterranean Sea](#), May 2021 and references therein to materials known before the issuance of the Facilitation Guidance.

<sup>301</sup> ['Italy's top court: Handing over migrants to Libyan coast guards is illegal'](#), *Info Migrants*, 20 February 2024.

<sup>302</sup> Facilitators Package Guidance, para. 4(iii), p. 6. This is also the view of CJEU Advocate General De la Tour in his opinion in Case C-460/23 *Kinsa*, ECLI:EU:C:2024:941, paras 72-73 and 85.

<sup>303</sup> Facilitators Package Guidance, para. 2.2, p. 5.

<sup>304</sup> *Ibid.*, para. 5, p. 6.

of the preparations for the present reform proposal submitted in November 2023.<sup>305</sup> However, their study was only completed and published nearly a year after, in September 2024,<sup>306</sup> and the individual case studies per Member State have not been made publicly accessible.<sup>307</sup> Therefore, its full impact on the reform proposal by the Commission cannot be determined. The study also faced methodological challenges, given 'the very short timeline (20 weeks)', the 'very little information on the practical implementation of the Facilitators Package in the Member States available online', the lack of comparability of statistics and other data, the fact that some of the cases of criminalisation of humanitarian assistance were still ongoing, and difficulties in 'setting up interviews' at national level.<sup>308</sup>

The study concludes that the transposition of the Facilitators Package is generally compliant across the EU, highlighting amendments adopted since the 2015 refugee crisis in fifteen Member States, including stricter penalties (in Cyprus, Italy, the Netherlands, and Slovenia), the extension of the humanitarian exemption to facilitation of transit cases, following a Conseil d'État ruling (in France), and the criminalisation of attempts (in Belgium).<sup>309</sup> There are different interpretations of 'intent' and of the benefit element and whether it should be considered in the determination of the offence.<sup>310</sup>

The option provided in Article 1(2) of the Facilitation Directive is used, according to the survey conducted as part of the Milieu study, in nine Member States (Belgium, Greece, Spain, Finland, France, Croatia, Ireland, Italy and Malta). There are, however, stark variations in interpretation and application, with different types of provisions differing in scope and functioning regarding the actions covered, their geographical reach, and their personal remits.<sup>311</sup> It may work as 'an exception in the application of the relevant provision' (Belgium), as a bar to prosecution (France), as 'an exclusion from punishment' (Spain, Greece), or as a 'supervening defence' (Ireland). The latter approach transfers the burden of proof to the defendant, which is problematic from a presumption of innocence standpoint.<sup>312</sup> Different understandings of what constitutes 'humanitarian assistance' also abound.<sup>313</sup> There is no correlation, however, between having implemented the option and criminalising humanitarian assistance. The study detects cases going in both directions. On the one hand, it presents countries where criminalisation cases exist, in spite of transposition of the humanitarian clause (Italy and Greece). On the other hand, it also refers to countries where cases have not been identified or criminalisation has otherwise been averted, irrespective of non-transposition of the exemption (Austria, Luxembourg, Portugal). The Commission Guidance is found to have had no significant impact, with no legislative or policy changes prompted by its adoption (except in Ireland).<sup>314</sup>

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<sup>305</sup> Milieu, [Study supporting the Implementation of the Facilitators Package](#), September 2024.

<sup>306</sup> Ibid. This is what transpires from p. 7 and the indication 'manuscript completed in September 2024' as well as from the watermark 'European Union, 2024'.

<sup>307</sup> This, and the absence of an impact assessment, have prompted the complaint (No. 202402031) to the EU Ombudsman submitted by PICUM (Platform for International Cooperation on Undocumented Migrants) and EDRI (European Digital Rights) on 7 November 2024 (on file with the author). For EDRI's submission, see [Complaint to the European Ombudsman](#), 4 November 2024. See also letter by the European Commission, [Ref. Ares\(2024\)6260282 – 04/09/2024](#).

<sup>308</sup> [Milieu Study](#), p. 9.

<sup>309</sup> Ibid., pp. 10–31.

<sup>310</sup> Ibid., pp. 13–16, 35–38. Some countries require 'unlawful enrichment' as part of the offence, see e.g. Austria, p. 37.

<sup>311</sup> Ibid., pp. 31–57.

<sup>312</sup> Ibid., pp. 32–33.

<sup>313</sup> Ibid., pp. 33–35.

<sup>314</sup> Ibid., p. 28.

The most substantial challenge identified in the Milieu study concerns the different approaches to the benefit element by law-enforcement and judicial authorities across Member States.<sup>315</sup> While in some countries the focus is on cases engaging organised criminal groups and facilitation committed with lucrative intent (like in Bulgaria, Cyprus, Luxembourg or Portugal), other countries also target low-ranking facilitation, charging migrants as perpetrators or abettors (like in Belgium, Greece, Italy and Poland).<sup>316</sup> In addition, the study identifies 71 cases of humanitarian assistance being criminalised in the eight Member States used as a sample to investigate this phenomenon.<sup>317</sup> Since 2015, as many as 236 persons have been investigated or prosecuted in Belgium, Greece, Spain, France, Croatia, Italy, Poland, and Sweden for the facilitation of irregular migration on solidarity or other selfless grounds.<sup>318</sup> According to the study, 'in the vast majority of cases' the accused were activists, volunteers, NGO personnel, or members of associations (131 of all defendants), followed by crew of SAR operations (38), and helpers (30), including parents accused of smuggling their own children.<sup>319</sup>

The Milieu study contains a 'problem definition' section intended as a basis for a future impact assessment that the study specifically recommends the Commission to undertake.<sup>320</sup> Two key issues are identified in this regard: (1) the lack of a common definition and application of the offence of facilitation and, relatedly, (2) the unclear delimitation of the offence vis-à-vis the notion of 'humanitarian assistance'.<sup>321</sup> The study also cautions that these issues are important since they may infringe upon the basic rights of migrants and those who engage with them on selfless grounds, including their consideration as victims rather than perpetrators.<sup>322</sup> As a ramification of this, the study detects related effects on NGOs and human rights defenders, who have been targeted in several situations, including through administrative practices beyond the formal criminalisation framework.<sup>323</sup> Cases against them have a chilling effect, may silence dissent, erode democratic freedoms,<sup>324</sup> and thus 'run counter international law and fundamental rights', thereby affecting the EU's reputation and its human rights and rule of law credentials.<sup>325</sup>

The main recommendation formulated by Milieu is for the Commission to conduct a comprehensive appraisal of the situation concerning the criminalisation of humanitarian assistance, particularly following up on cases of alleged harassment, intimidation, and defamation of civil society actors, and undertake a thorough impact assessment prior to reforming the Facilitators Package.<sup>326</sup>

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<sup>315</sup> Whether obtaining a material or other benefit is a constitutive element of the facilitation offence, as required by the UN Protocol definition of migrant smuggling (see Section 2.1.1 above), has no uniform interpretation across Member States.

<sup>316</sup> [Milieu Study](#), Executive Summary.

<sup>317</sup> *Ibid.*, p. 43.

<sup>318</sup> *Ibid.*, pp. 42-57.

<sup>319</sup> *Ibid.*, p. 44 ff.

<sup>320</sup> *Ibid.*, pp. 58-84. See also p. 7: 'The most pertinent recommendation is to launch another comprehensive evaluation and impact assessment in view of revising the Facilitators' Package. In relation to the current Package, we recommend investigating where the transposition and/or application in the Member States is not in line with the EU rules and take the necessary action vis-à-vis the concerned Member States. This also includes following up on cases of alleged harassment of C[ivil] S[ociety] O[rganisations] and of shrinking civil space. Guidance going beyond the 2020 Guidance should also be considered'.

<sup>321</sup> *Ibid.*, pp. 60-61.

<sup>322</sup> *Ibid.*, pp. 69-72, 74-80.

<sup>323</sup> *Ibid.*, pp. 54-57 on administrative hurdles introduced in Italy, Malta, Spain, and Greece, regarding SAR NGOs.

<sup>324</sup> *Ibid.*, pp. 72-74.

<sup>325</sup> *Ibid.*, p. 7.

<sup>326</sup> *Ibid.*, pp. 85-86.

### 3.5. The proposed 2023 reform

In November 2023, the Commission submitted a 'migrant smuggling package'.<sup>327</sup> Alongside its *Global Alliance to Counter Migrant Smuggling*,<sup>328</sup> the Commission presented a proposal for a Regulation to enhance police cooperation, reinforce Europol's role, strengthening coordination at EU level, enhancing information sharing, inter-agency cooperation, and common resources in the fight against migrant smuggling and trafficking in human beings.<sup>329</sup> It also proposed to reform the facilitators *acquis*, by replacing both the 2002 Facilitation Directive and Framework Decision with a single legal instrument, to 'update' and 'modernise' the existing legal framework.<sup>330</sup>

Although the focus, in the explanatory memorandum, is on '[m]igrant smuggling [as] a criminal activity that disrespects human life and strips people of their dignity *in the pursuit of profit*',<sup>331</sup> profit is not part of the provisions of the text of the proposed directive.<sup>332</sup> It does not make part of the definitional elements of the new baseline crime proposed by the Commission. '[L]ucrative intent' is presumably the main indicator of the offender's intention to perpetrate the crime, 'in particular by organised criminal groups'.<sup>333</sup> However, this wording has also not been transposed into the text of the proposed directive.<sup>334</sup> Merely 'intentionally assisting a third-country national to enter ... transit ... or stay within the territory of any Member State in breach of [the] relevant ... laws ... constitutes a criminal offence where [the perpetrator] 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',<sup>335</sup> which potentially covers a wide spectrum of morally irreprehensible behaviour. Providing legal assistance in exchange for a fee, or delivering rescue or medical services on a salaried basis, or on receipt of donations for the sustenance of an NGO's independent functioning,<sup>336</sup> could potentially be interpreted as coming within the remit of this clause — as has happened in the past.<sup>337</sup> This has also been highlighted in the external studies undertaken on behalf of the Commission and the Parliament.

The offence is also committed where 'there is a high likelihood of causing serious harm' or if it amounts to 'publicly instigating third-country nationals to enter [irregularly]', with or without the intermediation of profit.<sup>338</sup> Insofar as maritime SAR and similar initiatives on land (e.g. across the

<sup>327</sup> European Commission, '[Commission launches a Global Alliance to Counter Migrant Smuggling and proposes a strengthened EU legal framework](#)', press release, 28 November 2023.

<sup>328</sup> European Commission, '[Call to Action on a Global Alliance to Counter Migrant Smuggling](#)', 28 November 2023.

<sup>329</sup> [2023 Europol Regulation Proposal](#).

<sup>330</sup> [2023 Facilitation Directive Proposal](#), Recital 2 and explanatory memorandum, pp. 2–3.

<sup>331</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 1 (emphasis added). For a critique of this understanding, see e.g. Eamon Aloyo and Eugenio Cusumano, 'Morally evaluating human smuggling: the case of migration to Europe', *Critical Review of International Social and Political Philosophy*, Vol. 24(2), 2021, p. 133.

<sup>332</sup> 'Profit' is mentioned in the explanatory memorandum and in recital 1, however, it is not part of the provisions of the proposed directive.

<sup>333</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 9.

<sup>334</sup> Cf. 2023 Facilitation Directive Proposal, Articles 3–5.

<sup>335</sup> 2023 Facilitation Directive Proposal, Article 3(1)(a).

<sup>336</sup> '[Hungary to criminalise migrant helpers with "Stop Soros" legislation](#)', *The Guardian*, 29 May 2018.

<sup>337</sup> Amnesty International, '[Greece: Regulation of NGOs working on migration and asylum threatens civic space](#)', 31 July 2020.

<sup>338</sup> 2023 Facilitation Directive Proposal, Articles 3(1)(b) and 3(2).



Alps<sup>339</sup> or at the EU-Belarus border<sup>340</sup>) entail an inherent risk of harm and considering the absence of a definition of 'public instigation' in the body of the directive,<sup>341</sup> the continued criminalisation of humanitarian conduct cannot be excluded under the proposed provisions. The Commission itself asserts that the elements of the crime 'will *usually not* be fulfilled when it comes to ... the provision of humanitarian assistance or the support of basic human needs',<sup>342</sup> but it fails to rule it out in all cases.

Although the Commission is aware of the fact that the 'broad definition of the offence and the absence of exemptions' are the main challenges posed by the 2002 Facilitators Package, acknowledging that it 'has not been effective in creating clarity and legal certainty',<sup>343</sup> there is no exoneration clause in the new proposed version of the directive. With the optional provision in the current Article 1(2) being taken off the text, the proposed draft risks to add further ambiguity. While 'it is not the purpose of this Directive to criminalise ... humanitarian assistance or the support of basic human needs', this is contemplated only if 'provided ... in compliance with legal obligations',<sup>344</sup> leaving assistance or support activities that are permitted, though not mandated, by law in an uncertain position.

### 3.6. Persisting issue: lack of impact assessment

According to several observers, the Commission proposal 'seems to have been rushed for political considerations',<sup>345</sup> possibly on account of the preliminary ruling request in the *Kinsa* litigation.<sup>346</sup> The legislative initiative was not included in the Commission's 2023 work programme,<sup>347</sup> neither was it clearly scheduled as part of the renewed EU action plan against migrant smuggling (2021–2025).<sup>348</sup>

For that reason, the submission of the proposed directive without an impact assessment has been the subject of criticism, with the UN Special Rapporteur on Human Rights Defenders referring to it as 'a shocking omission',<sup>349</sup> while the European Data Protection Supervisor (EDPS) considered the

<sup>339</sup> ['In the highest city in France, welcoming migrants is becoming increasingly complicated'](#), *Le Monde*, 14 August 2023.

<sup>340</sup> ECRE, [EU Eastern borders: more deaths at Poland Belarus border as reports of pushbacks, detention and crack-down on solidarity continue, Council of Europe concerned over pushbacks and criminalisation in Latvia](#), 17 February 2023.

<sup>341</sup> Cf. 2023 Facilitation Directive Proposal, Recital 6.

<sup>342</sup> *Ibid.*, Recital 7 (emphasis added).

<sup>343</sup> *Ibid.*, explanatory memorandum, p. 3.

<sup>344</sup> *Ibid.*, Recital 7.

<sup>345</sup> Letter by PICUM and EDRi to the European Commission regarding the lack of proper impact assessments, 7 February 2024 (on file with the author).

<sup>346</sup> Valsamis Mitsilegas, 'Reforming EU criminal law on the facilitation of unauthorised entry: the new Commission proposal in the light of the Kinshasa litigation', *New Journal of European Criminal Law*, Vol. 15(1), 2024, p. 3, referring to: CJEU, Case C-460/23 *Kinsa* ([preliminary ruling request](#)). The case has subsequently been renamed 'Kinsa'. See Opinion of the Advocate General, Case C-460/23 *Kinsa*, ECLI:EU:C:2024:941. This view has been shared by several of the stakeholders interviewed for this study.

<sup>347</sup> Commission Work Programme 2023, [COM\(2022\) 548](#). The initiative was part of the Commission Work Programme 2024, [COM\(2023\) 638](#), published in October 2023, ca. one month before the migrant smuggling package was tabled.

<sup>348</sup> European Commission, A renewed EU action plan against migrant smuggling (2021–2025), [COM\(2021\) 591](#). The plan stated, on p. 18, that: 'The Commission intends to report on the implementation of the Facilitators package, including on the implementation of the 2020 guidance, in 2023' and, 'if necessary', on the results of that report, 'the Commission will propose to revise the legal framework to ensure that the EU is equipped to implement the policy framework created by this EU action plan to respond to the constantly evolving challenges in this area' (emphasis added).

<sup>349</sup> UN Special Rapporteur on the Situation of Human Rights Defenders, [Response to the proposal by the European Commission for a Directive to update the Facilitators Package](#), February 2024, p. 2.

situation 'deeply worrying'.<sup>350</sup> In this line, the European Economic and Social Committee (EESC) has called 'for more transparency' in the preparation of legislative proposals.<sup>351</sup> Impact assessments constitute an essential element of the Commission's Better Regulation agenda.<sup>352</sup> Their key role has been confirmed in the 2016 Interinstitutional Agreement on Better Law-Making, which recognises the 'positive contribution of impact assessments in improving the quality of Union legislation' by '[helping] the three Institutions [to] reach well-informed decisions'.<sup>353</sup> In response to the criticism, the Commission issued an analytical staff working document supporting the proposal six months after the proposal's submission.<sup>354</sup> However, the latter cannot be considered to substitute the impact assessment, as it does not measure fundamental rights implications, nor does it present several policy options or justify why the selected approach was retained among possible alternatives.<sup>355</sup> This is, nonetheless, a key feature of impact assessments, which 'shall be presented in such way as to facilitate the consideration by the European Parliament and the Council of the choices made by the Commission',<sup>356</sup> while guaranteeing that fundamental rights are 'fully respected'.<sup>357</sup> The Court of Justice has emphasised that where significant social impacts are expected, 'the preparation of impact assessments is a step in the legislative process that, as a rule, must take place'.<sup>358</sup>

The Commission dispensed with this requirement altogether 'due to the urgency to prepare the two legislative proposals and the need to act swiftly on tackling migrant smuggling'.<sup>359</sup> The urgency ground, however, cannot be used as a blanket exemption. On the contrary, it needs to be adequately justified. The Commission's Better Regulation Guidelines indicate that, '[w]here an impact assessment is required ... but ... is not possible ... an analytical document in the form of a staff working document presenting the evidence behind the proposal and cost estimates should be prepared within three months of the initiative's adoption'.<sup>360</sup> An explanation of why it is 'not possible' to undertake must be provided. Yet, in this case, the Commission did not elaborate on the circumstances impeding an impact assessment. Furthermore, it delivered its analytical staff working document in double the time expected, and failed to incorporate a significant range of publicly

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<sup>350</sup> EDPS, [Opinion 4/2024](#) on the Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794, January 2024, para. 8, p. 6.

<sup>351</sup> EESC, [Opinion: Anti-Smuggling Package](#), SOC/787-EESC-2024, 10 July 2024, para. 1.8.

<sup>352</sup> Commission, [Better Regulation Agenda: why and how](#). See also Chapter IV of the [Better Regulation Guidelines](#), November 2021.

<sup>353</sup> [Interinstitutional Agreement](#) between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, para. 12.

<sup>354</sup> Yet the SWD was not published via the official channels, it is not in the Commission register of documents nor in EurLex.

<sup>355</sup> Analytical supporting document, [SWD\(2024\) 134](#).

<sup>356</sup> [Interinstitutional Agreement](#) between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, para. 14.

<sup>357</sup> *Ibid.*, para. 12.

<sup>358</sup> CJEU, Case C-482/17 *Czech Republic v Parliament and Council* ECLI:EU:C:2019:1035, para. 84.

<sup>359</sup> European Commission, Response letter addressed to EDRI and PICUM, Ref. Ares(2024)2580015 – 09/04/2024 (on file with the author), p. 1.

<sup>360</sup> Better Regulation Guidelines, [SWD\(2021\) 305](#), p. 30.

available sources, including the European Parliament's 2016 and 2018 studies<sup>361</sup> and abundant academic and civil society literature on the subject.<sup>362</sup>

Many of the issues identified in the analytical staff working document are instead supported with evidence from the 2017 REFIT evaluation and with data from Eurojust's 2018 *Casework on Migrant Smuggling*.<sup>363</sup> In the six intervening years, the Commission could have conducted an impact assessment to adequately support the proposed reform. The need to enhance the investigation and prosecution of criminal networks, to harmonise penalties, revise jurisdictional provisions, reinforce Member States' resources to counter migrant smuggling, and improve data collection and reporting, was already highlighted in these documents.<sup>364</sup> In fact, the challenges identified in the 2017 REFIT evaluation: (1) 'differences in national legislation and the levels of enforcement', (2) 'lack of clarity of the current definition' of migrant smuggling and its 'distinction ... [to] humanitarian assistance', and (3) 'serious lack of reliable and comparable data on migrant smuggling offences and criminal justice responses', provide the main guidance to the reform.<sup>365</sup>

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<sup>361</sup> Sergio Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, December 2016; and Sergio Carrera et al., ['Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update'](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, December 2018.

<sup>362</sup> e.g. ReSOMA, [The criminalisation of solidarity in Europe](#), March 2020; Amnesty International, [Punishing compassion: Solidarity on trial in Fortress Europe](#), March 2020; OMCT, [Europe: Open season on solidarity](#), November 2021; Marta Gionco and Jyothi Kanics, [Resilience and resistance: in defiance of the criminalisation of solidarity across Europe](#), The Greens/EFA, June 2022; PICUM, [More than 100 people criminalised for acting in solidarity with migrants in the EU in 2022](#), 2023.

<sup>363</sup> Eurojust, [Report of Eurojust's casework in the field of migrant smuggling](#), 1 April 2018.

<sup>364</sup> These are the five objectives of the reform proposal. See analytical supporting document, [SWD\(2024\) 134](#), pp. 4-7.

<sup>365</sup> Ibid., p. 8.

## 4. Review of the proposed objectives and coherence analysis

This chapter offers an analysis of the main elements of the proposal, critically and thoroughly reviewing the objectives of the Commission proposal as formulated therein and in light of coherence considerations. It sets off by assessing the relevance of the stated objectives with regard to the legal and implementation challenges established in the previous chapter. Whether alternative or additional objectives should be considered is also determined. The chapter then follows with an examination of the interplay and compatibility of the proposal's provisions with international rules and related EU law and policy. The interplay with the proposed Regulation on police cooperation is considered in detail.

### 4.1. Objectives of the draft directive

The overarching objective of the proposed directive is to update and modernise the Facilitators Package<sup>366</sup> to prevent and fight migrant smuggling, considered 'a criminal activity that disrespects human life and strips people of their dignity in the pursuit of profit'.<sup>367</sup> This is deemed 'crucial to addressing irregular migration in a comprehensive way', targeting the criminal networks that 'take advantage of people's despair ... putting people's lives at risk and seeking in every way to maximise their profits'.<sup>368</sup> This is in line with the New Pact on Migration and Asylum, which places countering migrant smuggling 'at the centre of its comprehensive approach to migration'.<sup>369</sup> With this in mind, the proposal identifies five core objectives reviewed in the next sections.<sup>370</sup>

#### 4.1.1. Ensuring an effective investigation, prosecution and sanctioning of organised criminal networks responsible for migrant smuggling

In order to ensure an effective criminal justice response to migrant smuggling and the organised criminal networks responsible for it, relying on the 2017 REFIT evaluation, the Commission points to the challenges posed by the current definition of the crime of facilitation, which dates from 2002. This definition is deemed too broad and 'not ... effective in creating clarity and legal certainty', especially with regard to the 'distinction between facilitation of irregular migration and humanitarian assistance'.<sup>371</sup> The newly proposed Articles 3, 4 and 5 are intended to bring clarity on the conducts to be criminalised. The Commission declares that the purpose is 'not to criminalise third-country nationals for the fact of being smuggled, assistance provided to family members, or humanitarian assistance or the support of basic human needs provided to third-country nationals', without however introducing explicit exemptions or adopting specific safeguards in the operative part of the directive and caveating the provision to actions undertaken 'in compliance with legal obligations'.<sup>372</sup>

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<sup>366</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 2 and Recital 2.

<sup>367</sup> Ibid., p. 1 and Recital 1.

<sup>368</sup> Ibid.

<sup>369</sup> Ibid., p. 2 and Recital 3.

<sup>370</sup> Analytical supporting document, [SWD\(2024\) 134](#), pp. 23–24.

<sup>371</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 3.

<sup>372</sup> Ibid. See also analytical supporting document, [SWD\(2024\) 134](#), p. 5.

### 4.1.2. Harmonising penalties that take account of the seriousness of the offence

On the basis of the increased violence by criminal networks towards migrants and law enforcement authorities, the Commission introduces the notion of 'aggravated criminal offences' in draft Article 4.<sup>373</sup> The goal is to more severely punish offences committed as part of an organised criminal group, causing serious harm or threatening life, and when causing death, attaching higher penalties, thereby 'reflect[ing] the higher social concern regarding more serious and harmful conducts'.<sup>374</sup> The Commission also proposes to increase the minimum level of maximum penalties. Article 6 of the proposed directive contemplates a maximum level of 3 years imprisonment for the main offence, at least 10 years for aggravated offences, and 15 years for the most serious offences. Accessory measures, such as forcible return and entry bans are also set out.<sup>375</sup> Attempts that are considered to cause death of one or more third-country nationals are also to be severely penalised.<sup>376</sup>

### 4.1.3. Improving the jurisdictional reach

Draft Article 12 aims at extending the jurisdiction of EU Member States, enabling them to prosecute a wider plethora of criminalised acts that tend to occur extra-territorially, including in international waters.<sup>377</sup> This is intended to 'increase the possibilities of sanctioning high-value targets who are organising smuggling activities [remotely] and to avoid a situation where no State is able to exercise jurisdiction'.<sup>378</sup> In addition to jurisdictional bases recognised in international law, like nationality, flag or registration, the proposal also includes unorthodox grounds like habitual residence (Article 12(1)b)), and the conduct of business (without formal establishment) in the EU (Article 12(1)c). It also covers facilitation attempts presumed to target the Member States but that fail to materialise and where third-country nationals lose their lives.

### 4.1.4. Reinforcing Member States' resources to tackle and prevent migrant smuggling

Without making provision for specific means to be attributed, the Commission requires Member States to ensure that national authorities involved in anti-facilitation efforts have adequate resources, in terms of staff, financial, technical and technological equipment.<sup>379</sup> Article 14 aims to ensure the effective performance of their functions to overcome obstacles related to the effective prevention and punishment of offences in connection with the directive, while Article 15 seeks to guarantee specialised and regular training.<sup>380</sup> Information and awareness-raising campaigns as well as education and research programmes conducted in cooperation with other Member States, relevant EU agencies, third countries, and other stakeholders, are contemplated in Article 13.<sup>381</sup> Article 16, in turn, mandates that effective investigative tools be made available at national level, including 'special investigative tools, such as those ... used in countering organised crime and other

<sup>373</sup> This is different from 'aggravating circumstances', which are regulated separately in Article 9. See also Recital 14. See also analytical supporting document, [SWD\(2024\)134](#), pp. 5-6.

<sup>374</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 3 and Recital 9.

<sup>375</sup> *Ibid.*, Recital 11 and Article 6(5).

