



EUROPEAN POLICY ANALYSIS

The Facilitation Proposal: Assessing the EU's response to the smuggling of migrants

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Summary

Around the world, the fight against the smuggling of migrants is seen as a critical component of countries' migration management strategies. It often relies on the premise that organised smuggling networks must be dismantled to protect migrants from exploitation and reduce irregular migration.

In November 2023, the European Commission proposed new legislation to update and strengthen the EU's counter-smuggling framework (known as the Facilitators' Package). The current legislation was adopted in 2002 to establish a common definition of the offence of facilitation of unauthorised entry, transit, and residence, and a penal framework to prevent the crime. The Council of the EU reached a common position on the new proposal in December 2024. The European Parliament has yet to adopt a mandate for interinstitutional negotiations.

This SIEPS European Policy Analysis takes a critical look at the planned reform. It shows that, if adopted, the new directive would expand the punitive scope of counter-smuggling measures. It would widen member states' powers to criminalise people on the move and those who provide them with humanitarian assistance, further distancing the EU counter-smuggling framework from international agreements. Furthermore, a continued lack of data transparency and accountability rules would prevent the assessment of the EU counter-smuggling strategy within the Union's borders and beyond.

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The opinions expressed in the publication are those of the author.

1. Introduction

In November 2023, in the context of an international conference to announce the launch of a Global Alliance to counter Migrant Smuggling, the European Commission submitted a proposal for a Directive of the European Parliament and of the Council that sets minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union.¹ The document (known as the “Facilitation Proposal”), is now the basis of negotiations in the European Parliament and the Council of the EU of a new directive which intends to replace Council Directive 2002/90/EC and Council Framework Decision 2002/946/JHA, the so-called “Facilitators’ Package” that has been in place since 2002.² The Facilitator’s Package established a common definition for the offenses of facilitating unauthorised entry, transit and residence, and set up a penal framework to sanction facilitation processes.³ However it distanced itself from the UNDOC Protocol’s definition of smuggling by not including a financial and material benefit element, which allowed for the widespread criminalisation of smuggled migrants and those who provided humanitarian assistance.

In December 2024, the Council reached a common position on the Commission’s Facilitation Proposal, which will form the basis for negotiations with the European Parliament. The new Facilitation Proposal responds to “the need to reinforce Union action to prevent irregular migration and loss of life, intensify cooperation with countries of origin and transit, and ensure cooperation between Member States and Europol, FRONTEX and Eurojust”⁴ amidst the increasing complexity and

sophistication of migrant smuggling organisations.⁵ The Facilitation Proposal also indicates the intention to further empower member states to individually define and prosecute smuggling, and by extension, to impose sanctions at their discretion. It introduces tougher financial sanctions and sentencing parameters and recognises the need for effective data collecting and reporting.

“Taken together, these elements raise concerns over access to justice and member states’ efforts towards accountability concerning the fight against migrant smuggling.”

This brief assesses the Facilitation Proposal. It argues that far from dismantling smuggling networks, the Facilitation Proposal reveals a renewed commitment to prosecuting and sanctioning smuggled migrants and those who provide basic humanitarian aid. Alongside the calls to empower the criminalisation efforts of member states and enforcement agencies, it is of concern that the Facilitation Proposal does not call for the introduction of data transparency mechanisms that would allow member states to effectively report the outcomes of their actions against smuggling. Taken together, these elements raise concerns over access to justice and member states’ efforts towards accountability concerning the fight against migrant smuggling.

¹ European Commission, 2023. *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, Brussels, 28 November.

² Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence. Official Journal L 328, 05/12/2002 p. 0017–0018.

³ Council of the European Union, 2024. *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 – General approach*, Brussels, 29 November 2024 (OR. en) 15916/1/24 REV 1. 2023/0439(COD).

⁴ Council of the European Union, 2024, p. 6.

⁵ See EUROPOL, 2022. *European Migrant Smuggling Centre (EMSC)*. <https://www.europol.europa.eu/about-europol/european-serious-and-organised-crime-centre-esocc/european-migrant-smuggling-centre-emsc>

2. Migrant Smuggling

The fight against migrant smuggling has been showcased worldwide as a critical component of countries' migration management strategies. These strategies often rely on the premise that dismantling organised smuggling networks is a necessary step in protecting migrants from exploitation, while simultaneously reducing irregular migration.⁶

Across the EU, justice and home affairs agencies have mobilised significant resources and gained widespread political support for the fight against smuggling gangs, as counter-smuggling has become a key operational priority.

Migrant smuggling – defined as “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”⁷ – affects all regions of the world. It is the direct outcome of the lack of equal access to legal migration pathways, which creates demand for clandestine mechanisms to enter foreign countries worldwide. According to the 2018 Global Report on Smuggling by the United Nations Office on Drugs and Crime (UNODC), 2.5 million people were smuggled in 2016 alone, for an economic return of around US\$ 5.5–7 billion derived from the fees paid to smugglers.⁸ An oft-cited statistic from the International Criminal Police Organization INTERPOL states that about 90% of those who reach the EU irregularly have done

so with the assistance of smugglers,⁹ although the provenance of this calculation has never been fully explained.

