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Sanctioning the Facilitation of Irregular Migration: The Kinsa Light at the End of the Overcriminalisation Tunnel

ERMIONI XANTHOPOULOU

12.1 INTRODUCTION

The employment of criminal sanctions in EU migration and asylum law has been a long-standing interest of scholars.¹ It is usually studied as an example of ‘cimmigration’, a pattern referring to the convergence of crime control and immigration policies by means of using criminal law in the field of immigration to control mobility.² In particular, the Facilitators Package,³ consisting of the EU Facilitation Directive establishing minimum rules for the definition of the facilitation offences and the Framework Decision on the strengthening of the penal legal framework, has been the subject of intense academic and civil society debate.⁴ Key criticism contends that it has introduced an ambiguous

¹ Valsamis Mitsilegas, *The Criminalisation of Migration in Europe, Challenges for Human Rights and the Rule of Law* (Springer, 2015); Constanza Di Francesco Maesa, ‘(In)Effectiveness of Criminal Sanctions as regards Irregular Immigrants’ (2018) 8 *European Criminal Law Review* 5.

² Gian Luigi Gatta, Valsamis Mitsilegas and Stefano Zirulia (eds), *Controlling Immigration Through Criminal Law. European and Comparative Perspectives on ‘Cimmigration’* (Hart Publishing, 2021).

³ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/17 (thereafter, Facilitation Directive) 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 [2002] OJ L328/1 (‘Facilitation Framework Decision’).

⁴ Eamon Aloyo and Eugenio Cusumano, ‘Morally Evaluating Human Smuggling: The Case of Migration to Europe’ (2021) 24 *Critical Review of International Social and Political Philosophy* 133; Violeta Moreno-Lax and Efthymios Papastavridis (eds), *Boat Refugees’ and Migrants at Sea: A Comprehensive Approach* (Brill, 2016).

scope leading to overcriminalisation and a breach of fundamental rights and harming civil society.⁵

In November 2023, the European Commission proposed new legislation to reform the existing law.⁶ The timeline of reform proposals has partially coincided with the litigation in the *Kinsa* case that challenged the legality and proportionality of the legal framework.⁷ Both the *Kinsa* litigation and the proposed reform intensified scholarly interest in the topic. While we know what the issues of the current law are, the impact of the proposed reforms and of the ruling in *Kinsa* remain to be assessed, which is the gap that this chapter intends to fill. So, the aim of this chapter is to evaluate the *Kinsa* ruling and assess the efficacy of the proposed reform. It asks to what extent the proposed reform addresses existing issues of overcriminalisation considering international legal standards, fundamental rights, criminal law principles and EU constitutional law. The comprehension of normative choices made by the legislators would be incomplete without taking stock of the widespread climate of anti-immigration, populist rhetoric in policymaking at national and EU level. For this reason, the chapter also borrows from ‘law in context’ to illuminate the assessment of the debate as influenced by the social context.⁸

The chapter first outlines the current legal framework on countering the facilitation of unauthorised migration and the key criticism, which is also well presented in *Kinsa*; second, it examines the proposed reform and the persisting issues under the reform when evaluating it against international and EU legal standards on fundamental rights safeguards, principles of criminal law and EU constitutional law; third, it showcases the challenges faced by the ongoing, at the time of writing, legislative process situating the debate within the laborious inter-institutional process.

⁵ Valsamis Mitsilegas, ‘The Normative Foundations of the Criminalisation of Human Smuggling. Exploring the Fault Lines between European and International Law’ (2019) 10 *New Journal of European Criminal Law* 68, 78; Sergio Carrera, Valsamis Mitsilegas, et al, *Policing Humanitarianism. EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart, 2019); Sergio Carrera et al, ‘Fit for purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants’ (European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, 2016); Violeta Moreno-Lax, ‘Towards a Thousand Little Morias: the EU (Non-)Rescue Scheme - Criminalising Solidarity, Structuralising Defection’ in Daniel Thym (ed), *Reforming the Common European asylum system* (Nomos, 2022); Stefano Zirulia, ‘Les Enfants de la Clarée: Why the Facilitators Package is Incompatible with the Charter of Fundamental Rights’ (Border Criminologies, 2 September 2024).

