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COMMISSION STAFF WORKING DOCUMENT

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1. Policy context

Migrant smuggling is a criminal activity that disrespects human life and strips people of their dignity in the pursuit of profit, violating fundamental rights as well as undermining the migration policy objectives of the EU. Preventing and countering migrant smuggling is one of the key priorities of the European Union. It is crucial to tackle organised criminal networks involved and responsible for migrant smuggling in order to address irregular migration in a comprehensive way.

To this aim, the EU has developed a multidisciplinary policy framework, including by setting out two dedicated Action Plans¹, as well as a long-standing legal framework adopted in 2002 - the Facilitators Package. This Package is composed of Council Directive 2002/90/EC², which defines the offence of facilitation of unauthorised entry, transit and residence, and Council Framework Decision 2002/946/JHA³, which creates a penal framework by setting out minimum rules on penalties, liability of legal persons and jurisdiction.

Over the past 20 years, migrant smuggling to and within the EU has evolved markedly reaching unprecedented levels, increasingly resulting in human rights violations and deaths of migrants. Since 2014, a staggering number of over 29 000 dead or missing people, of which at least 1242 children, has been recorded in the Mediterranean alone⁴. Much more harm and many more casualties occur regularly in attempts to cross the sea and on land towards or through EU countries. Two of the worst tragedies in the Mediterranean were registered in 2023, with around 100 people losing their lives off the coast of Calabria, Italy, in February and more than 700 people perishing in a shipwreck off the coast of Pylos, Greece, in June.

Moreover, irregular migration to the EU is marked by year-on-year increase⁵, as shown by the number of irregular crossings detected at the external borders resulting in 380 000 irregular entries in 2023, a rise of 17% compared to 2022. Although the actual numbers of smuggled migrants are not known, irregular migration can be taken as an indicator of migrant smuggling trends. The flows of irregular migration across borders are increasingly controlled by criminal networks, and it is estimated that more than 90% of the irregular migrants use the services of smugglers to reach the EU⁶.

According to the interim report 2023 of the European Union Serious and Organised Crime Threat Assessment (EU SOCTA), migrant smuggling is set to further increase in the future due to the continued demand for smuggling services. Demand is driven by emerging and deepening crises, most notably economic recessions, environmental emergencies caused by

¹ EU Action Plan against migrant smuggling (2015-2020), COM(2015)285 final (27.5.2015); A renewed EU action plan against migrant smuggling (2021-2025), COM(2021) 591 final (29.9.2021).

² Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence.

³ Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

⁴ International Organisation for Migration, Missing migrants project, available at: <https://missingmigrants.iom.int/region/mediterranean>.

⁵ Frontex Risk analysis 2022/2023.

⁶ Estimates by Europol.

climate change, as well as conflicts and demographic pressure in third countries. Smuggling activities generate substantial profits for the criminal networks, with an annual turnover estimated between at least EUR 4.7 and 6 billion⁷. This makes migrant smuggling a low risk – high profit crime. Providing a strong and firm response to smugglers’ activities is therefore of primary importance for reducing irregular migration.

As recalled by President von der Leyen in her State of the Union address last September 2023, today the EU faces the need to further strengthen the tools at its disposal to better respond to the global challenge of migrant smuggling. This calls for an update of the current legal framework, by strengthening the governance on countering migrant smuggling and the role of EU agencies, in particular of Europol, and by intensifying cooperation between Justice and Home Affairs Agencies and Member States, as well as with partner countries to tackle this issue globally.

To that end, the Commission presented on 28 November 2023, a proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union⁸ defining the criminal offences and the sanctions for the investigation and successful prosecution of migrant smuggling. That proposal formed part of a package also comprising a 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) 2016/794⁹, aiming to strengthen the operational cooperation by reinforcing the role of Europol and strengthening EU-level information exchange and interagency cooperation¹⁰. Together these two proposals seek to modernise the legal framework to fight migrant smuggling and to ensure that we have the necessary legal and operational tools to respond to the new *modi operandi* of smugglers, as set out in the Commission Work Programme 2024 announced on 17 October 2023.¹¹

The legislative package was presented on the day of the International Conference launching a ‘Global Alliance to counter migrant smuggling’. It complements existing initiatives to counter migrant smuggling and contributes to the implementation of the renewed EU action plan against smuggling (2021-2025) by updating the existing EU legal framework to sanction migrant smugglers acting on the migratory routes and setting out a new modern, legal,

⁷ United Nations Office on Drugs and Crime, Global study on smuggling of migrants, 2018.

⁸ 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; COM(2023) 755 final (28.11.2023).

⁹ COM(2023) 754 final (28.11.2023).

¹⁰ Commission Staff Working Document accompanying the 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 final (15.4.2024)

¹¹ COM(2023) 638 final (17.10.2023).

operational and international cooperation framework against migrant smuggling for the years to come.¹²

To complement the information already provided at the time of the adoption of the proposal for a Directive that aims to modernise the legal framework to fight the smuggling of migrants, notably in its explanatory memorandum, and in accordance with the Better Regulation principles, the present document provides more detailed information on the facts and figures that underpin the Commission proposal¹³ given that the legislative proposal was exceptionally presented without an accompanying Impact Assessment.

This Staff Working Document accompanies the Commission proposal for the Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union¹⁴. It provides an overview of the implementation of the current EU framework applicable to migrant smuggling, identifies current challenges, and presents arguments for the policy options chosen in the new proposal to address them. It does so by building, among others, on the findings of the 2023 Study on the implementation of the Facilitators Package¹⁵, the comprehensive 2017 REFIT evaluation¹⁶, as well as on the results of consultations with Member States, EU Agencies and other relevant stakeholders¹⁷ that were consulted in the framework of the preparation of the evaluation of the Facilitators Package in 2017, in the preparation of the Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence in 2020¹⁸, in the preparation of the renewed EU action plan against smuggling (2021-2025) and in the course of 2023 as part of the preparation of the Study on the implementation of the Facilitators Package.

2. Objectives of the Commission proposal

With a view to modernising and reinforcing the existing EU legal framework on migrant smuggling, the Commission proposal for a Directive strives to achieve the following objectives:

- (1) Ensuring an effective investigation, prosecution and sanctioning of organised criminal networks responsible for migrant smuggling

¹² COM(2021) 591 final (29.9.2021).

¹³ 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; COM(2023) 755 final (28.11.2023).

¹⁴ COM(2023) 755 final (28.11.2023).

¹⁵ Milieu Law and Policy Consulting, Study supporting the implementation of the “Facilitators Package”, September 2023.

¹⁶ SWD(2017) 117 final.

¹⁷ EU Agencies: Frontex, Europol, Eurojust and FRA; judicial and law enforcement practitioners; representatives of bar associations, civil society organisations, think tanks, UN Special Rapporteur on the situation of human rights defenders etc.

¹⁸ Communication from the Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01.

The EU Strategy to tackle Organised Crime 2021-2025¹⁹ highlights that migrant smuggling remains one of the key activities for organised crime groups. 57 of the reported most threatening criminal networks active in the European Union, and affecting the region's internal security, engage in migrant smuggling²⁰. In addition, around half of the migrant smuggling networks have 'polycriminal' nature, and are also involved in other crimes²¹, such as trafficking in human beings, production and provision of fraudulent and false documents, drugs and firearms smuggling, while also facilitating unauthorised movements within the EU. With the aim to strengthen the joint efforts at the EU level and provide more focused EU legislation, the proposal brings clarity on which conduct should be criminalised. It defines migrant smuggling as facilitation of unauthorised entry, transit and stay conducted for actual or promised financial or material benefit or one that is highly likely to cause serious harm to a person. The proposal also introduces the offence of public instigation of third-country nationals to enter, transit across or stay irregularly in the European Union, taking into account the new *modi operandi* of smugglers that operate abroad and intentionally recruit migrants, for instance through internet (e.g., by sharing information on embarkations, promoting fake packages to travel to the EU etc.) to enter, transit across or stay irregularly in the European Union.