Numbers and amounts are often circulated by states to communicate the size and scope of migrant smuggling. While quite prominent in the security agenda and discourse, official data on migrant smuggling remain extremely scarce, and the data that do exist are often incomparable.¹⁰ It is virtually impossible to determine the real magnitude of the market, in part due to its clandestine nature – migrant smuggling is hardly ever reported by those who rely on it as they are unlikely to seek the attention of the authorities.

Despite its ubiquity in the migration discourse, migrant smuggling is still poorly understood in migration policy, academic and enforcement circles. It is often confused with human trafficking (a different but often intertwined crime). It is narrowly described as constituted by men organised into transnational networks or gangs, with a penchant for violence and greed; as presenting ever-increasing complexity and sophistication; and as conducive to exorbitant profits. In the EU context, it has often been argued that smuggling networks have connections to terrorists, or that they may be involved in other forms of transnational organised crime.¹¹ In sum, the scant nature of evidence¹² has led to its oversimplification in public debates and in policymaking.¹³

⁶ European Commission, 2023. Keynote speech by President von der Leyen at the International Conference on a Global Alliance to Counter Smuggling, 28 November.

⁷ UNODC, 2000. *Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime*. Palermo: UNODC. https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf

⁸ UNODC, 2018. *Global Study on the Smuggling of Migrants*. Vienna: UNODC Research, p. 5.

⁹ EUROPOL, 2018. *Migrant Smuggling Networks: Joint Europol-INTERPOL Report. Executive Summary 2016*. The Hague: Europol.

¹⁰ UNODC, 2024. *The migrant smuggling market on the central Mediterranean*. UNODC Observatory on Smuggling of Migrants Update #2 – October 2024.

¹¹ EUROPOL, 2018, p. 10.

¹² Achilli, L., and A. Tint, 2022. ‘Debunking the smuggler-terrorist nexus: Human smuggling and the Islamic State in the Middle East’. *Studies in Conflict & Terrorism*, 45(5–6), 463–478.

¹³ See Engle Merry, S., 2016. *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking*. Chicago and London: The University of Chicago Press.

Smuggling and Trafficking: Two Different Crimes

The term *migrant smuggling* is often confused with or used as a synonym for the term *human trafficking*, despite referring to a different crime. Migrant smuggling is defined as the facilitation of the illegal entry of a person into a country different from their own in exchange for a material benefit. Human trafficking is the recruitment, transportation, transfer, harbouring or receipt of people through force, fraud or deception, with the aim of exploiting them for profit.

There are several differences between the two crimes. Migrant smuggling involves the crossing of borders, while human trafficking can take place within or beyond a country's borders. The UNODC Smuggling Protocol considers migrants the *object* of smuggling, and migrant smuggling a crime against a state, not against a person. The UNODC Trafficking Protocol defines human trafficking as a crime against a person. It is, however, acknowledged that while smuggled migrants are not "victims" of the crime of smuggling, they may fall victim to other crimes in the course of being smuggled, including sexual and physical assault, kidnapping, theft, homicide, manslaughter and human trafficking itself.

Migrant smuggling and human trafficking can intersect, and in the experience of people on the move

who travel irregularly, they often occur in tandem. For example, a person who agrees to hire the services of a *smuggling* facilitator, can find themselves in a *trafficking* situation when, in the context of their transit, they are forced or coerced to work (often in other criminal activities) to pay off additional costs not covered under the initial agreement. Victims of trafficking may find themselves in a position where the only way to leave, transit or arrive to another country is by securing the services of a smuggling facilitator who, for a fee, is able to transport them to another location.

Research has shown that young people and children who aspire to travel to destinations across the EU and who might have voluntarily hired the services of a smuggler are offered – and accept – reductions in their fees if they take control of vessels or vehicles.¹⁴ For many, taking over the piloting of a boat or other means of transportation saves their lives and those of the people on board.¹⁵ While the Smuggling Protocol states that people should not be penalised for the sole act of being the object of smuggling, countries across the EU have systematically turned to indicting smuggled migrants (including teenagers traveling alone) with facilitating smuggling.¹⁶

While official data on smuggling are scant, empirical research has shown that in most countries of origin and transit, the facilitation of irregular migration for profit is not perceived as a crime but rather as a service.¹⁷ The activity is

facilitated by multiple actors with varying profiles, skills and connections.¹⁸ Many of them operate opportunistically, individually or in small groups, and do not need to be constituted into networks to be effective.¹⁹ Among those who smuggle are

¹⁴ UNODC, 2021a. *Migrant Smuggling to Morocco and the Western Mediterranean*. UNODC Observatory of Migrants. First Edition, 8 December 2021. https://www.unodc.org/res/som/docs/Observatory_StoryMap_2_Final_2021.12.07.pdf, p. 15.

