

## II

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AND AGENCIES

## EUROPEAN COMMISSION

## COMMUNICATION FROM THE COMMISSION

**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)

**1. Introduction**

The EU has developed a comprehensive and multidisciplinary policy framework to address migrant smuggling, including by setting out and implementing the first EU action plan (2015-2020) to tackle this criminal activity <sup>(1)</sup>. Its core objective is to disrupt the business model of criminal organisations that put migrants' lives at risk and threaten our societies' security, while avoiding risks of criminalising those who provide assistance to migrants in distress. This objective remains a key political priority for the EU.

The 'Facilitators Package' <sup>(2)</sup> constitutes the legal framework that the EU adopted in 2002 to define the offence of facilitation of unauthorised entry, transit or residence in the EU and to set out related criminal sanctions.

In particular, Directive 2002/90/EC – the Facilitation Directive – obliges Member States to appropriately penalise anyone who, in breach of laws, intentionally assists a non-EU country national to enter or transit through an EU country, or for financial gain, a non-EU country national to reside in an EU country.

At the same time, when defining the offence, the Directive provides for the possibility for Member States to exempt humanitarian assistance from being criminalised.

In 2017, the Commission carried out the first comprehensive evaluation ('the evaluation') of the Facilitators Package <sup>(3)</sup>. Acknowledging the concerns related to possible criminalisation of humanitarian assistance, the evaluation pointed in particular to a perceived lack of legal certainty and to the lack of appropriate communication between authorities and those operating on the ground. While it considered a legal revision at that stage to be unnecessary, the Commission proposed a more effective exchange of knowledge and good practices between prosecutors, law enforcement and civil society to address the practical consequences of those weaknesses.

<sup>(1)</sup> COM(2015) 385 final of 27.5.2015.

<sup>(2)</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 17) and Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 1). These instruments were adopted together and are commonly referred to as the 'Facilitators Package'.

<sup>(3)</sup> REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: The Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), SWD (2017) 117 final.

As a follow-up to this evaluation, in 2018 the Commission launched a process of regular consultation with civil society and EU agencies, including the Fundamental Rights Agency and Eurojust, to build up knowledge and gather evidence in order to identify the issues linked to interpreting and applying the Facilitation Directive. In July 2018, the European Parliament adopted a Resolution on guidelines for Member States to prevent humanitarian assistance from being criminalised <sup>(4)</sup>, calling upon the Commission ‘to adopt guidelines for Member States specifying which forms of facilitation should not be criminalised, in order to ensure clarity and uniformity in the implementation of the current acquis...’.

Since 2018, this consultation process and various exchanges with stakeholders have pointed to an increasingly difficult environment for NGOs and individuals when assisting migrants, including when they carry out search and rescue operations at sea. Latest research that the Commission has discussed with NGOs suggests that acts carried out for humanitarian purposes have been increasingly criminalised since 2015 <sup>(5)</sup>. Data collected confirmed that judicial prosecutions and investigations against individuals on grounds related to the offence of facilitation have increased in the EU since 2015. The research found 60 investigation and prosecution cases – mostly on facilitation of entry – in 10 Member States between 2015 and 2019, with cases peaking in 2018. The cases analysed as part of the research 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 Resolution, the lack of reliable and comparable national criminal statistics remains an issue, in particular on facilitation of irregular migration offences <sup>(6)</sup>.

Taking into account the European Parliament’s Resolution and the results of the consultation process, the Commission considers that guidance on interpreting the Facilitation Directive is needed to provide greater clarity on its scope of application. It is understood that this guidance does not prejudice the competence of the Court of Justice of the European Union, which is responsible for the final interpretation of EU law.

## 2. The legal framework against migrant smuggling at international and European level

### 2.1. The international law framework: the United Nations Protocol on the smuggling of migrants

The United Nations Protocol against the smuggling of migrants by land, sea and air supplementing the United Nations Convention against Transnational Organised Crime <sup>(7)</sup> (‘the Protocol’) was adopted in 2000 and entered into force in 2004. It was the first international instrument to provide a common definition of migrant smuggling. The EU acceded to the Protocol in 2006 <sup>(8)</sup> and all EU Member States, except Ireland, have ratified it.