⁶ European Commission, ‘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 (‘Facilitation Directive Proposal’) and European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol’s support to preventing and combating such crimes and amending Regulation (EU) 2016/794’, COM(2023) 754 final (‘Europol Regulation Proposal’).

⁷ Case C-460/23 *Kinsa v OB Criminal proceedings brought by Procura della Repubblica presso il Tribunale di Bologna* [2025] EU:C:2025:392.

⁸ Philip Selznick, ‘“Law in Context” Revisited’ (2003) 30 *Journal of Law and Society* 177.

12.2 SANCTIONING SMUGGLING: CURRENT SITUATION

The current framework on counter-smuggling dates back to the pre-Lisbon third pillar and is governed by the Facilitators Package.⁹ It is composed of a Directive that defines the crime of facilitation of irregular entry, transit and residence, which is accompanied by a Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. According to the Preamble of the Directive, the common goal of these measures is to provide tools to more effectively address unauthorised immigration,¹⁰ an aim that is broader than only countering criminal activities pertaining to exploitative migrant smuggling.

The conduct of facilitation of unauthorised entry, transit and residence is defined by the Directive and confirmed by the Framework Decision as a criminal offence attracting penalties.¹¹ The definition of such conduct in Article 1(1) of the Directive states:

Each Member State shall adopt appropriate sanctions on:

- (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;
- (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.

Therefore, the *mens rea* of the first offence requires intention and the *actus reus* includes the elements of: a) assistance; b) provided to a third country national to enter, or transit across, the territory of a Member State; and c) in breach of the laws. The second offence concerns facilitation of residence and includes the additional element of the person engaging in the conduct ‘for financial gain’.

The compatibility of this provision which essentially criminalises the facilitation of irregular immigration with the EU Charter of Fundamental Rights (‘the Charter’) has been put in question before the Court of Justice of the European Union (CJEU) as it effectively allows the prosecution of anyone providing assistance even when the motif is not exploitative and could as well be of a humanitarian nature.¹² As discussed in the next section, the scope of criminalisation is ambiguous. Under Article 1(1a) of the Directive, intentionally assisting the unauthorised entry of a foreigner through any means, for any purpose, with or without a financial or other material benefit, is sufficient for criminalisation under EU law. The requirement of a financial gain is only necessary for the crime

⁹ Facilitation Directive (n 3); Facilitation Framework Decision (n 3).

¹⁰ Facilitation Directive (n 3), Recital 1.

¹¹ *ibid* Art 1(1)(a) combined with Art 1(1) of the Facilitation Framework Decision (n 3).

¹² *Kinsa* (n 7).

of facilitation of irregular residence as defined by Article 1(2) of the Facilitation Directive.¹³ So, while the offence is a very serious one, the scope of criminalisation is broad enough to include *all* acts of facilitation.

The wide scope of criminalisation as delineated by the Directive has effectively resulted in the criminalisation of humanitarian acts of rescue. This is because Member States are free to decide, at implementation level, whether and how to introduce justifications for humanitarian acts facilitating unauthorised migration. As a result, secondary EU law is criticised for allowing the criminalisation of humanitarian acts of rescue due to its ambiguous scope. The law in its current form does not exempt actors that facilitate the smuggling of non-nationals for charitable or altruistic reasons from the scope of the offence. Under the Directive that defines the conduct of infringements, subsequently confirmed as criminal by the Framework Decision, there is no distinction between exploitative action with financial motives and action engaged for humanitarian or solidarity reasons, whether by civil society organisations, individual volunteers, or family members assisting each other.

While no mandatory exemption for humanitarian action is included in the legally binding operative part of the Directive, Article 3 of the Directive calls on Member States to 'take the measures necessary to ensure that the infringements referred to in Articles 1 and 2 are subject to effective, proportionate and dissuasive sanctions'. The broad scope of definition, coupled with the criminalisation requirement of the Framework Decision, results in a far-reaching scope of criminalisation capturing non profitable conducts with dubious connection to a harm element. For example, Italian law,¹⁴ implementing the Facilitators Package, prohibits any act aimed at facilitating entry including facilitation that is not carried out for profit, which may even result in prosecuting parents as smugglers when accompanying their children while crossing the border. Such broad scope is contrary to the UN Smuggling Protocol, the main international law instrument governing the fight against smuggling which includes an exception to criminalisation with regard to acts of humanitarian assistance.¹⁵ It frames the offence of smuggling strictly within the context of organised crime accompanied with receiving financial or other material benefit.¹⁶ This strict framing, the humanitarian exception and the requirement of obtaining a financial or material benefit is not present in the Directive. Instead, there is an optional clause for Member States not to criminalise facilitation acts for rescue purposes.¹⁷

¹³ Facilitation Directive (n 3), Art 1(1)(b).