By defining the offence more precisely, the proposal also usually excludes the criminalisation of assistance provided to family members, or humanitarian assistance, or the support of basic human needs provided to third-country nationals. The proposal further clarifies that it is not the purpose of the Directive to criminalise such conducts carried out in compliance with legal obligations.

(2) More harmonised penalties that take account of the seriousness of the offence

Since the adoption of the Facilitators Package in 2002, criminal networks involved in migrant smuggling have increasingly resorted to threats and violence vis-à-vis migrants and law enforcement authorities²². They have even resorted to kidnapping, torture and sexual assault against irregular migrants with vulnerable persons such as women and children at an even higher risk of abuse (e.g. sexual abuses). According to Europol, the most threatening criminal networks engaged in migrant smuggling facilitate entry in the EU, secondary movements within the EU, and the legalisation of irregular stay. Some provide services to other smuggling networks, and, in some cases, networks smuggle migrants with a view to exploiting them, mainly in the form of labour exploitation²³. Criminal networks involved in migrant smuggling also increasingly use a broad variety of means of transport, including unseaworthy, less detectable vessels (such as fishing boats and makeshift metal boats), road vehicles where migrants are dangerously concealed and endangering their lives. With a view

¹⁹ COM(2021) 170 final (14.4.2021).

²⁰ Europol (2024), Decoding the EU's most threatening criminal networks, Publications Office of the European Union, Luxembourg.

²¹ Estimates by Europol.

²² Europol Spotlight (2023) Criminal Networks in Migrant Smuggling.

²³ Europol (2024), Decoding the EU's most threatening criminal networks, Publications Office of the European Union, Luxembourg.

to ensuring a harmonised treatment of these serious offences in the Member States and taking account of the serious nature of these criminal offences, the proposal increases the penalties and introduces aggravated criminal offences (e.g., offence committed as part of an organised criminal group, causing serious harm or endangering life or health, causing death) to which there are corresponding higher levels of criminal penalties. The main offence of facilitation would be punishable by a maximum level of imprisonment of at least 3 years, while aggravated offences (e.g. organised crime, use of serious violence) for at least 10 years and the most serious offences (causing death) for at least 15 years.

(3) Improving the jurisdictional reach

Criminal networks that smuggle migrants have a global dimension. According to Europol, most migrant smuggling networks active in the EU are composed of both EU and non-EU nationals, with the majority of individuals being non-EU adult males. In many instances, smugglers have the same nationality as the migrants they smuggle or originate from the countries along the smuggling routes and many non-EU nationals involved in migrant smuggling legally reside in the EU. The ringleaders of smuggling networks usually operate remotely and are thus rarely successfully pursued by authorities.

To increase the possibilities of sanctioning high-value targets who are organising smuggling activities and to avoid a situation where no State exercises jurisdiction over serious and tragic smuggling cases happening for instance in international waters, the proposed Directive explicitly expands the jurisdiction of the Member States to cases in which the facilitation of unauthorised entry into the EU fails and third-country nationals lose their lives outside the territory of a Member State: this is, for instance, the case in which unseaworthy boats sink in international waters, therefore before reaching the territorial waters of a Member State or a third country. The proposed Directive also expands jurisdiction over offences committed on board of ships or aircraft registered in a Member State or flying its flag and offences committed by legal persons doing business, but not necessarily established, in the EU in view of the new *modi operandi* of smugglers increasingly relying on commercial and charter flights to bring migrants to countries close to, or bordering the EU, from where migrants then seek to irregularly enter the EU²⁴.

(4) Reinforcing Member States' resources to tackle and prevent migrant smuggling

To ensure that Member States effectively counter migrant smuggling, the proposed Directive requires Member States to make sure that the relevant law enforcement and judicial authorities are adequately resourced, sufficiently trained and specialised to ensure effective prevention of crimes, as well as investigation and prosecution of offenders. In addition, Member States should also work on the prevention of migrant smuggling, through information and awareness-raising campaigns, research and education programmes.

(5) Improving data collection and reporting

²⁴ Frontex, Risk Analysis for 2023/2024.

Lack of robust, comprehensive and comparable data on migrant smuggling offences and criminal justice responses at national and European level has been identified in the 2017 evaluation²⁵ as a key element hindering the assessment of the effects of the Facilitators Package in the Member States; furthermore, this lack prevents national policy makers and practitioners from monitoring and measuring the effectiveness of their measures. To address this shortcoming and ensure better monitoring, the proposal requires Member States to collect and report statistical disaggregated data on an annual basis. This would contribute to a better understanding of the nature and scale of migrant smuggling, the geographical causes, the detection of cases and the responses of the criminal justice systems of the Member States, supporting evidence-based policy making.

3. Implementation of the Facilitators package – main challenges

Migrant smuggling is a cross-border crime that requires intervention at EU level, as the actions of criminal networks are likely to have consequences for more than one Member State, the whole Schengen Area, or the EU and may lead to secondary movements. Member States acting alone cannot successfully address this cross-border crime.

Against this backdrop, the general objective of the Facilitators Package is to contribute to the fight against irregular migration, by criminalising the aiding of unauthorised transit, entry and residence in the EU, both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings²⁶, excluding the humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.

The specific objectives of the Facilitators Package are to ensure the approximation of the relevant legal provisions across EU Member States²⁷, on the one hand by establishing a common definition of the offence, which is the subject of the Directive, and on the other hand by setting out minimum rules for penalties, liability of legal persons and jurisdiction, which are covered in the Framework Decision. Under the Facilitators Package, any person who, is found to have intentionally assisted unauthorised entry, transit, or, when conducted for financial profit, residence of a non-EU national in the EU in breach of immigration law, is to be sanctioned. Member States can however decide not to apply sanctions when such facilitation of unauthorised entry or transit is conducted with the aim of providing humanitarian assistance. Member States have generally transposed the provisions of the Facilitators Package into national legislation, although the approaches chosen vary, leading to fragmentation.

²⁵ European Commission (2017) REFIT Evaluation, SWD(2017) 117 final.

²⁶ Directive 2002/90/EC, recital (2) “... *measures should be taken 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*”.

²⁷ Only Denmark is not bound by the Directive Ireland has opted in in line with Protocol 21.

The first comprehensive evaluation of the Facilitators Package was carried out in the framework of the Commission's Regulatory Fitness and Performance Programme (REFIT)²⁸ in 2017. The evaluation showed that the legislation had contributed to the approximation and harmonisation of Member States legal frameworks on migrant smuggling also by clarifying the distinction between the offences of migrant smuggling and trafficking in human beings. The evaluation and other studies also pointed to the key challenges that have been identified in the Facilitators Package:

- differences in national legislation and the levels of enforcement of legislation on combatting migrant smuggling (e.g. variations in definition, financial elements and sanctions) leading to the varied approaches of Member States in the criminalisation of migrant smuggling;
- lack of clarity of the current definition of the facilitation of unauthorised entry, transit and residence in creating the distinction in criminalisation between the offense of facilitation of irregular migration, on the one hand, and humanitarian assistance, on the other;
- serious lack of reliable and comparable data on migrant smuggling offences and criminal justice responses at national and European level.

The 2017 evaluation and impact assessment supporting study²⁹ also pointed to the increasingly significant organisation and networking of migrant smuggling and role of organised crime groups sustaining migrant smuggling as well as limited jurisdiction of Member States to intervene outside of the EU, limiting the possibilities to apprehend and prosecute migrant smugglers. Moreover, it pointed to the insufficient cross-border information gathering and sharing³⁰ that might lead to migrant smugglers avoiding detection, prosecution and conviction and limited cooperation from third countries to suppress migrant smuggling as key issues.

3.1. Definition of the offence and treatment of humanitarian assistance

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, contrary to facilitation of irregular residence, which is a criminal offence only when conducted for financial gain. At the same time, when defining the offence, the EU law provides for the possibility for Member States to exempt humanitarian assistance from being criminalised. Member States have made different legislative choices on how to implement this optional

²⁸ SWD(2017) 117 final, p. 34.

²⁹ European Commission, Directorate-General for Migration and Home Affairs, Nicoletta, R., Petronella, S., Bozeat, N. 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)*, Publications Office, 2017, p. 218; <https://data.europa.eu/doi/10.2837/214285>.