Smuggling of migrants is defined in Article 3 of the Protocol 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’.

<sup>(4)</sup> 2019/2769(RSP).

<sup>(5)</sup> Lina Vosyliūtė & Carmine Conte, ‘Crackdown on NGOs and volunteers helping refugees and other migrants’, Research Social Platform on Migration and Asylum (ReSOMA), Final Synthetic Report, June 2019, p. 32. The monitoring exercise has been carried out by the Migration Policy Group through ReSOMA’s collaborative and participatory process involving experts from NGOs, researchers and other stakeholders. This exercise was based on the case monitoring already carried out by Open Democracy, the Institute of Race Relations and the update 2018 study of Centre for European Policy Studies on the Facilitation Directive. The ReSOMA project has been funded through the EU Horizon 2020 research and innovation programme.

<sup>(6)</sup> Following the evaluation, Eurostat collected data on migrant smuggling offences from Member States as part of a pilot collection for the reference years 2015, 2016 and 2017, while the data collection for the 2018 reference year was included in the annual questionnaire sent by Eurostat to collect criminal statistics from Member States.

<sup>(7)</sup> [https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM\\_Protocol\\_English.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf)

<sup>(8)</sup> See: i) Council Decision 2006/616/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community (OJ L 262, 22.9.2006, p. 24); and ii) Council Decision 2006/617/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community (OJ L 262, 22.9.2006, p. 34).

In its 2017 paper on the Concept of 'Financial or Other Material Benefit' in the Smuggling of Migrants Protocol <sup>(9)</sup>, the United Nations Office on Drugs and Crime (UNODC) describes such financial or other material benefit as the very purpose of migrant smuggling, *'the reason behind the growing involvement of organized criminal groups in conduct that often puts the lives of vulnerable migrants in great jeopardy'*. UNODC notes that *'[t]he financial or other material benefits associated with migrant smuggling are fuelling a trade that turns human suffering and resilience against unfair odds, into enormous and unscrupulously procured profits'* <sup>(10)</sup>. The UNODC paper further describes the *'phenomenon of facilitated illegal entry with no benefit motive'* as *'an act that falls beyond the scope of the Protocol'* <sup>(11)</sup>.

UNODC concludes that, even if *'the Protocol does not prevent States from creating criminal offences outside its scope – for example facilitation of illegal entry or illegal stay'*, it *'does not seek and cannot be used as the legal basis for the prosecution of humanitarian actors'* <sup>(12)</sup>. It recalls that the Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols <sup>(13)</sup> *'elaborates on this theme, affirming that the reference to "financial or other material benefit" was indeed intended to exclude groups with purely political or social motives'*. On this basis, UNODC urges countries *'to include safeguards to ensure that faith-based organizations, civil society and individuals acting without any purpose to obtain a financial or other material benefit are excluded from the application of smuggling offences while ensuring that such exclusion cannot be used as a loophole to escape justice'* <sup>(14)</sup>.

## 2.2. The EU legal framework: the Facilitators Package

Migrant smuggling is increasingly associated with serious human rights violations and loss of lives, in particular when it occurs at sea <sup>(15)</sup>. The facilitation of irregular migration takes various forms, such as:

- actually transporting or managing the transportation of anyone who does not have a right to enter or transit through a country of which they are not a national;
- fabricating and/or providing fake documents;
- arranging marriages of convenience.

These activities are carried out by organised criminal networks or individuals and generate substantial profits for them. Besides, an increase in the number of irregular migrants reaching the EU sustains the demand not only for activities that facilitate entry into the EU, but also for those related to irregular residence. The facilitation of irregular entry, transit and (when conducted for financial gain) residence are penalised under the Facilitators Package.