¹⁵ Arencibia, D., no date. *Pateras, testigos protegidos y teléfonos móviles: Apuntes para la defensa de personas investigadas como patrones de pateras cuando buscaban su propia migración*. Observatorio Criminológico del Sistema Penal ante la Migración. Universidad de Málaga. <https://ocspi.wordpress.com/blog-ocspi/>

¹⁶ Patanè, F., M.P. Bolhuis, J. Van Wijk and H. Kreiensen, 2020. 'Asylum-seekers prosecuted for human smuggling: A case study of Scafisti in Italy'. *Refugee Survey Quarterly*, 39(2), 123–152. Taylor, V. (2024). 'No such thing as justice here', the criminalisation of people arriving to the UK on 'small boats'. Centre for Criminology at the University of Oxford and Border Criminologies. https://blogs.law.ox.ac.uk/sites/default/files/2024-02/No%20such%20thing%20as%20justice%20here_for%20publication.pdf

¹⁷ Zhang, S.X., G.E. Sanchez and L. Achilli, 2018. 'Crimes of solidarity in mobility: Alternative views on migrant smuggling'. *The Annals of the American Academy of Political and Social Science*, 676(1), 6–15.

¹⁸ UNODC, 2018, p. 8.

¹⁹ Campana, P., 2018. 'Out of Africa: The organization of migrant smuggling across the Mediterranean'. *European Journal of Criminology*, 15(4), 481–502.

people on the move themselves, who profit from the knowledge generated from their own journeys (whether successful or not).²⁰ There is scant evidence of migrant smuggling ventures becoming fully entangled with other forms of organized crime like terrorism or drug trafficking, as facilitators seek to reduce their detection and improve the likelihood of success, although it has been shown that smuggling facilitators often pay fees to transit through the territories of other criminal groups.²¹ Profits often remain within the smuggling facilitators' communities²² and are essential to their survival and growth.²³ Contrary to the widely held perception – which holds that smuggling exclusively involves adult men – women, young people and children also perform essential tasks, often seeking their own mobility.²⁴

Perhaps due to the perception that migrant smuggling is an activity that solely takes place outside of the EU's gates or is facilitated by foreign gangs based elsewhere or operating remotely, research on the crime within and from the EU (i.e. to the UK and Scandinavia) is extremely scant. Most information available about EU smuggling dynamics comes from journalistic coverage, which is most often published in response to high profile accidents or mass casualty events. While well intended, this tends to reproduce monolithic, over-generalising claims surrounding smuggling and its facilitators.

Smuggling in Sweden

In Scandinavia – and in the specific case of Sweden – smuggling cases are limited.²⁵ The 2005 Aliens Act defines the crime of facilitation of illegal entry, as well as aggravating circumstances (e.g. those who, due to its nature, merit harsher penalties). Cases considered to be small are handled by local police units, while complex cases of transnational nature are referred to specialised prosecutors from the National Unit against Organised Crime.²⁶

Examples of cases identified in Sweden have included a man who advertised his services on Telegram and who was sentenced to 2 years and 6 months in prison for having travelled into Sweden 12 times via ferry to facilitate the entry of 47 people; a man who at least 6 times used "look-alike passports" to facilitate the entry of people into or through Sweden; and a man who over the span of 2 years and 6 months smuggled 8 people relying on forged passports.²⁷ While some smuggling attempts reported by the Swedish Police Authority included more complex cases involving other countries, these were, in their words, rare.²⁸

²⁰ Achilli, L., 2018. 'The "good" smuggler: The ethics and morals of human smuggling among Syrians'. *The Annals of the American Academy of Political and Social Science*, 676(1), 77–96. Richter, L., 2019. 'Doing bizness: Migrant smuggling and everyday life in the Maghreb'. *Focaal*, 2019(85), 26–36.

²¹ Celaya, S.L. and G. Sanchez, 2024. *Una visión fronteriza sobre la interacción entre el tráfico de migrantes y el tráfico de drogas. Reimagining the Migration Protection System: Critical Reflections from The Border*. El Paso: HOPE Border Institute, pp. 20–27.

²² Augustova, K. and D.L. Suber, 2023. 'The Kurdish kaçakçı on the Iran-Turkey border: corruption and survival as EU sponsored counter-smuggling effects'. *Trends in Organized Crime*, 26(1), 48–63.

²³ Brachet, J., 2018. 'Manufacturing smugglers: From irregular to clandestine mobility in the Sahara'. *The Annals of the American Academy of Political and Social Science*, 676(1), 16–35.

²⁴ Ersätt med Mixed Migration Centre, 2025. *Gendered smuggler-migrant interactions in the Central Sahel*. MMC North and West Africa 4Mi Snapshot January 2025. Geneva: MMC. https://mixedmigration.org/wp-content/uploads/2025/01/363_Gendered-smuggler-migrant-interactions-Central-Sahel_EN.pdf; Hagan, M. 2023. *Under one roof: Strategic intersectionality among women negotiating the Calais border under lockdown*. Environment and Planning C: Politics and Space, 41(8), 1536–1554; Richter, L. 2019. 'Doing bizness: migrant smuggling and everyday life in the Maghreb'. *Focaal*, 2019(85), 26–36.