³⁰ The insufficient exchange of information is being tackled through the Commission proposal for a Regulation [COM(2023) 754 final] whereas the cooperation with third countries is tackled through operational cooperation on the ground, including through the Global alliance against migrant smuggling.

clause resulting in an uneven approach to the criminalisation of the facilitation of unauthorised entry and transit.

First of all, Member States made different choices when it comes to the criminalisation of the facilitation of irregular entry as compared to transit: most Member States, with the exception of Austria and Slovenia, criminalised the facilitation of the unauthorised entry as such, without requiring financial gain or material benefit. For facilitation of unauthorised transit, only Austria, Bulgaria, Cyprus, Malta and Slovenia require financial gain to be present. Belgium, Germany, Portugal and Cyprus criminalise both the facilitation of unauthorised entry and/or transit committed for financial gain and the facilitation of entry and/or transit without financial gain as alternative basic offences³¹.

The introduction of financial gain as a constituent element of the offence in many Member States is driven by criminal policy considerations. One Member State³² introduced legislative changes regarding the offence of facilitation of unauthorised entry or transit specifically to add the element of financial gain due to the need for efficient prosecution, whereas the same concerns have led another Member State³³ in the opposite direction, as the proof of the financial gain element reportedly caused difficulties for prosecution in view of the complications encountered in tracing illicit financial flows, given that payments can take place in third countries or through informal systems such as *hawala*³⁴.

As regards the facilitation of unauthorised residence, the facilitation at least partially takes place on EU territory, thus making financial transactions possibly easier to trace. 16 Member States³⁵ require the purpose of financial gain for this conduct to be criminalised, whereas 8 Member States³⁶ criminalise facilitation of unauthorised residence without financial gain. 3 Member States³⁷ criminalise facilitation of unauthorised residence both when committed for financial gain and without.

Different approaches have led to differences in how **national authorities approach the crime of facilitation**. In certain Member States³⁸ the practice of the authorities is to focus on cases of facilitation when committed with a lucrative intent or by organised criminal groups. In other Member States the approach focuses on people providing services to irregular

³¹ Study on the implementation of the Facilitators Package (2023).

³² Austria; Study on the implementation of the Facilitators Package (2023).

³³ Ireland; Study on the implementation of the Facilitators Package (2023).

³⁴ Hawala is an Informal Value Transfer System (IVTS) which operates outside or in parallel of traditional financial channels. Transactions take place without the movement of cash or electronic transfer, through a network of money brokers called hawaladars.

³⁵ Austria, Bulgaria, Cyprus, Czechia, Estonia, Spain, Hungary, Italy, Luxembourg, Latvia, the Netherlands, Poland, Portugal, Sweden, Slovenia and Slovakia; Study on the implementation of the Facilitators Package (2023).

³⁶ Belgium, Denmark, Greece, France, Ireland, Lithuania, Malta and Romania; Study on the implementation of the Facilitators Package (2023).

³⁷ Cyprus, Croatia and Germany; Study on the implementation of the Facilitators Package (2023).

³⁸ Bulgaria, Cyprus, Luxembourg and Portugal; Study on the implementation of the Facilitators Package (2023).

migrants in the context of their professional activities³⁹, and on people providing assistance for selfless reasons where there was seemingly no element of financial gain involved⁴⁰.

Nine Member States explicitly exempt humanitarian assistance from criminalisation⁴¹ (see Annex I), but the scope of the exemption varies significantly, with some Member States exempting only the cases of humanitarian assistance mandated by law⁴², for example in cases of search and rescue at sea, saving a life or preventing an injury and in cases of immediate situations of danger. In addition, the legal orders of several Member States⁴³ have general criminal law provisions on “state of necessity” that could be applicable and exclude acts of facilitation in cases of actual or imminent danger.

The REFIT evaluation showed that a wide margin left to the Member States to criminalise various acts without criminal intent is detrimental to the protection of civil society organisations and human rights defenders that uphold the rights of refugees and other vulnerable members of the community and can result in prosecutions of genuine humanitarian assistance. More recently, the Study on the implementation of the Facilitators Package also highlighted two shortcomings in the current legislative framework: first, the differing definitions and application of the offence of “facilitation” and inclusion of “for financial gain” as subjective element in the Member States’ legislation; second, the unclear definition and differing application of facilitation of unauthorised entry when carried out for selfless reasons, such as in cases of assistance of family members.

In addition, the results of the extensive public consultation on the EU legislation to tackle migrant smuggling conducted in the framework of the REFIT evaluation⁴⁴ pointed to the risk of punishment of humanitarian assistance due to deficiencies of the definition of the offence with most of the stakeholders pointing to “insufficient protection of those providing humanitarian assistance” as the main issue affecting the implementation⁴⁵. The lack of clarity in the law was thus noted by several stakeholders to be the main source of uncertainty for individuals and organisations assisting irregular migrants regarding the risks of criminal sanction also contributing to the heterogeneous implementation by Member States.

Since 2018, consultations and various exchanges with stakeholders⁴⁶ have pointed to an increasingly difficult environment for civil society organisations and human rights defenders as well as individuals when assisting migrants, including when they carry out search and

³⁹ e.g., Belgium.

⁴⁰ For example, instances of persons providing assistance to family members or where the assisted person was not in a situation of immediate danger; Study on the implementation of the Facilitators Package (2023).

⁴¹ Belgium, Greece, Spain, Finland, France, Croatia, Ireland, Italy and Malta, Study on the implementation of the Facilitators Package (2023).

⁴² Italy, Malta, Croatia and Greece, Study on the implementation of the Facilitators Package (2023).

⁴³ Bulgaria, Czechia, Germany, Hungary, Latvia, the Netherlands, Portugal, Romania, Slovenia, and Slovakia, Study on the implementation of the Facilitators Package (2023).

⁴⁴ European Commission (2017) REFIT Evaluation, p. 44.

⁴⁵ European Commission (2017) REFIT Evaluation, p. 48-49.

⁴⁶ See Annex III.

rescue operations at sea. Prosecutions and investigations against individuals on grounds related to the offence of facilitation have increased in the EU since 2015 and the cases analysed concern mostly volunteers, human rights defenders, crews of boats involved in search and rescue operations at sea, but also ordinary members of the public, family members, journalists, mayors and religious leaders. However, as pointed out in the evaluation and in the European Parliament's Resolution⁴⁷, the lack of reliable and comparable national criminal statistics remains an issue, in particular on facilitation of irregular migration offences.

This is also confirmed with a more recent closer examination of the treatment of humanitarian assistance between 2017-2023 in eight Member States⁴⁸ as part of the Study on the implementation of the Facilitators Package. The Study identified 71 cases of investigation and prosecution of humanitarian assistance⁴⁹, involving 236 people⁵⁰. Civil society organisations, and their members, as well as human rights defenders, were the biggest group affected (131 persons), followed by members of crews carrying out search and rescue operations (38) and helpers who have been involved in proceedings (30). The assessment of the implementation of the Facilitators Package in other Member States⁵¹ showed that providing humanitarian assistance is not prosecuted in some Member States⁵² due, for example, to being inconsistent with the criminal intent, whereas cases of prosecution were identified in others⁵³.

In September 2020, in the context of the comprehensive approach to migration underpinning the proposal for a New Pact on Migration and Asylum, the Commission provided guidance⁵⁴ on the implementation of the Facilitators Directive's rules on humanitarian assistance. This guidance firstly emphasized that under the Directive, humanitarian assistance mandated by law, such as in cases of search and rescue operations, cannot and must not be criminalised, and secondly invited the Member States that had not already done so to use the possibility under the Directive not to impose sanctions where the purpose of the activity is to provide humanitarian assistance, in cases where this is not mandated by law⁵⁵. However, due to its non-binding nature, the Guidance did not seem to have a significant impact on legislative or

⁴⁸ Belgium, Croatia, Spain, France, Greece, Italy, Poland and Sweden, Study on the implementation of the Facilitators Package (2023).