The general objective of the Facilitators Package is to help fight against both irregular migration, by penalising facilitation in connection with unauthorised crossing of the border, and organised crime networks that endanger migrants' lives. Under Article 1(1) of the Facilitation Directive, anyone who intentionally helps a non-EU national to enter, transit, or (when conducted for financial gain) reside in the EU in breach of immigration law, must be penalised.

<sup>(9)</sup> [https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/UNODC\\_Issue\\_Paper\\_The\\_Profit\\_Element\\_in\\_the\\_Smuggling\\_of\\_Migrants\\_Protocol.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/UNODC_Issue_Paper_The_Profit_Element_in_the_Smuggling_of_Migrants_Protocol.pdf)

<sup>(10)</sup> Preface, iii.

<sup>(11)</sup> See note 9.

<sup>(12)</sup> See note 9, p. 14, UNODC also recalls that *'according to the Travaux Préparatoires, the intention of the drafters was to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. In the words of the Interpretative Note attached to the relevant provision, "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"'*.

<sup>(13)</sup> UNODC, 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. 13, para. 26.

<sup>(14)</sup> See note 13, p. 71.

<sup>(15)</sup> REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence cit., p. 4.

As detailed in the evaluation, the Protocol and the Facilitators Package remain coherent with each other, despite some differences <sup>(16)</sup>. The evaluation recalls that ‘as Parties to the Protocol, both the EU and its Member States are bound to apply it including when passing or implementing legislation within its scope’ and that ‘the Protocol strengthened the EU position on tackling migrant smuggling as a form of organised crime’.

The facilitation offence as set out in Article 1(1) of the Facilitation Directive is indeed broader than in the Protocol insofar as financial gain is not a constituent component of the offence of facilitation of irregular entry or transit. Financial gain — together with participation in a criminal organisation or endangering the lives of the people who are the subjects of the offence — is listed under the aggravating circumstances set out in Article 1(3) of Framework Decision 2002/946/JHA.

However, Article 1(2) of the Directive provides for the possibility to exempt facilitation of unauthorised entry and transit from being criminalised, when carried out for humanitarian assistance purposes. According to this provision, ‘Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned’.

Leaving aside references to general criminal law provisions, such as those concerning acts that had to be carried out to avert a dangerous situation <sup>(17)</sup>, only eight Member States include in national law an exemption from punishment for facilitating unauthorised entry and/or transit in order to provide some form of humanitarian assistance <sup>(18)</sup>. An examination of the legislation of these Member States reveals a variety of national interpretations of the Directive, each taking account of the national legal context.

Belgium and Spain have adopted almost verbatim the language in the Directive on including humanitarian assistance as a reason for non-incrimination, while other Member States used different constructions.

Croatia sets out explicit exemptions for:

- facilitating entry – to save lives, prevent injuries, provide emergency medical assistance and humanitarian assistance in accordance with special legislation – and
- facilitating residence – on humanitarian grounds, without intending to prevent or postpone measures being taken to secure return.

In Greece, captains and masters of ships and aircrafts as well as drivers of any means of transport are not incriminated for providing assistance by rescuing someone at sea or by transporting someone who needs international protection in accordance with international law.

Italy adopted an explicit provision that recalls Article 54 of the Italian Penal Code, with a general clause that does not criminalise activities aimed at:

- preventing those involved in the action from being seriously harmed;
- rescuing and/or offering humanitarian help to foreigners present on Italian territory.

Finland takes into account someone’s humanitarian motives or their motives as regards close family relations, as well as the circumstances related to the safety of the foreigner in their home country or country of permanent residence.

In France, following a judgment from the Constitutional Council <sup>(19)</sup> and a subsequent amendment made to the relevant provisions, relatives and anyone providing legal, linguistic or social advice, or any type of assistance for exclusively humanitarian purposes, have been exempted from criminalisation as regards facilitating transit or residence, although not for facilitating entry.

<sup>(16)</sup> See note 15, p. 31.