¹⁴ Consolidated Act of Provisions Concerning Immigration and the Condition of Foreigners (Testo unico sull'immigrazione, Legislative Decree No 286 of 25 July 1998, Italy) Art 1.

¹⁵ UN General Assembly, 'Protocol against the Smuggling of Migrants by Land, Sea and Air: Supplementing the United Nations Convention against Transnational Organized Crime, (2000) UN Doc A/RES/55/25, Art 6(1) ('UN Smuggling Protocol'); Mitsilegas (n 5) 78.

¹⁶ UN Smuggling Protocol (n 15), Art 6(1).

¹⁷ Facilitation Directive (n 3), Art 1(2).

Indeed, the Facilitation Directive allows Member States to include an exemption¹⁸ in their national implementing laws, without, however, obliging them to include such an exemption.¹⁹ Very few states have implemented the optional clause, which explains the rise in prosecutions of civil society organisations offering rescue at sea.²⁰ The lack of a mandatory provision and instead an invitation for Member States to act at their discretion arguably constitutes a limited attempt to comply with international law. The provision falls short of international law *requiring* Member States to provide for a humanitarian exemption. Still, the existence of this option in the operative part of the Directive indicates that the restriction of fundamental rights in question is not necessary for the fulfilment of migration control or border protection goals. At the same time, Article 83 of the Treaty on the Functioning of the European Union (TFEU) grants powers to approximate criminal laws by establishing *minimum* and *not maximum* rules concerning the definition of criminal offences, and the EU legislator has no power under the Treaties to decriminalise. Therefore, there is a broader constitutional limitation possibly preventing the introduction of a mandatory exemption that would act as a maximum rule and limit for Member States when transposing the Directive.

12.3 THE TURNING POINT OF KINSA LITIGATION

At a time when criminalisation of solidarity has been on the rise²¹ and while proposals for reform²² had not, at that point, materialised, the litigation in *Kinsa* constitutes an important judicial development bringing well-reported fundamental rights concerns into the judicial arena. Responding to a request for a preliminary reference lodged by the Bologna court in Italy, the CJEU held, in a ground-breaking and much-expected ruling, delivered on 3 June 2025, that the conduct of a person bringing third-country national minors under their care into the territory of a Member State without authorisation does not fall within the scope of Article 1(1)(a) of the Facilitation Directive, regarding the crime of facilitating unauthorised entry. According to the ruling, this provision must be read under the light of Articles 7, 24, and 52(1) of the Charter to preclude national legislation criminalising as facilitation of entry such conduct of a parent.²³ The following section delves into the case, specifically showcasing the harmful effect

¹⁸ *ibid.*, Art 1(2).

¹⁹ *ibid.*

²⁰ Carrera et al (n 5) 36–42.

²¹ Council of Europe Commissioner for Human Rights, ‘Protecting the Defenders Ending Repression of Human Rights Defenders Assisting Refugees, Asylum Seekers and Migrants in Europe’ (Recommendation, CommHR (2024)11), <https://rm.coe.int/recommendation-protecting-the-defenders-ending-repression-of-human-rig/1680ae9b1c>.

²² Carrera et al (n 5).

²³ ‘[T]hose articles preclude national legislation criminalising such conduct’ *Kinsa* (n 7), para 73.

of ambiguity, before exploring the proposed reforms that are still, at the time of writing, being deliberated by the legislators. Indeed, the European Commission tabled a reform proposal soon after the preliminary question was lodged.²⁴ Therefore, the ruling can influence the ongoing legislative deliberations.²⁵

12.3.1 The Facts

The case concerns the prosecution of a Congolese woman (OB) for the facilitation of the unauthorised entry of her minor daughter and niece. On 28 August 2019, OB was arrested at Bologna airport after attempting to pass through border controls with false documents for herself, her minor daughter and minor niece. Proceedings were brought against her for the offence of facilitating the unauthorised entry of third-country nationals,²⁶ in conjunction with the offence of holding false identity documents.²⁷ The arrest was pursuant to Italian law that prohibits any act aimed at facilitating the entry of an undocumented foreigner implementing the Facilitation Directive.²⁸ OB stated that she had fled her country of origin to escape the death threats imposed upon her and her family by her former partner, and that she exercises care over both her daughter and her niece, whose mother had died.