⁴⁹ 28 cases concern facilitation of irregular entry, 14 facilitation of entry (SAR), 12 facilitation of irregular transit, 7 facilitation of irregular residence, 4 facilitation of entry and transit, 2 facilitations of irregular entry and residence, 2 are mixed cases of facilitation of irregular entry, transit and residence and 2 are not possible to be clustered due to lack of information.

⁵⁰ The Member States with a higher number of cases are France, Italy and Greece, with 23, 14 and 13 cases respectively; in Belgium, Spain and Poland, five cases have been identified in each Member State, while in Sweden four and in Croatia two cases.

⁵¹ Study on the implementation of the Facilitators Package (2023).

⁵² Bulgaria, Cyprus, Estonia, Luxembourg, Portugal, Romania.

⁵³ Denmark, Germany, Latvia, the Netherlands, Slovenia and Slovakia.

⁵⁴ Communication from the Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01.

⁵⁵ Humanitarian assistance provided to the migrants on the move, at the borders or in the territory of a Member State.

policy changes in the Member States except in Ireland⁵⁶ that revised its approach in 2021 on the exemption of humanitarian assistance.

3.2. Geographical scope of the offence

The assessment of the current legislation showed that some of the provisions of the Facilitators' Package **pose difficulties in the context of judicial cooperation**. For example, the scope of application of Article 1(1)(a) of the Facilitation Directive refers to *'the territory of a Member State'* leading to different approaches and interpretation of the geographical scope of the offence in the Member States as to what should be considered the relevant territory – only the territory of that Member State, the European Union as a whole or even wider. While some Member States criminalise the facilitation of unauthorised entry into, and transit through, their own territories only (e.g. Bulgaria, Cyprus, Czechia, Denmark, Estonia, Greece, Spain, Finland, Croatia⁵⁷, Lithuania, Latvia, Poland, Portugal, Romania, Slovenia and Slovakia), others expand their jurisdiction over such criminal activity committed in any of the countries of the EU (e.g. Cyprus, Austria, Belgium, Italy, Hungary⁵⁸) or the Schengen area (e.g. France, Germany and Luxembourg), the European Economic Area (e.g. Sweden), or the territory of the States parties to the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (UN Protocol) (e.g. Ireland, Luxembourg and the Netherlands). The differing definitions of the offence in the Member States, including the geographical scope leads to difficulties in establishing jurisdiction and initiating prosecution over cross-border offences and judicial cooperation between the different Member States.

Eurojust casework⁵⁹ points out how the differences in the definitions of smuggling-related offences, including the geographical scope, and how the lack of harmonisation may have an adverse impact on initiating prosecutions in cases where the investigation for a cross-border crime is limited to the territory of that Member State, given that the offence needs to be committed on the territory of that Member State to be able to trigger a domestic judicial response⁶⁰.

3.3. Penalties

⁵⁶ The influence of the 2020 Commission Guidance is expressly referenced in an unofficial parliamentary committee explanation of the 2021 enactment.

⁵⁷ In Croatia national law criminalises the facilitation of entry and transit in the EU and the Schengen area only when perpetrated for financial gain.

⁵⁸ In Hungary, the facilitation of residence includes the territory of all the countries members of the European Economic Area.

⁵⁹ Report on Eurojust's casework on migrant smuggling, 1 April 2018, p. 19.

⁶⁰ Report on Eurojust's casework on migrant smuggling, 1 April 2018, p.20: 'Operation Saigon' The Czech Criminal Code provides that the serious crime of organising and facilitating illegal border crossing applies to *'[w]hoever organises for another unauthorised crossing of a state border or whoever facilitates or enables another to cross a state border without authorisation or facilitates or assists another after crossing a state border in transportation through the territory of the Czech Republic or whoever organises such transportation'*. In some of the cases, the facilitators and migrants did not cross the Czech state borders and as a result, although the facilitators are Czech nationals or persons with permanent residence in the Czech Republic and did organise such transportation, prosecuting them for transporting the migrants was not possible, as such conduct was not punishable under the domestic Criminal Code.

The current Directive obliges Member States to adopt effective, proportionate and dissuasive sanctions. The Framework Decision complements it by setting out criminal penalties, aggravating circumstances and requiring Member States to apply a minimum penalty of eight years of imprisonment when the offence of facilitation of unauthorised entry or transit is committed for financial gain and either as an activity of a criminal organisation, or endangering the lives of the persons who are subject to the offence.

However, the range of penalties adopted by Member States varies significantly, from fines as low as EUR 6 to imprisonment of up to 6 months as minimum penalties, with the maximum penalties ranging from five to 10 years of imprisonment (see Annex II).

When it comes to the facilitation of **unauthorised entry and transit**, criminal penalties in the Member States range from up to one year of imprisonment in Belgium and Spain to up to 10 years of imprisonment in Bulgaria, Cyprus, Ireland and Slovenia. A majority of Member States provide for a fine⁶¹ either alternatively⁶² or in addition to the custodial sentence. In Italy, Croatia and Greece the amount of the fine increases with the number of persons whose entry and transit was facilitated. For instance, in Italy, a fine of EUR 15,000 is applied for each transported third-country national. In Greece, facilitation can be sanctioned with a prison term of up to 10 years and a fine from EUR 30,000 to 60,000 for each transported person. Where the offence has been committed for financial gain or as an activity of a criminal organisation these factors are treated in most cases as aggravating circumstances and lead to more severe penalties.

As regards **facilitation of unauthorised residence, criminal penalties** in the Member States range from up to one year of imprisonment in Austria, Belgium, Czechia, Estonia and Spain to up to 15 years of imprisonment in Cyprus. Moreover, since 2015 fifteen Member States have found it important to amend their national legislation (amendments are currently pending in two Member States) with the amendments including stricter penalties, criminalisation of smuggling attempt and the exemption from criminalisation of humanitarian assistance of unauthorised transit.

The significant differences in sanctions across the EU may have contributed to migrant smugglers choosing specific Member States, routes and channels in order to avoid more severe sanctions.

3.4. Jurisdiction

The criminal jurisdiction is currently determined following the territoriality principle linking the offence to the territory of the specific Member State. In line with the current EU legislation⁶³, Member States shall, in principle, establish jurisdiction when the offences of facilitation of unauthorised entry and transit, as well as residence are committed: (a) in whole

⁶¹ Belgium, Cyprus, Germany, Denmark, Estonia, Spain, Finland, Ireland, Lithuania, Luxembourg, Latvia, Malta, the Netherlands and Sweden.

⁶² Belgium, Bulgaria, Cyprus, Greece, France, Ireland, Italy, Luxembourg, Malta, Slovenia and Slovakia.

⁶³ Article 4 of the Council Framework Decision.

or in part within its territory; (b) by one of its nationals; or (c) for the benefit of a legal person established on its territory.

Migrant smuggling is by definition a cross-border crime and people who are organising or committing the crime are often located outside the EU. As a result, and often due to a lack of cooperation among competent authorities in third countries, Member States have encountered difficulties in effectively prosecuting and convicting facilitators.

In addition, migrant smuggling is increasingly happening on the territory of the EU through the facilitation of transit of persons, who have no right to move across EU countries based on their status or residence title. Moreover, since the adoption of the Facilitators Package in 2002, criminal networks have become more agile and adaptable resorting to the use of a broad variety of means of transport, including unseaworthy, less detectable vessels (such as small inflatable boats) usually sourced outside of the EU. As a new modus operandi, they are also increasingly using commercial and charter flights to bring migrants to countries close to or bordering the EU, under various pretexts, such as visa-free policy regimes or apparent labour migration opportunities, from where migrants then seek to irregularly enter the EU.

3.5. Statistics on migrant smuggling

Member States do not have any reporting obligations under the current legal framework. The 2017 REFIT evaluation identified the lack of robust, comprehensive and comparable data on migrant smuggling offences and criminal justice responses at national and European level as a key element hindering the assessment of the effects of the Facilitators Package in the Member States. This also applied to the extent to which increases in detection and prosecution of facilitators, or the enhanced cooperation between Member States, are directly linked to the implementation of the Facilitators Package.