<sup>(17)</sup> See *Criminalisation of migrants in an irregular situation and of persons engaging with them*, FRA (2014), p. 10.

<sup>(18)</sup> Belgium, Greece, Spain, Finland, France, Croatia, Italy and Malta in the REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence cit., p. 15, as well as Article L622-4 of the French Code on Foreigners, as amended by law n°2018-778 of 10 September 2018, and Article 43, Para 2, Item 2 of Croatia’s Law on Foreigners, as adopted in 2017.

<sup>(19)</sup> In its Decision n° 2018-717/718 QPC of 6 July 2018, the French Constitutional Council ruled that the possibility to assist people, for humanitarian purposes, stems from the constitutional principle of fraternity, regardless of these people’s legal status in the country. Moreover, it considered that the domestic provision that exempted certain types of conduct could only be interpreted as also applying to any other type of assistance provided for humanitarian purposes. However, it did not extend its ruling to facilitating entry, which ‘necessarily entails an illicit situation’, contrary to facilitating transit.

In Malta, when an individual helps someone in immediate danger to land on and/or transit through its territory, it is possible not to institute proceedings if such acts have been carried out to provide humanitarian assistance <sup>(20)</sup>.

The power to assess, in light of a case's circumstances, whether an act falls under an exemption as set out in national law rests with the judicial authorities, which have to strike the right balance between different interests and values at play <sup>(21)</sup>.

### 3. Scope of application of Article 1 of the Facilitation Directive

In view of the general spirit and objective of the Facilitation Directive, it is clear that it cannot be construed as a way to allow humanitarian activity that is mandated by law to be criminalised, such as search and rescue operations at sea, regardless how the Facilitation Directive is applied under national law.

According to the international law of the sea, States have an obligation to require shipmasters flying their flag, insofar as they can do so without serious danger to the ship, the crew or the passengers, to provide assistance to people or vessels in distress at sea. This principle is enshrined in:

- the United Nations Convention on the Law of the Sea <sup>(22)</sup>;
- the International Convention for the Safety of Life at Sea (SOLAS) <sup>(23)</sup>; and
- the International Convention on Maritime Search and Rescue <sup>(24)</sup> (SAR).

In addition, the applicable legal framework includes treaties related to maritime traffic and International Maritime Organization (IMO) resolutions <sup>(25)</sup>.

Moreover, the duty of countries to set out the obligation for shipmasters to assist any individual, vessel or aircraft in distress at sea is recognised as a principle of customary international law. Therefore, it is binding on all countries.

Everyone involved in search and rescue activities must observe the instructions received from the coordinating authority when intervening in search and rescue events, in accordance with general principles and applicable rules of international maritime and human rights law. Criminalisation of non-governmental organisations or any other non-state actors that carry out search and rescue operations while complying with the relevant legal framework amounts to a breach of international law, and therefore is not permitted by EU law.

<sup>(20)</sup> REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence cit., pp. 14-15.

<sup>(21)</sup> On the need to strike the right balance between the need to protect public policy and prevent crimes, on one hand, and to take account of the humanitarian purpose of the act, on the other, see, for example, with reference to Article L. 622-1 of the French Code on entry and stay of foreigners and right to asylum, and Article 8 of the European Convention on Human Rights, the judgment of the European Court of Human Rights of 10.11.2011, n° 29681/08, *Mallah v. France*.

<sup>(22)</sup> [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf)

<sup>(23)</sup> [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx)

The SOLAS Convention (Chapter V – Safety of Navigation) obliges the master of a ship at sea, which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, to proceed with all speed to their assistance. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. If the ship receiving the distress alert is unable to proceed to their assistance or, in the special circumstances of the case, considers it unreasonable or unnecessary, the master must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress. Taking into account the recommendation of the Organization, he must inform the appropriate search and rescue service accordingly. The Convention mandates contracting governments to coordinate and cooperate in assisting the shipmaster to deliver people rescued at sea to a safe place. It also provides that the owner, the charterer, the company operating the ship or any other person must not prevent or restrict the master of the ship from taking or executing any decision, which in the master's professional judgement is necessary for safety of life at sea.