²⁵ Council of Europe, 2023. *Country Fact Sheet: Smuggling of Migrants (Sweden)*. 31 October 2023. Strasbourg: COE. <https://rm.coe.int/sweden-2768-4513-3065-v-1/1680aefb9c>. p. 4.

²⁶ Council of Europe, 2023, p. 3

²⁷ Council of Europe, 2023, p. 5.

²⁸ Council of Europe, 2023, p. 4.

3. The Migrant Smuggling Protocol

The United Nations Convention against Transnational Organized Crime (UNTOC) is the main international instrument in the fight against transnational organised crime. The Convention is further supplemented by three Protocols that target specific areas and manifestations of organised crime:

- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;
- the Protocol against the Smuggling of Migrants by Land, Sea and Air; and
- the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

The Protocol against Trafficking in Persons transformed legal and policy responses against trafficking around the world; it also, arguably, improved the protection of victims of trafficking. The Migrant Smuggling Protocol, on the other hand, has been much less influential. UN member states – including EU member states – have opted to develop their own definitions and legislation on smuggling, in line with their own legislative and regulatory interests, and often differing substantially from the definition established in the Protocol.²⁹

The Smuggling Protocol includes articles that establish the critical components of the definition of migrant smuggling that UN member states, as signatories of the Protocol and of other international conventions, should consider when defining the crime as part of their own legislation. They include the financial or material

benefit component, the principle of non-criminalisation of humanitarian assistance and the non-criminalisation of smuggled migrants. The inclusion of the intention to obtain a financial or other material benefit as a defining element of migrant smuggling sought to avoid the criminalisation of those who facilitate migration for humanitarian or family reunification reasons. The Protocol's drafters indicated that it was "not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations", and that "the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers".³⁰ Furthermore, the Protocol sought that the actions to counter migrant smuggling should focus solely on the acts of organised criminal groups rather than on people on the move themselves.³¹

The Smuggling Protocol also seeks to prevent the prosecution of smuggled migrants for having been smuggled, recognising them, in the words of the Protocol's drafters, "[as] victims [that] should therefore not be criminalized".³² Protection of the rights of migrants is identified as one of the three purposes of the Protocol. States Parties "are explicitly required to take all appropriate measures, consistent with their obligations under international law, to preserve and protect the rights of smuggled migrants including the right to life; the right not to be subject to torture or other cruel, inhuman, or degrading treatment or punishment; and the right to consular access."³³

UNODC has repeatedly expressed its concern over the distancing of States Parties from their commitments to the Smuggling Protocol, and for

²⁹ Gallagher, A., 2017. 'Whatever happened to the migrant smuggling protocol?', in McAuliffe, M. and M. Klein Solomon (Conveners), *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration*, IOM: Geneva. https://publications.iom.int/system/files/pdf/migrant_smuggling_protocol.pdf, p. 1.

³⁰ United Nations, *Interpretative notes*, UN Doc. A/55/383/Add.1, 3 November 2000, p. 16, para. 88. United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Sales No. E.05.V.2 (2004) p. 333, para. 19.

³¹ UNODC, 2002. *Model Law against the Smuggling of Migrants*. Vienna: UNODC, p. 6.

³² United Nations Office on Drugs and Crime, 2006. *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 483.

³³ Gallagher, 2017, p. 3.

the way in which their corresponding smuggling legislations have instead adopted definitions that compromise the safety of migrants and that often define their actions – and those of humanitarian respondents and providers of basic services – as crimes of smuggling, even without the presence of a financial or material benefit.³⁴

4. The Facilitators' Package

The definition of migrant smuggling included in the EU's 2002 Facilitators' Package – and which precedes the Facilitation Proposal presented in November 2023 – defines the facilitator of unauthorised entry, transit and residence as “(a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens”; and as “(b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.”

Absent from the definition is the specific reference to material or financial benefit as a component of the crime that is present in the Smuggling Protocol. This gap has had repercussions. Over the years, data have shown that the lack of a financial or material benefit element has allowed for the designation as smuggling of actions that, while allowing for the entry of a person into the EU, do not involve or lead to individuals receiving any material benefit – for example, the facilitation of border crossings

for friends or family members, or the provision of humanitarian assistance for people on the move by ordinary citizens and civil society organisations.³⁵

There is a strong body of evidence showing that the implementation of the Facilitators' Package has allowed for the criminalisation of smuggled migrants. Across the EU, member states often impose harsher sentences on smuggled migrants who smuggled themselves or their family members in order to reach safety;³⁶ wives have been prosecuted for sharing a home with their undocumented husbands,³⁷ as have smuggled migrants who took control of boats or vehicles to save their occupants.³⁸

“There is a strong body of evidence showing that the implementation of the Facilitators' Package has allowed for the criminalisation of smuggled migrants.”