As part of the first EU Action plan against migrant smuggling (2015-2020), the Commission made efforts to establish a regular collection of statistics on migrant smuggling to build the knowledge base and evidence-based policy needed to address migrant smuggling crime. Eurostat started to collect the data in 2017 (reference year 2015) on the migrant smuggling offences, legal status of the persons (suspected; prosecuted; convicted; imprisoned), their nationality and gender. However, due to the voluntary nature of reporting, some Member States never provided data⁶⁴ or only occasionally⁶⁵ whereas others provided data that was incomplete or not comparable. As part of the renewed Action Plan against smuggling (2021-2025), Member States were again encouraged to enhance the quality and availability of data that is provided to Eurostat, however without much success. In terms of criminal justice response to migrant smuggling, there is no quantitative overview of investigation, prosecution and conviction for migrant smuggling across EU Member States yet, and the data collected on the investigations, prosecutions and convictions are mostly partial and/or not updated.

4. The way forward: closing the gaps and strengthening the legal framework

⁶⁴ Ireland.

⁶⁵ Luxembourg sent data only for reference years 2016- 2017 and Belgium for 2017-2018 and 2020.

Migrant smuggling is a cross-border crime that requires intervention at EU level as the actions of criminal networks are likely to have consequences for more than one Member State, the whole Schengen Area or the EU and it may lead to secondary movements. Member States acting alone cannot effectively address this cross-border crime. The current EU legal framework was adopted in 2002 under provisions pre-dating the Treaty of Lisbon which included principles of mutual recognition of judgments and judicial decisions, and measures for approximation of legal provisions. In the meantime, the Treaty of Lisbon has provided a stronger basis for the development of a criminal justice area, while also stipulating new powers for the European Parliament. The general objective of this proposal for the new Directive is to bring forward a modern EU criminal law instrument in line with the latest EU criminal law standards that, based on Article 83 paragraph 2 of the Treaty on the Functioning of the European Union, clearly defines the offence of facilitation of unauthorised entry, transit and stay in the EU and provides for minimum sanctions, and which is in line with the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air. Reducing differences between Member States and further approximating the definition of the offence of migrant smuggling, relevant penalties and jurisdictional reach should ensure similar concepts of the offence and similar penalties and prevent forms of “forum shopping” by criminals taking advantage of systems where penalties are less severe. The proposal aims at improving the capacity of Member States to combat migrant smuggling more efficiently, notably in relation to the trends that have emerged or evolved since the adoption of the Facilitators package. Although, the proposal mainly affects the public authorities, a better definition of the criminal offence and inclusion of aggravated criminal offences, aggravating and mitigating circumstances, and the requirement of preventive measures, aim to increase the effectiveness of tackling the crime of migrant smuggling while ensuring a proportionate response contributing to the increased protection of all relevant fundamental rights of the EU citizens and third-country nationals concerned. Costs on the public authorities linked to the update of the legal framework cannot be quantified at this stage but are not likely to lead to regulatory or financial burden on citizens or businesses.

4.1. Definition of the offence and the treatment of humanitarian assistance

The broad definition of the offence in the current legislative framework as to what constitutes migrant smuggling has led to an uneven approach in the Member States to the treatment of the offences of facilitation of unauthorised entry, transit and stay. In addition, the *modi operandi* of smugglers have significantly evolved since the adoption of the Facilitators Package in 2002, with an increased involvement of criminal networks generating substantial profits from migrant smuggling.

The renewed EU action plan against smuggling (2021-2025)⁶⁶ pointed to the need to scale up the dismantling of organised crime structures, targeting those groups that pose a higher risk to Europe’s security and on the individuals in the higher echelons of criminal organisations. In order to strengthen the joint efforts at the EU level to counter this cross-border crime and

⁶⁶ COM(2021) 591 final.

target specifically criminal networks, the proposal supports this objective by focusing on offences committed with a lucrative intent and those that are highly likely to cause serious harm, that are more likely to be executed by organised criminal groups. This, and the new offence of public instigation of irregular migrants, will bring clarity on what constitutes migrant smuggling in distinction with humanitarian assistance and low-level facilitation.

The 2017 evaluation and impact assessment supporting study⁶⁷ showed that the deterrent effect of the current legislation depends on the level or rank of the perpetrators that are apprehended and prosecuted. Prosecuting low ranking pilots of ships has no deterrent effect and does not help tackling leading members of criminal groups. In other terms, prosecuting those who are liable both of smuggling and participation in an organised criminal group has a much higher deterrent effect than prosecuting those who are liable only for smuggling. A more focused EU legislation will lead to further harmonisation of Member States' approaches to the criminalisation of migrant smuggling and enable investigations particularly targeting criminal networks active across the EU in order to disrupt their business models, leading to increased numbers of investigations, prosecutions and convictions, in particular of high-value targets.

4.1.1. Facilitation of unauthorised entry, transit and stay to the EU conducted for financial or material benefit or the promise thereof (Article 3(1)a)

Inclusion of the 'financial or material benefit and the promise thereof' as a key element of the offence is added to provide more legal clarity as to what should be considered as an offence of migrant smuggling at EU level with a view to focusing the resources at EU level to specifically target criminal groups that profit from putting people's lives at risk and/or that are clearly motivated with financial benefit. In doing so, the proposal endorses the 'follow the money approach' as an effective way of targeting the main players of organised criminal groups, including those involved with migrant smuggling. Moreover, adding 'financial and material benefit' is in line with the UN Protocol that includes financial or other material benefit as a constituent element of the crime and in doing so stresses the links between migrant smuggling and organised crime. The Facilitators' Package considers organised crime and facilitation of entry and transit for financial gain as an aggravating element in determining higher penalties and in doing so it does not distinguish between the 'facilitation of entry and transit to the EU without benefit and the more serious offences conducted for profit.

In addition to a clearer definition of the corresponding criminal offence (inclusion of the financial/material benefit), it is clarified in recital 7 of the proposal that it is not the objective of the Directive to criminalise the provision of humanitarian assistance or the support of basic human needs nor to prosecute migrants for the fact of being smuggled (in line with the UN Protocol), nor to criminalise assistance provided by family members. The proposal further

⁶⁷ European Commission, Directorate-General for Migration and Home Affairs, Nicoletta, R., Petronella, S., Bozeat, N. 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)*, Publications Office, 2017, p. 218; <https://data.europa.eu/doi/10.2837/214285>.

clarifies that it is not the purpose of the Directive to criminalise such conducts carried out in compliance with legal obligations.

4.1.2. Facilitation of unauthorised entry, transit and stay to the EU facilitation that is highly likely to cause serious harm (Article 3(1)b)

Some migrant smugglers employ the pay-as-you-go approach⁶⁸ with payments sometimes taking place outside of the EU or through informal channels with Member States highlighting the difficulty in gathering evidence for prosecution in such cases. The proposal introduces an offence that is ‘highly likely to cause serious harm’ given that criminal networks demonstrate a high degree of violence and recklessness in their smuggling activities. This terminology is already used in EU legislation such as in the Directive on the protection of environment through criminal law (2024/1203) with references to ‘serious injury’ and the Directive amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims referencing ‘particularly serious harm to a victim’ in aggravated trafficking offences. The smuggled persons are often endangered by the *modi operandi* used by criminals to facilitate them across borders such as the widespread use of unsafe means of transportation and concealment, as well as reckless behaviour on the part of the smugglers when attempting to escape law enforcement authorities, with incidents resulting in the death and injuries of irregular migrants and law enforcement. For example, Spanish authorities arrested smugglers for forcing at least 37 migrants through violence and intimidation to jump off a high-speed boat into the water, 5 of whom drowned⁶⁹. In another case, a criminal network was dangerously transporting up to 17 migrants in 5-seat cars from Bulgaria to Romania, and then toward Western Europe⁷⁰. In these cases, there needs to be an intention to commit the offence coupled with a substantial risk that it will cause serious harm to another person (physical harm, injury and death etc.) including to the representatives of law enforcement. In this regard, it is considered that humanitarian assistance and assistance by family members will not meet the constitutive elements of this offence.