<sup>376</sup> *Ibid.*, Recitals 12 and 19 and Articles 5, 4(e) and 12(2) read in conjunction.

<sup>377</sup> See also Recital 18.

<sup>378</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 4. See also analytical supporting document, [SWD\(2024\)134](#), pp. 6 and 13-14.

<sup>379</sup> Analytical supporting document, [SWD\(2024\)134](#), p. 6.

<sup>380</sup> 2023 Facilitation Directive Proposal, Recitals 22 and 23.

<sup>381</sup> *Ibid.*, Recital 21.

serious crime cases'. These include 'the interception of communications, covert surveillance, [or] monitoring bank accounts'.<sup>382</sup>

#### 4.1.5. Improving data collection and reporting

The lack of 'robust, comprehensive and comparable data on migrant smuggling offences and criminal justice responses at national and European level' has been a key shortcoming hindering progress and the proper assessment of the Facilitators Package, identified already in the 2017 REFIT evaluation.<sup>383</sup> This impedes the effective monitoring of implementation and the measuring of the effectiveness of any instruments adopted. The Commission, thus, proposes that Member States be legally bound to collect and report statistics on a series of elements in proposed Article 17 on a yearly basis. This is intended to support a better understanding of the phenomenon (e.g. its nature and scale), the detection of cases and, more generally, evidence-based policy-making.<sup>384</sup>

## 4.2. Additional objectives pursued

The proposal identifies several additional objectives stemming from previous evaluations, stakeholder consultations, and information provided by JHA agencies, in particular Europol, Eurojust and Frontex.<sup>385</sup>

First, the directive seeks to 'update', 'amend and expand', and generally **modernise the EU legal framework on facilitation**,<sup>386</sup> ensuring the approximation of Member States' rules by establishing a common definition of the offence (including with regard to its geographical scope<sup>387</sup>) and setting out minimum rules for penalties, liability of natural and legal persons, and jurisdiction.<sup>388</sup>

Second, the directive aims to **address implementation challenges** identified in several evaluations and fitness checks of existing legislation, particularly in the 2017 REFIT evaluation and the 2024 Milieu study on the implementation of the Facilitators Package.<sup>389</sup> These relate to stark differences across Member States in the transposition, implementation, application, and enforcement of the relevant rules, especially in terms of widely differing definitions of the offence of facilitation and its distinction from the provision of humanitarian assistance. Indeed, as the Commission posits, 'people providing services to irregular migrants in the context of their professional activities or providing assistance for selfless reasons have ... been prosecuted' in several Member States.<sup>390</sup> This is presented as being at odds with the key aim to 'focus on offences committed with a lucrative intent in particular by organised criminal groups',<sup>391</sup> making it necessary to 'further align the definition of the offence ... in particular with regard to the element of financial gain'.<sup>392</sup>

<sup>382</sup> Ibid., Recital 24. See also analytical supporting document, [SWD\(2024\) 134](#), p. 22.

<sup>383</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 4. See also analytical supporting document, [SWD\(2024\) 134](#), pp. 6-7 and 14. Invitations to this effect in the EU [action plan against smuggling \(2015-2020\)](#) and the [renewed action plan \(2021-2025\)](#) have been without much success.

<sup>384</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, pp. 4-5 and 8 and Recital 26.

<sup>385</sup> Ibid., p. 10.

<sup>386</sup> Ibid., Recitals 2 and 29. See also Article 1 and analytical supporting document, [SWD\(2024\) 134](#), p. 3.

<sup>387</sup> Analytical supporting document, [SWD\(2024\) 134](#), p. 12.

<sup>388</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 7 and Recitals 5 and 8.

<sup>389</sup> Ibid., pp. 8-9. See also analytical supporting document, [SWD\(2024\) 134](#), p. 4.

<sup>390</sup> Ibid., p. 9.

<sup>391</sup> Ibid.

<sup>392</sup> Ibid., p. 10.

Third, the Commission intends for the proposed directive to **make an overall contribution to reducing irregular migration to the EU**.<sup>393</sup> The proposed provisions are said to produce an enhanced deterrent effect in comparison to the 2002 package, whose 'deterrent effect ... was questioned against the background of increasing migrant smuggling to the EU'.<sup>394</sup> Available data disclose a '66 % increase' of irregular entries detected at external borders in 2022 compared to the previous year, a 'new record [of] 15 000 migrant smugglers reported ... in 2022', and an estimated '90 % of [all] irregular migrants who reach the EU [to] make use of the services of smugglers, mostly organised in criminal groups'.<sup>395</sup> These figures do not take account of how many of those persons are subsequently recognised as refugees or granted subsidiary protection or other status under national law, nor do they consider the lack of legal channels to reach the EU to exercise the right to asylum.<sup>396</sup>

Fourth, the Commission presents **anti-facilitation policy as a means to protect migrants** making the object thereof. Without introducing any specific safeguards, the proposal is said to 'respect ... the fundamental rights and observe ... the principles recognised by Articles 2 and 6 [TEU] and enshrined in the Charter of Fundamental Rights'.<sup>397</sup> The 'increase[d] effectiveness of tackling the crime of migrant smuggling' is seen, per se and without more, as 'also increase[ing] the protection of all relevant fundamental rights of the third-country nationals concerned'.<sup>398</sup>

### 4.3. Coherence assessment

The coherence assessment undertaken by the Commission is rather cursory. More specifically, it is limited to affirming that the proposed directive is 'consistent and coherent' with the relevant instruments of international and EU law and policy in the domain of irregular migration and anti-smuggling efforts.<sup>399</sup> No further analysis is presented in the proposed directive, nor the analytical working document.

#### 4.3.1. Alignment with international law

The cross-border nature of the facilitation of unauthorised entry, stay and transit is a key element to be taken into account when adopting measures in this domain. Accordingly, EU and national measures should build on the international commitments of the EU and its Member States.<sup>400</sup> In this line, the Commission asserts, without specifically elaborating on it, that the proposal is consistent with the **UN Smuggling Protocol**.<sup>401</sup> It acknowledges that the Protocol includes financial or other benefit as a constituent element of the crime, without extracting any conclusions from the fact that Article 3 of the proposed directive is much broader in its definition of the baseline offences of facilitation of irregular migration than the equivalent provision in the UN Protocol.

The analysis in Chapter 2 of the present study demonstrates that the definition of 'smuggling of migrants' in Article 3(a) of the Protocol requires the 'procurement' of 'illegal entry' that is 'committed

<sup>393</sup> Analytical supporting document, [SWD\(2024\) 134](#), p. 7.

<sup>394</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 8.

<sup>395</sup> *Ibid.*, p. 1. See also analytical supporting document, [SWD\(2024\) 134](#), p. 2. In addition, according to the [renewed action plan \(2021-2025\)](#), p. 4, an estimated '85 % to 90 % of migrant smuggling into the EU is enabled by sea'.

<sup>396</sup> Red Cross EU Office, [RCEU comments on the revised EU Facilitation Directive](#), 7 March 2024, p. 3.

<sup>397</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 10 and Recital 28. See also a generic mention of the Convention on the Rights of the Child in Recital 4.

<sup>398</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 10.

<sup>399</sup> *Ibid.*, p. 5.

<sup>400</sup> *Ibid.*, Recital 4.

<sup>401</sup> *Ibid.*, p. 5.

intentionally' and specifically 'in order to obtain' a financial or other benefit as part of 'an organised criminal group'.<sup>402</sup> The benefit component has been included in the proposed directive (Article 3(1)(a)) but in very broad form, to the effect that any person who facilitates irregular migration shall be criminalised if s/he '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', regardless of whether it has been actually obtained or even accepted as a matter of fact.<sup>403</sup> Moreover, the criminal intent required under the proposed directive is linked to the intention of assisting unauthorised migration rather than of obtaining the financial or other benefit at stake.<sup>404</sup> The proposal does not include the benefit requirement under Article 3(1)(b) and (2), with regard to situations with a high likelihood of causing serious harm to a person, and in instances of public instigation of third-country nationals to enter, transit, or stay without authorisation. At the same time, the requirement of the offence being committed 'within the framework of a criminal organisation' is part of the 'aggravated criminal offences' in Article 4, instead of a constitutive element of the baseline crime.

As noted in Section 2.1.2. above, the UN Protocol includes a number of exclusions, exemptions and saving clauses that have not been transposed by the Commission in its proposal. Smuggled migrants are considered victims under the UN regime and 'shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of [smuggling]'.<sup>405</sup> Article 16 of the Protocol explicitly requires Contracting Parties to adopt 'all appropriate measures ... to preserve and protect the rights of [smuggled migrants]'. Recognising their condition as victims, specific protections and 'assistance' in this regard must be adopted as well.<sup>406</sup> Although the Commission partly acknowledges the Protocol's approach, when specifying in the explanatory memorandum that 'third-country nationals are not to become liable to criminal prosecution ... for having been subject to the offence', there is no specific provision in the main body of the proposed directive to this effect, only a preambular statement in Recital 7.

Full alignment with the UN Protocol definition would have been beneficial not only to ensure compliance with UN law obligations, but also to reinforce conformity with the autonomous requirements imposed by the EU principle of legality, analysed in the next chapter. This would enhance uniformity and predictability,<sup>407</sup> as well as improve cross-border effectiveness of anti-smuggling efforts both within and beyond the EU.

Besides the transnational framework against organised crime, the Commission acknowledges the relevance of the **law of the sea and maritime Conventions** as part of the international commitments that EU and Member States' actions 'should ... take into account',<sup>408</sup> presumably with a view to 'prevent[ing] irregular migration and loss of life'.<sup>409</sup> However, rescue obligations are not specifically taken into account to exonerate conduct aimed at saving human lives. The optional exoneration clause in current Article 1(2) of the 2002 Facilitation Directive has been replaced with a generic statement in Recital 7, where the Commission declares that 'it is not the purpose of this Directive to

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<sup>402</sup> SoM, Article 3(a) in light of Articles 4 and 6(1).

<sup>403</sup> UNHCR, [UNHCR comments on the Commission proposal for a Facilitation Directive \(Anti-Smuggling Directive\) – COM\(2023\) 755](#), 14 March 2024, para. 22.

<sup>404</sup> Ibid.

<sup>405</sup> SoM, Article 5.

<sup>406</sup> SoM, Article 16(2) and (3).

<sup>407</sup> CJEU, [Opinion](#) of Advocate General De la Tour in Case C-460/23 *Kinsa*, ECLI:EU:C:2024:941, para. 58, speaking of the requirements of 'foreseeability, precision and non-retroactivity of the applicable criminal law' by reference to CJEU, Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936, paras 51–56 and case law cited.

<sup>408</sup> 2023 Facilitation Directive Proposal, Recital 4.

<sup>409</sup> Ibid., Recital 3.



criminalise ... humanitarian assistance or the support of basic human needs', both of which could encapsulate SAR activities. But this is subject to it being 'provided ... in compliance with legal obligations', which modifies the terms in UNCLOS and the SAR and SOLAS Conventions.<sup>410</sup> The clearer statement in the explanatory memorandum (based on the 2020 Commission Guidance), according to which 'criminalisation of any non-state actors that carry out search and rescue operations at sea, complying with the relevant legal framework, amounts to a breach of international law and is therefore not permitted by EU law',<sup>411</sup> has not been retained in the text of the proposed directive.

The Commission also mentions in Recital 4 that the **work of UNODC** should also be taken into account. In this regard, it would have been welcomed that the specific safeguards against the criminalisation of humanitarian assistance called for by UNODC had been introduced in the proposed directive, to effectively ensure the exemption of actions by faith-based organisations, civil society and selfless individuals.<sup>412</sup> Instead, the Commission merely states, again in Recital 7, that the elements of the facilitation offences 'will usually not be fulfilled' in relation to assistance provided among family members, or within the delivery of humanitarian assistance or the support of basic human needs. As already noted, the proposal highlights that 'it is not the purpose of this Directive to criminalise [such conduct]', but it caveats this stipulation and places it under the condition that it be provided 'in compliance with [undefined] legal obligations'.<sup>413</sup> In addition, the proposed directive does not attempt a definition of the concept of 'humanitarian assistance', which should be assessed 'on a case-by-case basis, taking into account all the relevant circumstances'.<sup>414</sup> Consequently, there are no categorical exclusions of interventions by humanitarian actors. All conduct leading directly or indirectly to the unauthorised entry, transit, or stay in the territory of the Member States is, by default, encompassed in the facilitation offences of the Directive.<sup>415</sup> Only individual exemptions may be accorded by the relevant prosecutorial or judicial authorities on an exceptional basis.

Finally, in terms of **international human rights and refugee law standards**, the proposed directive briefly mentions the UN Convention on the Rights of the Child, as an instrument EU and Member State actions should take into account when adopting anti-facilitation measures.<sup>416</sup> The Preamble also requests Member States to 'apply this Directive in accordance and in full compliance with the 1951 [Geneva] Convention', specifically with respect to obligations associated with access to international protection, in particular the principle of *non-refoulement*, and fundamental rights.<sup>417</sup> However, there is no allusion to the principle of non-penalisation for irregular entry/stay of Article 31 of the Geneva Convention. The clause in the operative part of the 2002 Framework Decision, obliging Member States to implement anti-facilitation provisions 'without prejudice to the protection afforded refugees and asylum seekers in accordance with international law ... in particular ... pursuant to Articles 31 and 33 of the 1951 [Geneva] Convention' is no longer part of the text of the proposed directive.<sup>418</sup>

<sup>410</sup> See further Section 2.2 above.

<sup>411</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 5.

<sup>412</sup> UNODC, [The concept of 'financial or other material benefit' in the Smuggling of Migrants Protocol](#), Issue paper 2017, p. 71.

<sup>413</sup> 2023 Facilitation Directive Proposal, Recital 7.

<sup>414</sup> *Ibid.*, explanatory memorandum, p. 5.

<sup>415</sup> Analytical supporting document, [SWD\(2024\) 134](#), p. 8: 'Currently, under EU law, facilitation of irregular entry and transit is criminalised irrespective of whether it is conducted for the purpose of a financial or material benefit ...'.

<sup>416</sup> 2023 Facilitation Directive Proposal, Recital 4.

<sup>417</sup> *Ibid.*, Recital 10.

<sup>418</sup> 2002 Facilitation Framework Decision, Article 6. Cf. SoM, Article 19.

Other than preambular statements, there are no human rights guarantees in the main body of the proposal. The Council's general approach does not introduce significant changes on the matter. Although it proposes to add a saving clause, worded similarly to Article 19 of the UN Protocol, it proposes to do so in the form of a new recital with a convoluted formulation that appears to simply replicate the text of current Recital 7 of the proposed directive.<sup>419</sup> The move, from a binding provision in the body of the instrument (as in the UN Smuggling Protocol) to the preamble (as in the proposed directive) is not inconsequential. Preambular statements aid interpretation but do not per se create self-standing obligations. Demoting legal commitments in this way detracts from their binding force.

### 4.3.2. Consistency with other EU laws and policies

The proposal is considered consistent with the New Pact on Migration and Asylum, which 'provides for a strong European **response to migrant smuggling** inside and outside the EU as an essential part of the comprehensive approach to migration' the Union supports.<sup>420</sup> Furthermore, the proposed directive is said to 'implement ... the renewed EU action plan against smuggling (2021-2025)'.<sup>421</sup> This is achieved by 'updating and modernising the existing EU legal framework to sanction migrant smugglers acting on the migratory routes'.<sup>422</sup> In this way, the proposal coheres with the EU action plans on the Western, Central and Eastern Mediterranean as well as the Western Balkans routes.<sup>423</sup> It is also said to be in line with the Toolbox countering the use of commercial carrier services to facilitate irregular migration<sup>424</sup> and with the proposal for a Regulation on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants thereby facilitating irregular migration to the EU.<sup>425</sup> Yet, no mention is made of the existing Carrier Sanctions Directive,<sup>426</sup> nor of the Regulation concerning the conditions to be complied with to pursue the occupation of road transport operator,<sup>427</sup> which already set out procedures and penalties vis-à-vis transport companies involved in the facilitation of irregular migration, questioning the need for additional measures.<sup>428</sup>

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<sup>419</sup> Council, General Decision, Article 6. Cf. SoM, Article 19.

<sup>419</sup> Council approach, Recital 4. Cf. SoM, Article 19.

<sup>420</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 5 and Recital 3.

<sup>421</sup> *Ibid.*, referring to A renewed EU action plan against migrant smuggling (2021-2025), [COM\(2021\) 591](#).

<sup>422</sup> *Ibid.*

<sup>423</sup> [EU action plan for the Eastern Mediterranean route](#), 18 October 2023; [EU action plan for the Central Mediterranean](#), 21 November 2022; [Action plan for the Western Mediterranean and Atlantic routes](#), 6 June 2023; [EU action plan on the Western Balkans](#), 5 December 2022.

<sup>424</sup> [Toolbox on measures targeting transport operators that facilitate irregular migration to the EU](#), 6.6.2023.

<sup>425</sup> European Commission, Proposal for a Regulation on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union, [COM\(2021\) 753](#).

<sup>426</sup> [Council Directive 2001/51/EC](#) of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985. See also Violeta Moreno-Lax, *Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law*, Oxford University Press, 2017, chapter 5.

<sup>427</sup> [Regulation \(EC\) No 1071/2009](#) of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC.

<sup>428</sup> IRU, [IRU Position on the European Commission proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU](#), 9 April 2024, p. 2.

The Commission considers the proposal to support the objectives pursued under the Security Union Strategy<sup>429</sup> and the revised Maritime Security Strategy,<sup>430</sup> as well as under the EU strategies to tackle organised crime (2021–2025) and human trafficking (2021–2025).<sup>431</sup> Although there are no specific cross-references or any further elaboration in the text of the proposal, neither in the Preamble nor in the operative part, the proposed directive is deemed consistent with several legal instruments in the **criminal justice and irregular migration policy domains**, including the Directive on the freezing and confiscation of instrumentalities and proceeds of crime,<sup>432</sup> the Convention on mutual assistance in criminal matters,<sup>433</sup> the European Investigating Order Directive,<sup>434</sup> the Victims' Rights Directive,<sup>435</sup> the Europol and Eurojust Regulations,<sup>436</sup> the Digital Services Act,<sup>437</sup> the Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal matters,<sup>438</sup> and the Directive on the residence permit issued to victims of trafficking or facilitation who cooperate with the competent authorities.<sup>439</sup> However, some other legislation directly linked with the objective of tracking the assets of organised criminal networks that would have sustained the 'follow the money' approach underpinning anti-smuggling efforts EU-wide is not mentioned. According to Europol, '[t]here should be a link made to AMLA' (the EU's anti-money laundering authority).<sup>440</sup> When targeting high-ranking facilitators, asset freezing and recovery is considered 'more important than prison sentences ... to actually disrupt the business model of smuggling networks'.<sup>441</sup> The link to AMLA, in Europol's view, could be made in the proposed Regulation on enhancing police cooperation that complements the Facilitation Directive proposal.<sup>442</sup>

In any event, consistency claims are not supported by specific provisions, which would have been particularly helpful in ensuring the **protection, assistance, and support to the victims of crime** as

<sup>429</sup> European Commission, EU Security Union Strategy, [COM\(2020\) 605](#).

<sup>430</sup> Council of the EU, Maritime security: Council approves revised EU strategy and action plan, [press release](#), 24 October 2023.

<sup>431</sup> European Commission, EU Strategy to tackle organised crime 2021–2025, [COM\(2021\) 170](#); European Commission, EU strategy on combatting trafficking in human beings 2021– 2025, [COM\(2021\) 171](#).

<sup>432</sup> [Directive 2014/42/EU](#) of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

<sup>433</sup> [Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union](#).

<sup>434</sup> [Directive 2014/41/EU](#) of 3 April 2014 regarding the European Investigation Order in criminal matters.

<sup>435</sup> [Directive 2012/29/EU](#) of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>436</sup> [Regulation \(EU\) 2016/794](#) of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) (hereafter: 'Europol Regulation'); [Regulation \(EU\) 2018/1727](#) of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA. However, the Commission does not explicitly mention the recent amendment to Europol's mandate through [Regulation \(EU\) 2022/991](#) of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation.

<sup>437</sup> [Regulation \(EU\) 2022/2065](#) of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act).

<sup>438</sup> [Council Framework Decision 2009/948/JHA](#) of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

<sup>439</sup> [Council Directive 2004/81/EC](#) of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

<sup>440</sup> Interview with Europol official, 11.12.2024 (transcript on file with the author), p. 1.

<sup>441</sup> Ibid.

<sup>442</sup> [2023 Europol Regulation Proposal](#).

well as the natural and legal persons engaging in humanitarian assistance or the provision of legitimate services without unjust enrichment. Specific clauses to distinguish aggravated forms of facilitation from instances of **human trafficking**, perpetrated through recourse to 'serious violence'<sup>443</sup> or when the offence entails the 'exploitation ... of a third-country national',<sup>444</sup> would be necessary. Links to the **Return Directive**, in line with its provisions, should also be made when imposing accessory measures, including forced return and re-entry bans – the maximum length of which needs to align with the maximum periods allowed under the Return Directive.<sup>445</sup> The same applies to the **asylum *acquis***. No mention has been made of the instruments of the Common European Asylum System to ensure access to procedures and legal advice as well as to reception conditions and assistance services, as per the relevant EU legislation. For this purpose, the new Directive should contain explicit and specific wording to prevent Member States from failing to comply with their obligations under the asylum and fundamental rights *acquis*.<sup>446</sup>

Another aspect to be considered is that the proposed directive lacks – and can hardly provide on its own – **cooperation mechanisms with non-EU countries**. 'Anti-smuggling operational partnerships' are considered key to the success of anti-smuggling efforts.<sup>447</sup> In this regard, according to Europol, among other factors, the lack of alignment of the proposed directive provisions with the UN Protocol definition of smuggling of migrants can make cooperation with third countries more difficult.<sup>448</sup> Such lack of alignment between the EU instruments and the UN Protocol translates into 'the [absence] of a common understanding of smuggling of migrants across jurisdictions'.<sup>449</sup> This is why the proposed directive constitutes 'a missed opportunity' to provide a level playing field on which to build meaningful cooperation with key partners.<sup>450</sup> The expansion of jurisdictional clauses alone is not enough, 'unilateral efforts on the part of the EU will not suffice', when the 'main issue is that activities seen as preparatory to the commission of the crime of facilitation by the EU are considered as legitimate activities by third countries, like the arrangement of transit across Mali, Niger, etc.'<sup>451</sup> This is why, not only from a legal perspective, but also from an operational standpoint, ensuring full alignment with the UN Protocol is important and constitutes a first step to building the trust and confidence necessary to establish international partnerships.<sup>452</sup>

### 4.3.3. The interplay of the proposal with the proposed Regulation on enhancing police cooperation and the role of Europol, COM (2023)754

The proposal for a revised Facilitation Directive was issued at the same time as the proposal for a Regulation on enhancing police cooperation and the role of Europol in relation to the prevention,

<sup>443</sup> 2023 Facilitation Directive Proposal, Article 4(c).

<sup>444</sup> *Ibid.*, Article 9(d).

<sup>445</sup> Cf. Recital 11 and Article 6(5)(b) and (c) calling for 10-year re-entry bans 'in the most serious cases', 'without prejudice to more favourable provisions that may be applicable by virtue of Union ... law'.

<sup>446</sup> Concurring: Meijers Committee, [Comment on the EU's Facilitators Package](#), CM2407, September 2024, p. 4. See also UNHCR, [UNHCR comments on the Commission proposal for a Facilitation Directive \(Anti-Smuggling Directive\) – COM\(2023\) 755](#), 14 March 2024, para. 9.

<sup>447</sup> European Commission, A renewed EU action plan against migrant smuggling (2021–2025), [COM\(2021\) 591](#), p. 9 ff, in particular Section 3.1.1 from p. 12.

<sup>448</sup> Interview with Europol official, 11.12.2024 (transcript on file with the author), p. 2.

<sup>449</sup> *Ibid.* This is also the view of the Parliamentary Assembly of the Council of Europe (PACE), [Recommendation 2283\(2024\)](#), A Shared European approach to address migrant smuggling.

<sup>450</sup> Interview with Europol official, 11.12.2024 (transcript on file with the author), p. 2.

<sup>451</sup> *Ibid.*

<sup>452</sup> In this line, also interview with Eurojust official, 11.12.2024 (transcript on file with the author).

detection and investigation of migrant smuggling and trafficking in human beings.<sup>453</sup> Both proposals were presented on the Commission's launch of a Global Alliance to counter migrant smuggling,<sup>454</sup> to 'complement existing initiatives in the area', and are considered 'part of a coherent package'.<sup>455</sup>

The main goal of the proposed regulation is to 'reinforce Europol's role in the fight against migrant smuggling',<sup>456</sup> which is intended to be achieved through a set of five complementary objectives.<sup>457</sup> These include:

- 1) Enhancing inter-agency cooperation in the JHA area, specifically 'to ensure regular exchange of information and operational cooperation and coordination' between Europol, Frontex and Eurojust;<sup>458</sup>
- 2) improving 'steer and coordination' regarding the fight against migrant smuggling,<sup>459</sup> in particular through the assignment of critical strategic tasks to the European Centre Against Migrant Smuggling (ECAMS) established within Europol;<sup>460</sup>
- 3) strengthening information sharing on migrant smuggling, by introducing new obligations on Member States to collect and share information, including biometrics, with Europol and potentially also third countries<sup>461</sup>;
- 4) reinforcing resources at Member State level through the creation of specialised services connected to ECAMS<sup>462</sup>; and
- 5) enhancing Europol's role regarding operational support for the prevention and countering of migrant smuggling, including by setting up operational task forces and Europol deployments in the Member States for operational support.<sup>463</sup>

All these proposed new tasks and enhanced powers are, nonetheless, based on an unclear definition of 'migrant smuggling', which is intended to encompass 'any of the activities referred to in Articles 3, 4 and 5 of the [proposed Facilitation] Directive'.<sup>464</sup> This cross-referral creates the impression that all forms of facilitation, as contemplated in the draft directive, are akin to migrant smuggling, presumably as defined in the UN Protocol, even though they do not entail a profit element nor a connection with organised crime. Europol's mandate, according to its founding regulation, is however circumscribed to supporting cooperation among law enforcement authorities in the Union with a view to 'preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States'.<sup>465</sup> The offences that amount to 'serious crime' have been enumerated in Article 83(1) TFEU. The list is formulated in exhaustive terms, by using the words '[t]hese areas of crime are the following', and concern only 'terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised

<sup>453</sup> [2023 Europol Regulation Proposal](#).