Evidence also indicates that the implementation of the Facilitators' Package has led to the widespread criminalisation of humanitarian organisations, service providers and ordinary people who provide live-saving support and solidarity to smuggled migrants. An analysis by the Platform for International Cooperation on Undocumented Migrants (PICUM) identified that in 2023 alone, at least 117 people faced criminal or administrative charges for acting in solidarity with migrants.³⁹

³⁴ See for a detailed analysis, Moreno-Lax, V. 2025. Commission Proposal for a Revised Facilitation Directive: Targeted Substitute impact assessment. Brussels: European Parliamentary Research Service. [https://www.europarl.europa.eu/RegData/etudes/STUD/2025/765787/EPRS_STU\(2025\)765787_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2025/765787/EPRS_STU(2025)765787_EN.pdf)

³⁵ See for example, Carrera, S., L. Vosyliute, S. Smialowski, J. Allsop and G. Sanchez, 2018. *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, Directorate General for Internal Policies of the Union PE 608.838 – December 2018. Brussels: European Parliament, p. 3. Platform for International Cooperation on Undocumented Migrants, 2024. *Cases of criminalisation of migration and solidarity in the EU in 2023*. Brussels: PICUM..

³⁶ da Silva, C., 2021. ‘Greek court sentences Syrian refugee to 52 years in prison over ‘illegal’ crossing from Turkey’. *The Independent*. 28 April 2021. <https://www.independent.co.uk/news/world/europe/Syrian-refugee-Greecebos-court-b1838166.html>.

³⁷ UNODC, 2021a, p. 22.

³⁸ Kitsantonis, N., 2021. ‘He saved 31 people at sea. Then got a 142-year prison sentence’. *The New York Times*. 25 June 2021. <https://www.nytimes.com/2021/06/25/world/europe/greece-migrants.html>

³⁹ PICUM, 2024, p. 7.

Women and the Criminalisation of Migrant Smuggling

According to a 2021 report by the United Nations Office on Drugs and Crime (UNODC), despite the Smuggling Protocol's provisions seeking to prevent the prosecution of close family members who may facilitate irregular entry, women in the EU are often charged with migrant smuggling for procuring their own entry or that of their children, or for living alongside husbands, romantic partners and children who are in the EU irregularly. Of the 41 cases examined in the report, at least 15 involved women charged with migrant smuggling or related offenses for smuggling or facilitating the irregular stay of a family member.

While some courts acknowledged that the actions of the women could have been humanitarian in nature because they were conducted on behalf of family members, in many cases, the existence of

family ties between a woman and the smuggled party did not prevent the imposition of guilty verdicts and penalties. A Somali woman was sentenced to 9 months of incarceration for lending her passport to her half-sister to enter the EU irregularly. In most cases, even if the charges the women faced were eventually dismissed, the legal process alone had serious consequences for their families. For example, the charges against a woman who forged the names of her children on her passport to introduce them to the UK were dismissed on appeal, but her children had long been returned to their country of origin.⁴⁰ A pregnant woman was given a harsher sentence by a male judge who considered getting pregnant made her "more culpable and therefore required a more severe sentence". The case was eventually dismissed.⁴¹

5. The Facilitation Proposal and its Implications

On 28 November 2023, the European Commission presented a proposal for a new directive to combat migrant smuggling and replace the 2002 Facilitators' Package.⁴² The proposal is intended to lead to the adoption of a directive providing "an instrument of minimum harmonisation, where member states are free to adopt or maintain legislation providing for a broader incrimination than what is set out in this directive."

This section briefly examines some of the potential implications of the elements present in the current text (as agreed by the Council in December 2024)⁴³ of the Facilitation Proposal.

1. It empowers member states to define what constitutes smuggling and to penalise it at their discretion. While the text of the Facilitation Proposal includes a humanitarian clause (namely assistance to close family members or support of humanitarian needs) and

states that migrants should not be prosecuted solely on the basis of being smuggled, it grants member states ample freedom to define the crime of smuggling. It also allows member states to impose the sanctions their judges and courts consider appropriate in the context of their national law. UNODC – the guardian of the Smuggling Protocol – has repeatedly expressed its concern over the way in which definitions of smuggling have departed from the Protocol and its intentions.

2. The proposal potentially weaponises aggravated circumstances. Aggravated circumstances are actions that allow a judge to impose harsher sanctions or penalties. In the Facilitation Proposal, these include the participation or involvement of a public official, the existence of a prior smuggling conviction, the instrumentalisation of a person by a third country or a hostile non-state actor, and dispossessing migrants of their travel documents. A noticeable addition is the inclusion of a reference to the

⁴⁰ UNODC, 2021b. *Women in Migrant Smuggling: A Caselaw Analysis*. Vienna: UNODC. https://www.unodc.org/documents/human-trafficking/2021/Women_in_Migrant_Smuggling.pdf, p. 19.