The referring court asked the CJEU to determine whether the Facilitators Package, as well as the Italian legislation implementing it,²⁹ are compatible with the principle of proportionality set out in Article 52(1) of the Charter, read in conjunction with the right to personal liberty and the right to property referred to in Articles 6 and 17, as well as the rights to life and physical integrity referred to in Articles 2 and 3, the right to asylum referred to in Article 18, and respect for family life referred to in Article 7. The applicant criticised the EU legislator for disregarding the principle of legality of criminal offences and penalties, enshrined in Article 49(1) of the Charter, in its requirements relating to the clarity and foreseeability of criminal law.³⁰ The referring judge argued that the criminalisation of humanitarian activities in Italian legislation implementing the Facilitators Package fails to respect the principle of proportionality.

²⁴ *Kinsa* (n 7).

²⁵ Valsamis Mitsilegas, 'Reforming EU Criminal Law on the Facilitation of Unauthorised Entry: The New Commission Proposal in the Light of the Kinshasa Litigation' (2024) 15 *New Journal of European Criminal Law* 3.

²⁶ Consolidated Act of Provisions concerning Immigration and the Condition of Foreigners (Testo unico sull'immigrazione, Legislative Decree No 286 of 25 July 1998, Italy) Art 1.

²⁷ *Codice Penale* (Italian Criminal Code), Art 497-bis.

²⁸ Facilitators Package (n 3), Art 1(1) a.

²⁹ Art 12 of the Consolidated Law on Immigration, Legislative Decree No 286 of 25 July 1998 (n 26).

³⁰ *Kinsa* (n 7).

12.3.2 Opinion of AG de la Tour

On 18 June 2024, the Court completed its hearing on the *Kinsa* preliminary question, and, on 7 November 2024, Advocate General de la Tour issued his opinion.³¹ He opined that the Facilitation Directive complies with the principle of legality in Article 49(1) of the Charter considering that the Directive is being implemented by Member States. In this respect, he deemed the Directive to be sufficiently clear for the purpose that it serves, as it is Member States when transposing it that should ensure that the domestic law, which actually creates criminal liability, is compliant with the principles of legality in criminal law and proportionality.

Although it is true that the Directive itself does not create criminal liability, it does set the scope within which Member States can create criminal liability in their respective criminal transposing legislation by establishing minimum rules. EU criminal law is bound to adhere to principles enshrined in the Charter, so it is disappointing that the Opinion does not capture this as an opportunity to urge for legal certainty.

The Court has often highlighted in its case law the significance, of the principle of legality of criminal offences and penalties in its requirements relating to the foreseeability, precision and non-retroactivity of the applicable criminal law.³² Besides, a two-stage, EU and national, legality check must serve as an additional guarantee.³³ For example, in *Intertanko and Others*, not only did the Court not deny the application of the principle of legality of criminal offences and penalties to Directives, but it also held that the principle is additionally binding on national law. Yet, the opinion does not come completely as a surprise as it aligns with a previous restrictive approach of the CJEU on the principle of legality reminding that the test is ought to be performed at national stage.³⁴ The opinion prioritises criminal justice interests vis-a-vis a strict compliance of legal certainty in line with earlier case law.³⁵

³¹ Case C460/23, *Kinsa v OB Criminal proceedings brought by Procura della Repubblica presso il Tribunale di Bologna* [2024] EU:C:2024:941, Opinion of AG Collins ('Opinion in *Kinsa*').

³² Case C42/17, *MAS and MB* [2017] EU:C:2017:936, paras 51–56 citing the following cases: Case C-500/10, *Belvedere Costruzioni* [2012] EU:C:2012:186, para 23; Case C-331/88, *Fedesa and Others* [1990] EU:C:1990:391, para 42; Case C-60/02, *X* [2004] EU:C:2004:10, para 63; Case C-303/05, *Advocaten voor de Wereld* [2007] EU:C:2007:261, para 49; Case C-72/15, *Rosneft* [2017] EU:C:2017:236, para 162.