<sup>454</sup> European Commission, webpage [International Conference on a Global Alliance to Counter Migrant Smuggling](#).

<sup>455</sup> 2023 Europol Regulation Proposal, explanatory memorandum, p. 2. See also 2023 Facilitation Directive Proposal, explanatory memorandum, p. 1.

<sup>456</sup> 2023 Europol Regulation Proposal, explanatory memorandum, p. 3 and Article 1.

<sup>457</sup> *Ibid.*, pp. 3–4.

<sup>458</sup> *Ibid.*, p. 3.

<sup>459</sup> *Ibid.*

<sup>460</sup> *Ibid.*, Articles 3–6. ECAMS' current name is European Centre for Migrant Smuggling.

<sup>461</sup> *Ibid.*, Article 8 and Recital 8.

<sup>462</sup> *Ibid.*, Article 7.

<sup>463</sup> *Ibid.*, Article 9: Amendments proposing new Articles 5a and 5b for the [Europol Regulation](#).

<sup>464</sup> *Ibid.*, Article 2(1).

<sup>465</sup> Europol Regulation, Recital 1. See also Article 3(1) and Annex I.

crime'.<sup>466</sup> The inclusion of other offences requires a unanimous decision by the Council, after the European Parliament has expressed its consent.<sup>467</sup> Therefore, migrant smuggling may only figure insofar as it entails organised crime or if otherwise agreed to constitute a serious crime. This is precisely what was agreed in Annex I of the Europol Regulation, which includes, among other crimes, 'immigrant smuggling and trafficking in human beings'. Accordingly, since the facilitation definition in Articles 3, 4 and 5 of the proposed directive relates to actions that exceed smuggling/trafficking and may instead amount to humanitarian assistance, mutual aid between migrants, including family members, and the provision of services in good faith, these fall beyond the scope of Europol's mission.<sup>468</sup> The action of the two proposals together thus leads to the undue indirect expansion of Europol's powers contrary to the applicable provisions – namely in cases where migrant smuggling is undertaken outside circumstances constituting a serious crime or that involve organised crime.

This overstepping of the limits imposed by the Treaty has further ramifications. The provisions in the proposed regulation enhance the measures foreseen in the proposed Facilitation Directive. In particular, the tasks assigned to the ECAMS reinforce the prevention and resources provisions established in Articles 13 and 14 of the proposed directive. These include the preparation of strategic analyses and risk assessments on migrant smuggling trends, *modus operandi*, and threats and the provision of a framework to support cooperation and coordination of efforts at Member State and Union level, including via data sharing and the exchange of information.<sup>469</sup> For their part, operational actions, including the launch of operational task forces and Europol deployments to execute investigative measures facilitating cross-border information exchange through analytical, operational, technical and forensic support,<sup>470</sup> enhance the provision on investigative tools in Article 16 of the proposed directive. Finally, the new obligations on Member States to collect 'all relevant information concerning and resulting from criminal investigations into migrant smuggling', which is to be transmitted to Europol 'as soon as possible',<sup>471</sup> complement the data collection and statistics obligations set out in Article 17 of the proposed directive. All of this, however, is done on the basis of the presumption that Europol is thereby supporting anti-smuggling efforts, as if all activities in Articles 3, 4 and 5 of the proposed directive amounted to migrant smuggling by definition.

The related impacts on fundamental rights have not been identified nor mitigated by the Commission. Europol, under the proposed reform, will gain additional data processing powers, including regarding biometrics. This is clear from the explanatory memorandum and the legislative financial statement attached to the proposal, which are not part of the operative body of the proposed regulation.<sup>472</sup> As remarked by experts in the field, Europol is, thereby, set to gain 'very broad data processing capacities on a crime that is not clearly defined' and on the ground of ambiguous provisions.<sup>473</sup> There is indeed no specific limitation to gather and analyse data exclusively on forms of facilitation that amount to 'serious crime' or 'organised crime'. Moreover, this is provided

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<sup>466</sup> Article 83(1) TFEU.

<sup>467</sup> Ibid.

<sup>468</sup> Article 88(1) TFEU: 'Europol's mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy'.

<sup>469</sup> 2023 Europol Regulation Proposal, Article 5.

<sup>470</sup> Ibid., Articles 6 and 9, amending Article 4 and introducing new Articles 5a and 5b in the [Europol Regulation](#).

<sup>471</sup> Ibid., Articles 7(2) and 8.

<sup>472</sup> Ibid., explanatory memorandum, pp. 3 and 7, and legislative financial statement, pp. 7, 12 and 21. See also Council of the EU, [Migrant smuggling: Enhanced role of Europol in fighting migrant smuggling](#), press release, 19 June 2024.

<sup>473</sup> Interview with academic expert #1, 18.11.2024 (transcript on file with the author), p. 1.

for 'without safeguards and without accountability'.<sup>474</sup> The lack of guarantees has been highlighted by the European Data Protection Supervisor (EDPS) in his opinion on the proposed regulation, underscoring the 'need to establish mechanisms for mitigation of data protection risks' in the form of 'clear binding rules providing for appropriate safeguards'.<sup>475</sup> The CJEU case law reinforces this proposition by introducing a requirement to allow the processing of biometric data 'only where strictly necessary'.<sup>476</sup> One key concern in this regard is the possibility of sharing personal data with third countries with which the EU has no bilateral agreements concluded under Article 218 TFEU. In these circumstances, in the EDPS' own assessment, Recital 8 of the draft regulation could be read as authorising the transfer of personal data to third countries 'in the absence of an adequacy decision or of adequate or appropriate data protection safeguards', using the exceptional derogation clause in Article 25(5) of the Europol Regulation as a basis. The EDPS is concerned that this might be interpreted as an option, if not an invitation, to systematically exchange data with third countries in disregard of data protection and fundamental rights standards.<sup>477</sup> Although, according to the wording of Article 25(5) of the Europol Regulation, 'derogations may not be applicable to systematic, massive or structural transfers', this wording has not been transposed or recalled in the proposal.

Shortcomings regarding the proposed regulation are thus shared with those affecting the draft Facilitation Directive. As the next chapters demonstrate, the assessment of effectiveness, efficiency, proportionality, and fundamental rights implications provided by the Commission are inadequate, showing that there would have been a need to carry out a detailed analysis in a thorough impact assessment before the Commission adopted its proposals.<sup>478</sup>

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<sup>474</sup> Ibid.

<sup>475</sup> EDPS, [Opinion 4/2024](#), executive summary, p. 2 and para. 21.

<sup>476</sup> CJEU, Case C-205/21 *Ministerstvo na vatreshnite raboti* ECLI:EU:C:2023:49, paras 63, 115-122.

<sup>477</sup> EDPS, [Opinion 4/2024](#), para. 28. See also Sarah Tas and Flavia Patanè, [Proposal for a Regulation on police cooperation to counter migrant smuggling and human trafficking](#), EPDS, European Parliament, 2025.

<sup>478</sup> Insisting on this need, see EPDS, [Opinion 4/2024](#), executive summary, p. 2 and para. 8.

## 5. Effectiveness, efficiency and proportionality assessment

This chapter considers the appropriateness of the proposal's provisions in light of the principles of legality, proportionality, legal certainty, and non-penalisation (of refugees for their illegal entry or stay and of third-country nationals for the fact of being smuggled<sup>479</sup>). Whether the proposed legal framework is well suited to address the dynamic environment wherein facilitation offences occur is paid particular attention, alongside definitional issues regarding the manner in which the crimes (Articles 3–4), ancillary actions (Article 5), aggravating / mitigating circumstances (Articles 9–10), and limitation periods (Article 11) have been framed. Matters of scope (Article 1), to determine whether activities that have no link with an actual or promised financial or material benefit or are very causally distant from the facilitation of irregular entry, transit or stay risk being criminalised, are considered in detail. The proportionality of investigative and prosecuting tools (Recital 24 and Articles 12–17) as well as of the penalties envisaged (Articles 6 and 8) are also addressed. Overall, the chapter conducts an effectiveness, efficiency, and proportionality analysis – as expected of an impact assessment.

### 5.1. Definitional issues: principle of legality and effectiveness assessment

The effectiveness assessment is to consider whether the proposed measures are likely to meet their declared objectives or whether there are obstacles that may generate a significant mismatch.<sup>480</sup> When envisaging legislative reform, the analysis should consider 'how successful EU action has been in achieving or progressing towards its objectives ... identify the factors driving or hindering progress and how they are linked (or not) to the EU intervention'.<sup>481</sup> Both definitional issues and matters of scope, as considered below, affect legal certainty and, ultimately, compliance with the rule of law. Under these principles, the law must be accessible and foreseeable; it must be sufficiently clear for individuals to adjust their conduct to the applicable requirements, which, in turn, must be sufficiently predictable in their application.<sup>482</sup> These elements are the essence of the principle of legality, which constitutes a general principle of EU law.<sup>483</sup> The objective, as signalled by UNODC, is to ensure that 'the public understands what is and what is not criminal', which, in turn, serves to 'support successful investigations and prosecutions'.<sup>484</sup> It also contributes to efficient justice systems and generally promotes public confidence in the justice system overall.<sup>485</sup>

#### 5.1.1. Choice of legal basis

The proposed directive relies on Article 83(2) TFEU as its legal basis. This is the Treaty provision allowing for the approximation of criminal laws to support the effective implementation of a policy area that has already been harmonised, such as the 'common immigration policy', as the Commission

<sup>479</sup> CSR51, Article 31; SoM, Article 5.

<sup>480</sup> European Commission, [Better Regulation Toolbox](#), 2023, Tool #47, pp. 405 ff.

<sup>481</sup> *Ibid.*, p. 405.

<sup>482</sup> ECtHR, *Kafkaris v. Cyprus*, App 21906/04, 12 February 2008, para. 140. See further, Cian Murphy, 'The principle of legality in criminal law under the ECHR', *European Human Rights Law Review*, Vol. 2, 2010, p. 192.

<sup>483</sup> CFR, Article 49. See further Christina Peristeridou, *The principle of legality in European criminal law*, Intersentia, 2015, pp. 182 ff.

<sup>484</sup> Questionnaire replies by UNODC (on file with the author), p. 2.

<sup>485</sup> *Ibid.*



declares.<sup>486</sup> The fact that Article 83(1) TFEU, addressing specifically 'organised crime', has not been selected instead is demonstrative of a mistargeting of efforts.<sup>487</sup> This is especially so when considering that the proposed directive was presented as part of the counter-smuggling package submitted by the Commission, comprising also of the Global Alliance and the Regulation to reinforce Europol's role and inter-agency cooperation precisely in the fight against migrant smuggling.<sup>488</sup> In this context, the choice of Article 83(2) TFEU is particularly problematic insofar as it 'strengthens and normalises [the] use of criminal law for migration management [purposes]',<sup>489</sup> beyond the anti-smuggling terrain. It serves to put criminal justice instruments at the service of migration control on a more general basis — albeit without incorporating the rights-based and victim-protection centred perspective of criminal justice measures. In spite of statements to the contrary in the explanatory memorandum and elsewhere, the legal basis selected in substance demonstrates the paramount goal to be migration control rather than the fight against organised crime.<sup>490</sup>

### 5.1.2. Ensuring effective investigation, prosecution and sanctioning of organised criminal networks responsible for migrant smuggling

The revision of the crime definition and preparatory acts in the proposed directive responds directly to the need of 'ensuring an effective investigation, prosecution and sanctioning' of the facilitation of irregular migration.<sup>491</sup> The challenges identified already in the 2017 REFIT evaluation 'linked to the broad definition' in the 2002 instruments motivate the changes; indeed, the existing definition 'has not been effective in creating clarity and legal certainty'.<sup>492</sup> Stakeholder reactions to the proposal, including input gathered for the present study, corroborate this key shortcoming of the Facilitators Package.

In particular, experts,<sup>493</sup> NGOs,<sup>494</sup> international organisations,<sup>495</sup> professional associations,<sup>496</sup> and EU agencies share the view that 'harmonisation of the definition is not sufficient in the current 2002

<sup>486</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 7.

<sup>487</sup> See also Valsamis Mitsilegas, 'Reforming EU criminal law on the facilitation of unauthorised entry: the new Commission proposal in the light of the Kinshasa litigation', *New Journal of European Criminal Law*, Vol. 15(1), 2024, p. 3.

<sup>488</sup> European Commission, [Commission launches a Global Alliance to Counter Migrant Smuggling and proposes a strengthened EU legal framework](#), press release, 28 November 2023.

<sup>489</sup> Interview with academic expert #1, 18.11.2024 (transcript on file with the author), p. 4.

<sup>490</sup> A different point has been made in the literature challenging the view that migrant mobility be actually in the hands of criminal networks and organised groups, showing how it is arranged in much more spontaneous and organic ways, based on contacts and social support structures. See e.g. Federico Alagna, Gabriella Sanchez and Luigi Achilli, '[New horizons or old barriers? The 2023 EU anti-smuggling directive proposal and human mobility in the Mediterranean](#)', *Mediterranean Politics*, 2024. See also Andrew Fallone, '[Social capital and transnational human smuggling: what is the impact of counter-smuggling policies?](#)', ICMPD, May 2021.

<sup>491</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 3.

<sup>492</sup> Ibid.

<sup>493</sup> Interview with academic expert #1, 18.11.2024 (transcript on file with the author), p. 1; Interview with academic expert #2, 13.11.2024 (transcript on file with the author), p. 1; Interview with academic expert #3, 19.11.2024 (transcript on file with the author), p. 1.

<sup>494</sup> e.g. Red Cross EU Office, '[RCEU comments on the revised EU Facilitation Directive](#)', 7 March 2024, p. 1; Questionnaire replies by PICUM (on file with the author); Sea Watch, '[Briefing on the Commission's proposal for a new Facilitators' Package](#)', March 2024, p. 1 (and references therein).

<sup>495</sup> e.g. Questionnaire replies by UNODC (on file with the author).

<sup>496</sup> e.g. Council of Bars and Law Societies of Europe (CCBE), '[CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit, and stay in the Union](#)', 17 May 2024, p. 1; IRU, '[IRU position on the European Commission proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU](#)', 9 April 2024, p. 1.

package',<sup>497</sup> causing 'issues from an operational perspective due to variations ... across Member States'<sup>498</sup> and having the 'unintended effect of penalising persons exercising the[ir] fundamental right[s]'.<sup>499</sup> In fact, in 2023 alone, at least 117 individuals faced criminal or administrative proceedings on facilitation grounds and 76 migrants have been criminalised.<sup>500</sup> The number of 'boat drivers' arrested in Italy in 2022 was counted at 264.<sup>501</sup> Some consider that, since they extend the terms of the UN Protocol, both the current and proposed definition of facilitation fundamentally revise the accepted meaning of 'smuggling of migrants' thus creating 'a conflict'.<sup>502</sup> Insofar as the expansion affects international law commitments, it contravenes the saving clause in Article 19 of the Protocol. For others, the inconsistency creates a 'disconnect between EU and international law',<sup>503</sup> leading to the 'over-criminalisation',<sup>504</sup> witnessed especially since 2015, that affects rule of law standards.<sup>505</sup> Yet, whether the proposed provisions effectively address these issues is in doubt. Moreover, Member States do not share these concerns and, in the Council's general approach of December 2024,<sup>506</sup> they display a very different attitude, proposing changes that will exacerbate existing problems.

### *Criminal offences (Article 3)*

The new formulation of the baseline crime targets 'intentionally assisting a third-country national to enter, transit across, or stay within the territory of any Member State in breach of relevant [EU or Member State] laws', thus expanding the geographical remit from 'a' to 'any' Member State in comparison to the 2002 formulation.<sup>507</sup> But, unlike the 2002 terms, criminalisation is only contemplated in three cases: (1) when the person concerned 'requests, receives or accepts, directly or indirectly, a financial or other material benefit, or a promise thereof, or carries out the conduct in order to obtain that benefit'; (2) where, with or without a benefit, there is 'a high likelihood of causing serious harm to a person'; and (3) when the person concerned 'publicly instigat[es] third-country nationals to enter, transit across, or stay within the territory of any Member State [irregularly]'.<sup>508</sup>

The issue with option (1) is the very broad conceptualisation of what may amount to a benefit. As pointed out above, the mere promise or expectation of anything characterisable as an advantage, irrespective of it being actually accepted or obtained, can be considered to fulfil this requirement. The lack of a condition of specific lucrative intent is also problematic. It can be interpreted as if facilitation were a strict liability offence,<sup>508</sup> requiring no criminal intention, with underlying motives being irrelevant. This is why, as Europol signals, anybody — including service providers or car-sharing

<sup>497</sup> Interview with Eurojust official, 11.12.2024 (transcript on file with the author).

<sup>498</sup> Interview with Europol official, 11.12.2024 (transcript on file with the author).

<sup>499</sup> UNHCR, [UNHCR comments on the Commission proposal for a Facilitation Directive \(Anti-Smuggling Directive\) – COM\(2023\) 755](#), 14 March 2024, para. 9 and s IV.

<sup>500</sup> PICUM, [Cases of criminalisation of migration and solidarity in the EU in 2023](#), 2024, p. 4.

<sup>501</sup> ARCI Porco Rosso and Borderline Europe, [As long as you can still listen: the criminalization of migrant boat drivers in 2022](#), 10 January 2023.

<sup>502</sup> Interview with FRA official, 14.11.2024 (transcript on file with the author).

<sup>503</sup> Interview with academic expert #1, 18.11.2024 (transcript on file with the author), p. 1.

<sup>504</sup> Interview with academic expert #3, 19.11.2024 (transcript on file with the author), p. 1.

<sup>505</sup> Interview with academic expert #2, 13.11.2024 (transcript on file with the author), p. 1.

<sup>506</sup> Council, General approach, Council doc. 16910/24. See also 'Migrant smuggling: member states reach agreement on criminal law', [Council press release](#), 13 December 2024. For an overview and critique, see Statewatch, [EU: New migrant smuggling law to ensure criminalisation of solidarity](#), 10 December 2024.

<sup>507</sup> Most Member States applaud this extension. See Council, General approach, Article 1; and e.g. Questionnaire replies by the Czechia (on file with the author).

<sup>508</sup> Strict liability applies to offences for which there is no need to prove criminal intent or what the defendant believed, knew or intended. Guilt can accordingly be established by the commission of the relevant act regardless of mindset.

users and users of online accommodation platforms (such as Airbnb) – risks being 'inadvertently' involved in the crime of facilitation,<sup>509</sup> which is controversial from a legal certainty and presumption of innocence perspective. The new recital proposed by the Council to the effect that '[n]othing in this Directive should be understood as requiring strict liability for any consequence arising from the activities qualified as criminal offences' may go some way in dispelling this risk.<sup>510</sup> However, the fact that 'the notion of "intention" should be interpreted in accordance with national law' will still lead to variation across the EU.<sup>511</sup>

Option (2) also gives rise to concerns. No definitions of 'serious harm' or 'a person' are provided and there is no determination of what amounts to 'a high likelihood', how far the causation chain may extend to entail liability, or whether 'intention to commit the offence' (rather than the harm caused) is sufficient for criminalisation.<sup>512</sup> This may lead to cases where engaging in intrinsically risky activities, like rescue, may per se and without further qualification fall within the definition. This is particularly likely since the Commission expects this option to be perpetrated 'even though there is no financial or material benefit or [promise thereof]'.<sup>513</sup>

The crime of 'public instigation' is highly contentious, especially since no definition is provided of what it means and how it differs from 'inciting', which is already covered under the attempt clause in Article 5. The Commission refers to 'advertisements of routes and prices on social media ... travel guidance ... instructions to migrants on embarkations or how to cross green borders via encrypted communication apps or digital maps'<sup>514</sup> – despite the *private* character of such communications. Draft Recital 6, without introducing a legally binding exclusion, establishes that '[p]roviding objective information or advice to third-country nationals on the conditions for the legal entry and stay in the Union, and on international protection, should not be understood as public instigation'. What amounts to 'objective information' is, however, left undetermined. In any event, the notion itself collides with the freedom of expression and information that includes the right to hold opinions (which are per definition *subjective*) and to receive and impart ideas without undue interference, including of a political kind (e.g. against closed borders or confronting EU priorities on the fight against irregular migration). The right is recognised explicitly 'regardless of frontiers' thus protecting trans-national exchanges.<sup>515</sup> Adding to the coherence analysis above, the crime, without the introduction of specific safeguards, seems inconsistent with anti-SLAPP efforts at EU level.<sup>516</sup> The recent Anti-SLAPP Directive attempts to protect public watchdogs, including journalists, activists, and civil society organisations engaged in public interest matters, such as migration policy and human rights, to counter smear and defamation attacks, including unfounded accusations of involvement in crime, corruption or disinformation.<sup>517</sup>

Generally, the fact that *any* person may commit the crime of facilitation and, under options (2) and (3), without the requirement of a material gain distracts from the objective of targeting the

<sup>509</sup> Europol, [European Union serious and organised crime threat assessment: Crime in the age of technology](#), SOCTA 2017, p. 50. This is also the Commission's understanding. See analytical supporting document, [SWD\(2024\) 134](#), p. 20.

<sup>510</sup> Council, General approach, Recital 11b.

<sup>511</sup> Ibid.

<sup>512</sup> Cf. Analytical supporting document, [SWD\(2024\) 134](#), p. 17.

<sup>513</sup> 2023 Facilitation Directive Proposal, Recital 6.

<sup>514</sup> Cf. Analytical supporting document, [SWD\(2024\) 134](#), p. 18. See also 2023 Facilitation Directive Proposal, Recital 25.

<sup>515</sup> CFR explanations, p. 21.

<sup>516</sup> [Directive \(EU\) 2024/1069](#) of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation' – SLAPP).

<sup>517</sup> Further on this point, see Border Violence Monitoring Network (BVMN), [Facilitation Directive: feedback provided to the European Commission by the Border Violence Monitoring Network](#), 18 March 2024, pp. 12–15.

'organised criminal networks responsible from migrant smuggling',<sup>518</sup> which is the foremost objective the proposed directive pursues. Such an approach is not prone to 'break the business model of smugglers', nor to 'dismantl[e] [the] organised crime structures' on which they rely, seen to 'pose a higher risk to Europe's security' than occasional perpetrators.<sup>519</sup> It will rather divert the scarce investigative and law enforcement resources from those objectives to tackle low-ranking perpetrators and actors with no link to criminal networks, including those acting out of humanitarian concern.

This contradicts the renewed action plan against migrant smuggling, which requires a focus on 'high-value targets'.<sup>520</sup> The proposed directive thus distances itself from Commission President Von der Leyen's 10 points of action to address the challenges of migration, especially the 'follow the money' approach to counter smuggling.<sup>521</sup> As the Commission acknowledges, '[p]rosecuting low ranking pilots of ships has no deterrent effect ... [on] leading members of criminal groups'.<sup>522</sup> The discrepancy is reflected in, if not pre-determined by, the choice of legal basis of the proposed directive, as discussed in the previous section.

The Council, however, appears to be satisfied with this stance, which seemingly buttresses its general approach to the proposal. Indeed, the Council suggests to reduce the definition of the baseline crime and aggravated offences to current draft Article 3(1)(a), but at the same time allow Member States to retain absolute discretion to 'adopt or maintain legislation providing for a broader incrimination than what is set out in [the] Directive'.<sup>523</sup> In particular, the Council proposes to leave Member States 'free to criminalise such conduct when no financial or another material benefit has been provided', which arguably defeats the harmonisation objective pursued.<sup>524</sup> From the Council's perspective, this is in line with the goal of approximation of criminal law under Article 83(2) TFEU, according to which the proposed directive should be seen as 'an instrument of minimum harmonisation'.<sup>525</sup> Yet, whether such 'minimum harmonisation' — and the legal certainty that needs to come with it — can be achieved through this formula is open to question.

#### *Ancillary actions (Article 5)*

The Commission proposes to criminalise incitement, aiding and abetting, and facilitation attempts, continuing the approach of the 2002 Facilitation Directive.<sup>526</sup> None of the terms are, however, defined. It is thus unclear whether incitement relates to the act of facilitation itself or to the migrants that may be instigated to enter, transit or stay irregularly. What amounts to aiding and abetting crimes that are already defined on the basis of facilitation and how it may be distinguished from attempts also remains obscure. How far in the causal chain can acts be considered connected to or preparatory of the facilitation of irregular migration is unclear. It is uncertain whether supporting

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<sup>518</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 3.

<sup>519</sup> European Commission, A renewed EU action plan against migrant smuggling (2021-2025), [COM\(2021\) 591](#), p. 1 and 22.

<sup>520</sup> *Ibid.*, p. 22. See also analytical supporting document, [SWD\(2024\) 134](#), p. 16.

<sup>521</sup> European Commission President, [EUCO Migration Letter](#), Ares(2024)7288990 – 14/10/2024, p. 4. See also Ursula von der Leyen – Candidate for the European Commission President, [Political guidelines for the next European Commission 2024-2029](#), 18 July 2024, p. 17.

<sup>522</sup> Analytical supporting document, [SWD\(2024\) 134](#), p. 16.

<sup>523</sup> Council, General approach, Recital 6a.

<sup>524</sup> *Ibid.* and redrafted Recital 6.

<sup>525</sup> Council, General approach, Recital 6a.

<sup>526</sup> 2002 Facilitation Directive, Article 2.

migrants with drinking water in the Sahara desert,<sup>527</sup> for instance, may be considered a punishable act under the reform.