4.1.3. Public instigation (Article 3(2))

Migrants are often recruited and encouraged to migrate irregularly when they are in key hubs of migrant smuggling⁷¹, where large concentrations of migrants are present in reception centres and makeshift camps⁷² with advertisements of routes and prices on social media platforms widely used as a recruiting method. Criminal networks' attractiveness is advertised through their degree of success in their smuggling activities based on recommendations and

⁶⁸ Payment of smuggling fees upon completion of a leg of the journey; Europol Spotlight Report (2023), Criminal networks in Migrant Smuggling, p.5.

⁶⁹ Three arrested in Spain following migrant deaths at sea | Europol (europa.eu).

⁷⁰ 42 arrested for smuggling migrants across the Danube | Europol (europa.eu).

⁷¹ Europol Spotlight Report (2023) Criminal networks in Migrant Smuggling, p.4.

⁷² Europol Spotlight Report (2023) Criminal networks in Migrant Smuggling, p.4-5.

positive reviews, linguistic and ethnic ties⁷³ as a way to recruit migrants into embarking to the EU irregularly. Migrants are encouraged in different ways to come to the EU irregularly, for example, by applying to universities that are not internationally accredited and have very low requirements for enrolment⁷⁴ making the process highly profitable for the universities no matter whether the “student” attends lessons or not or through non-legitimate travel agencies and labour migration agents that provide the documents or arrange part or the entirety of the travel on a false pretext, such as work visas, to get migrants as close as possible to the EU from where the migrants irregularly cross into the EU. In addition, smugglers often share travel guidance on social media and provide instructions to migrants on embarkations or how to cross green borders via encrypted communication apps or digital maps. The offence of public instigation modernises the way in which we understand migrant smuggling, allowing to expand the reach over smugglers that operate abroad, and to discourage the *modus operandi* of persons who publicly instigate, for instance through the internet, migrants to enter, transit or stay in the EU without authorisation. Providing objective information or advice to migrants on the conditions for the legal entry and stay in the EU, and on international protection, shall not be understood as public instigation.

4.1.4. Geographical scope of the offence

In addition to providing more legal clarity on the smuggling offences, the proposed Directive also aims to rectify the current obstacles to cross-border judicial cooperation as identified by Eurojust by clarifying the geographical scope of the offence. It introduces a reference to ‘*the territory of any Member State*’, to indicate the scope of the offence as the territory of the EU with a view to harmonising the approaches in the Member States by replacing the current reference to ‘*the territory of a Member States*’⁷⁵ which has led to different interpretations in the Member States.

Providing a consistent and modernised definition of the offence of migrant smuggling throughout the EU, and adopting a common, more precise definition will decrease or eliminate tendencies for smugglers to ‘shop around’ the EU to where the threshold of criminalisation is lower within the EU. Such a consistent definition should also increase clarity and eliminate uncertainty as to when the constituent elements of facilitation of unauthorised entry, transit and residence are considered as met.

4.2. Penalties - more harmonised penalties that take account of the seriousness of the offence

⁷³ Europol Spotlight Report (2023), Criminal networks in migrant smuggling.

⁷⁴ A passport, a health certificate, academic records and high school or university diplomas, an admission letter provided by the educational institution, a tuition fee, and a commitment from the student to get a visa before the end of the 90-day period.

⁷⁵ Facilitation Directive, Article 1(1) a and b.

As indicated above, one of the challenges of the current framework is that there are significant differences between the Member States on what is considered a criminal offence of smuggling and the related penalties. This may lead to different verdicts and different sanctions.

In order to have a common response to the most serious offences and reduce the degree of variation between the national systems, the proposal introduces the definition of aggravated criminal offences. These are offences that are particularly serious because they are committed in the framework of a criminal organisation; cause serious harm or endanger the life of people; entail or result in the use of serious violence; or concern vulnerable persons, including unaccompanied minors.

In view of their gravity, these are not conceived as aggravating circumstances but as proper constituent elements of the offence. This entails an appropriate increase of the sanctions regime, with maximum penalties of at least 10 years of imprisonment. This approach and the level of penalties mirrors the approach set out in the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims⁷⁶. While the standard offences of migrant smuggling and trafficking in human beings are distinct and entail different constitutive elements, the aggravated offences included in this proposal and the aggravated offences included in Article 4(2) of Directive 2011/36/EU bear significant resemblance. They are phrased differently because trafficking in human beings is a crime against the person, but they both include commission involving vulnerable persons, commission in the framework of a criminal organisation, commission through serious violence or causing serious harm, and deliberate or negligent endangerment of life. In consideration of such similarity, it is considered that the appropriate penalties should mirror those of Directive 2011/36/EU, i.e., a maximum penalty of at least 10 years of imprisonment. To reflect the specificity of migrant smuggling appropriately and the seriousness of the offence and of its effects, it is proposed that the most serious offences, those causing death, are punished up to 15 years of imprisonment.

In addition to aggravated offences (where the aggravated elements of the offence already lead to the higher penalty levels), the proposed Directive also includes aggravating circumstances. These are elements to be considered in the judicial proceedings and applied on a case-by-case basis to increase the penalties. This includes elements that are often featured in other EU criminal law instruments, such as commission by public officials when performing their duties, and repeated convictions for offences of the same nature; as well as other circumstances that aim to address *modi operandi* that are typical of migrant smuggling, such as depriving migrants of their travel documents or committing the crime while carrying a firearm. Moreover, in view of the increasing number of cases where irregular migrants are forced to pay the debt for smuggling fees accumulated with the criminal networks through illegal employment, under-paid jobs or debt bondage, exploitative living conditions or being forced to participate in smuggling activities, the proposed Directive introduces these elements as aggravating circumstances specific to migrant smuggling.

⁷⁶ Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims Article 4 Penalties.

As a novelty compared to the framework currently in place, the Directive proposes mitigating circumstances. In line with similar Directives⁷⁷, mitigating circumstances concern the contribution provided by offenders through cooperation with the competent national authorities. This aims to modernise the legal framework by fostering a horizontal approach among current EU criminal law instruments and, at the same time, to incentivise offenders to cooperate by providing evidence that helps the authorities to find evidence, or to identify or bring to justice other offenders.

4.3. Improving jurisdictional reach to address the new modi operandi of migrant smuggling

According to Europol⁷⁸, most migrant smuggling networks active in the EU are composed of both EU and non-EU nationals, with many non-EU nationals involved in migrant smuggling legally residing in the EU. In many instances, smugglers have the same nationality as the migrants they smuggle or originate from the countries along the smuggling routes. In order to respond to these developments and close jurisdictional gaps, the Directive proposes to extend jurisdiction over offences committed not only by EU nationals but also by habitual residents (Article 12(1)b) and by not only legal persons established in the EU (Article 12(1)c i) but also to those operating in the EU (Article 12(1)c ii).

The use of commercial means of transport, mainly by air, to facilitate irregular migration to the EU has progressively emerged as a new modus operandi of smuggling networks. Criminal networks are increasingly taking advantage of commercial flights between third countries under various pretexts, such as visa-free policy regimes or apparent labour migration opportunities, to bring migrants to countries close to or bordering the EU, from where the migrants then seek to irregularly enter the EU. There are currently several transport routes and transit hubs to Europe that take advantage of the services provided by transport operators to bring migrants close to the EU. In order to respond to this efficiently, in June 2023, the Commission presented a Toolbox addressing the use of commercial means of transport to facilitate irregular migration to the EU⁷⁹ which brought together a full range of operational and diplomatic measures and legal instruments that aim at filling the existing gaps and providing a framework that would allow the EU to respond efficiently and in a targeted way to cases in which transport operators are, advertently or inadvertently, concerned with the facilitation of irregular migration to the EU. In view of the fact that many of the transport operators are established outside of the EU but operate in the EU, the Commission proposes to extend jurisdiction to the legal persons operating in the EU in the Directive.

⁷⁷ For example, Directive on the protection of environment through criminal law (2024/1203); Directive (EU) 2017/541 on combatting terrorism; proposal for a Directive on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council; COM(2023) 234 final.