³³ Maria Kaiafa-Gbandi, 'Approximation of Substantive Criminal Law Provisions in the EU and Fundamental Principles of Criminal Law' in Francesca Galli and Anne Weyembergh (eds), *Approximation of Substantive Criminal Law in the EU – The Way Forward* (Éditions de l'Université de Bruxelles, 2013).

³⁴ Case C303/05, *Advocaten voor de Wereld v Leden van de Ministerraad* [2007] EU:C:2007:261. Here, the Court held that the abolition of double criminality in the Framework Decision on the European Arrest Warrant and the Surrender Procedures is in line with both the principle of legality in criminal law and the principle of non-discrimination.

³⁵ Case C-105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I-05285, EU:C:2005:386; For a comprehensive and systematic review of the principle of legality in EU criminal law, see Christina Peristeridou, *The Principle of Legality in European Criminal Law* (Intersentia, 2015).

However, the double yardstick of legality check at both levels is useful as long as it applied as a guarantee rather than as an opportunity for escaping the check at either level. The opinion, in this regard, fully entrusting the legality check to Member States, does not make full use of the two-stage legality check. Indeed, a Directive only sets minimum rules and does allow a space for manoeuvre for Member States, but they also need to ensure that legal certainty will not be compromised, at least as far as this minimum degree of definition is concerned.

AG de la Tour, moreover, opined that the criminalisation of facilitating unauthorised immigration is not contrary to the principle of proportionality of criminal offences and penalties enshrined in Article 49(3) of the Charter, considering the risks that smuggled persons are exposed to even by acts that might appear to be performed in the name of solidarity, which makes it necessary to adopt a broad scope of criminalisation.³⁶ AG de la Tour suggests that expansive criminalisation is compensated by a balancing act that national courts and authorities are expected to exercise when considering whether a person is acting out of humanity, necessity, or motivated by criminal intent to gain financial or material benefit.³⁷

According to settled case law, Member States must exercise their powers in compliance with EU law and its general principles that prescribe that ‘the severity of a penalty must correspond to the seriousness of the infringement concerned’, ie cardinal proportionality,³⁸ in line with Article 52(1) of the Charter and the principle of proportionality of penalties in Article 49(3) of the Charter.³⁹ Member States’ latitude is thus limited by the prohibition on providing for inappropriate and disproportionate penalties.⁴⁰ In fact, ‘the fact that those provisions [of the Directive] must be transposed is not such as to call into question the unconditional nature of the requirement relating to the appropriate and proportionate nature of penalties’.⁴¹ The Opinion does not engage with the proportionality of criminalisation itself as prompted by the request but rather with the proportionality of sanction leaving the preliminary question unanswered.

who raises ‘questions, inconsistencies and lacunae’ in the fragments of legality as developing in EU criminal law.

³⁶ Opinion in *Kinsa* (n 31), paras 76–96.

³⁷ *ibid*, para 90.

³⁸ Peter Asp, *The Substantive Criminal Law Competence of the EU: Towards an Area of Freedom, Security & Justice* (Jure, 2013) 199.

³⁹ Case C-544/19, *Ecotex Bulgaria LTD v Teritorialna direksia na Natsionalnata agentsia za prihodite* [2021] EU:C:2021:100, para 97; Case C40/21, *TAC v Agenția Națională de Integritate* [2023] ECLI:EU:C:2023:367, paras 33–34.

⁴⁰ Opinion in *Kinsa* (n 31) para 94.

⁴¹ *ibid*, para 93; Case C-205/20, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* [2022] EU:C:2022:168, para 26.