*Aggravating circumstances (Article 9) and aggravated criminal offences (Article 4)*

The Commission proposes to distinguish between aggravated criminal offences and aggravating circumstances, an approach that departs from the criminal justice systems of most Member States, the rationale for which is not explained in the proposal. Committing the offence vis-à-vis particularly vulnerable individuals, such as unaccompanied minors; as part of an organised criminal group; actually causing serious harm or endangering life; perpetrating it through the use of 'serious violence'; or by causing the death of the third-country nationals concerned is considered an aggravated form of the baseline crime of facilitation.<sup>528</sup> By contrast, when the offence is committed by a public official in the performance of their duties; when it 'entailed or resulted in' the illegal employment of the third-country nationals concerned; in cases of recidivism; if the offence 'entailed or resulted in' the exploitation or instrumentalisation of migrants; when third-country nationals are dispossessed of their identity or travel documents; or in cases where the offence is perpetrated 'while carrying a firearm', whether visibly or not and regardless of it being actually used or threatened to be used, these are considered aggravating circumstances.<sup>529</sup> In both cases, of aggravated crimes and aggravating circumstances, the offence attracts a higher penalty. So, the basis for the distinction is unclear, as are the terms employed, which have not been given a specific definition. This is probably why the Council proposes to eliminate the distinction by erasing Article 4 and modifying Article 9, so that aggravating circumstances can still be taken into account by judges 'in accordance with national law'.<sup>530</sup>

As far as aggravated criminal offences are concerned, committing the offence as part of a criminal organisation attracts a higher penalty than the baseline crime, as do all the other offences in this category,<sup>531</sup> regardless of their incommensurability. The fact that the irregular entry, transit or stay of unaccompanied minors, without further caveats, is considered an aggravated form of the crime puts parents and other family members facilitating the unauthorised movement of their own children at particular risk. What amounts to 'serious violence' in this framework is unclear. The fact that a specific intent to cause harm or death is not necessary means that facilitation that results in accidental injury or loss of life, despite any precautions taken, also carries a higher punishment. The modifications proposed by the Council do not alter this situation. Although the Council suggests that Article 4 be eliminated, it also proposes to incorporate its provisions within Article 6 on penalties, thereby achieving the same result albeit in a more oblique way. Not naming the relevant elements as 'aggravating circumstances' directly eliminates the link to the regime that usually attaches to them under national law, making it unclear what their treatment and related safeguards should be.

In terms of aggravating circumstances in the Commission proposal, the very expansive references to offences that 'entailed or resulted in' illegal employment, exploitation or instrumentalisation appear particularly problematic. While 'entailing' may indicate a willing act of having recourse to any of these means the Commission considers reprobable, 'resulting' escapes the control of the perpetrator and may lead to criminalisation for causally remote consequences only loosely connected with the act of facilitation. Then, equating in gravity the illegal employment, exploitation

<sup>527</sup> Cf. Water dropping along the Arizona desert: '[Jury acquits aid worker accused of helping border crossing migrants in Arizona](#)', NPR, 21 November 2019.

<sup>528</sup> 2023 Facilitation Directive Proposal, Article 4.

<sup>529</sup> *Ibid.*, Article 9.

<sup>530</sup> Council, General approach, Article 9.

<sup>531</sup> 2023 Facilitation Directive Proposal, Article 6(3).

or instrumentalisation of third-country nationals does not seem justified. Including exploitation in this context may also lead to the conflation of facilitation with trafficking in human beings, which is regulated by a separate framework. The Council's general approach introduces some changes, like the elimination of carrying a firearm and the introduction of the use of cruel, inhuman or degrading treatment as an aggravating circumstance.<sup>532</sup> Apart from that, it maintains the Commission's proposal.

Finally, linking facilitation with 'instrumentalisation' to establish *individual* criminal liability is not warranted. 'Instrumentalisation' is predominantly a 'State-led' political act,<sup>533</sup> characterised as part of a 'hybrid attack' against the Union,<sup>534</sup> typically following a diplomatic fallout or outright conflict with 'State actors'.<sup>535</sup> It has also been very vaguely defined,<sup>536</sup> thus failing to provide an adequate legal basis for criminalisation that meets the requirements of legality and legal certainty. In addition, the existing 'instrumentalisation' definition is such that it objectifies migrants as threats, rather than recognising them as individuals with agency, dignity and rights.<sup>537</sup> Retaining the notion and linking it to the criminalisation of facilitation contributes to generating a hostile environment that stigmatises migrants and those who engage with them,<sup>538</sup> fostering xenophobia and discrimination.<sup>539</sup> The Council's suggestions in this regard, to limit criminalisation to situations of instrumentalisation where 'actions are indicative of an intention ... to destabilise the Union or a Member State' appear insufficient.<sup>540</sup> Mentioning that '[s]ituations in which non-state actors are involved in organised crime, in particular smuggling, should not be considered as instrumentalisation ... when there is no aim to destabilise the Union or a Member State', leaves vast room for interpretation.<sup>541</sup> The same applies in relation to the statement that '[h]umanitarian assistance should not be considered as instrumentalisation ... [also] when there is no aim to destabilise the Union or a Member State'.<sup>542</sup> The broad phrasing is equivocal and seems to imply that there can indeed be situations in which migrant smuggling by organised criminal networks and humanitarian assistance by individuals and civil society organisations can be interpreted as aiming to destabilise the Union or a Member State. What is more, the wording seems to put both categories of action on the same level of reprovability, reinforcing the confusion of all types of facilitation conduct regardless of motives, means, and actual intent.

### *Liability of legal persons (Article 7)*

Rules on the liability of legal persons under proposed Article 7 are a replica of provisions under Article 2 of the current 2002 Framework Decision. Under this clause, the Commission expects

<sup>532</sup> Council, General approach, Article 9, erasing (f) and adding (g).

<sup>533</sup> European Commission, A renewed EU action plan against migrant smuggling (2021–2025), [COM\(2021\) 591](#), p. 13.

<sup>534</sup> European Commission President, [EUCO Migration Letter](#), Ares(2024)7288990 – 14/10/2024, p. 5.

<sup>535</sup> European Commission, A renewed EU action plan against migrant smuggling (2021–2025), [COM\(2021\) 591](#), p. 5.

<sup>536</sup> Cf. Instrumentalisation has been defined as 'a situation ... where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security' in [Regulation \(EU\) 2024/1359](#) of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, Article 1(4)(b).

<sup>537</sup> Cf. CFR, Article 1. Also relevant in this context is the principle of equality before the law enshrined in CFR, Article 20.

<sup>538</sup> Red Cross EU Office, [RCEU Comments on the Revised EU Facilitation Directive](#), 7 March 2024, p. 4.

<sup>539</sup> Cf. CFR, Article 21. Cf. European Commission, A Union of equality: EU anti-racism action plan (2020–2025), [COM\(2020\) 565](#).

<sup>540</sup> Council, General approach, Recital 14a.

<sup>541</sup> *Ibid.*, Recital 14b.

<sup>542</sup> *Ibid.*, Recital 14c.

Member States to criminalise legal persons for offences 'committed for their benefit' – however this may be interpreted, especially in situations where no financial or material gain may be identified. The offence is to be perpetrated by any person with 'power of representation' of the legal person concerned; with 'authority to take decisions' on its behalf; or with 'authority to exercise control within the legal person', none of which are terms the proposed directive defines.<sup>543</sup> It also requires Member States to criminalise legal persons in situations where 'the lack of supervision or control' by the person with the power to exert it 'has made possible the commission of the criminal offence'.<sup>544</sup> These are very broad terms under which legal persons may be held liable for facilitation crimes, including when 'the lack of supervision or control' may be due to circumstances beyond the awareness, will or foreseeability of the representative concerned, despite best efforts to exercise due diligence and regardless of motives, knowledge, or the lack of criminal intent.<sup>545</sup>

It is worth recalling in this regard that legal persons under the proposed directive are 'legal entit[ies] having [formally] such status under the applicable national law', excluding public bodies exercising governmental authority as well as the bodies of international organisations.<sup>546</sup> Since organised criminal groups are not legally incorporated entities, the main culprits of facilitation of irregular migration escape this definition and the related liability regime set out in the proposal. Formally, only service providers and NGOs may be prosecuted under the terms proposed, which is at odds with the objective of targeting the 'organised criminal networks responsible from migrant smuggling'.<sup>547</sup>

### 5.1.3. Harmonising penalties

The draft directive builds on the 2002 legal framework<sup>548</sup> to propose harmonised penalties against natural and legal persons intended to reflect the gravity of the different offences. The idea is to 'reduce the ... variation between [Member States'] national systems', which the proposed directive may well achieve.<sup>549</sup> A limited set of mitigating circumstances, regarding the provision of information that helps authorities find evidence or bring others to justice,<sup>550</sup> is contemplated 'to incentivise offenders to cooperate'.<sup>551</sup>

Article 6 establishes maximum terms of imprisonment of 'at least three years' for the baseline crime under the three variants contemplated in Article 3. Aggravated offences generally attract a maximum term of 'at least ten years', except when causing death, which is to be punished with a maximum term of 'at least fifteen years'. The Council proposes to revise these terms to a maximum of three, eight, and ten years respectively,<sup>552</sup> which seems more proportionate, but still requires a detailed proportionality assessment as undertaken in Section 5.3 below.

In addition to criminal sanctions, Article 6 proposes non-criminal measures that may also be imposed, including the withdrawal of permits or authorisations to conduct the activities that led to

<sup>543</sup> 2023 Facilitation Directive Proposal, Article 7(1)(a), (b) and (c).

<sup>544</sup> Ibid., Article 7(2).

<sup>545</sup> See remarks by IRU, [IRU position on the European Commission proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU](#), 9 April 2024.

<sup>546</sup> 2023 Facilitation Directive Proposal, Article 2(3) and Recital 13.

<sup>547</sup> Ibid., explanatory memorandum, p. 3.

<sup>548</sup> 2002 Facilitation Framework Decision, Articles 1 and 3.

<sup>549</sup> Analytical supporting document, [SWD\(2024\) 134](#), p. 19.

<sup>550</sup> 2023 Facilitation Directive Proposal, Article 10. According to Recital 15, these may apply to both natural and legal persons.

<sup>551</sup> Analytical supporting document, [SWD\(2024\) 134](#), p. 20.

<sup>552</sup> Council, General approach, Article 6.

the criminal offence, exclusions from public funding and aid, the freezing or confiscation of the instrumentalities and proceeds of crime (including vehicles),<sup>553</sup> and, if the perpetrator is a third-country national, their expulsion and the imposition of a re-entry ban of up to ten years.<sup>554</sup> The Council's general approach slightly adapts the wording, inserts fines, and removes freezing and confiscation as well as expulsion from the list of possible accessory sanctions<sup>555</sup> – which would still be required under the terms of the Return Directive and of the Directive on the freezing and confiscation of instrumentalities and proceeds of crime respectively.

Regarding legal persons, Article 8 suggests a number of sanctions that 'may include' fines, exclusion from public funding as well as public benefits, aids and subsidies, disqualification from the practice of 'commercial activities' (which may be temporary or permanent), withdrawal of permits or authorisations to conduct the activities that led to the criminal offence, closure of establishments (also temporary or permanent), the freezing or confiscation of the instrumentalities and proceeds of crime (including SAR vessels),<sup>556</sup> and the placing under judicial supervision or judicial winding-up. The Council's general approach revises some of the terms used but without adding concretion. For instance, references to 'temporary or permanent' exclusions from public funding or the closure of establishments are eliminated, but without explicitly clarifying that permanent exclusions are not permitted. The language in relation to the 'practice of commercial activities' is also rendered vaguer, if not wider, when replaced with the 'practice of business', which encompasses not only activities of an economic nature but non-economic activities as well.<sup>557</sup> The method of calculating fines is also modified to give Member States more leeway. This can either be by reference to a percentage of the total worldwide turnover of the legal person concerned or a very high fixed amount of EUR 24 or 40 million, depending on the gravity of the offence.<sup>558</sup>

The proportionality analysis of the penalty framework is undertaken in Section 5.3 below. Suffice it to note the lack of comparable penalties under the national systems of several Member States for crimes of a similar gravity.<sup>559</sup> Here, facilitation is by-and-large more harshly punished.

#### 5.1.4. Improving the jurisdictional reach

The proposed directive expands on the jurisdictional bases in Article 4 of the 2002 Framework Decision, grounded in the principles of territoriality (place where the crime is committed), active personality (nationality of the offender), and establishment (legal incorporation of a legal person within the jurisdiction of the Member State concerned). To these, the Commission proposes to add flag and registration of ship and aircraft, as recognised in international law, as well as other circumstances that are not typically deemed to give rise to jurisdiction. These include habitual residence (when perpetrators are third-country nationals) and 'business done in whole or in part in [the] territory' of the Member State concerned<sup>560</sup> (when perpetrators are legal persons not established in the EU).

Draft Article 12 also demands Member States to establish jurisdiction over facilitation attempts, even when they occur extra-territorially, if they 'result... in the entry, transit or stay in the territory of that

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<sup>553</sup> 2023 Facilitation Directive Proposal, Recital 17.

<sup>554</sup> *Ibid.*, Recital 11.

<sup>555</sup> Council, General approach, Article 6(5).

<sup>556</sup> 2023 Facilitation Directive Proposal, Recital 17.

<sup>557</sup> Council, General approach, Article 8(2).

<sup>558</sup> *Ibid.*, Article 8(3).

<sup>559</sup> Interview with academic expert #1, 18.11.2024 (transcript on file with the author), p. 2.

<sup>560</sup> 2023 Facilitation Directive Proposal, Article 12(1)(c)(ii).



Member State of third-country nationals ... subject to the criminal offence'.<sup>561</sup> Controversially, the Commission also proposes (in unclear but imperative terms) that Member States be obliged to establish jurisdiction over attempts that cause the death of third-country nationals 'where the conduct would have constituted a criminal offence over which jurisdiction would have been established', for instance through flag or registration in the Member State concerned.

To help the extension of jurisdiction in the terms foreseen, the Commission proposes (again in 'shall' mode) to release Member States from the observance of what are considered customary principles of international law. For instance, the Commission suggests that Member States 'shall' make sure that their jurisdiction is not limited by conditions such as that 'the acts are a criminal offence at the place where they were carried out' or that 'the prosecution can be initiated only following a transmission of information from the State of the place where the criminal offence was committed', regardless of possible objections or lack of cooperation on the part of the third countries concerned.<sup>562</sup>

This regime is intended to allow Member States to expand their investigative, prosecutorial and enforcement action extra-territorially, 'to include offences that are committed outside the EU but have an impact on the EU',<sup>563</sup> such as 'cases of public instigation where smugglers operat[e] abroad' or 'cases in which the facilitation ... fails because third-country nationals lose their lives before reaching the ... territorial waters of a Member State'.<sup>564</sup> However, it disregards incompatibility issues with international standards,<sup>565</sup> possible disputes with third countries, and the multiplication of jurisdictional conflicts with third countries and between Member States.<sup>566</sup> Seemingly, in anticipation of some of these conflicts, the Council has proposed in its general approach to soften the language of Article 12 and distinguish between compulsory and discretionary bases on which Member States 'shall' or 'may' extend their jurisdiction.<sup>567</sup> A new recital has, nonetheless, been suggested whereby 'Member States are encouraged to criminalise migrant smuggling [rather than the facilitation of irregular migration] regardless of where the offence was committed and to consider establishing jurisdiction over migrant smuggling outside of their territories, beyond the minimum rules set forth in [the] Directive ...'.<sup>568</sup> Although this is intended to cover only instances 'in line with international law', which would typically require respect for the rules regarding exclusive flag and territorial jurisdiction and the principle of double incrimination if cooperation is to be established, the Council does not propose to revise the unorthodox bases enshrined in Article 12 of the Commission's text. The suggestion is rather for Member States to claim a sort of universal jurisdiction, which hitherto has been reserved for the most egregious crimes, such as crimes against humanity, war crimes, or genocide.<sup>569</sup> Besides the significant legality concerns this approach gives rise to, whether it is the most cost-effective way to address this matter is analysed under the efficiency assessment in Section 5.2.

<sup>561</sup> Ibid., Article 12(1)(e).

<sup>562</sup> Ibid., Article 12(3)(a) and (b).

<sup>563</sup> Analytical supporting document, [SWD\(2024\) 134](#), p. 21.

<sup>564</sup> Ibid.

<sup>565</sup> The extension of criminal jurisdiction to the high seas may interfere with freedom of navigation rights and the general regime applicable to international waters, including the principle of exclusive flag jurisdiction under UNCLOS. See, e.g., ITLOS, [The M/V "Norstar" case \(Panama v. Italy\)](#), [2019] List of Cases No. 25.

<sup>566</sup> Interview with Eurojust official, 11.12.2024 (transcript on file with the author), p. 2; Interview with Europol official, 11.12.2024 (transcript on file with the author), pp. 2 and 3.

<sup>567</sup> Council, General approach, Article 12(1) and (2).

<sup>568</sup> Ibid., Recital 19a.

<sup>569</sup> See e.g. *The Princeton Principles on Universal Jurisdiction*, Princeton University Press, 2001, foreword.

### 5.1.5. Reinforcing Member States' resources to tackle and prevent facilitation

Provisions on resources and the prevention of the crime of facilitation constitute a novelty in relation to the 2002 Facilitators Package. As noted above, the Commission makes no proposal for concrete means but requires Member States to generally guarantee that national authorities have 'a sufficient number of qualified staff and sufficient financial, technical and technological resources' for the effective discharge of their responsibilities under the proposed directive.<sup>570</sup> Article 15 thus aims at ensuring that 'adequate resources' are devoted for 'the provision of specialised training at regular intervals' of all relevant personnel, including law enforcement, judiciary and the staff of other bodies tasked with criminal investigations and the prosecution of facilitation offences.<sup>571</sup> Suggestions by Europol and Eurojust for 'more concreteness in terms of sufficient resources' and the creation of 'specialised prosecutors in all Member States' have not been retained, even though the 'lack of specialisation is [deemed] detrimental to the seamless application and implementation' of the regime.<sup>572</sup>

Information and awareness-raising campaigns alongside research and education programmes, undertaken in conjunction with other Member States, third countries, and other stakeholders, are contemplated in Article 13 as a preventive measure aimed at reducing the incidence of facilitation offences.<sup>573</sup> Yet their contribution to the prevention of irregular migration at large is hard to assess.<sup>574</sup>

Article 11, for its part, regulates limitation periods of a generous length to allow sufficient time for the investigation, prosecution, trial and adjudication of facilitation offences.<sup>575</sup> The periods are of a duration equivalent to, if not longer than, the prison terms foreseen for the different crimes, which is prone to allow ample margin for a criminal justice response by the Member States.<sup>576</sup>

Article 16, in turn, demands that effective investigative tools be made available at national level, including 'special investigative tools, such as those ... used in countering organised crime and other serious crime cases'. These include 'the interception of communications, covert surveillance, [or] monitoring bank accounts'.<sup>577</sup> Insofar as a majority of facilitation offences does not involve organised criminal smuggling groups but low-ranking facilitators, including family members, humanitarian actors, and migrants themselves,<sup>578</sup> the use of these means is incoherent and disproportionate.<sup>579</sup> This is expanded in Section 5.3 below. As per Europol remarks, '[a] more targeted formulation would have ensured better channelling towards serious criminal offences ... rather than low-level facilitation'.<sup>580</sup>

<sup>570</sup> 2023 Facilitation Directive Proposal, Article 14.

<sup>571</sup> Council proposals in its general approach, Articles 14 and 15, do not substantially revise the Commission provisions.

<sup>572</sup> Interview with Eurojust official, 11.12.2024 (transcript on file with the author), p. 1 and 3. Interview with Europol official, 11.12.2024 (transcript on file with the author), p. 3.

<sup>573</sup> The Council proposes that special attention be paid to the 'online dimension' in its general approach, Article 13(1).

<sup>574</sup> Research has shown that this objective is mostly elusive. See Nicolás Caso and Jørgen Carling, 'The reach and impact of migration information campaigns in 25 communities across Africa and Asia', *Migration Policy Practice*, Vol. 13(1), 2024, pp. 3–11; Florian Trauner et al., 'It's not about the information, it's about the situation': understanding the misalignment between EU deterrence messaging and migrants' narratives', *Journal of Ethnic and Migration Studies*, Vol. 50(14), 2024, pp. 3379–3395.

<sup>575</sup> 2023 Facilitation Directive Proposal, Recital 16.

<sup>576</sup> The Council proposes to revise this provision slightly in its general approach, Article 11.

<sup>577</sup> Ibid., Recital 24. See also analytical supporting document, [SWD\(2024\) 134](#), p. 22.

<sup>578</sup> [Milieu Study](#), p. 44 ff. See also Section 3.4 above.

<sup>579</sup> The Council has not proposed significant changes to this clause in its general approach, Article 16.

<sup>580</sup> Interview with Europol official, 11.12.2024 (transcript on file with the author), p. 3.

### 5.1.6. Improving data collection, monitoring and reporting

The absence of 'robust, comprehensive and comparable data on migrant smuggling offences and criminal justice responses at national and European level' has been a key obstacle to the emergence of an 'evidence-based policy at EU level', impeding proper monitoring of implementation and a solid understanding of the real scale of the facilitation phenomenon.<sup>581</sup> Therefore, the Commission's proposal for Member States to annually collect and provide statistical data on several elements is welcome.<sup>582</sup> However, data categories would need to be adjusted for information to be gathered on some of the key implementation problems detected in previous studies. Indeed, the number of family members, humanitarian actors, service providers acting in good faith, and migrants themselves that are investigated, charged, prosecuted, condemned, or punished would need to be known for an adequate effectiveness assessment of the measures concerned and a proper determination of whether they achieve the intended distinction between actual smuggling and the provision of assistance on a legitimate basis. This is also necessary for the continuous monitoring of implementation. Instead, the Commission adopts 'a quantitative rather than a qualitative approach', running the risk that the exercise simply serves to 'justify the policy ... demonstrat[ing] effectiveness in quantitative terms' but without helping to determine real adequacy on the ground.<sup>583</sup>

Council amendments in this regard are due to further water down the effectiveness of these arrangements. Considering it an otherwise excessive burden, the Council suggests that there only be an obligation to communicate 'existing statistical data available at the central level' to the Commission.<sup>584</sup> The Council does not contemplate the expansion of the duty beyond that point, and even proposes to eliminate some of the data categories suggested in the Commission's text.<sup>585</sup>

## 5.2. Efficiency assessment

The efficiency assessment focuses on whether the proposed initiative is likely to achieve its declared objectives 'at the lowest possible costs and with the lowest possible resources'.<sup>586</sup> The analysis should 'show that resources are used to their best and therefore that the costs generated are strictly necessary to reach the policy objectives'.<sup>587</sup> In situations where legislative revisions are being contemplated, 'for which problems of legislative complexity and/or unnecessary costs have [already] been identified', the Commission's Better Regulation Toolbox establishes that 'there should be a specific objective relating to the desire to simplify and improve the efficiency of existing legislation'.<sup>588</sup> Simplification and improvement should guide the regulatory efficiency exercise so as to identify the best cost-benefit balance along with possible 'gains, synergies and opportunities for more policy coherence' overall.<sup>589</sup> Time lags, direct and indirect (including unintended) costs and benefits and their distributional structure across stakeholders and society at large should be taken into account.<sup>590</sup> Although this is explicitly recognised by the Commission, at least in part, in the

<sup>581</sup> 2023 Facilitation Directive Proposal, pp. 4-5. See also analytical supporting document, [SWD\(2024\)134](#), p. 22.

<sup>582</sup> 2023 Facilitation Directive Proposal, Article 17 and Recital 26.

<sup>583</sup> Interview with academic expert #3, 19.11.2024 (transcript on file with the author), p. 5.

<sup>584</sup> Council, General approach, Recital 26 and Article 17(2) (emphasis added).

<sup>585</sup> Ibid., Article 17(2)(a) to (k).

<sup>586</sup> European Commission, [Better Regulation Toolbox](#), 2023, Tool #5, p. 35.

<sup>587</sup> Ibid., Tool #47, p. 407.

<sup>588</sup> Ibid., Tool #11, p. 70.

<sup>589</sup> Ibid., Tool #46, p. 390.

<sup>590</sup> Ibid., Tool #47, pp. 406-409, and Tool #56, pp. 503-508.

explanatory memorandum of the proposed directive, there is no detailed cost-benefit analysis provided.<sup>591</sup>

### 5.2.1. Costs

Direct and indirect regulatory costs, including unintended costs, should have been quantified by the Commission when proposing the Facilitation Directive reform. As several stakeholders have highlighted, including some EU agencies<sup>592</sup> and Member State representatives,<sup>593</sup> the lack of an impact assessment and the financial fiche that usually accompanies it is particularly regrettable in this regard.<sup>594</sup>

The cost calculation should have considered compliance costs for all those affected by the proposal, including adjustment costs and administrative costs that result from all activities required to comply with the obligations foreseen.<sup>595</sup> All information processes, training costs, data gathering exercises, and reporting obligations should have been taken into account per type of actor concerned, on the basis of data obtained from the Member States, from public or targeted stakeholder consultations, including evidence provided by social partners and professional associations, and by previous reports, studies and evaluations from independent experts and academics.<sup>596</sup> If there is EU funding or specific resources allocated to offset any of these costs, this too should be considered in the calculation.<sup>597</sup>

Nevertheless, the Commission only acknowledges the proposal to have 'budgetary implications for the Union', highlighting 'notably additional human resources needed for the European Commission (4 FTEs) to ensure support to the Member States in the transposition and correct implementation of the legislative package'.<sup>598</sup> No other costs have been identified, estimated or quantified. For instance, the 'big impact both financially and operationally' the directive is expected to have on JHA agencies, Member State authorities, service providers, and civil society at large has not been considered.<sup>599</sup> Among these, the anticipated multiplication of conflicts of jurisdiction and the enhanced cooperation and coordination efforts this will entail on the part of Eurojust, in particular, have not been taken into account. Yet, Eurojust signals they 'will need resources [they] currently do not have and that the Directive does not provide for'.<sup>600</sup> The capacity of '[t]he current team of three people working on this ... will not [suffice]'.<sup>601</sup> This is why the agency regrets the lack of 'more

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<sup>591</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 10. Also the analytical supporting document, [SWD\(2024\) 134](#), does not provide an analysis, making a mere reference to '[c]osts on the public authorities linked to the update of the legal framework [that] cannot be quantified at this stage but are not likely to lead to regulatory or financial burden on citizens or businesses.' on p. 15.

<sup>592</sup> Interview with Eurojust official, 11.12.2024 (transcript on file with the author), p. 3: 'We have missed the impact assessment and the financial fiche that [normally] accompanies the proposal. When this is missing, we need to do this ourselves with no extra resources. [The Commission] should have followed the Better Regulation principles'.