⁴¹ UNODC, 2021b, p. 19.

⁴² European Commission, 2023.

⁴³ Council of the European Union, 2024.

commission of “cruel, inhuman or degrading treatment” of the person subject to smuggling.

There is a risk that the new Facilitation Proposal, combined with the power granted to member states to determine what constitutes an act of smuggling, is used instead to facilitate the punishment of smuggled migrants themselves who without seeking profit operate any kind of vehicle or vessel transporting other migrants, and that finds itself involved in any kind of incident resulting in injury or loss of life.

This is of particular importance given the reliance of law enforcement and border control officials on high-risk practices in the context of counter-smuggling activities (e.g. raids, high-speed chases, forced returns, push-backs or other actions).

3. **The use of the “instrumentalisation” component can effectively violate the right to asylum.** Also considered an aggravated circumstance, instrumentalisation refers to “third-country or hostile non-state actors encouraging or facilitating the movement of a third country national, or stateless person to the external borders of the Union or a Member State to destabilize the Union or Member State.” The circumstances that constitute an act of instrumentalisation are left to the discretion of individual member states, but the measures to counter it have unequivocally and repeatedly resulted in the violation of the rights of people seeking international protection.

One of the most prominent cases of the use of the instrumentalisation language involved the crisis between the EU and Belarus. In the summer of 2021, the EU decided to impose

sanctions on said country over the escalation of serious human rights violations and the violent repression of civil society, democratic opposition and journalists.⁴⁴ In response, Belarus began to issue tourist visas allowing safe travel into their territory, allowing people to the borders of the EU. In return, Poland, Latvia and Lithuania, arguing that instrumentalisation had taken place, adopted national emergency measures that enabled them to forcefully push back and return third-country nationals without an individual assessment of their asylum applications.⁴⁵

Measures to counter alleged instrumentalisation efforts have repeatedly been condemned for the ways in which they compromise the safety of people on the move and their ability to seek asylum.⁴⁶ However, the Commission’s Directorate-General in charge of migration and home affairs has expressed support for the right of member states to protect their external borders and to implement the measures they consider necessary.⁴⁷

4. **The financial or material benefit, as currently proposed, will have unequal impacts.** The current articulation of the financial or material benefit as a constituent element of smuggling is likely to affect civil society actors and people on the move in different ways. The Facilitation Proposal does not entirely and explicitly exempt acts of humanitarian assistance from punishment but places them de facto outside of the scope of the crime of smuggling.⁴⁸ To a certain degree, this can be seen as beneficial to humanitarian organisations. However, actors like people on the move who contribute to the process of unauthorised entry (e.g. boat drivers in the Mediterranean Sea or the English Channel) could still be held criminally liable, even if they

⁴⁴ Council of the EU, 2021. *Belarus: fourth package of EU sanctions over enduring repression and the forced landing of a Ryanair flight*. Press Release. 21 June 2021.

⁴⁵ Goldner Lang, I., 2024. ‘Instrumentalisation of Migrants: It Is Necessary to Act, but How?’ *EU Immigration and Asylum Law and Policy Blog*. 15 October 2024.

⁴⁶ Human Rights Watch, 2022. *Violence and pushbacks at Poland-Belarus border*. 7 June 2022.; Smith, H., 2020. ‘Child dies off Lesbos in first fatality since Turkey opened border’. *The Guardian*, 2 March 2020.

⁴⁷ Parrock, J., 2021. ‘Lukashenko is ‘using human beings’ in an ‘extreme act of aggression towards the EU’, says Johansson’. *EuroNews*, 25 August 2021; European Commission, 2020. *Remarks by President von der Leyen at the joint press conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel*. Statement, 2 March 2020.

⁴⁸ European Commission, 2020. *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorized entry, transit and residence* (2020/C 323/01).

do not receive any financial or material benefit, on the ground that their actions could be seen as posing “a high likelihood of causing serious harm to a person”.⁴⁹

5. **The proposal provides member states, courts and judges discretionary powers to impose heavier fines, longer sentences and other sanctions against natural and – in particular – legal persons.** The prior section recognises that the introduction of a financial or material benefit component to the definition of smuggling could be interpreted as exempting humanitarian organisations from criminalisation. Yet the fact that the Facilitation Proposal provides ample freedom to member states, judges and courts to impose longer sentences and to establish the magnitude of fines and penalties at their discretion poses a potential challenge to humanitarian organisations.