⁷⁸ Europol Spotlight Report (2023), Criminal networks in migrant smuggling.

⁷⁹ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3057.

Furthermore, the proposed Directive expands jurisdiction over offences committed on board of ships or aircrafts registered in a Member State or flying its flag in line with the recent standards in EU criminal law instruments⁸⁰ in order to extend jurisdiction over offences that are committed on board of ships or aircrafts where a state would not be able to apply territorial jurisdiction, i.e. in the high-seas and international air space.

It also proposes to include offences that are committed outside the EU but have an impact on the EU i.e. those that aim to achieve the unauthorised entry, transit or stay of migrants in the EU. This includes, for instance, cases of public instigation where smugglers operating abroad intentionally recruit migrants, including through internet (e.g., by sharing information on embarkations, promoting fake packages to travel to the EU etc.) to enter, transit across or stay irregularly in the EU; or cases where an unauthorised entry to one Member State, results, through secondary movements, in unauthorised stay in a different Member State. This is for instance evident in the mismatch of numbers of irregular migrants arriving at the EU southern external borders and those who claim international protection in other Member States where it can be inferred that the transit, illegal stay and arrival to other EU Member States is likely to happen with the support of facilitators' networks.

To increase the possibilities of sanctioning high-value targets who are organising smuggling activities and to avoid a situation where no State is able to exercise jurisdiction over serious and tragic smuggling cases happening in international waters, the proposed Directive expands the jurisdiction of the Member States to cases in which the facilitation of unauthorised entry into the EU fails because third-country nationals lose their lives before reaching the territory (or the territorial waters) of a Member State. This is, for instance, the case in which unseaworthy boats sink in international waters, therefore outside the territorial jurisdiction of a Member State or of a third country.

The improvement of jurisdictional reach is moreover accompanied by an obligation of cooperation among the Member States to determine which Member State is to conduct criminal proceedings, in cases where the criminal offences covered by the proposed Directive fall within the jurisdiction of more than one Member State, with a view to avoid duplication of proceedings in the EU, possibly resulting in infringements of the fundamental principle of criminal law that a person may not be prosecuted or punished twice for the same offence (*ne bis in idem* principle).

4.4. Enhancing Member States resources

In order to help Member States effectively counter migrant smuggling, it is important to ensure that the relevant Member States' authorities are adequately resourced and trained in particular given that countering migrant smuggling and investigations require a multidisciplinary approach, specialist skills, technical expertise and financial support. This

⁸⁰ E.g. Directive on the protection of environment through criminal law (2024/1203); Directive (EU) 2017/541 on combating terrorism.

also mirrors the EU objective to ensure adequate resources to tackle different types of organised crime as reflected in all EU criminal law instruments.

In this regard, Member States should provide relevant, specialised and up to date training to the authorities that investigate and prosecute migrant smuggling to ensure a high level of legal knowledge, technical expertise and specialisation. Member States should make available effective investigative tools for the criminal offences referred to in this Directive, particularly on the investigative tools including for instance the interception of communications, covert surveillance including electronic surveillance, monitoring of bank accounts and other financial investigation tools. Capacity building will also foster better operational cooperation and exchange of information with other Member States and Europol. The timely exchange of accurate and up to date information is crucial for law enforcement authorities to successfully detect, prevent and investigate serious and organised crime. This is particularly the case for migrant smuggling and trafficking in human beings, due to the *modi operandi* used by organised crime networks involved in these crimes. As regards the bilateral exchange between Member States of information relating to criminal offences on migrant smuggling and trafficking in human beings, Directive (EU) 2023/977 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA will effectively close this gap. However, a major gap remains due to the insufficient sharing of information with Europol. This will be addressed through the 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) 2016/794⁸¹ (further elaborated in the Staff Working Document accompanying the proposal). In addition, Member States should also work on the prevention of migrant smuggling, through information and awareness-raising campaigns, research and education programmes.

4.5. Statistics on migrant smuggling - improving data collection and reporting

In order to address the shortcoming of voluntary reporting by Member States and the lack of comprehensive and comparable data on migrant smuggling and to ensure better monitoring, the proposal introduces an obligation for Member States to collect and report statistical disaggregated data on an annual basis both on natural and legal persons. Collecting and analysing reliable and timely submitted statistical data on crime and criminal justice is indispensable for developing evidence-based policy at EU level and will contribute to a better understanding of the nature and scale of migrant smuggling, the detection of cases and the responses of the criminal justice systems of the Member States.

5. Conclusion

This document accompanies the proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of

⁸¹ COM(2023) 754 final (28.11.2023).

unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA.

It provides a detailed analysis of the policy context that points to the evolution of migrant smuggling to and within the EU and a clear need to strengthen the tools that the competent national authorities and EU agencies have at their disposal. Moreover, it provides an analysis of the current legal framework i.e., the Facilitators package, highlighting its main challenges.

A modern, far reaching legal framework is an essential piece of the comprehensive EU toolbox that includes a wide range of policy, operational, financial and external cooperation instruments. In over 20 years since the EU legislation against migrant smuggling was adopted, the demand for migrant smuggling and its *modi operandi* have significantly evolved marked by increased use of violence and involvement of criminal networks. The implementation of the current Facilitators Package has resulted in varied approaches of Member States to what constitutes the offence and the penalties applied. The Package has been criticised for its lack of legal clarity as to what constitutes migrant smuggling as opposed to criminalisation of any facilitation of unauthorised entry, stay and transit, including acts of solidarity and compassion and without criminal intent.

Adopted before the Treaty of Lisbon, the existing EU legal framework on migrant smuggling needs to be modernised and reinforced to enhance the tools at the disposal of the European Union to prevent and respond to this continuously evolving crime, including in the context of the legal obligations on the Union and its Member States under international law under the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air.

In order to provide for a modern and effective legal framework there are five key aspects that the Commission proposal aims to address:

(1) Ensuring an effective investigation, prosecution and sanctioning of organised criminal networks responsible for migrant smuggling. The analysis shows the need to focus on tackling the criminal networks involved in migrant smuggling by bringing clarity on which offences should be criminalised i.e., those conducted for actual or promised financial or material benefit or that are highly likely to cause serious harm to a person. The proposal also introduces the offence of public instigation of third-country nationals to enter, transit across or stay irregularly in the European Union, taking into account the new *modi operandi* of smugglers that operate abroad or in the EU and intentionally recruit migrants, for instance through the internet (e.g., by sharing information on embarkations, promoting fake packages to travel to the EU etc.). In order to provide more legal clarity, it was also necessary to provide clarifications to Member States on the treatment of humanitarian assistance or assistance provided by family members to avoid over-criminalisation.

(2) More harmonised penalties that take account of the seriousness of the offence to respond to the increased use of violence towards migrants and law enforcement authorities, the use of a broad variety of unsafe means of transport endangering lives of migrants, including aggravating circumstances. Harmonised treatment of these serious offences in the Member States aims to address the very different approaches in the Member States as regards the penalties applied.

(3) Improving the jurisdictional reach to address the global dimension of migrant smuggling and increase the possibilities of sanctioning high-value targets who are organising smuggling activities and to avoid a situation where no State exercises jurisdiction over serious and tragic smuggling cases happening for instance in international waters, with an obligation of cooperation among the Member States to avoid duplication of prosecution.

(4) Reinforcing Member States' resources to tackle and prevent migrant smuggling including working on the prevention of migrant smuggling, through information and awareness-raising campaigns, research and education programmes.

(5) Improving data collection and reporting, and where appropriate, building on the existing IT tools, in order to address the lack of robust, comprehensive and comparable data on migrant smuggling offences and criminal justice responses at national and European level and develop evidence-based policy contributing to a better understanding of the nature and scale of migrant smuggling, the detection of cases and the responses of the criminal justice systems of the Member States, supporting evidence-based policy making.