<sup>593</sup> e.g. the French authorities in their reply to the Questionnaire for this study (on file with the author) have expressed 'regret [at] the way in which this text was drawn up, since its publication was not accompanied by any impact study'. They see [t]his absence is all the more regrettable in that it contravenes the 2016 Interinstitutional Agreement on Better Lawmaking, paragraph 13 of which stipulates that the Commission must carry out such a study prior to any initiative'.

<sup>594</sup> Cf. the 2023 Europol Regulation Proposal, which is accompanied by a legislative financial statement.

<sup>595</sup> European Commission, [Better Regulation Toolbox](#), 2023, Tool #59, p. 533 ff.

<sup>596</sup> *Ibid.*, p. 533.

<sup>597</sup> *Ibid.*, p. 538. 'FTE' stands for the 'full time equivalent' positions to be created according to the Commission.

<sup>598</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 11.

<sup>599</sup> Interview with Eurojust official, 11.12.2024 (transcript on file with the author), p. 1.

<sup>600</sup> *Ibid.*, p. 2.

<sup>601</sup> *Ibid.*

concretion in terms of sufficient resources' in the Commission proposal, 'specially because the case load will increase'.<sup>602</sup>

Some Member State representatives also consider the reporting duties imposed by Article 17 to be excessive. In their view, 'the transmission of statistical data is a major administrative burden for the administrations of the Member States'.<sup>603</sup> While 'in favour of providing such data', these representatives 'stress the importance of limiting their number in the interests of efficiency'.<sup>604</sup>

Academic experts have warned of the costs generated by the mistargeting of resources. 'How much money is being invested to track, prevent, and prosecute NGOs and other actors without a link to migrant smuggling rings' is unknown.<sup>605</sup> If the purpose of the proposed directive is indeed to target high-level criminals, the question should be asked of whether 'this [is] the best use of scarce criminal justice system resources' and the 'best use of tax payers' money' at EU and Member State levels.<sup>606</sup>

Transport operators have also complained of the lack of recognition of the 'efforts and measures undertaken by the vast majority of commercial [carriers] to avoid getting involved in [facilitation offences]'.<sup>607</sup> They have estimated, in calculations undertaken in 2016 in preparation for Brexit, that the costs incurred to address irregular migration challenges on the UK route alone amounted to EUR 1.5 billion per year. These include 'costs for additional precautionary security measures, additional waiting times due to security checks [at borders], ... additional insurance premiums, damage to vehicles and loads, and increasing difficulties in finding drivers'.<sup>608</sup> Criminalisation risks have been identified as one of the indirect costs facing the industry and leading to a 'serious driver shortage'.<sup>609</sup> Given the lack of consideration by the directive of any of these implications, the International Road Transport Union (IRU) has suggested that the proposal be withdrawn.<sup>610</sup>

### 5.2.2. Benefits

As with costs, direct and indirect regulatory benefits, including unintended benefits, should also have been quantified by the Commission when proposing the new directive. Yet, most of the benefits are expected or asserted rather than shown to exist or probable to materialise. For example, the Commission claims, without demonstrating in detail, that the proposal 'provide[s] the Union with rules which are fit for purpose' in terms of preventing and countering facilitation offences.<sup>611</sup> It also affirms, again without evidencing it specifically, how the new crime definitions, enhanced penalties and the expansion of jurisdictional bases will translate into 'increase[d] possibilities of sanctioning high-level targets who are organising smuggling activities'.<sup>612</sup> Besides these general assertions, there is no efficiency assessment contained in the proposal or the analytical supporting document accompanying it that identifies and calculates the benefits of the directive compared to the 2002 Facilitators Package.

<sup>602</sup> Ibid., p. 3.

<sup>603</sup> Questionnaire replies by French authorities (on file with the author), p. 9.

<sup>604</sup> Ibid.

<sup>605</sup> Interview with academic expert #2, 13.11.2024 (transcript on file with the author), p. 4.

<sup>606</sup> Ibid.

<sup>607</sup> IRU, [IRU position on the European Commission proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU](#), 9 April 2024, p. 3.

<sup>608</sup> Ibid, pp. 3-4.

<sup>609</sup> Ibid., p. 4.

<sup>610</sup> Ibid., p. 1.

<sup>611</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 2.

<sup>612</sup> Ibid., p. 4.

Several of the (by-and-large implicit) assumptions about the benefits of the proposed directive, e.g. regarding '[i]mplementation plans and monitoring, evaluation and reporting arrangements',<sup>613</sup> have been questioned. Some Member State representatives consider that 'the data required to be communicated by the Commission under Article 17 are excessively broad, and that their usefulness in ensuring the effectiveness of the fight against migrant smuggling has not been demonstrated'.<sup>614</sup> Without a dedicated assessment, it is hard to determine the merit of these impressions. For some, the added value of the proposal, compared to the 2002 framework, is 'difficult to objectivise' overall, also because of the lack of a thorough progress report of the renewed action plan against smuggling.<sup>615</sup>

### 5.3. Subsidiarity and proportionality assessment

The only **subsidiarity** statement included in the proposal is made alongside proportionality and refers to Article 5(3) TEU.<sup>616</sup> The Commission states that, since 'the objectives of the proposal cannot be sufficiently achieved by Member States ... [d]ue to the transnational dimension of migrant smuggling', and 'considering already existing EU legislation', the expectation is that 'action at EU level [will] be more effective and efficient and [will] bring a tangible added value compared to action taken by Member States individually'.<sup>617</sup> However, no further explanation is provided on whether or the extent to which these expectations may indeed materialise. The Commission simply states that 'EU intervention would create added value by further approximating criminal law of Member States and contributing to ensuring a common playing field between Member States'.<sup>618</sup>

As far as **proportionality** is concerned, the Commission focuses on the general principle set out in Article 5(4) TEU, according to which 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. In this regard, the Commission simply affirms, without demonstrating in detail or considering alternative options, that the proposed directive is 'limited to what is necessary to reinforce the EU framework on preventing and countering migrant smuggling and does not go beyond what is necessary to achieve the policy objectives at stake'.<sup>619</sup> Without a specific analysis it can, however, not be determined whether this is in fact the case or whether other options, including leaving the 2002 framework as is, are preferable.

In terms of whether the principle of proportionality in the criminal justice domain has been observed, the Commission merely asserts that in introducing its provisions, particularly the definition of aggravated offences and aggravating and mitigating circumstances, the Directive 'ensure[s] the proportionality of the criminal penalties' set out therein.<sup>620</sup> This, without more, is said to be 'in line with the principle of proportionality of criminal penalties as enshrined in Article 49(3) of the Charter'.<sup>621</sup> However, a detailed analysis of proportionality is wanting. Some key aspects that should have been considered are highlighted in the following sections.

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<sup>613</sup> Ibid., p. 11.

<sup>614</sup> Questionnaire replies by French authorities (on file with the author), p. 9.

<sup>615</sup> Ibid., pp. 6 and 7.

<sup>616</sup> This linkage is reflected in proposed Recital 27, which addresses both principles at the same time.

<sup>617</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 7.

<sup>618</sup> Ibid., p. 8.

<sup>619</sup> Ibid.

<sup>620</sup> Ibid., p. 8.

<sup>621</sup> Ibid.

### 5.3.1. Penalties

According to the experts consulted for this study, 'given that [the facilitation of irregular migration] should not be a criminal offence in the first place', at least in the terms designed by the directive, which depart from the concept of migrant smuggling under the UN Protocol, 'the principle of proportionality is compromised by definition', affecting by default the entire penalty framework.<sup>622</sup> It is very hard, in this context, to determine what an 'effective, proportionate and dissuasive' penalty is.<sup>623</sup> However, the penalty framework proposed is generally 'very harsh', especially 'if we take account of the reality on the ground' and the fact that in many instances, 'it is NGOs, family members, and boat pilots who are being criminalised'.<sup>624</sup> The legal persons liability framework is equally problematic, since it indirectly targets commercial carriers and NGOs, rather than criminal networks, which do not (and cannot) take the form of 'legal persons' under the proposed directive. Therefore, 'a more human rights-oriented approach', like the one underpinning the human trafficking framework, would have been preferable.<sup>625</sup>

The term of imprisonment foreseen in Article 6 seems excessive. It can, for instance, reach 'at least three years' for public instigation,<sup>626</sup> a crime that could be used to silence 'dissent and criticism of border violence'.<sup>627</sup> The same penalty applies to volunteers engaging in rescue activities, which intrinsically entail 'a high likelihood of causing serious harm'.<sup>628</sup> If rescue efforts fail and lead to loss of life, even accidentally, the penalty increases to 'at least fifteen years'.<sup>629</sup> Legitimate service providers, paid normal market rates, may also be charged and face three years imprisonment.<sup>630</sup> In turn, parents facilitating the unauthorised entry, transit or stay of their own children face 'at least ten year' sentences, given the particularly vulnerable position in which unaccompanied minors are considered to be in all circumstances — presumably also when assisted by their own parents to reunite with them.<sup>631</sup>

Complementary sanctions, as enshrined in Articles 6 and 8, can also have a disproportionate effect. Insofar as they can lead to the 'permanent' disqualification, 'withdrawal of permits or authorisations' to conduct their activities, and the 'permanent closure of [their] establishments',<sup>632</sup> it can lead to the dissolution of civil-society organisations and the dismantling of businesses.<sup>633</sup> The idea of

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<sup>622</sup> Interview with academic expert #1, 18.11.2024 (transcript on file with the author), p. 2.

<sup>623</sup> Ibid. See also 2023 Facilitation Directive Proposal, Articles 6(1) and 8(1).

<sup>624</sup> Interview with academic expert #1, 18.11.2024 (transcript on file with the author), p. 3. While proportionality requirements may be met in instances where the penalty framework applies to actual criminals, i.e. those with criminal intent and possibly links with organised networks, the harshness critique centres on its application to individuals engaged in humanitarian action. In these cases, proportionality is not fulfilled. See further below and Chapter 6.

<sup>625</sup> Ibid., p. 2.

<sup>626</sup> Reading 2023 Facilitation Directive proposal, Articles 3(2) and 6(2) in conjunction.

<sup>627</sup> Interview with academic expert #2, 13.11.2024 (transcript on file with the author), p. 2, referring to the 'Briançon 7' trial, where the defendants were accused of 'advancing their own cause' of open borders through the organisation of a 'solidarity march' that escorted migrants across the Alpine French-Italian passage. See '[French court overturns convictions of 7 people accused of helping migrants cross Alps at Briançon](#)', RFI, 10 September 2021.

<sup>628</sup> Reading 2023 Facilitation Directive proposal, Articles 3(1)(b) and 6(2) in conjunction.

<sup>629</sup> Ibid., Articles 4(e) and 6(4) together.

<sup>630</sup> Ibid., Articles 3(1)(a) and 6(2) together.

<sup>631</sup> Ibid., Articles 4(d) and 6(3) together.

<sup>632</sup> Ibid., Articles 6(a) and 8(d), (g) and (h).

<sup>633</sup> Interview with academic expert #2, 13.11.2024 (transcript on file with the author), p. 1.

'permanent' penalties is also at odds with the rehabilitation purpose these have under several national systems.<sup>634</sup>

### 5.3.2. Preventive, investigative and prosecuting tools

The provisions proposed by the Commission present issues in several respects regarding the preventive, investigative and prosecuting tools put forward in the directive. First, long limitation periods, like those proposed in Article 11, generate legal uncertainty, with individuals unsure of their position for extended lengths of time, which can have a chilling effect.

Second, the special investigative powers foreseen in Article 16 are problematic when applied to civil-society actors, volunteers, NGOs, family members, or migrants engaged in mutual help interventions. Recourse to these special measures is built on the presumed link with 'organised crime and other serious crime cases' of facilitation offences.<sup>635</sup> However, neither the baseline facilitation offence, nor most of the aggravated forms contemplated in the draft directive are actually related to organised crime.<sup>636</sup> As also highlighted by one of the experts consulted for this study, 'there is an internal inconsistency' in the construction of Article 16 'that is incompatible with proportionality and reasonability principles'.<sup>637</sup> Wiretapping, bank account monitoring, etc., 'amounts to treating perpetrators as part of organised crime, when this was not a requirement for their criminalisation'.<sup>638</sup>

Finally, the preventive freezing of assets and seizure of vehicles and other instrumentalities of crime vis-à-vis both natural and legal persons, per Articles 6 and 8,<sup>639</sup> can have very disproportionate effects. This is the case especially when these measures are applied not only against volunteers, NGOs, family members, or migrants themselves, but also when imposed on legitimate service providers. As remarked by IRU, these are typically imposed '[b]efore the actual guilt of a ... person has been established ... [and] without solid proof' in a way that 'could lead to the arbitrary and unnecessary closure of the operational activity ... resulting in income loss and ... financial difficulties'.<sup>640</sup> Such measures can cause 'immediate and irreparable damage', putting organisations out of business.<sup>641</sup> For IRU, the effect is similar to the harshest of penalties but imposed before/without a trial or the opportunity to be heard, defend innocence, and appeal against the measure concerned.<sup>642</sup>

### 5.3.3. Offences

A point often disregarded in proportionality analyses in the criminal justice domain is the question of whether the criminalisation of conduct is reasonable in the first place. In certain circumstances, what may be disproportionate 'is not the penalty but the offence itself'.<sup>643</sup> This has to do with 'the

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<sup>634</sup> See, e.g., [Spanish Constitution](#), Article 25(2).

<sup>635</sup> 2023 Facilitation Directive Proposal, Article 16.

<sup>636</sup> Interview with academic expert #2, 13.11.2024 (transcript on file with the author), p. 3. Actually, only the aggravated crime in Article 4(a) of the proposed directive foresees that the offence be 'committed within the framework of a criminal organisation'.

<sup>637</sup> Ibid.

<sup>638</sup> Ibid.

<sup>639</sup> 2023 Facilitation Directive Proposal, Articles 6(f) and 8(i).

<sup>640</sup> IRU, [IRU position on the European Commission proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU](#), 9 April 2024, p. 2.

<sup>641</sup> Ibid.

<sup>642</sup> Ibid.

<sup>643</sup> Interview with academic expert #3, 19.11.2024 (transcript on file with the author), p. 3.



excessive nature of the definition of the behaviour [considered] as a crime'.<sup>644</sup> The assessment is, in this case, concerned with the width of the crime of facilitation – much broader than the scope of migrant smuggling under UN law, which is problematic. It is not only *inherently* problematic, in that it may contravene the basic principle of legality under Article 49 CFR.<sup>645</sup> It also generates a climate of hostility vis-à-vis migrants and those who engage with them,<sup>646</sup> fostering discrimination and xenophobia.

That the EU facilitation framework entails the criminalisation of solidarity has, for the first time, been explicitly recognised by the Advocate General's opinion in the CJEU *Kinsa* case.<sup>647</sup> In the absence of a clear and legally binding exemption, this will continue under the proposed directive. Following the Advocate General's reading of the current 2002 provisions, 'the EU legislature did indeed intend to define a general infringement, covering all actions intended to facilitate unauthorised entry into the territory of a Member State, including where such acts are committed disinterestedly, out of altruism, compassion or solidarity, for humanitarian reasons or because of the existence of family ties'.<sup>648</sup> Yet, no assessment of proportionality is provided of this situation in light of its interference with key fundamental rights. The argument had been submitted by the referring court on the basis of Article 52(1) CFR.

As some scholars have posited,<sup>649</sup> it is not sufficient to address the matter from a 'retrospective proportionality' perspective,<sup>650</sup> looking at whether penalties adequately adjust to the respective offences to be penalised, reflecting their gravity. It is also necessary to assess issues of 'prospective proportionality' in relation to the offence.<sup>651</sup> The offence itself has to be 'proportionate in the strict sense'.<sup>652</sup> It must be the outcome of a reasonable balancing and comprehensive consideration of all the interests and elements at stake.<sup>653</sup> By imposing a blanket approach to the criminalisation of all forms of facilitation, regardless of means, motives and intent, the foremost consideration outweighing all other factors is the fight against irregular migration per se. The EU legislator, in both the 2002 and 2023 versions of the directive, by demanding the indiscriminate criminalisation of acts

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<sup>644</sup> Ibid.

<sup>645</sup> Angelo Marletta, '[The Commission "Guidance" on facilitation and humanitarian assistance to migrants](#)', EU Law Analysis Blog, 29 September 2020.

<sup>646</sup> Tugba Basaran, 'The saved and the drowned: Governing indifference in the name of security', *Security Dialogue*, Vol. 46(3), 2015, p. 205. See also BVMN, '[Facilitation Directive: Feedback provided to the European Commission by the Border Violence Monitoring Network](#)', 18 March 2024, p. 7.

<sup>647</sup> CJEU, [Opinion](#) of Advocate General De la Tour in Case C-460/23 *Kinsa*, ECLI:EU:C:2024:941.

<sup>648</sup> Ibid., para. 46.

<sup>649</sup> The argument has been made by Stefano Zirulia in '[Op-Ed: Facilitating irregular immigration under the lens of the proportionality principle – brief notes on the Advocate General's conclusions in the Kinsa Case \(C-460/23\)](#)', *EU Law Live*, 21 November 2024; and by Francesca Cancellaro and Stefano Zirulia in 'Building limits to the over-criminalisation of facilitating irregular migration: The *Kinsa* Case' (forthcoming).

<sup>650</sup> Antony Duff, 'Proportionality and the criminal law: proportionality of what to what?' in Emmanouil Billis, Nandor Knust and Jon Petter Rui (eds), *Proportionality in crime control and criminal justice*, Hart, 2021, chapter 2.

<sup>651</sup> Ibid.

<sup>652</sup> Stefano Zirulia, '[Op-Ed: Facilitating irregular immigration under the lens of the proportionality principle – brief notes on the Advocate General's conclusions in the Kinsa Case \(C-460/23\)](#)', *EU Law Live*, 21 November 2024.

<sup>653</sup> Ralf Poscher, 'Proportionality and the bindingness of fundamental rights', in Emmanouil Billis, Nandor Knust and Jon Petter Rui (eds), *Proportionality in crime control and criminal justice*, Hart, 2021, chapter 3. See also Robert Alexy, 'Constitutional rights, proportionality, and argumentation', in Jan Sieckmann (ed.), *Proportionality, balancing and rights: Robert Alexy's theory of constitutional rights*, Springer, 2021, p. 2.

of facilitation fails to consider the impact on the fundamental rights of migrants and those who engage with them.<sup>654</sup>

Indeed, the right to life, for instance, is affected, since the criminalisation of assistance may produce a chilling effect on rescue activities. It also impacts the rights to family unity and the best interests of the child by fostering separation between offenders and their supposed victims in cases of parental facilitation. Insofar as it may preclude access to territory and to legal assistance, facilitation offences may also impinge upon the right to asylum.<sup>655</sup> At the same time, by leaving it up to the Member States to exempt acts of humanitarian assistance, the EU legislator indirectly shows that the restriction of rights it entails is, after all, not strictly necessary for the purpose of countering migrant smuggling.<sup>656</sup>

In any event, as discussed in Chapter 2, many of the rights concerned are not absolute and can make the object of restrictions. However, the Charter introduces proportionality constraints.<sup>657</sup> Indeed, '[a]ny limitation on ... the rights and freedoms recognised [therein] ... may be made only if they are necessary and genuinely meet objectives of general interest ...'.<sup>658</sup> The Court of Justice has concluded, in 'settled case law', that 'the principle of proportionality requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question'.<sup>659</sup> This specifically involves that 'when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued'.<sup>660</sup>

The burden of demonstrating compliance with the adequacy, necessity, and strict proportionality tests identified by the Court falls thus, first and foremost, on the EU legislator.<sup>661</sup> To meet the adequacy test, the proposed restriction must not only be prone to serving the general interest concerned, it must do so effectively. It needs to 'genuinely reflect ... a concern to attain [the objective pursued] in a consistent and systematic manner'.<sup>662</sup> Yet, diverting from the prosecution of actual smuggling offences to criminalise all acts of facilitation, including those of humanitarian assistance, constitutes a waste of resources. Then, the necessity test requires that the objective pursued cannot but be achieved through the sort of measure intended. Nevertheless, here as well, smuggling conduct can be penalised through narrower provisions with a sharper focus, specifically targeting smuggling activities, which defeats the necessity requirement. Finally, the strict proportionality test demands that a proper balancing of all affected rights and interests be undertaken, allowing them to retain the widest scope possible.<sup>663</sup> This means that the least intrusive means capable of achieving

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<sup>654</sup> Stefano Zirulia, '[Op-Ed: Facilitating irregular immigration under the lens of the proportionality principle – brief notes on the Advocate General's conclusions in the Kinsa Case \(C-460/23\)](#)', *EU Law Live*, 21 November 2024.

<sup>655</sup> Cf. CJEU, Case C-821/19 *Commission v. Hungary* EU:C:2021:930.

<sup>656</sup> Stefano Zirulia, '[Waiting for Kinsa: The criminalisation of facilitating irregular immigration before the CJEU](#)', *Verfassungsblog*, 10 June 2024.

<sup>657</sup> This is also the view of the EDPS in his [Opinion 4/2024](#), paras 6-7, regarding the 2023 Europol Regulation proposal.

<sup>658</sup> CFR, Article 52(1).

<sup>659</sup> CJEU, Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28, para. 50.

<sup>660</sup> *Ibid.*

<sup>661</sup> Distinguishing between 'legislative proportionality' and 'proportionality in adjudication', see Emmanouil Billis, Nandor Knust and Jon Petter Rui, 'The typology of proportionality', in Emmanouil Billis, Nandor Knust and Jon Petter Rui (eds), *Proportionality in crime control and criminal justice*, Hart, 2021, chapter 1.

<sup>662</sup> CJEU, [Opinion](#) of Advocate General De la Tour in Case C-460/23 *Kinsa*, ECLI:EU:C:2024:941, para. 78 and case law cited.

<sup>663</sup> Stefano Zirulia, [Les enfants de la Clarée: Why the Facilitators package is incompatible with the Charter of Fundamental Rights](#), *Border Criminologies*, 2 September 2024.

the intended result should always be preferred, since it allows for the minimum interference with the rights at stake. Wholesale restrictions, insofar as they do not respect 'the essence of those rights',<sup>664</sup> are not proportionate. Any limitations imposed shall be to the 'exercise' rather than the existence of the rights concerned, which must preserve their core content and *effet utile* at all times, both in law and in practice.

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<sup>664</sup> CFR, Article 52(1).

## 6. Fundamental rights implications, in particular for the provision of humanitarian assistance

This chapter assesses the compatibility of the proposal's provisions with the Charter of Fundamental Rights, paying attention to the fact that it only refers to the protection of fundamental rights in the Preamble, without introducing any specific safeguards in the main text. In particular, the focus is on key substantive and procedural rights affected by the proposed reform. Particular attention is also paid to the presumption of innocence and related protections in the criminal justice context. The situation of humanitarian assistance is also evaluated, taking account of whether the provisions proposed by the Commission are likely to prevent it from being criminalised. The position of NGOs, of help provided among family members, and peer-to-peer assistance is considered in detail.

### 6.1. The consideration of fundamental rights in the proposal

The obligation to 'respect the rights, observe the principles and promote the application [of the Charter]' concerns all institutions and bodies of the Union, including the co-legislators, within the remit of their respective powers.<sup>665</sup> It is hence not sufficient that the proposed legislative provisions are claimed to 'respect the rights and observe the principles recognised by the Charter'.<sup>666</sup> The rights and principles concerned must in fact be protected and 'promoted', according to the Charter. This is all the more so in situations like the one at hand, where, as noted by the EESC, the content of the envisaged instrument 'could seriously affect the fundamental rights of migrants, and those assisting them on humanitarian grounds'.<sup>667</sup> The introduction of specific and detailed guarantees to this effect is, therefore, necessary.<sup>668</sup> This is reinforced by the explicit commitment to 'ensuring the protection of migrants' underpinning the entire EU's anti-smuggling policy.<sup>669</sup> Therefore, there should be a correspondence between this objective and the provisions of the proposed directive, as a matter of 'minimum basic coherence'.<sup>670</sup> Such provisions should offer a proper (legally binding) guarantee,<sup>671</sup> be designed in a way such as to ensure equality before the law and non-discrimination, on migration status or otherwise,<sup>672</sup> and in a manner that applies across the board, including to migrants, family members, NGOs, individual helpers, volunteers and human rights defenders (HRDs), and service providers.

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<sup>665</sup> CFR, Article 51(1).

<sup>666</sup> 2023 Facilitation Directive Proposal, Recital 28.

<sup>667</sup> EESC, [Opinion: Anti-Smuggling Package](#), SOC/787-EESC-2024, 10 July 2024, para. 1.9.

<sup>668</sup> Cf. Most of the Member States consulted for this study consider the draft (as it is) not to raise 'any threat to fundamental rights'. See e.g. Questionnaire replies by the Czechia (on file with the author), p. 3. See also Questionnaire replies by Romania (on file with the author) p. 5, stating that '[t]he current legal framework provides for necessary safeguards'. Compare: Questionnaire replies by Lithuania (on file with the author) p. 2, mentioning 'a few risks', including 'wrongful indictment and prosecution, higher risk of discrimination against certain national or traditional groups, more stringent migration control / refusal to grant asylum based on assumptions rather than lawful investigation, [and] stricter control of those providing humanitarian assistance (with a higher risk of breaching data protection laws)'.

<sup>669</sup> European Commission, A renewed EU action plan against migrant smuggling (2021–2025), [COM\(2021\) 591](#), p. 11.

<sup>670</sup> Interview with Frontex official, 14.11.2024 (transcript on file with the author), p. 3.

<sup>671</sup> Concurring: Questionnaire replies by UNODC (on file with the author), p. 5.

<sup>672</sup> CFR, Articles 20 and 21. See also European Commission, A Union of equality: EU anti-racism action plan (2020–2025), [COM\(2020\) 565](#).

### 6.1.1. Substantive rights

Chapter 2 has already highlighted the main substantive rights at stake in the anti-facilitation domain, regarding both natural and legal persons. Regarding natural persons, the **rights to life and to the integrity of the person** are paramount.<sup>673</sup> These mean that any restrictions to facilitation activities that interfere with those rights should be avoided. The criminalisation of conduct that involves 'a high likelihood of causing serious harm',<sup>674</sup> such as rescue at sea, but without criminal intent or the purpose of profiting from those concerned, is not compatible with the Charter.