The specific emphasis on maritime operations and vessels is notable, given the history of the criminalisation of humanitarian rescues at sea, and it suggests the inclination, moving forward, to couple criminal with administrative and financial sanctions to restrain the activity of sea-based humanitarian and rescue organisations.⁵⁰ As shown in the case of Italy, this approach has often gone unnoticed, for administrative and financial sanctions require lower standards of proof, are faster to implement and appear to be less confrontational – at least to the public eye.⁵¹

The sanctions imposed onto natural persons not only include fines but also the withdrawal of permits or authorisations to exert or carry out activities that resulted in the offense, prohibition against entering and staying in the member state territory, and exclusion from public funding schemes, all of which can effectively affect the ability of smuggled people on the move and those who provide assistance or support

to be able to carry on with their lives, even if ultimately found not liable of a crime of smuggling, as has often been the case.⁵²

6. **Extended jurisdictional reach.** While member states can prosecute an act of smuggling committed in their territory, by one of its nationals or on board of a ship or aircraft carrying its flag, the Facilitation Proposal also suggests granting member states the capacity to extend their jurisdiction to cover offenses committed outside of their territories by their own nationals or legal persons.

Combined with the instrumentalisation clause, the extended jurisdictional powers would allow member states to prosecute actions that are perceived as potentially destabilising for the Union or a member state, risk its essential functions or compromise its national security – even outside of the EU’s borders. These measures could take place through enforcement partnerships with third countries, or even extraditions, as has occurred in the past. Such measures have been shown to be detrimental to the lives of people on the move and communities along the migration pathway.⁵³

7. **Continued reliance on existing soft strategies to deter irregular migration despite proven shortcomings.** The Facilitation Proposal suggests the continuation of public awareness and information campaigns regarding the risks connected with irregular migration, as well as research and education programmes, as long as these are in line with the corresponding national laws of member states.

Information campaigns have repeatedly come under scrutiny, given their efforts to deter migration, the oversimplification of the decision to migrate and their excessive focus on smugglers and their actions. A growing body of

⁴⁹ For a complete analysis see Alagna, F., G. Sanchez and L. Achilli, 2024. ‘New horizons or old barriers? The 2023 EU anti-smuggling directive proposal and human mobility in the Mediterranean’. *Mediterranean Politics*, 1–12.

⁵⁰ Alagna et al., 2024.

⁵¹ Alagna et al., 2024, p. 7.

⁵² See UNODC, 2021b.

⁵³ Arrouche, K., L. Vosyliute and A. Fallone, 2021. *Between Politics and Inconvenient Evidence. Assessing the Renewed EU Action Plan against Migrant Smuggling*. Brussels: CEPS.

evidence suggests that migration information campaigns have scant impact on their main targets (young adult males), who appear largely unaffected by being exposed to warnings against migrating.⁵⁴

8. **Improved actions to ensure the continuation of enforcement actions.** The Facilitation Proposal allows improved access to resources for enforcement, including specialised training on and access to investigative tools – in particular those allowing for the interception of communications, covert and electronic surveillance and monitoring of cyber-based information.

As shown in this brief, there has been an emphasis on the role that criminal networks play in smuggling facilitation, their sophistication and evolution, as well as on the need to counter with tools that allow enforcement agencies and their counterparts in third countries to keep up with their prowess. There is, however, no significant evidence of the impact of the resources assigned to EU's anti-smuggling strategy on dismantling networks, given among other reasons the lack of uniform definitions and data collection strategies. Despite the designation of significant financial resources to counter smuggling across the EU, evidence suggests the measures implemented most often affect the safety of people on the move (often with devastating consequences)⁵⁵ and are not tailored to the structure and organisation of most forms of smuggling facilitation.

9. **The above concerns are also relevant to the Facilitation Proposal's reference to the ability to secure and rely on investigative tools allowing member states to intercept**

communications, carry out covert and electronic surveillance, and monitor accounts on the grounds of national security. How this information will be ultimately used and the techniques to obtain it – especially when involving smuggled migrants or those who provide them with humanitarian assistance – raise the standing concerns regarding the impact of extractive policing and its legality during criminal proceedings, as well as their impact on migrants' rights. While intelligence gathering by border and migration enforcement agencies has often been described as “anonymous, voluntary, and harmless”, it “take(s) place in the context of irregular entry, lack of privacy, and in the presence of police officers, where individuals are detained and at risk of deportation.”⁵⁶ As outlined by the EU Data Protection Watchdog, “Data subjects run the risk of wrongfully being linked to a criminal activity across the EU, with all of the potential damage for their personal and family life, freedom of movement and occupation that this entails.”⁵⁷

10. **Data reporting.** The Facilitation Proposal recognises the need for data concerning counter-smuggling efforts and establishes minimum data reporting requirements (existing statistical data) to be followed by member states.

The fact that member states will have the ability to introduce their own definitions of the crime of smuggling will invariably translate into member states having differing definitions and legislation. Such differences mean that the possibility of data comparison will continue to be unlikely. Data gaps will continue to deter the understanding of the impact of counter-smuggling efforts and the effects of criminalisation in the EU and

⁵⁴ Caso, N. and J. Carling, 2024. ‘The reach and impact of migration information campaigns in 25 communities across Africa and Asia’. *Migration Policy Practice*, XIII(1), 3–11.