<sup>(24)</sup> [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-\(SAR\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-(SAR).aspx)

The SAR Convention (Annex) obligates Parties to assist the shipmaster in delivering people rescued at sea to a safe place and requires maritime rescue coordination centres to have appropriate operating procedures for initiating the process of identifying the most suitable places for disembarking people found in distress at sea.

<sup>(25)</sup> At its 78<sup>th</sup> session, the Maritime Safety Committee (MSC 78, in 2004) of the IMO adopted important amendments to Chapter V of the SOLAS Convention and to Chapters 2, 3 and 4 of the Annex to the SAR Convention. These amendments entered into force on 1 July 2006. At the same session, the MSC adopted a set of operational guidelines. The purpose of these amendments and the current guidelines is to help ensure that people in distress are assisted, while minimising the inconvenience to assisting ships and ensuring the continued integrity of search and rescue services.

In conclusion, when Article 1 of the Facilitation Directive criminalises the facilitation of unauthorised entry and transit, while giving Member States the possibility not to impose sanctions in cases where the purpose of the activity is to provide humanitarian assistance, it does not refer to humanitarian assistance mandated by law, as this cannot be criminalised.

#### 4. **Guidance**

In light of the considerations above, in the Commission's view, Article 1 of the Facilitation Directive must be interpreted as follows:

- i) humanitarian assistance that is mandated by law cannot and must not be criminalised;
- ii) in particular, the criminalisation of NGOs or any other non-state actors that carry out search and rescue operations at sea, while complying with the relevant legal framework, amounts to a breach of international law, and therefore is not permitted by EU law;
- iii) where applicable, assessment of whether an act falls within the concept of 'humanitarian assistance' in Article 1(2) of the Directive – a concept that cannot be construed in a manner that would allow an act mandated by law to be criminalised – should be carried out on a case-by-case basis, taking into account all the relevant circumstances.

#### 5. **Policy Recommendation**

NGOs and individuals in the EU providing humanitarian assistance to migrants have expressed growing concerns over recent years <sup>(26)</sup>. Rescue operations at sea, as well as support given to migrants on the move, be it at borders or within the territory of a Member State, are reportedly carried out in a context of tension with national or local authorities, with rescuers and volunteers fearing undue administrative pressure and sanctions <sup>(27)</sup>.

In its Resolution <sup>(28)</sup> on the issue, the European Parliament called on Member States 'to transpose the humanitarian assistance exemption provided for in the Facilitation Directive'.

Recalling that EU law does not intend to criminalise humanitarian assistance, the Commission has taken stock of the situation since the evaluation of the Facilitators Package. In light of this, the Commission invites Member States that have not already done so to use the possibility provided for in Article 1(2) of the Facilitation Directive, which allows them to distinguish between activities carried out for the purpose of humanitarian assistance and activities that aim to facilitate irregular entry or transit, and allows for the exclusion of the former from criminalisation.

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<sup>(26)</sup> In particular, see i) the thematic Study on behalf of the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, 'Using criminal law to restrict the work of NGOs supporting refugees and other migrants in Council of Europe member states', December 2019; ii) Lina Vosyliūtė & Carmine Conte, 'Crackdown on NGOs and volunteers helping refugees and other migrants', ReSOMA, cit.; Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, 'Update Study "Fit for purpose?" The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants', Study for the EP Petitions Committee (PETI), European Parliament, December 2018; iii) European Union Agency for Fundamental Rights (FRA), 'Fundamental Rights Considerations: NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations', October 2018 ; iv) FRA, '2019 update - NGO ships involved in search and rescue in the Mediterranean and criminal investigations', June 2019; v) 'Punishing Compassion. Solidarity on trial in fortress Europe', Amnesty International, March 2020.

<sup>(27)</sup> REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence, cit.

<sup>(28)</sup> 2019/2769(RSP), cit.