Prosecutorial interventions abroad, on the extended jurisdictional bases proposed under Article 12 of the proposal, for instance, to investigate action classified as 'public instigation' or facilitation attempts,<sup>675</sup> cannot be such as to lead to the **refoulement** of individuals fearing persecution or to exposing them to a risk of **ill-treatment**,<sup>676</sup> e.g. by forcing them to 'remain' in an unsafe country.<sup>677</sup> The same is true of the **right to asylum**,<sup>678</sup> and the **right to leave any country**, which must be accessible in law and in practice.<sup>679</sup> Merely inviting Member States to 'apply this Directive in accordance and in full compliance with the 1951 [Geneva] Convention' does not amount to a sufficient guarantee.<sup>680</sup>

The **right to family life**, in conjunction with the **principle of non-penalisation** for unauthorised entry or stay, bars the criminalisation of facilitation conduct performed between family members, including vis-à-vis **minor children**.<sup>681</sup> The provision in Article 4(d) of the proposed directive thus contravenes these rights when applied to family facilitation cases. The absence of legally binding safeguards in this respect aggravates the situation. The weak language employed in Recital 7 does not suffice to provide the necessary safeguards.

The criminalisation framework must also preserve **access to services**, including **health care**, so as to guarantee a **dignified standard of living** to those concerned.<sup>682</sup> Access to transportation, legal advice,<sup>683</sup> housing, education, and all other services of 'general economic interest' must not be prevented on the grounds of migration status.<sup>684</sup> Access must be granted on a non-discriminatory basis. This is why the very broad definition of a 'financial or other material benefit' contained in Article 3(1)(a) of the Directive poses a risk, whereby service providers may avoid contact with third-country nationals for fear of penalisation. Racial profiling, stereotyping, xenophobia and

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<sup>673</sup> CFR, Articles 2 and 3.

<sup>674</sup> 2023 Facilitation Directive Proposal, Articles 3(1)(b) and 4(b) and (e).

<sup>675</sup> Ibid., Articles 3(2) and 5.

<sup>676</sup> CFR, Articles 4 and 19.

<sup>677</sup> UNHCR, [UNHCR comments on the Commission proposal for a Facilitation Directive \(Anti-Smuggling Directive\) – COM\(2023\) 755](#), 14 March 2024, para. 8.

<sup>678</sup> CFR, Article 18.

<sup>679</sup> See recommendations of PACE in this regard, in [Recommendation 2283\(2024\)](#), A Shared European approach to address migrant smuggling, para. 3.6.

<sup>680</sup> 2023 Facilitation Directive Proposal, Recital 10.

<sup>681</sup> CFR, Articles 7 and 24; CSR51, Article 31; SoM, Article 5.

<sup>682</sup> CFR, Articles 35 and 36.

<sup>683</sup> On the importance of preserving access to legal services and the significance of the role of lawyers in the migration policy domain, including the need to preserve their independence and highlighting specific risks at which legal service providers find themselves in under the proposed provisions, see CCBE, [CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit, and stay in the Union](#), 17 May 2024.

<sup>684</sup> CFR, Article 36.

stigmatisation may increase as a result.<sup>685</sup> The opposite is also true: migrants, to avoid detection, may avoid reaching out to service providers, self-limiting their access to core, sometimes life-saving, assistance. Anti-facilitation provisions can indeed have the effect of 'isolat[ing] migrants ... and increase[ing] their vulnerabilities'.<sup>686</sup> As already noted, Recital 7 is not enough to dispel such risks.

Besides a right to provide services, legal persons also enjoy several other rights recognised by the Charter, as described in Chapter 2. Civil society organisations, like individuals, enjoy the **freedom of thought, opinion, expression, assembly and association**, including on political grounds and to defend causes that may not align with EU or Member State priorities in the migration policy terrain.<sup>687</sup> Activity that does not amount to migrant smuggling as defined in the UN Protocol should not be targeted for criminalisation. The values of democracy, freedom, rule of law and respect for human rights, on which the EU is founded, may otherwise be compromised.<sup>688</sup> This is why the absence of a legally binding humanitarian exemption, as further expounded in Section 6.2 below, and the introduction of the crime of 'public instigation' in Article 3(2) are especially problematic. As highlighted by the UN Special Rapporteur on the Situation of Human Rights Defenders, there already are cases in the EU in which individuals have been criminalised for sharing information with migrants, which is incompatible with Charter provisions.<sup>689</sup> The obligation on Member States to use 'special investigative tools' under draft Article 16 compounds the situation. Covert surveillance mechanisms have already been employed vis-à-vis journalists and NGO volunteers in several EU countries, with their use considered 'a severe violation of their rights to privacy and freedom of expression' by several UN bodies.<sup>690</sup>

Finally, the **right to property** may also be unduly affected by the proposed provisions. According to Article 17 of the Charter, 'everyone', including natural and legal persons, 'has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions'. This covers 'boats, engines and other boat components and vehicles' that may be used for rescue at sea.<sup>691</sup> Although the Charter contemplates the possibility of limitations to the right 'in the public interest and in the cases and under the conditions provided for by law',<sup>692</sup> there should be safeguards against arbitrariness. The preventive 'freezing and confiscation' of elements considered 'instrumentalities' for the commission of the crime,<sup>693</sup> including the seizure of vehicles, may be disproportionate. There should, accordingly, be procedural safeguards introduced in the directive to avoid such an effect.

### 6.1.2. Procedural safeguards

Complementing the analysis in Chapter 2, in light of which this section should be read,<sup>694</sup> it is necessary to recall the main procedural safeguards that the proposed directive should include. As

<sup>685</sup> BVMN, [Facilitation Directive: feedback provided to the European Commission by the Border Violence Monitoring Network](#), 18 March 2024, p. 4.

<sup>686</sup> Red Cross EU Office, [RCEU comments on the Revised EU Facilitation Directive](#), 7 March 2024, pp. 1-2.

<sup>687</sup> CFR, Articles 11 and 12.

<sup>688</sup> Article 2 TEU.

<sup>689</sup> UN Special Rapporteur on the Situation of Human Rights Defenders, [Response to the proposal by the European Commission for a Directive to update the Facilitators Package](#), February 2024, p. 4, referring to the [case of Tommy Olsen and Panayote Dimitras in Greece](#).

<sup>690</sup> Ibid., p. 5, referring to reports [AL ITA 5/2020](#) and [AL ITA 2/2021](#), co-signed by several UN Special Rapporteurs and human rights working groups across mandates.

<sup>691</sup> 2023 Facilitation Directive Proposal, Recital 17.

<sup>692</sup> CFR, Article 17.

<sup>693</sup> 2023 Facilitation Directive Proposal, Articles 6(f) and 8(i).

<sup>694</sup> See especially sections 2.3.5 and 2.3.6 above.

proposed by several stakeholders,<sup>695</sup> the text should introduce a clear set of measures and procedures whereby all potential facilitators may have their cases heard and avoid the imposition of preventative measures, formal charges, prosecution, and eventual condemnation. At all steps of the criminalisation process should there be procedural safeguards introduced to avoid undue penalisation and the waste of criminal justice resources that comes with it. This is necessary to comply with the **rights to good administration and effective remedies** enshrined in Articles 41 and 47 of the Charter. Specific clauses should be introduced so as to guarantee the opportunity of good faith operators to make their cases, submit evidence, and defend their innocence. A more precise definition of the circumstances according to which NGOs and service providers may avoid criminalisation is necessary. This is all the more so because they are the only entities capable of being formally classified as 'legal persons' under the proposed directive<sup>696</sup> and thus be held liable pursuant to draft Articles 7 and 8 — unlike organised criminal groups. The opposite risks impinging upon the presumption of innocence and the **right of defence** under Article 48 of the Charter. The example of the Carrier Sanctions Directive 2001/51 could be followed in this respect. Article 6 thereof explicitly imposes the obligation on Member States to 'ensure that their laws, regulations and administrative provisions stipulate that carriers against which proceedings are brought ... have effective rights of defence and appeal'.<sup>697</sup>

The imposition of **preventive measures**, including the seizure of vehicles or the temporary withdrawal of permits to continue their activities, can have particularly harsh, if not irreparable, consequences. It can put organisations out of business, result in irrecoverable income loss, and financial and operational difficulties. It can also fatally tarnish reputation. For these reasons, it is imperative to introduce **fair trial** guarantees and to keep the burden of proof with the accusation, rather than with the defendant. Proving a negative, i.e. non-involvement in migrant smuggling, is more difficult than proving a positive, i.e. actual involvement in the conduct to be criminalised. The imbalance created by shifting the burden proof to the defendant is prone to reverse the **presumption of innocence**, putting defendants at an unreasonable disadvantage. 'Only ... operators ... for whom it has been established prima facie evidence that they have been intentionally involved in ... migrant smuggling should become the subject of investigation and prosecution'.<sup>698</sup>

The rules on the liability of legal persons, as currently drafted in the Directive, risk being interpreted as **strict liability** provisions, in a way that is incompatible with basic criminal justice principles. A driver, for instance, 'should not be held liable when third-country nationals board their vehicle unless it can be proven that the driver, other staff or the company [was] knowingly involved'.<sup>699</sup> The standard for liability should be '[k]nowing and willing involvement' in migrant smuggling.<sup>700</sup> Otherwise, the threat of criminalisation, from investigation and prosecution to the imposition of sanctions, can have the effect of 'deter[ring] professional drivers from reporting incidents' in the first place,<sup>701</sup> to the detriment of the objectives pursued by the proposed directive. The standard of 'lack of supervision or control' espoused by the directive on the basis of which suspicion can be

<sup>695</sup> See, e.g., IRU, [IRU position on the European Commission proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU](#), 9 April 2024; and CCBE, [CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit, and stay in the Union](#), 17 May 2024.

<sup>696</sup> 2023 Facilitation Directive Proposal, Article 2(3).

<sup>697</sup> [Council Directive 2001/51/EC](#) of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

<sup>698</sup> IRU, [IRU position on the European Commission proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU](#), 9 April 2024, p. 5.

<sup>699</sup> *Ibid.*, p. 3.

<sup>700</sup> *Ibid.*, p. 5.

<sup>701</sup> *Ibid.*, p. 3.

raised and preventive measures adopted is too broad.<sup>702</sup> It also poses the question of whether it is at all legal for the headquarters of companies and other organisations to maintain their staff under constant surveillance. This is hardly compatible with the **rights to privacy and data protection**.<sup>703</sup> The offer of mitigating circumstances is not enough. As highlighted by IRU, 'Member States must foresee an appeals procedure against any precautionary measure or verdict and sanction' before it is imposed.<sup>704</sup>

A final issue the draft directive does not elaborate on, but the Commission acknowledges in passing in the analytical document accompanying the proposal, has to do with the **ne bis in idem principle** and the right not to be tried or punished twice in criminal proceedings for the same criminal offence recognised under Article 50 of the Charter. The fact that the baseline crime is now defined in terms of irregular entry, transit, or stay in 'any' Member State of the EU,<sup>705</sup> added to the expanded bases on which criminal jurisdiction can be established, creates the risk of multiple procedures starting in different Member States on the same cases at the same time. The Commission suggests that 'with a view to avoiding duplication of proceedings',<sup>706</sup> Member States cooperate to establish which one should conduct or continue them. Draft Article 12(4) creates an obligation to that end, and Eurojust can be called upon to mediate if necessary. However, the directive fails to establish a specific mechanism, steps, or a procedure to ensure that cooperation indeed takes place.

## 6.2. The situation of humanitarian assistance

The treatment of humanitarian assistance under the facilitators regime is the single stickiest point highlighted in previous studies,<sup>707</sup> reports,<sup>708</sup> and evaluations,<sup>709</sup> and the issue that worries stakeholders the most.<sup>710</sup> The absence of a uniform definition and consensus around the regulatory approach to follow across Member States are the thorniest factors. The foreseeable impact of the approach followed by the Commission in the proposed directive is also of utmost concern. Consideration of potential alternatives constitutes a matter for reflection that the co-legislators should take into account.

<sup>702</sup> 2023 Facilitation Directive Proposal, Article 7(2).

<sup>703</sup> CFR, Articles 7 and 8.

<sup>704</sup> IRU, [IRU position on the European Commission proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU](#), 9 April 2024, p. 4.

<sup>705</sup> 2023 Facilitation Directive Proposal, Articles 3(1) and 12.

<sup>706</sup> Analytical document supporting the 2023 Facilitation Directive proposal, [SWD\(2024\) 134](#), p. 21.

<sup>707</sup> e.g. Sergio Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, December 2018, pp. 59–87; Violeta Moreno-Lax et al., [The EU approach on migration in the Mediterranean](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, June 2021, pp. 92–117.

<sup>708</sup> e.g. FRA, [Criminalisation of migrants in an irregular situation and of persons engaging with them](#), 2014; ReSOMA, [The criminalisation of solidarity in Europe](#), March 2020; Amnesty International, [Punishing compassion: Solidarity on trial in Fortress Europe](#), March 2020; Centre for Peace Studies, [Criminalisation of solidarity in the EU – What should be done to stop it?](#), 2020; OMCT, [Europe: Open season on solidarity](#), November 2021; Marta Gionco and Jyothi Kanics, [Resilience and Resistance: in defiance of the criminalisation of solidarity across Europe](#), The Greens/EFA, June 2022; PICUM, [More than 100 people criminalised for acting in solidarity with migrants in the EU in 2022](#), 2023; PICUM, [Cases of criminalisation of migration and solidarity in the EU in 2023](#), 2024.

<sup>709</sup> REFIT Evaluation, [SWD\(2017\) 117](#), pp. 14–15; [Milieu Study](#), pp. 31–57.

<sup>710</sup> Except for Member State representatives, all interview transcripts and questionnaire replies obtained in preparation for this study, as well as the materials consulted, corroborate this impression.



### 6.2.1. Issues with the regulatory approach adopted

As sections 3.2 and 3.4 above have shown, there is substantial and consequential variation across Member States' jurisdictions on the definition of 'humanitarian assistance'. Different approaches are followed, some putting the accent on the motivation of the actors concerned, the type of action undertaken, or the type of person assisting or being assisted. The role of situations of danger or distress and whether the necessity defence may be of relevance in the case at hand also varies, as does the role of legal duties, such as the duty to render assistance and proceed to the rescue of persons in distress at sea.<sup>711</sup> There are also inconsistencies regarding the role accorded to the absence of criminal intent, to the lack of financial or other material gain, and to the geographical reach and implications of the conduct.<sup>712</sup> In some countries, criminalisation may be averted or reduced through the invocation of defences or through reliance on mitigating circumstances.<sup>713</sup> The effects of exoneration also fluctuate, from the exclusion of unlawfulness or guilt in some Member States, to constituting a bar to incrimination and prosecution or only to penalisation.<sup>714</sup> Different prosecutorial priorities also lead to variation across jurisdictions. While some countries focus on big smuggling rings, others target any facilitator, including family members, boat pilots, NGOs and volunteers.<sup>715</sup>

These vast differences are primarily attributable to the discretionary nature of the exemption clause in Article 1(2) of the 2002 Facilitation Directive and its vague formulation, according to which Member States 'may decide not to impose sanctions ... for cases where the aim of the behaviour is to provide humanitarian assistance'. As already noted, the current legislation does not define what 'humanitarian assistance' amounts to, nor does it provide for a harmonised approach to its legal treatment. The fact that the benefit element does not make part of the definition of the baseline crime of facilitation also contributes to the uncertainty.<sup>716</sup> Such uncertainty generates legality issues, since individuals cannot anticipate with sufficient reliability whether their conduct will be criminalised or not. Leaving it up to the discretion of Member States whether to distinguish between migrant smuggling and humanitarian facilitation fails to meet the legal quality threshold required by the legal certainty standard governing criminal law.<sup>717</sup>

The change proposed by the Commission, from an optional exemption clause to a merely indicative recital, may cause the leniency allowed under the current regime to disappear<sup>718</sup> and 'make it even worse for migrants, family members and NGOs'.<sup>719</sup> The many caveats of Recital 7 'may actually legitimise criminalisation'.<sup>720</sup> What is more, some observers opine that the elimination of the optional exemption clause, given the wording of Articles 3 to 5 of the proposed directive, obliges Member States to prosecute *all* facilitation conduct and that it be only on an exceptional, case-by-case basis

<sup>711</sup> REFIT Evaluation, [SWD\(2017\) 117](#), pp. 14–15; [Milieu Study](#), pp. 31–57.

<sup>712</sup> Ibid.

<sup>713</sup> Ibid.

<sup>714</sup> Ibid.

<sup>715</sup> Ibid.

<sup>716</sup> Cf. CCBE, [CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit, and stay in the Union](#), 17 May 2024, p. 4.

<sup>717</sup> See Section 5.1 above.

<sup>718</sup> Interview with Eurojust official, 11.12.2024 (transcript on file with the author), p. 3.

<sup>719</sup> Interview with Frontex official, 14.11.2024 (transcript on file with the author), p. 1.

<sup>720</sup> Interview with academic expert #2, 13.11.2024 (transcript on file with the author), p. 3.

that national judges determine whether the behaviour does not warrant penalisation.<sup>721</sup> According to the Meijers Committee, under the text submitted by the Commission, 'Member States no longer have the option not to [criminalise] humanitarian assistance', since all facilitation conduct needs to be criminalised by default.<sup>722</sup>

Thus, several stakeholders consider this a significant 'regressive' or 'backward' step in terms of safeguarding humanitarian assistance from criminalisation.<sup>723</sup> Generally, the vague wording of the provision and the fact that it comes in the form of a non-binding preambular statement is considered insufficient.<sup>724</sup> Indeed, the wording used, indicating that the crime of facilitation 'will *usually* not be fulfilled' when the conduct amounts to the provision of humanitarian assistance, to assistance among family members, or to support for '*basic human needs*', remains ambiguous.<sup>725</sup> It is unclear what amounts to 'basic human needs' and whether providing transportation, accommodation, and other services without an immediate life-saving character, but that are nonetheless fundamental to guarantee the rights and dignity of migrants, qualify under this formulation.<sup>726</sup> The fact that the exception is intended to only apply in cases where the assistance is provided 'in compliance with legal obligations' compounds the uncertainty.<sup>727</sup> While 'it is not the purpose of this Directive to criminalise ... humanitarian assistance',<sup>728</sup> a simple recital cannot guarantee such a result on its own. The same is true of the statement to the effect that '[t]hird-country nationals should not become criminally liable for having been the subject to such criminal offences'.<sup>729</sup> Without explicit and specific safeguards in the legally binding body of the directive this cannot produce full legal force. Therefore, Recital 7 is not a solution to the implementation problems identified by the Commission (discussed in Chapter 3).

The Council's perspective in its general approach to the text of the proposal goes in the same direction. It proposes to breakdown the humanitarian clause to distinguish between 'assistance provided to close family members' (without defining the terms) from 'humanitarian assistance or the support of basic human needs' (also without concretion).<sup>730</sup> But it still subjects them to 'compliance with the applicable national and international legal framework', generating doubts as for when, how, and to which extent these behaviours will be exempt from criminalisation. That '[n]othing in this Directive should be understood as requiring the criminalisation' of those forms of assistance is contained in a preambular statement rather than in the operative part of the directive, replicating the shortcomings of the Commission's text.<sup>731</sup> The Council also suggests to give more visibility to

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<sup>721</sup> This reverses the relationship between rules and their exceptions, in that the rights concerned will be curtailed by default through the blanket criminalisation of facilitation and it will only be through exceptional adjudication in court that judges may exempt the individual from punishment.

<sup>722</sup> Meijers Committee, [Comment on the EU's Facilitators Package](#), CM2407, September 2024, p. 6.

<sup>723</sup> UN Special Rapporteur on the Situation of Human Rights Defenders, [Response to the proposal by the European Commission for a Directive to update the Facilitators Package](#), February 2024, p. 3; interview with FRA officials, 14.11.2024 (transcript on file with author), p. 2; Sea Watch, [Briefing on the Commission's proposal for a new Facilitators' Package](#), March 2024, p. 1.

<sup>724</sup> CCBE, [CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit, and stay in the Union](#), 17 May 2024, p. 5.

<sup>725</sup> 2023 Facilitation Directive Proposal, Recital 7 (emphasis added).

<sup>726</sup> Red Cross EU Office, [RCEU comments on the Revised EU Facilitation Directive](#), 7 March 2024, p. 4.

<sup>727</sup> 2023 Facilitation Directive Proposal, Recital 7.

<sup>728</sup> Ibid.

<sup>729</sup> Ibid.

<sup>730</sup> Council, General approach, Recital 7.

<sup>731</sup> Ibid.

the non-criminalisation clause regarding third-country nationals.<sup>732</sup> A separate Recital 7a stipulates that they 'should not become criminally liable for the sole fact of having been the subject of [facilitation offences]'. But this is '[w]ithout prejudice to rules of national law relating to unauthorised entry', which may well criminalise the act of irregular entry or presence as a separate offence,<sup>733</sup> and rests against the background of the total freedom the Council intends to allow Member States to 'adopt or maintain legislation providing for a broader incrimination than what is set out in [the] Directive'.<sup>734</sup> Finally, the Council suggests to add at the end of Recital 4 that '[n]othing in [the] Directive should affect the rights, obligations and responsibilities of Member States and individuals to provide assistance to third-country nationals, for humanitarian reasons or aimed at meeting their basic human needs', thus replicating and somewhat reinforcing the humanitarian exemption contained in Recital 7. While specifying that '[t]his assistance can also include legal, linguistic or social advice or support', it makes the entire regime subject to 'applicable international law' and to 'compliance with [undetermined] legal obligations' presumably stemming from national law.<sup>735</sup>

### 6.2.2. Foreseeable impact

Since the optional nature of the humanitarian clause in the 2002 Facilitation Directive is what allegedly 'opened the door for the criminalisation of support to migrants',<sup>736</sup> the expectation under the revised regime is for the criminalisation of humanitarian assistance, mutual aid, and the good faith provision of services to continue, if not further aggravate.

The UN Rapporteur on the Situation of Human Rights Defenders has been receiving a growing number of complaints from different parts of Europe, including Italy,<sup>737</sup> Greece,<sup>738</sup> Poland,<sup>739</sup> and Latvia.<sup>740</sup> Recent reports by different organisations confirm the trend, documenting mounting cases of humanitarian assistance being criminalised. As pointed out above, only in 2023, PICUM found 'at least 117 individuals' who have been subjected to criminal and administrative proceedings for engaging in solidarity with migrants, the majority of which on charges of facilitation.<sup>741</sup> The EU Fundamental Rights Agency has been documenting incidents of criminalisation against rescue NGOs in the Mediterranean since 2018.<sup>742</sup> Their latest report shows that from the 17 NGO vessels still active in May 2024 only eight were at sea, with several being 'blocked in port due to ongoing legal proceedings'.<sup>743</sup> In May 2024 alone, the Italian Civil Aviation Authority issued five decisions banning

<sup>732</sup> Cf. SoM, Article 5; CSR51, Article 31.

<sup>733</sup> Council, General approach, Recital 7a.

<sup>734</sup> Ibid., Recital 6a.

<sup>735</sup> Ibid., Recital 4.

<sup>736</sup> UN Special Rapporteur on the Situation of Human Rights Defenders, [Response to the proposal by the European Commission for a Directive to update the Facilitators Package](#), February 2024, p. 3.

<sup>737</sup> UN Rapporteur on the Situation of HRDs, [Italy: alleged due process violations and other worrying developments related to the trial of HRDs in Trapani and the regulation of civilian search and rescue \(joint communication\)](#), 3 May 2023.

<sup>738</sup> UN Rapporteur on the Situation of HRDs, [Greece: criminal investigations opened against human rights defenders Panayote Dimitras, Tommy Olsen, Madi Williamson and Ruhi Akhtar \(joint communication\)](#), 9 March 2023.

<sup>739</sup> UN Rapporteur on the Situation of HRDs, [Poland: HRDs on Poland-Belarus border allegedly attacked, detained, searched & ill-treated \(joint communication\)](#), 15 April 2022.

<sup>740</sup> UN Rapporteur on the Situation of HRDs, [Latvia: alleged undue use of criminal proceedings against human rights defenders Ieva Raubiško and Egils Grasmanis \(joint communication\)](#), 8 May 2023.

<sup>741</sup> PICUM, [Cases of criminalisation of migration and solidarity in the EU in 2023](#), 2024, p. 4.

<sup>742</sup> FRA, [Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations – 2018](#), 1 October 2018.

<sup>743</sup> FRA, [Search and rescue operations and fundamental rights – June 2024 update](#), 1 July 2024, [section 3](#).

aircraft deployed by civil society organisations for rescue operations from taking off.<sup>744</sup> Actually, since July 2023, 18 new cases have been launched, involving fines and the temporary blocking of vessels in ports in application of Italy's Decree No. 1/2023 (which has since become Law No. 15/2023).<sup>745</sup> The rules impose strict conditions on NGO rescue operations, such as the obligation to proceed to designated ports, usually far away from rescue areas, up in the north of the country. In addition, the legislation obliges rescue vessels to proceed immediately to the designated port after *each* rescue, which impedes the rescue of additional groups of persons in distress regardless of whether rescue capacity may still be available.<sup>746</sup> In seven cases, sanctions have apparently been imposed on NGOs for refusing to follow instructions provided by the Libyan Coast Guard<sup>747</sup> – which, if obeyed, would have led to the *refoulement* of the persons concerned.

Several high-profile cases against individual volunteers are still pending or have recently been dismissed after long and protracted proceedings. For instance, Seán Binder and Sarah Mardini,<sup>748</sup> have recently been acquitted of several charges (including espionage, forgery and unlawful use of radio frequencies),<sup>749</sup> but they still potentially face additional criminalisation for facilitating irregular entry into Greece.<sup>750</sup> For their part, the Luventa case,<sup>751</sup> against crew members from Jugend Rettet, Save The Children, and Médecins Sans Frontières for aiding and abetting irregular immigration, has been discontinued after seven years.<sup>752</sup> The Italian judiciary has dismissed it for lack of evidence, noting irregularities during the investigation, involving the use of 'special investigative tools' similar to those that proposed Article 16 of the directive will generalise if finally adopted.