⁵⁵ Tas, S. & Patane, F. 2025. Proposal for a regulation on police cooperation to counter migrant smuggling and human trafficking: targeted substitute impact assessment. Brussels: European Parliamentary Research Service. [https://www.europarl.europa.eu/RegData/etudes/STUD/2025/765777/EPRS_STU\(2025\)765777_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2025/765777/EPRS_STU(2025)765777_EN.pdf)

⁵⁶ Bachiller Lopez, C. and F. Morenilla, 2022. ‘Questioning the interviewers: Frontex's covert interrogations at the Spanish southern border’. *Statewatch*, 3 August 2022.

⁵⁷ Barker, H., C. Rodelli, C. Berthelemy, S. Richani, A. Napolitano, 2025. ‘Why the new Europol regulation is a Trojan horse for surveillance’. *EUObserver*, 19 February 2025. <https://euobserver.com/migration/ar62dea65a>

beyond its borders. The continued absence of disaggregated data will also prevent enhanced knowledge of the gendered impacts of counter-smuggling across the EU and on the ways enforcement specifically affects women and children.⁵⁸ Rather troublingly, the lack of data points to a structuring of an enforcement system without accountability measures.

6. Conclusions

The current text of the Facilitation Proposal, as agreed in the Council, suggests that the directive is at risk of becoming an instrument allowing member states to unrestrictedly and expeditiously designate as smuggling the actions of people on the move seeking to reach safety, as well as the activities of humanitarian actors and ordinary people that act in solidarity with migrants.

The Facilitation Proposal's punitive tone and nature marks a turn to granting wider powers to member states to define smuggling and the kind and scope of sanctions it merits. While the accompanying documents argue the directive is merely an *instrument of minimum harmonisation*, it will ultimately allow member states to freely "adapt or maintain legislation providing for a broader incrimination than what is set in this Directive" and provides no controls or safeguards that could prevent excessive or inadequate over-policing and criminalisation.

The Facilitation Proposal leaves the shortcomings originally present in the Facilitators' Package largely unaddressed. Most troublingly, it cements the power of member states to define and act individually in the persecution of smuggling crimes, against international conventions. It also continues to rely on tropes and over-generalisations concerning smuggling, while leaving largely unaddressed the lack of equal access to pathways to safe, orderly and regular migration as the main

driver of smuggling. Furthermore, it continues to distance itself from the commitments of the Smuggling Protocol, ultimately leading to limited protection for smuggled migrants and humanitarians.

The lack of accurate, consistent and comparable data on smuggling makes it impossible to have a clear understanding of the reach and impact of counter-smuggling activities carried out by EU agencies, not only against transnational smuggling networks, but also on smuggled migrants and those who provide humanitarian assistance. While there are entities designated to collect and report data, their sources and research methodologies are unclear, and access to already existing data is extremely limited and restricted.

Furthermore, the Facilitation Proposal fails to impose obligations on member states to report on the effectiveness of their actions. This raises serious accountability concerns, considering the vast budgets that the EU has dedicated to the fight against migrant smuggling in the Union and across its neighbourhoods.⁵⁹

The growing body of evidence gathered by civil society and academia has consistently shown that far from affecting organised crime, the application of the Facilitators' Package has systematically led to the criminalisation of humanitarian actors, family members of people on the move and basic service providers, who are not only formally prosecuted and sentenced, but also subjected "to wider dynamics of suspicion, intimidation, harassment and disciplining."⁶⁰ This emphasises the need for data on those at the punishing end of counter-smuggling interactions, their interactions with law enforcement and the judicial system. Leaving these issues unaddressed raises questions about financial management, judicial fairness and access to due process.

⁵⁸ Chemlali, A., 2023. 'A mother's choice: Undocumented motherhood, waiting and smuggling in the Tunisian–Libyan borderlands'. *Trends in Organized Crime*, 26(1), 30–47.

⁵⁹ Poland alone was set to receive approximately €90 million under the Border Management and Visa Instrument for 2021–2027. Ahamad Madatali, H. and J. Blanckaert, 2024. *Revision of the anti-smuggling package: The 'facilitators package' and Europol's mandate*. Briefing, Implementation Appraisal. February 2024. European Parliament, p. 8.

⁶⁰ Carrera, S. et al., 2018, p. 3.

It is also clear that the Facilitation Proposal's impetus to allow for harsher sentences and fines points to a renewed commitment to punish those involved in smuggling, which the evidence has consistently shown tend to be people eventually found worthy of international protection. It is also clear that the language concerning financial fines targets humanitarian organisations and their actions.

To conclude, the enhanced ability to criminalise practices as smuggling as articulated in the

Facilitation Proposal, is unlikely to reduce the need for smuggling services or stop exploitative and abusive practices. If the elements described above remain unaddressed, the emerging directive is likely to serve primarily as a tool allowing for the continued criminalisation of people on the move, their family members and those who provide solidarity in need. As a result, the efforts on the part of the EU to dismantle smuggling networks will likely continue to be called into question.