Annex I - Exemptions for humanitarian assistance in Member States

Member State	Scope of the offence	Exemptions
BE	Entry, transit and residence	<ul style="list-style-type: none"> • Actions done for ‘<i>mainly</i> humanitarian reasons’
FI	Entry and transit	<ul style="list-style-type: none"> • Actions for ‘humanitarian motives’. • Takes into account circumstances affecting the safety of the alien in his or her home country or country of permanent residence. • Assistance provided for motives related to close family relations.
FR	Transit and residence	<ul style="list-style-type: none"> • Legal, linguistic or social advice or support or any other assistance provided exclusively for humanitarian purposes. • Assistance provided by family members. • Personal intent: for solely humanitarian reasons.
EL	Entry and transit	<ul style="list-style-type: none"> • Search and rescue • Transport of people in need of international protection as required by international law and transportation inland or facilitation of transportation in order to follow specific illegal entry, • Reception and identification procedure set out by law and after a notification of the competent police and coast guard authorities.
ES	Entry and transit	<ul style="list-style-type: none"> • Actions motivated by providing ‘humanitarian aid’ (actions guided by humanitarian motivations).
HR	Entry and residence	<ul style="list-style-type: none"> • For entry: the motive of providing humanitarian aid is alternative to “saving a life, preventing injury, [and] providing emergency medical assistance”. • For residence: act is based on ‘humanitarian grounds’ and there is no “intention of preventing or postponing measures being taken to secure return”. • Actions that are in line with the laws governing humanitarian aid and air traffic. • SAR.
IE	Entry, transit and residence	<ul style="list-style-type: none"> • Smuggled migrant. • For residence: those who act in the ordinary course of their business, trade or profession, whether for profit or otherwise, in supplying a good or service to the illegal immigrant. • Assistance to a person seeking international protection in the State or equivalent status in the context of the work of a <i>bona fide</i> organisation, provided it is done without charge.
IT	Entry	<ul style="list-style-type: none"> • Actions where the foreigner is “in need”.
MT	Entry and transit	<ul style="list-style-type: none"> • When the assistance is provided to ‘any other person in any immediate situation of danger’.

Annex II - Criminal sanctions applicable to natural persons

Member State	Criminal sanctions applicable for the facilitation of entry and transit	Criminal sanctions applicable for the facilitation of residence
	Imprisonment/fines	Imprisonment/fines
AT	Up to 2 years	Up to 1 year
BE	8 days – 1 year and/or fine EUR 1,700 - 6,000	8 days – 1 year and/or fine EUR 1,700 - 6,000
BG	For entry: 1-10 years and a fine EUR 2,500 - 15,000. For transit: 1-5 years and a fine EUR 1,500 - 5,000.	Up to 5 years and a fine EUR 1,500 - 5,000
CY	Up to 10 years and/or a fine up to EUR 50,000	Up to 15 years and/or a fine up to EUR 100,000
CZ	Up to two years	Up to one year
DE	Up to 5 years or a fine EUR 5 - 10,800,000	Up to 5 years or a fine EUR 5 - 10,800,000
DK	Up to 2 years or a fine EUR 335 - 940	Up to 2 years or a fine EUR 335 - 940
EE	Up to 3 years or a fine of min. EUR 300	Up to 1 year or a fine of min. EUR 300
EL	Up to 10 years and a fine of min. EUR 20,000	Minimum 1 year and a fine of min. EUR 5,000
ES	3 months – 1 year or a fine EUR 180 - 144,000	3 months – 1 year or a fine EUR 180 - 144,000
FI	Up to 2 years or a fine of minimum EUR 6	N/A
FR	5 years and a fine of EUR 30,000	5 years and a fine of EUR 30,000
HR	A fine of EUR 3,050 for each transported third-country nationals	A fine of EUR 3,050 for each transported third-country nationals
HU	1-5 years	1-2 years
IE	Up to 10 years and/or a fine which amount is not limited	Up to 10 years and/or a fine which amount is not limited
IT	2-6 years and a fine of EUR 15,000 for each transported third-country nationals	Up to 4 years and a fine up to EUR 15,493
LT	Up to 6 years or a fine EUR 4,900 - 196,000	Up to 6 years or a fine EUR 7,350 - 294,000

LU	3-5 years and/or a fine EUR 10,000 - 50,000	3-5 years and/or a fine EUR 10,000 - 50,000
LV	Up to 2 years or a fine which amount is not determined by national law	Up to 2 years or a fine which amount is not determined by national law
MT	Up to 2 years and/or a fine up to EUR 11,646.87 For facilitation of transit for financial gain, 6 months - 5 years and/or a fine up to EUR 23,293.73	Up to 2 years and/or a fine up to EUR 11,646.87
NL	Up to 6 years or a fine up to EUR 90,000	Up to 6 years or a fine up to EUR 90,000
PL	6 months - 8 years	3 months - 5 years
PT	Up to 3 years	1-5 years
RO	2-7 years	1-5 years
SE	Up to 2 years or a fine if the offence is considered minor. The range of the fine is not determined by law.	Up to 2 years or a fine if there are mitigating circumstances. The range of the fine is not determined by law.
SI	3-10 years and a fine which amount is not determined by law	3-10 years and a fine which amount is not determined by law
SK	1-5 years and a fine EUR 160 - 331,930 in case of financial gain	1-5 years and a fine EUR 160 - 331,930 in case of financial gain

Annex III – Stakeholder consultations

Broad stakeholder consultations on the Facilitators Package have been done on different occasions in order to gather views and concrete suggestions from authorities, experts and other stakeholders working on or interested in migrant smuggling, as well as to gather updated knowledge and address possible information gaps. The Commission organised or participated in a number of seminars, events and bilateral meetings, with a wide range of stakeholders. The consultations were conducted:

- November 2014 - March 2016 in the context of the preparation of the 2017 REFIT Evaluation of the Facilitators package⁸²;
- May 2018⁸³ - February 2020⁸⁴, consultations with the relevant civil society organisations with 55 NGOs sending in their written contribution in view of the preparation of the Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence in 2020;
- February to June 2021: targeted consultations in the context of the preparation of a renewed EU action plan against migrant smuggling with the Member States' National Contact Points for migrant smuggling, international organisations⁸⁵,
- Public consultation (from 19 March 2021 until 11 June 2021) in the context of the preparation of a renewed EU action plan against migrant smuggling (2021-2025)⁸⁶;
- March - May 2023 consultations with stakeholders⁸⁷ in the preparation of the Study on the implementation of the Facilitators Package
- October 2023 – consultations in the preparation of the legislative proposals with the EU Agencies (Eurojust, Europol, the European Border and Coast Guard Agency) and Member States National Contact Points for migrant smuggling.

In general, stakeholders positively assessed the approximation of the criminal framework in the Member States. Divergent views were expressed by different categories of stakeholders on the definition of the offence and the optional character of exempting actions conducted on humanitarian grounds. Representatives of civil society organisations highlighted that a wide definition of the offence leads to a lack of clarity and legal certainty as well as to risks of criminalisation of humanitarian assistance by civil society organisations or individuals assisting and/or working with irregular migrants, whereas Member States did not refer to a

⁸² European Commission (2017) REFIT Evaluation; Annex II – Stakeholder consultations, p. 40-44.

⁸³ Meeting organised on 3 May 2018 with PICUM, MSF, MPG, CEPS and FRA.

⁸⁴ Meeting organised on 3 March 2020 with MPG, PICUM, Red Cross, Amnesty International, Caritas, Sea Watch, Salvamento Marítimo, SOS Méditerranée, MSF, CEPS and FRA.

⁸⁵ Council of Europe, ICMPD, IOM, Interpol, OHCHR, UNHCR, UNICEF, UNODC.

⁸⁶ Details available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12724-Fighting-migrant-smuggling-2021-2025-EU-action-plan_en.

⁸⁷ Consultation of EU Agencies (EUROPOL, Frontex, FRA), legal experts, public prosecutors, judges, academics, law enforcement representative, NGO representatives.

need to narrow the definition of the offence or to introduce a mandatory exemption from criminalisation.

However, varied national approaches to the crime of facilitation affects the effectiveness of common EU action, and in order to focus on offences committed with a lucrative intent in particular by organised criminal groups, it is necessary to clearly define the offence of facilitation. Consultation of Europol and Eurojust also pointed to the same approach because it would facilitate operational cooperation and response.