Many other instances of criminalisation go unreported.<sup>753</sup> Acts of administrative policing,<sup>754</sup> hostile rhetoric,<sup>755</sup> surveillance,<sup>756</sup> harassment,<sup>757</sup> threats and violence<sup>758</sup> have become frequent in the everyday encounters of NGOs and individuals engaging with third-country nationals with Member State authorities across the EU. The offices of KISA, a migrant support group in Cyprus, were literally bombed in January 2024,<sup>759</sup> in an apparent xenophobic attack that remains to be fully investigated. This adds to other famous cases involving activists Cédric Herrou, initially convicted for assisting asylum seekers cross the Roya valley at the French-Italian border, who were lost and would

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<sup>744</sup> Ibid.

<sup>745</sup> Ibid.

<sup>746</sup> Ibid.

<sup>747</sup> Ibid.

<sup>748</sup> For the full story, see Amnesty International, [Greece: 'Farcical' trial of rescue volunteers begins next week](#), 5 January 2023.

<sup>749</sup> ['Greek court rejects charges against aid workers'](#), AP, 13 January 2023.

<sup>750</sup> ['Greek court acquits aid workers who helped rescue migrants crossing in small boats'](#), AP, 30 January 2024.

<sup>751</sup> See Luventa-crew awareness-raising page: [Solidarity at Sea](#), 'the case' section.

<sup>752</sup> For the full reconstruction of the timeline, see ECCHR, ['Acquittal for Luventa sea rescuers'](#), undated.

<sup>753</sup> Jyothi Kanics and Marta Gionco, [Resilience and resistance: in defiance of the criminalisation of solidarity across Europe](#), The Greens/EFA, June 2022.

<sup>754</sup> ['Malta closes ports to migrant rescue NGO ships'](#), Malta Today, 28 June 2018. See, generally, Sergio Carrera et al., *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart 2020).

<sup>755</sup> ['France adds its voice to stop NGO ships from acting as "taxis"'](#), Euractiv, 28 June 2018.

<sup>756</sup> ["'It's a shame": NGOs blast Italy's compulsory code of conduct for rescue ships in the Mediterranean'](#), Euronews, 6 February 2023.

<sup>757</sup> Human Rights Watch, ['Greek authorities target NGOs reporting abuses against migrants'](#), 22 July 2021.

<sup>758</sup> ['People helping asylum seekers in Europe face rising violence, report warns'](#), The Guardian, 22 February 2024.

<sup>759</sup> ['Kisa offices destroyed in apparent attack'](#), Cyprus Mail, 5 January 2024. See also UN Regional Information Centre for Western Europe, ['Cyprus: defending migrants' human rights at one's own peril'](#), 12 December 2024.

otherwise have perished in the Alps,<sup>760</sup> or Carola Rackete, the captain of the Sea-Watch 3, who contravened orders and entered a port in Italy to disembark the survivors of a shipwreck in urgent need of medical attention.<sup>761</sup> The conflation of humanitarian action with migrant smuggling underpins all these cases.

Although many human rights defenders are eventually released, trial processes and investigations, especially if they include the adoption of preventive measures and the seizure of vessels, are in themselves punitive and have a chilling effect.<sup>762</sup> In these cases, the punishment is in the prosecution that puts organisations out of the game. Indeed, as remarked by the EESC, '[l]egal action, administrative and practical obstacles, and police harassment make providing humanitarian assistance more complicated and dangerous ... creating ... a climate of fear around humanitarian, legal or even administrative assistance', which it considers 'a wrong and unacceptable way to combat smuggling'.<sup>763</sup>

Lawyers and journalists as well as good faith service providers are also at risk.<sup>764</sup> The Greek so-called Watergate phone-tapping scandal is a case in point.<sup>765</sup> It unfolded in 2022, implicating the use of predator spyware on journalists covering migration. The strategy included a series of lawsuits on unfounded allegations of involvement in migrant smuggling rings,<sup>766</sup> leading to Government resignations when uncovered.<sup>767</sup>

Family facilitation is also being targeted. This includes tragic examples, like the one of a father of a six-year-old child who drowned during a sea crossing, charged for endangering his son's life and now risking a ten-year prison sentence in Greece<sup>768</sup> — a sentence similar to the one suggested in the proposed directive in situations involving minors.

The amount of 'boat drivers' and simple survivors accused of smuggling is also on the rise, with 264 arrested in Italy in 2022.<sup>769</sup> A report from July 2023 looks at the same phenomenon in Greece, examining 81 trials of 95 pilots arrested and tried for facilitation of irregular entry.<sup>770</sup> The report shows grave shortcomings, with trials lasting an average of 37 minutes (the shortest only 6 minutes in total), leading to disproportionate prison sentences of 46 years in average and fines of over EUR 300 000.<sup>771</sup> The judgments are based on questionable and/or very limited evidence, such as the sole testimony of the police officer making the arrest, who in up to 68 % of cases did not subsequently appear in front of court during trial to be cross-examined.<sup>772</sup> As a result, the report

<sup>760</sup> International Federation for Human Rights (FIDH), ['France: Migrant rights defender Cédric Herrou finally released'](#), 1 April 2021.

<sup>761</sup> ['Investigation against Carola Rackete shelved'](#), *Info Migrants*, 24 December 2021.

<sup>762</sup> Recommendation by the Council of Europe Commissioner for Human Rights, [Protecting the defenders ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe](#), February 2024.

<sup>763</sup> EESC, [Opinion: Anti-Smuggling Package](#), SOC/787-EESC-2024, 10 July 2024, para. 1.9.

<sup>764</sup> Cf. CCBE, [CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit, and stay in the Union](#), 17 May 2024, p. 5.

<sup>765</sup> ['Greek "Watergate" phone-tapping scandal puts added pressure on PM'](#), *The Guardian*, 28 August 2022.

<sup>766</sup> ['Thirty-three NGO members face charges of illegally smuggling migrants into Greece'](#), *Ekathimerini*, 28 September 2020.

<sup>767</sup> Article 19, ['Greece: SLAPP award winner urged to drop defamation lawsuits'](#), 21 October 2022.

<sup>768</sup> ['Asylum seeker father faces 10 years in Greek jail for son's death'](#), *Al Jazeera*, 16 May 2022.

<sup>769</sup> ARCI Porco Rosso and Borderline Europe, [As long as you can still listen: the criminalization of migrant boat drivers in 2022](#), 10 January 2023.

<sup>770</sup> Borderline Europe, [A legal vacuum: the systematic criminalisation of migrants for driving a boat or car to Greece](#), July 2023.

<sup>771</sup> See key findings in the [press release](#) summarising the report, issued on 5 July 2023.

<sup>772</sup> *Ibid.*

finds that persons convicted for the facilitation of irregular migration in Greece make up the second largest group of inmates by crime, with almost 90 % of the total number being third-country nationals.<sup>773</sup> Many of these are indeed migrants seeking safety, who accept to pilot ships in exchange for a discount on the price of their own trips across the Mediterranean or who simply take command of vessels to avoid a shipwreck.<sup>774</sup>

In other instances, mere survivors are charged with migrant smuggling, even though they do not pilot the ships in which they travel. The 2023 Pylos shipwreck, where over 500 persons lost their lives on their way to Greece from Egypt, offers an example.<sup>775</sup> A journalistic investigation has recently revealed that the nine migrants charged in Greece for driving the ship and provoking the shipwreck were in fact passengers and, thus, victims rather than perpetrators – an information the authors claim was known to the authorities.<sup>776</sup> The principle of non-penalisation for irregular entry or stay – in this as well as in the cases of boat pilots – should have precluded their criminalisation and allowed for the unencumbered submission and examination of their asylum claims on arrival.<sup>777</sup>

The implications of this trend, towards the growing criminalisation of humanitarian assistance and mutual aid and their conflation with migrant smuggling, has a very detrimental impact on those concerned. However, it also affects society at large and the well-functioning of democracy EU-wide. The paramount role of civil society organisations and the freedom of thought, opinion, expression, assembly and association in the 'realisation of democracy and human rights' has been explicitly underlined by the Council of Europe Committee of Ministers.<sup>778</sup> Both are considered 'an essential prerequisite' of the well-functioning of democracy and the rule of law.<sup>779</sup> Also the European Commission has acknowledged that '[a]n empowered civil society is a crucial component of any democratic system' in that it 'represents and fosters pluralism and can contribute to more effective policies'.<sup>780</sup> NGOs help to guarantee 'transparent and accountable governance'.<sup>781</sup> On this basis, the UN Declaration on Human Rights Defenders takes a step further and recognises a right of 'everyone', whether individuals or organisations, 'to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels'.<sup>782</sup> All of these core rights and freedoms, which underpin the founding values of the EU, are jeopardised by the current tendency to conflate acts of humanitarian and mutual assistance with the crime of migrant smuggling.

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<sup>773</sup> Ibid.

<sup>774</sup> Ibid. See also Bordermonitoring.eu, [Incarcerating the marginalized: the fight against alleged smugglers on the Greek hotspot Islands](#), November 2020; Andrew Fallone and Lina Vosyliute, *The new EU action plan against smuggling: between politics and evidence*, Ref. Ares(2021)3228844 – 16/05/2021, p. 5.

<sup>775</sup> Amnesty International, ['Greece: One year on from the Pylos shipwreck, the Coast Guard's role must be investigated'](#), 13 June 2024.

<sup>776</sup> ['Pylos shipwreck: Greece knew the real smugglers'](#), *Solomon*, 4 December 2024.

<sup>777</sup> CSR51, Article 31.

<sup>778</sup> Council of Europe Committee of Ministers, Recommendation on the legal status of non-governmental organisations in Europe, [CM/Rec\(2007\)14](#), Preamble, para. 3.

<sup>779</sup> Council of Europe Venice Commission, Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, [CDL-AD\(2011\)035](#), para. 45.

<sup>780</sup> European Commission, The roots of democracy and sustainable development: Europe's engagement with civil society in external relations, [COM\(2012\) 492](#), p. 3.

<sup>781</sup> Ibid.

<sup>782</sup> UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, UNGA Res (1998) [A/RES/53/144](#), Article 1.

### 6.2.3. Alternative avenues

The decision not to criminalise acts of solidarity and not to treat humanitarian assistance, mutual aid, and the good faith provision of services the same way as smuggling activities is not only a political choice but a matter of compliance with legal obligations and the founding principles of the EU.<sup>783</sup> The UN Declaration on Human Rights Defenders reinforces this conclusion.<sup>784</sup>

Since the proposed Facilitation Directive provides for minimum approximation rules, because 'it is not a Regulation', Member States 'remain free to adopt more extensive provisions and to criminalise further conduct' beyond the terms proposed.<sup>785</sup> To avoid deviation and ensure uniformity across EU jurisdictions, a mandatory exoneration clause would be necessary, to 'indicate an outer limit' to the freedom allowed to national authorities when transposing the Directive.<sup>786</sup>

Several stakeholders share this view and have forcefully called for 'a mandatory, explicit, unambiguous and broad-in-scope solidarity clause' to be incorporated in the final text.<sup>787</sup> As some have noted, 'only an active obligation for Member States to prevent starting investigations against humanitarian assistants will provide humanitarian assistants the necessary protection which they are entitled to according to international [and EU] law'.<sup>788</sup> The same applies to the legal status of migrants under the directive. It should be made clear that they are victims rather than (co-)perpetrators, and thus be excluded from criminalisation.<sup>789</sup> Making these exclusions binding (as required by the obligations contracted by the EU and/or its Member States under international law) should be a priority of the co-legislators during the negotiation process.

Regarding humanitarian assistance, the clause, to achieve its aim, should define it broadly and in line with Charter rights. The idea put forward by several stakeholders,<sup>790</sup> to adopt the definition contained in the European Consensus on Humanitarian Aid,<sup>791</sup> would have the advantage of reinforcing coherence across EU policies.<sup>792</sup> Others have suggested a similar approach, building

<sup>783</sup> Article 2 TEU.

<sup>784</sup> UN Declaration on Human Rights Defenders, UNGA Res (1998) [A/RES/53/144](#).

<sup>785</sup> Interview with academic expert #3, 19.11.2024 (transcript on file with the author), p. 1.

<sup>786</sup> Ibid.

<sup>787</sup> CCBE, [CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit, and stay in the Union](#), 17 May 2024, p. 6; SOLIDAR, [SOLIDAR's input on the proposal for a directive – COM\(2023\)755 \(EU new Facilitation Directive\)](#), 18 March 2024, p. 1; Red Cross EU Office, [RCEU comments on the Revised EU Facilitation Directive](#), 7 March 2024, p. 4; Questionnaire replies by PICUM (on file with the author), p. 4; Questionnaire replies by Sea Watch (on file with the author), p. 6. In less forceful terms but in the same direction, see Questionnaire replies by UNODC (on file with the author), p. 5: 'An explicit mandatory exclusion of humanitarian assistance ... would have provided additional safeguards to preserve the right to protection and assistance stemming from international and European law'.

<sup>788</sup> Meijers Committee, [Comment on the EU's Facilitators Package](#), CM2407, September 2024, p. 7.

<sup>789</sup> Discussing the discrepancies across Member States in the treatment of migrants, as either suspects, perpetrators, witnesses, or victims, see Mirentxu Jordana Santiago, ['Addressing migrant smuggling in the European Union: challenges for a non-criminalized, coordinated, and effective response'](#), EULEN Working Papers Series No. 19/22, p. 7.

<sup>790</sup> e.g. Meijers Committee, [Comment on the EU's Facilitators Package](#), CM2407, September 2024, pp. 5-6. See also Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, December 2018, p. 51.

<sup>791</sup> Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, [The European consensus on humanitarian aid](#), 2008.

<sup>792</sup> This would be in line with Article 13 TEU, according to which '[t]he Union ... shall aim to ... ensure the consistency, effectiveness and continuity of its policies and actions'.

upon several UN General Assembly Resolutions and proposing that the notion encompasses 'classic humanitarian assistance work as well as protection initiatives and the promotion of social cohesion'.<sup>793</sup> This includes 'both short and long-term actions taken to save lives, alleviate suffering and maintain human dignity ... including actions to reduce vulnerabilities and promote and protect human rights [at large]'.<sup>794</sup>

However, the inclusion of an explicit exception from criminalisation in the directive will not do away with the possibility pursued in several Member States of imposing administrative measures that curtail humanitarian activity, including rescue efforts at sea. The shift from criminalisation to administrative curtailment has been documented in Italy,<sup>795</sup> for instance, and 'will continue even with an explicit humanitarian clause'.<sup>796</sup> A broader discussion, beyond the revision of the Facilitators Package, is needed in this regard to avoid the continued shrinking of civic space<sup>797</sup> and the noxious consequences it has on democracy, rule of law, and the protection of human rights.<sup>798</sup>

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<sup>793</sup> Council of Europe, [Using criminal law to restrict the work of NGOs supporting refugees and other migrants in Council of Europe Member States](#), December 2019, para. 3.

<sup>794</sup> Ibid.

<sup>795</sup> '[Come hanno fermato le navi delle ONG](#)', *Il Manifesto*, 24 April 2021; '[La Corte UE: No alla persecuzione delle navi ONG](#)', *Il Manifesto*, 2 August 2022.

<sup>796</sup> Interview with FRA official, 14.11.2024 (transcript on file with author), p. 3. Interview with Frontex official, 14.11.2024 (transcript on file with the author), p. 2.

<sup>797</sup> e.g. FRA, [Protecting civil society – update 2023](#), 18 October 2023. See also UN Human Rights Regional Office Europe, '[A spotlight on human rights defenders: enhancing the common agenda for protection](#)', Video message by High Commissioner for Human Rights Volker Türk, 9 December 2024.

<sup>798</sup> Article 2 TEU.



## 7. Key findings and recommendations

This chapter summarises the main findings and makes concrete recommendations for the European Parliament's consideration on specific means and measures to adopt in line with the study's conclusions. It recounts the main issues and the ways in which they should be addressed.

### 7.1. Key findings

**Chapter 2** offered an overview of the main international legal standards on migrant smuggling, maritime search and rescue, refugee protection, and human rights of relevance to the regulation of anti-facilitation efforts at EU level.

From the analysis of trans-national criminal law, the **UN Smuggling Protocol** provides the 'universal' definition and the regime applicable to 'all aspects of smuggling of migrants'.<sup>799</sup> In so doing, the Protocol pursues the dual objective of preventing and combating the crime, 'while protecting the rights of smuggled migrants'.<sup>800</sup> It defines the crime as 'the procurement' of 'illegal entry' that is 'committed intentionally' and 'in order to obtain' a financial or other material benefit,<sup>801</sup> and as part of an 'organised criminal group'.<sup>802</sup> From UNODC's analysis, it transpires that in order to fulfil obligations under the Protocol, Contracting Parties cannot unilaterally modify the core definition of migrant smuggling. In particular, the text 'does not provide a legal basis for the prosecution of facilitation of illegal entry or illegal stay where there is no purpose to obtain a financial or other material benefit'.<sup>803</sup> This is corroborated by the several exclusions, exemptions and saving clauses the Protocol contemplates vis-à-vis smuggled migrants, who should not be criminalised for being smuggled,<sup>804</sup> and vis-à-vis 'groups that smuggle migrants for charitable or altruistic reasons',<sup>805</sup> who should equally be exempt. UNODC explicitly urges Contracting Parties 'to include safeguards',<sup>806</sup> in the form of 'all appropriate measures, including legislation if necessary, to preserve and protect the rights of [the] persons [concerned]',<sup>807</sup> in line with international law.<sup>808</sup> As the Commission has acknowledged, both the EU and the Member States, as Parties to the Protocol, 'are bound to apply it *including when passing or implementing legislation within its scope*'.<sup>809</sup>

The **international law of the sea** is also of relevance to the design of anti-facilitation legislation. The universal duty to rescue must be taken into account. Both the EU and the Member States, as Parties to UNCLOS, 'shall fulfil in good faith the obligations assumed' and 'exercise the rights, jurisdiction and freedoms recognized [therein]'<sup>810</sup> in conformity with its provisions and 'other rules of

<sup>799</sup> SoM, Preamble para. 4.

<sup>800</sup> SoM, Article 2.

<sup>801</sup> SoM, Article 3(a) in light of Article 6(1).

<sup>802</sup> SoM, Article 4.

<sup>803</sup> UNODC, [The concept of 'financial or other material benefit' in the Smuggling of Migrants Protocol](#), Issue paper 2017, p. 71.

<sup>804</sup> SoM, Article 5.

<sup>805</sup> UNODC, [Legislative guide for the implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime](#), 2005, p. 333, para. 19.

<sup>806</sup> UNODC, [The concept of 'financial or other material benefit' in the Smuggling of Migrants Protocol](#), Issue paper 2017, p. 71.

<sup>807</sup> SoM, Article 16(1).

<sup>808</sup> SoM, Article 19(1).

<sup>809</sup> Facilitators Package Guidance, p. 4. (emphasis added), referring to Commission's [REFIT evaluation](#), p. 31.

<sup>810</sup> UNCLOS, Article 300.

international law'.<sup>811</sup> The interplay with the right to life generates specific obligations the Commission has acknowledged,<sup>812</sup> including explicitly the 'need to avoid the criminalisation of those who provide humanitarian assistance to people in distress at sea'.<sup>813</sup>

Several other **international human rights** and **refugee protection standards** are of relevance in this context. Key protections include the rights to dignity and integrity,<sup>814</sup> the prohibition of *refoulement* and ill-treatment,<sup>815</sup> the rights to asylum and non-penalisation for irregular entry or stay,<sup>816</sup> the right to leave any country including one's own,<sup>817</sup> to liberty and security,<sup>818</sup> to private and family life,<sup>819</sup> to data protection,<sup>820</sup> to equality before the law,<sup>821</sup> the prohibition of discrimination,<sup>822</sup> child-specific safeguards,<sup>823</sup> the rights to health care,<sup>824</sup> to access to services, to property,<sup>825</sup> the freedom of thought and conscience,<sup>826</sup> expression and information,<sup>827</sup> assembly and association,<sup>828</sup> the presumption of innocence,<sup>829</sup> as well as the principles of legality and proportionality of criminal offences and penalties,<sup>830</sup> and the *ne bis in idem* prohibition.<sup>831</sup> Procedural safeguards and effective remedies cater for the procedural dimension of these protections.<sup>832</sup> Although not all are absolute, they do forbid unreasonable, unjustifiable and disproportionate interferences with their core content. Any **limitations** adopted,<sup>833</sup> including anti-facilitation measures, must be designed in a way such as not to preclude access to and the effective exercise of the rights concerned. They must be provided for by law, pursue a legitimate aim, and be appropriate, necessary, and proportionate to achieving it. Where less intrusive measures can be adopted to attain the envisaged objective, they have preference.

The **scope of application of the obligations imposed by the EU Charter of Fundamental Rights** is the same as that of EU law at large. Charter rights and principles must be respected, protected, and actively promoted whenever EU entities exercise their competences and whenever Member States implement EU law, including extra-territorially.<sup>834</sup> There are no situations where powers conferred

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<sup>811</sup> UNCLOS Articles 2(3) and 87(1).

<sup>812</sup> CFR, Article 2.

<sup>813</sup> Commission SAR Recommendation, Preamble, para. 5.

<sup>814</sup> CFR, Articles 1 and 2.

<sup>815</sup> CFR, Articles 4 and 19.

<sup>816</sup> CFR, Article 18; CSR51, Article 31.

<sup>817</sup> ICCPR, Article 12(3); ECHR, Article 2 Protocol 4.

<sup>818</sup> CFR, Article 6.

<sup>819</sup> CFR, Article 7.

<sup>820</sup> CFR, Article 8.

<sup>821</sup> CFR, Article 20.

<sup>822</sup> CFR, Article 21.

<sup>823</sup> CFR, Article 24.

<sup>824</sup> CFR, Article 35.

<sup>825</sup> CFR, Articles 7, 8, and 17.

<sup>826</sup> CFR, Article 10.

<sup>827</sup> CFR, Article 11.

<sup>828</sup> CFR, Article 12.

<sup>829</sup> CFR, Article 48.

<sup>830</sup> CFR, Article 49.

<sup>831</sup> CFR, Article 50.

<sup>832</sup> CFR, Articles 41 and 47.

<sup>833</sup> CFR, Article 52(1).

<sup>834</sup> CFR, Article 51.

by EU law, including in the anti-facilitation domain, may be exercised without due regard for fundamental rights. As corroborated by the CJEU, 'situations cannot exist which are covered ... by [EU] law without ... fundamental rights being applicable'; '[t]he applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter'.<sup>835</sup>

**Chapter 3** has provided a critical and comprehensive examination of the existing EU legal framework regarding the facilitation of irregular migration as well as an overview of the main legal and practical shortcomings in relation to its transposition and implementation at the national level.

The analysis has revealed the **cleavage between the EU facilitation and the UN migrant smuggling definitions**. In contrast to the UN Protocol, intentionally assisting a foreigner to enter/stay without authorisation through whatever means, whichever the purpose, with or without the intermediation of a financial or other material benefit, suffices for criminalisation under EU law.<sup>836</sup> A financial gain is only necessary for the crime of facilitation of irregular residence.<sup>837</sup> This means that, under the current rules, there is no distinction between abusive or exploitative action and action engaged in for humanitarian or solidarity reasons, whether by civil society organisations, individual volunteers, or family members assisting each other. The offence is 'defined objectively' and 'irrespective of [the] person's motives', as noted by the Advocate General in the *Kinsa* case,<sup>838</sup> which is currently pending before the CJEU.

The **risk of over-criminalisation** was emphasised by the **European Parliament** already at the time of the debate on the adoption of the Facilitators Package.<sup>839</sup> Although the Parliament proposed several amendments that would have introduced meaningful safeguards these were not retained. The Parliament has reiterated its reservations on several occasions,<sup>840</sup> concentrating on the lack of legal certainty for those concerned and the overriding focus on punishment and deterrence of the current regime. The optional 'humanitarian clause'<sup>841</sup> is considered insufficient.<sup>842</sup>

Similar findings have been reached by the Commission's 2017 REFIT **evaluation** and its supporting study,<sup>843</sup> adding to the evidence base on the problem of over-criminalisation and leading to the adoption of interpretative guidance.<sup>844</sup> Nonetheless, the fact that the existing framework does not focus on organised criminal networks, does not contain sufficient human rights safeguards, and

<sup>835</sup> CJEU, Case C-617/10 *Fransson*, ECLI:EU:C:2013:105, para. 21.

<sup>836</sup> 2002 Facilitation Directive, Article 1(1)(a).

<sup>837</sup> *Ibid.*, Article 1(1)(b).

<sup>838</sup> CJEU, [Opinion](#) of Advocate General De la Tour in Case C-460/23 *Kinsa*, ECLI:EU:C:2024:941, paras 40 and 46.

<sup>839</sup> European Parliament, Report on the initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence (10675/2000 – C5 0427/2000 – 2000/0821(CNS)) and on the initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence (10676/2000 – C5-0426/2000 – 2000/0820(CNS)), 25 October 2000, [A5-0315/2000](#).

<sup>840</sup> European Parliament, [Resolution](#) of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)), para. 39. See also [Resolution](#) of 18 April 2018 on progress on the UN Global Compacts for Safe, Orderly and Regular Migration and on Refugees (2018/2642(RSP)); and [Resolution](#) of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised (2018/2769(RSP)).

<sup>841</sup> 2002 Facilitation Directive (emphasis added), Article 1(2).

<sup>842</sup> Sergio Carrera et al., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2016; and [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2018.

<sup>843</sup> Nick Bozeat et al., [Evaluation and impact assessment study on a proposal for a revision of the EU legal framework related to the facilitation of irregular migration \(migrant smuggling\)](#), ICF International, European Commission, 2017; and European Commission, [REFIT Evaluation](#).

<sup>844</sup> European Commission, [Facilitators Package Guidance](#).

leads to the criminalisation of humanitarian assistance was not considered sufficient to warrant an overhaul of the regime. The conclusion that the Facilitators Package 'has not significantly contributed to reducing irregular migration' and has had 'little deterrent effect' and did not lead to a reform of the Facilitators Package at that time.<sup>845</sup>

The most up-to-date evaluation of the implementation of the Facilitators Package, undertaken by Milieu in preparation for the **2023 Commission proposal**, shows the **persistence of these concerns**.<sup>846</sup> Although the Commission is aware of the fact that the 'broad definition of the offence and the absence of exemptions' are the main challenges of the 2002 Facilitators Package, acknowledging that it 'has not been effective in creating clarity and legal certainty',<sup>847</sup> these issues have not been resolved. The **lack of an impact assessment** – overriding the main recommendation by Milieu – compounds the situation.

**Chapter 4** analysed the main elements of the proposal, thoroughly reviewing the objectives of its provisions as formulated therein and in light of coherence considerations. The chapter first assessed the relevance of the stated objectives with regard to the legal and implementation challenges established in Chapter 3. It then examined the consistency of the 2023 proposal's provisions with international rules as well as related EU law and policy. The interplay with the new proposal for a regulation on police cooperation was also considered in detail.

The five main **objectives** pursued by the draft directive are **based on the 2017 REFIT evaluation**, largely ignoring materials and findings that emerged in the subsequent six years. These include:

- (1) Ensuring an effective investigation, prosecution and sanctioning of organised criminal networks responsible for migrant smuggling;
- (2) Harmonising penalties that take account of seriousness of the offence;
- (3) Improving the jurisdictional reach;
- (4) Reinforcing Member States resources to tackle and prevent migrant smuggling; and
- (5) Improving data collection and reporting.<sup>848</sup>

The analysis reveals that the proposal aims to address several supplementary goals, such as to modernise the EU legal framework on facilitation,<sup>849</sup> to address implementation challenges with the current framework,<sup>850</sup> and to make an overall contribution to reducing irregular migration to the EU.<sup>851</sup> Against this background, the Commission presents the proposal as a means to protect the fundamental rights of the third-country nationals concerned, without introducing any specific safeguards.<sup>852</sup>

The **coherence analysis** shows **important inconsistencies** both **internal** to the proposal and with regard to **external** standards stemming from international and EU law and policy. For instance, although the Commission acknowledges that 'people providing services to irregular migrants in the context of their professional activities or providing assistance for selfless reasons have ... been prosecuted' in several Member States,<sup>853</sup> the proposal does not incorporate the element of financial gain as an obligatory component of the offence across the board. This is so, in spite of the

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<sup>845</sup> [REFIT Evaluation](#), pp. 18 and 19.

<sup>846</sup> [Milieu Study](#).

<sup>847</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 3.

<sup>848</sup> *Ibid.*, pp. 3–4.

<sup>849</sup> *Ibid.*, Recitals 2 and 29. See also Article 1 and analytical supporting document, [SWD\(2024\) 134](#), p. 3.

<sup>850</sup> *Ibid.*, pp. 8–9; analytical supporting document, [SWD\(2024\) 134](#), p. 4.

<sup>851</sup> Analytical supporting document, [SWD\(2024\) 134](#), p. 7.

<sup>852</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 10.

<sup>853</sup> *Ibid.*, p. 9.

Commission's aim to 'focus on offences committed with a lucrative intent in particular by organised criminal groups'.<sup>854</sup> This approach generates an internal inconsistency as well as a problem of alignment with the **UN Smuggling Protocol**.

In terms of external coherence, the Commission asserts that the proposal is 'consistent with the UN Protocol',<sup>855</sup> without paying attention to the fact that Article 3 of the proposed directive is much broader in its definition of the baseline crime. The exclusions, exemptions and saving clauses set out in the Protocol have not been adequately transposed either. There is no specific provision in the operative text of the proposed directive with a legally binding character, only preambular statements in Recitals 4, 10 and 28, which in addition employ ambiguous terms. The Commission also acknowledges the relevance of the **law of the sea and maritime Conventions** that the EU and the Member States 'should ... take into account',<sup>856</sup> but rescue obligations are not specifically considered to exonerate conduct aimed at saving human lives. Finally, in terms of **international human rights and refugee law standards**, the proposed directive briefly mentions some relevant instruments<sup>857</sup> and requests Member States to apply them 'in accordance and in full compliance with the 1951 [Geneva] Convention', 'in particular the principle of *non-refoulement*'.<sup>858</sup> But there are **no legally binding guarantees to this effect in the text of the proposal**.

The Commission claims, but does not elaborate on, consistency with existing **EU instruments** in the areas of anti-smuggling policy and in the criminal justice and irregular migration. However, no mention is made of the existing carrier sanctions regime,<sup>859</sup> nor of the Regulation establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator,<sup>860</sup> which already set out procedures and penalties vis-à-vis transport companies involved in the facilitation of irregular migration, questioning the need for additional measures.<sup>861</sup> The need for additional measures has also been challenged by the International Road Transport Union (IRU) in its position on the proposal. Consistency claims with the victims' rights,<sup>862</sup> human trafficking,<sup>863</sup> and return framework<sup>864</sup> are not supported by specific provisions, and no connection has been made to the asylum *acquis* whatsoever.

Regarding the **draft regulation** to enhance police cooperation and strengthen Europol's role, the analysis demonstrates that coherence needs to be assessed on the basis that all the new tasks and powers suggested build on an unclear definition of 'migrant smuggling' that is unduly equated with facilitation offences, even though they do not entail a profit element nor a link to organised crime.

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<sup>854</sup> Ibid.

<sup>855</sup> Ibid., p. 5.

<sup>856</sup> Ibid., Recital 4.

<sup>857</sup> Ibid., referring to the UN Convention on the Rights of the Child.

<sup>858</sup> Ibid., Recital 10. There is no allusion to the principle of non-penalisation for irregular entry/stay in CSR51, Article 31.

<sup>859</sup> [Council Directive 2001/51/EC](#) of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

<sup>860</sup> [Regulation \(EC\) No 1071/2009](#) of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC.

<sup>861</sup> International Road Transport Union (IRU), [IRU position on the European Commission proposal laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU](#), 9 April 2024, p. 2.

<sup>862</sup> [Directive 2012/29/EU](#) of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>863</sup> [Council Directive 2004/81/EC](#) of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

<sup>864</sup> [Directive 2008/115/EC](#) of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

Europol's mandate, according to its founding Regulation (EU) 2016/794, is however circumscribed to supporting police cooperation regarding 'organised crime ... and other forms of serious crime',<sup>865</sup> including with regard to 'immigrant smuggling'.<sup>866</sup> Insofar as there are crimes of facilitation of irregular migration that do not amount to smuggling and do not involve organised criminal networks, these should not be considered to come within the remit of Europol's competences. The opposite may lead to the undue indirect expansion of Europol's powers contrary to its core mission.

**Chapter 5** has conducted an effectiveness, efficiency, and proportionality analysis. Overall, it has assessed the proposal's provisions in light of the principles of legality, proportionality, and legal certainty. The chapter reaches the conclusion that the proposed legal framework is not well suited to address persisting challenges facing the current facilitation regime. There are significant definitional issues with the manner in which the crimes, ancillary actions, aggravating and mitigating circumstances, and liability rules have been framed. Matters of scope are also problematic, maintaining the risk of over-criminalisation.

Definitional issues and matters of scope affect **legal certainty** and, ultimately, **compliance with the rule of law**, thereby impacting the **effectiveness analysis** of the proposal. Under these principles, as the analysis has shown, the law must be accessible and foreseeable; it must be sufficiently clear from the wording of the relevant provisions how individuals should act; and it must also be sufficiently predictable in its application.<sup>867</sup> The Commission proposal, however, fundamentally revises the universally accepted meaning of 'smuggling of migrants',<sup>868</sup> extending it so far that it affects key international law commitments and EU law standards. No **efficiency analysis** has been undertaken by the Commission, which prevents a cost-benefit assessment of the proposal. At the same time, necessity and added-value of EU action has not been evaluated. Finally the assessment of **proportionality** regards mostly compliance with the general principle set out in Article 5(4) TEU. The Commission merely asserts that the provisions of the proposed directive 'ensure [by themselves] the proportionality of the criminal penalties' set out therein.<sup>869</sup> This, without more, is said to be 'in line with the principle of proportionality of criminal penalties as enshrined in Article 49(3) of the Charter' of Fundamental Rights.<sup>870</sup> Given their shortcomings, the effectiveness, efficiency and proportionality assessments are not fully compliant with the Better Regulation Guidelines and Toolbox.<sup>871</sup>

The **main problems** identified are:

- (1) The lack of a link to organised crime and of an undue profit requirement as part of the baseline crime (Article 3);
- (2) The very broad conceptualisation of what may amount to a financial or material benefit, in relation to one of the proposed configurations of the baseline crime (Article 3(1)(a)), with the mere promise or expectation of anything characterisable as an advantage, irrespective of it being actually accepted or obtained, potentially fulfilling this requirement;
- (3) The lack of a condition of specific lucrative intent, which may lead to the interpretation of facilitation as a strict liability offence, impinging upon the presumption of innocence;

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<sup>865</sup> [Europol Regulation](#), Recital 1. See also Article 3(1) and Annex I.

<sup>866</sup> *Ibid.*, Annex I.

<sup>867</sup> ECtHR, *Kafkaris v. Cyprus*, App 21906/04, 12 February 2008, para. 140.

<sup>868</sup> SoM, Articles 3a, 4, and 6(1).

<sup>869</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 8.

<sup>870</sup> *Ibid.*

<sup>871</sup> European Commission, [Better Regulation Agenda: Why and How](#); [Better Regulation Guidelines](#); and [Better Regulation Toolbox](#).

- (4) The absence of specific definitions of key terms, like 'serious harm' or 'high likelihood' (Article 3(1)(b)), which may lead to intrinsically dangerous activities (like search and rescue (SAR)) being potentially criminalised, even where the connection to the offence is causally remote or non-existent;
- (5) The crime of 'public instigation' (Article 3(2)), which is very vaguely defined and in terms that collide with the freedom of expression and information;
- (6) The uncertainty surrounding 'incitement', 'aiding and abetting', and 'attempt' (Article 5), which may stretch the concept of preparatory acts beyond reasonability bounds;
- (7) The unclear distinction between 'aggravated crimes' and 'aggravating circumstances' (Articles 4 and 9) and how this affects related safeguards;
- (8) The incommensurability of the circumstances leading to 'aggravated crimes' or counting as 'aggravating circumstances', e.g. placing the 'use of serious violence' on a par with the assistance provided to unaccompanied minors, even by their own parents (Article 4), and equating in gravity the illegal employment, exploitation or instrumentalisation of migrants that may ensue (Article 9);
- (9) Considering links to those circumstances in such broad terms as those proposed, i.e. when the offence 'entailed or resulted in' illegal employment, exploitation or instrumentalisation;
- (10) The lack of consideration for the risk of conflating facilitation offences with human trafficking, when exploitation is involved (Article 9(d)), or with the employers' sanctions regime, when it leads to illegal employment (Article 9(b));
- (11) The risk of eroding the principle of individual responsibility underpinning the criminal law that arises when facilitation is connected to the (typically State-led) 'instrumentalisation' of migrants;
- (12) The requirement to criminalise legal persons that formally qualify as such, which can only include incorporated service providers and NGOs (Articles 2(3) and 7);
- (13) The proposal to criminalise legal persons in situations where 'the lack of supervision or control' by the person with the power to exert it 'has made possible the commission of the criminal offence' (Article 7(2)), regardless of the specific circumstances, potentially beyond the awareness, will or knowledge of the representative concerned and despite due diligence efforts;
- (14) The harshness and disproportionate severity of the penalty framework proposed (Articles 6 and 8), especially considering that the majority of cases concern NGOs, family members, and migrants facilitating their own entry/stay, often for the purposes of seeking international protection;
- (15) The disproportionate severity of complementary sanctions (Articles 6 and 8), including the 'permanent' disqualification, 'withdrawal of permits or authorisations' to conduct activities, the seizure of vehicles (including rescue vessels), and the 'permanent closure of establishments', which can lead to the dissolution of civil-society organisations and the dismantling of businesses, and is at odds with the rehabilitation purpose of penalties under national law;
- (16) The absence of procedural arrangements and safeguards prior to the adoption of preventive measures, including the freezing of assets or the seizure of vehicles, which may be imposed without the opportunity to be heard, defend innocence, and appeal the measure concerned;

- (17) The circumstances on which jurisdiction is proposed to be extended (Article 12), disregarding international standards and possibly leading to conflicts among Member States and with third countries;
- (18) The coherence and proportionality problems caused by the call to use special investigative tools (Article 16) including in cases where the offence has no link to organised crime;
- (19) The inadequate monitoring and follow up arrangements proposed (Article 17), focused on the collection of statistical data that will not allow for an understanding of whether family members, humanitarian actors, good faith service providers, and smuggled migrants are unduly criminalised;
- (20) The lack of mandatory humanitarian exemption and of a general assessment of whether criminalisation is warranted as a proportionate response to the facilitation of irregular migration, given the significant impact it has on fundamental rights, especially when undertaken by family members, NGOs, and migrants facilitating their own journeys or providing peer assistance.

The **Council's general approach**, proposing to allow Member States to retain absolute discretion to 'adopt or maintain legislation providing for a broader incrimination than what is set out in [the] Directive',<sup>872</sup> will only exacerbate these issues.

As the analysis has demonstrated, by imposing a **blanket approach** to the criminalisation of all forms of facilitation, regardless of means, motives and intent, the foremost consideration outweighing all other factors is the fight against irregular migration. Yet, criminalisation must be the outcome of a reasonable balancing of all the interests at stake, including the rights of those concerned.<sup>873</sup> The burden of demonstrating compliance with the adequacy, necessity, and strict proportionality tests for the limitation of rights under the Charter falls first and foremost on the legislator.<sup>874</sup> And blanket restrictions, insofar as they do not respect 'the essence of those rights',<sup>875</sup> are not proportionate.

**Chapter 6** has assessed the compatibility of the proposal's provisions with the Charter, paying attention to the fact that it only refers to the protection of fundamental rights in the explanatory memorandum and the recitals, introducing no specific safeguards in the main text. The focus has been on key substantive and procedural rights affected by the proposed reform, paying particular attention to the presumption of innocence and related protections in the criminal justice context. The situation of humanitarian assistance has been specifically evaluated, taking account of whether the provisions proposed by the Commission are likely to prevent it from being criminalised.

The overall conclusion is that it is not enough that the proposed legislative provisions are claimed to 'respect the rights and observe the principles recognised by the Charter'.<sup>876</sup> The **rights and principles concerned must in fact be protected and 'promoted'**, according to the Charter. The introduction of specific and detailed guarantees to this effect is, therefore, necessary.

The treatment of **humanitarian assistance** under the facilitators regime is the most controversial issue in this regard. The absence of a uniform definition and consensus around the regulatory approach to follow across Member States are most problematic. As the analysis undertaken has shown, there is substantial and consequential variation across jurisdictions.<sup>877</sup> Different approaches

<sup>872</sup> Council, General approach, Recital 6a.

<sup>873</sup> CFR, Article 52(1).

<sup>874</sup> CJEU, Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28, para. 50.

<sup>875</sup> CFR, Article 52(1).

<sup>876</sup> 2023 Facilitation Directive Proposal, Recital 28.

<sup>877</sup> REFIT Evaluation, [SWD\(2017\) 117](#), pp. 14-15; [Milieu Study](#), pp. 31-57.



are followed, some putting the accent on the motivation of the actors concerned, the type of action undertaken, or the type of person assisting or being assisted. The role of situations of danger or distress and whether the necessity defence may be of relevance in the case at hand also varies, as does the role of legal duties, such as the duty to rescue persons in distress at sea. There are also inconsistencies regarding the role accorded to the absence of criminal intent, to the lack of financial or other material gain, and to the geographical reach and implications of the conduct. In some countries, criminalisation may be averted or reduced on the grounds of defence or through reliance on mitigating circumstances. The effects of exoneration also fluctuate, from the exclusion of unlawfulness or guilt in some Member States, to constituting a bar to prosecution or only to penalisation. Different prosecutorial priorities also lead to variation. While some countries focus on big smuggling rings, others target any facilitator, including family members, boat pilots, NGOs and volunteers.

These vast differences are primarily attributable to the discretionary nature of Article 1(2) of the 2002 Facilitation Directive and its vague formulation. The change proposed by the Commission, **from an optional exemption clause to an indicative recital**, will exacerbate the situation, since all facilitation conduct will be criminalised by default, by virtue of the legally binding provisions of the proposed directive. While it may well 'not [be] the purpose of th[e] Directive to criminalise ... humanitarian assistance',<sup>878</sup> a simple recital cannot guarantee such a result on its own. The same is true of the statement to the effect that third-country nationals should not become criminally liable for having been the subject of such criminal offences.<sup>879</sup> Without explicit and specific safeguards in the legally binding body of the directive this cannot produce full legal force. The expectation under the proposed regime is for the criminalisation of humanitarian assistance, mutual aid, and the good faith provision of services to continue, if not further aggravate. The trend across Member States is one of multiplying cases, which affects society at large and the well-functioning of democracy EU-wide. Core rights and freedoms, which underpin the founding values of the Union, are jeopardised by the current tendency to conflate acts of humanitarian and mutual assistance with the crime of migrant smuggling.

## 7.2. Recommendations

In light of the main findings and the main deficiencies detected in the Commission proposal, the study makes the following recommendations:

- (1) Call for the withdrawal of the proposal until such time as a thorough and comprehensive **impact assessment** pursuant to the Better Regulation standards has been undertaken, addressing all the issues identified in this study and related reports in depth and in detail;
- (2) Request the full alignment of the facilitation offence in the proposed directive with the **UN Protocol** definition of migrant smuggling. This will not only ensure compliance with international obligations but also reinforce conformity with the autonomous requirements imposed by the EU principles of legality and legal certainty, and facilitate cooperation with third countries from a legal and an operational standpoint, building the trust necessary to forge international partnerships;

<sup>878</sup> 2023 Facilitation Directive Proposal, Recital 7.

<sup>879</sup> Ibid.

- (3) Revise the **legal basis** of the proposed directive to Article 83(1) TFEU, addressing specifically 'organised crime', and re-focus the entire framework of the proposed provisions on the objective of targeting the 'organised criminal networks responsible for migrant smuggling';<sup>880</sup>
- (4) Ensure full **coherence** with other EU instruments on the protection, assistance, and support of victims of crime, the Return Directive, and the asylum *acquis* to guarantee full and effective access to the rights and protections to which third-country nationals are entitled;
- (5) Introduce explicit and specific provisions in the binding part of the directive to ensure both legally and in practice the respect, protection and promotion of the **rights** of migrants and of the actors that may engage with them without criminal intent and with no link to smuggling networks. A fully binding guarantee should be provided, designed in a way such as to ensure equality before the law and non-discrimination on migration status or otherwise;
- (6) Insert a clear set of measures and procedures whereby all potential facilitators may have their cases heard and avoid the imposition of preventative measures, formal charges, prosecution, and eventual condemnation. At all steps of the criminalisation process **procedural safeguards** must exist to avoid undue penalisation and the strain on criminal justice resources that comes with it. Specific clauses should be introduced to guarantee the rights to be heard, submit evidence, and defend innocence in line with the presumption of innocence and the right of defence;
- (7) Revise the **definition** of the baseline crime of facilitation as entailing a criminal lucrative intent and committed as part of an organised smuggling network to avoid a conflict with the definition of migrant smuggling in the UN Protocol and the configuration of the offence as one of strict liability. In this connection, it is important to conceptualise what amounts to a financial or material benefit as undue or unfair enrichment to prevent the risk of over-criminalisation;
- (8) Introduce mandatory **exoneration clauses** to exclude from criminalisation all conduct performed in the context of good faith service provision and the provision of assistance for selfless reasons. This should be broadly phrased to include all actions taken to 'save lives, alleviate suffering and maintain human dignity ... including actions to reduce vulnerabilities and promote and protect human rights'.<sup>881</sup> To comply with the principle of non-criminalisation,<sup>882</sup> the liability of migrants who facilitate their own journeys, let alone those who make the object of smuggling offences, should also be explicitly excluded. The status as victims, rather than (co)perpetrators, of smuggled migrants should be made clear in legally binding provisions within the main body of the directive;
- (9) Eliminate the crime of **public instigation** and 'incitement' altogether and precisely define what amounts to preparatory acts of 'aiding and abetting' or 'attempt', always keeping in mind that the target should be the organised criminal networks engaged in migrant smuggling;
- (10) Remove the clause on **'aggravated crimes'** and retain only the clause on 'aggravating circumstances' on the understanding that the basic elements of the baseline crime need to be fulfilled in every case for the conduct to attract criminalisation;

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<sup>880</sup> 2023 Facilitation Directive Proposal, explanatory memorandum, p. 3.

<sup>881</sup> Council of Europe, [Using criminal law to restrict the work of NGOs supporting refugees and other migrants in Council of Europe Member States](#), December 2019, para. 3.

<sup>882</sup> SoM, Article 5; RSC51, Article 31.

- (11) Specify the notions that constitute '**aggravating circumstances**' for compliance with the principle of legal certainty, including the concepts of 'serious harm' or 'high likelihood'. Relatedly, eliminate references to offences that 'entailed or resulted' in related crimes to avoid confusion with the human trafficking regime and the employers' sanctions framework. Links to the (typically State-orchestrated) 'instrumentalisation' of third-country nationals should also be removed to prevent the erosion of the principle of individual responsibility underpinning the criminal law system;
- (12) Refine the regime applicable to **legal persons** to avoid mis-targeting good faith service providers and NGOs. In particular, the proposal to criminalise legal persons in situations where 'the lack of supervision or control' by the person with the power to exert it 'has made possible the commission of the criminal offence' (Article 7(2)) should be eliminated. The standard for liability should be knowing and willing involvement in migrant smuggling with a lucrative intent;
- (13) Revisit the **penalty framework** to prevent undue harshness and disproportionality, including in relation to crimes of a dissimilar severity;
- (14) Revise the set of **complementary sanctions**, making clear that 'permanent' sanctions are arbitrary and can never be justified. References to the 'permanent' disqualification, 'withdrawal of permits or authorisations' to conduct activities and to the 'permanent closure of establishments' should be removed and Member States precluded from imposing them in national law;
- (15) Introduce clear procedural arrangements and safeguards prior to the adoption of **preventive measures**, including regarding the freezing of assets or the seizure of vehicles, so that they can only be imposed after granting the opportunity to be heard and to appeal the measure concerned;
- (16) The bases on which **jurisdiction** must or may be extended need to be brought in full compliance with international standards, including the principles of exclusive flag and territorial jurisdiction operating at sea and vis-à-vis third countries, taking account of the freedom of navigation applying on the high seas, the principle of double incrimination governing trans-national cooperation in criminal matters, and reserving the establishment of universal jurisdiction for crimes against humanity, genocide, and war crimes, as is customary in the international sphere;
- (17) References to '**special investigative tools**' should be removed, unless the baseline crime has been redefined as recommended herein and these tools are thus reserved for the investigation of offences concerning organised crime;
- (18) Specific follow up arrangements should be introduced to guarantee the effective and independent **monitoring** of implementation and compliance by the Member States. The introduction of national smuggling monitors in the image of the national trafficking monitors envisaged in the new Trafficking Directive offers a good example that could be followed;
- (19) The collection of **statistical data** to be forwarded to the Commission needs to include all relevant categories to allow for a comprehensive understanding of whether family members, humanitarian actors, good faith service providers, and smuggled migrants are being unduly criminalised;
- (20) Launch an independent observatory on the **use of administrative measures** with a punitive effect vis-à-vis journalists, civil society organisations, and human rights defenders engaging with irregular migrants. This will serve to determine their impact on rights and fundamental freedoms with a view to identifying the best course of action for the preservation of the civic

space and the well-functioning of democracy at large. The examples of the European Monitoring Centre on Racism and Xenophobia that preceded FRA,<sup>883</sup> or of the Search and Rescue Observatory for the Mediterranean, hosted at Queen Mary University of London,<sup>884</sup> could be followed in this regard.

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<sup>883</sup> [European Monitoring Centre on Racism and Xenophobia.](#)

<sup>884</sup> [Search and Rescue Observatory for the Mediterranean.](#)

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'[In the highest city in France, welcoming migrants is becoming increasingly complicated](#)', *Le Monde*, 14 August 2023.

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'[People helping asylum seekers in Europe face rising violence, report warns](#)', *The Guardian*, 22 February 2024.

'[Pylos shipwreck: Greece knew the real smugglers](#)', *Solomon*, 4 December 2024.

## TABLE OF INTERVIEWS AND QUESTIONNAIRE REPLIES

Table 1 – Table of interviews and questionnaire replies

STAKEHOLDER	DATE	TYPE OF INPUT
Lithuanian Government	22 November 2024	Questionnaire replies
Czech Government	15 November 2024	Questionnaire replies
Romanian Government	26 November 2024	Questionnaire replies
French Government	11 December 2024	Questionnaire replies
Europol official	11 December 2024	Interview
Eurojust official	11 December 2024	Interview
FRA official	14 November 2024	Interview
Frontex official	14 November 2024	Interview
UNODC	15 November 2024	Questionnaire replies
Sea Watch	15 November 2024	Questionnaire replies
PICUM	15 November 2024	Questionnaire replies
Academic expert #1	18 November 2024	Interview
Academic expert #2	13 November 2024	Interview
Academic expert #3	19 November 2024	Interview

Note that the questions of interviews and questionnaires were the same, only the format changed. Transcripts were shared with respondents for corroboration of their statements and confirmation that these had been faithfully captured in the written record. Consent to cite was provided on the basis of no direct identification through name, surname, or specific information rendering informants personally identifiable. All quotations in the study stem from these written records.



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This study constitutes a targeted substitute impact assessment of the Commission's proposal for a revised Facilitation Directive (COM(2023) 755), presented on 28 November 2023 as part of a package to address migrant smuggling. It provides a critical review of the existing legal and policy framework at EU level and its shortcomings regarding transposition and implementation. It also undertakes a critical and thorough appraisal of the proposed objectives and measures in terms of coherence, effectiveness and efficiency, including with a view to assessing the adequacy of the interplay between this proposal and the related draft Regulation on enhancing police cooperation (COM(2023) 754). It highlights the misalignment of the proposal with relevant international and key EU law standards. It raises concerns about definitional issues, the lack of sufficient human rights safeguards, and the absence of a clear distinction between facilitation offences and the legitimate provision of services and humanitarian assistance. The study also examines the legality and proportionality of the proposed measures and stresses the need for a thorough evaluation of wider impacts on civic space and democracy at large.

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