12.3.3 CJEU Ruling

The Court, in its turn, rephrased the question to limit the analysis around the specific circumstances of the individuals concerned. Departing from the approach of both the referring judge and the AG, the ruling engaged with the question of whether the national criminalisation in question is proportionate, in the specific circumstances at least of this case and found that the scope of the law must not include the conduct in question. So, it did recognise that criminalising such conduct would disproportionately interfere with the rights to family life and the right of the child, thereby violating the principle of proportionality under Article 52(1) of the Charter and excluded these cases from its scope, avoiding a broader conflict within EU law. The ruling also highlighted that such measures countering migrant-smuggling must not breach the right to asylum,⁴² which was relevant considering the mother's subsequent asylum application and the principle of non-penalisation of international refugee law.⁴³ The Court additionally held that the mother must not be prosecuted for attempting an unauthorised entry as the principle of non-penalisation affords putative refugees protection from prosecution.

The ruling, while not squarely addressing the broader issue of criminalising solidarity, is 'a candle in the dark',⁴⁴ as it calls for the interpretation of the current but also of the reform Directive to be aligned with fundamental rights. Member States cannot rely on the Directive's minimum-harmonisation character to justify additional criminalisation that will not comply with the Charter, since *Kinsa* confirms that the Charter constrains national measures implementing EU law. The ruling is arguably encouraging for national courts to pose more requests for preliminary references to further clarify the interpretation of the Directive. This focus on the prospective check of proportionality, despite being limited on the specific circumstances of the case, is significant, as it can have broad implications for the compliance check of criminalisation beyond the confines of this case.⁴⁵ Indeed, the chosen approach that is distinct from the opinion's approach focusing on retrospective cardinal proportionality, at the time that a reform is deliberated, might appear as a call for the legislator and the national prosecutors and courts to be more careful of prospective proportionality of criminalisation. This is quite a significant prompt considering the ongoing reform deliberation, which is discussed next.

⁴² Art 18 of the Charter.

⁴³ Art 31 Refugee Convention.

⁴⁴ Steve Peers, 'A Candle in the Dark: the CJEU Rules against Criminalising Parents for Smuggling their Children' EU Law Analysis (2025), <https://eulawanalysis.blogspot.com/2025/06/a-candle-in-dark-cjeu-rules-against.html>.

⁴⁵ Stefano Zirulia, 'The Legacy of *Kinsa*: Using Proportionality to Limit the Criminalisation of Solidarity' Verfassungsblog (26 June 2025), <https://verfassungsblog.de/kinsa-judgment-proportionality>.

12.4 PROPOSED REFORM, PERSISTING ISSUES AND THE WAY FORWARD FOR COUNTER-SMUGGLING LAW

Until 2023 the Commission had only adopted non-binding guidelines for the implementation of the Facilitation Package.⁴⁶ However, this changed shortly after the *Kinsa* litigation started. On 28 November 2023, four months after the submission of the *Kinsa* reference, the European Commission presented a package of legislative proposals to reform the EU legal framework on migrant smuggling. The package consists of a proposal for a revised Facilitation Directive,⁴⁷ and a proposal for a regulation to enhance police cooperation and strengthen Europol's role in the fight against migrant smuggling and human trafficking.⁴⁸

At a policy level, the Commission had also adopted a renewed EU action plan against migrant smuggling for the period 2021–25,⁴⁹ following up on an earlier EU action plan against migrant smuggling,⁵⁰ which was adopted in May 2015. Considering these political proclamations, the adoption of a proposal on 28 November 2023 does not come as a surprise. What is interesting, though, is that the Commission acted straight after the *Kinsa* preliminary question was lodged in July 2023. The proposed amendments to a number of provisions, focused primarily on criminal offences (Articles 3 and 4), penalties for natural persons (Article 6), liability of and sanctions for legal persons (Articles 7 and 8), jurisdiction (Article 12), prevention (Article 13), investigation (Article 16) and data collection (Article 17).

The proposal continues to criminalise the facilitation of irregular migration but there are also some welcome changes. The necessity for change is finally acknowledged and this, on its own, is a shift in the Commission's stance.⁵¹ The Preamble to the proposed Directive specifically acknowledges the need for precise and detailed definition of the offence. What is also welcome is the presence of an express *actus reus* constituent element that there must be a financial/material benefit, aligning the offence with the UN Smuggling Protocol.⁵² The Directive also introduces several aggravated offences (eg offences committed as part of an organised criminal group, causing serious harm or endangering life or health, or causing death). The expansion in the proposed Directive of the jurisdiction of Member States to cases in which the facilitation of unauthorised entry

⁴⁶ 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] OJ C323/1.

⁴⁷ Facilitation Directive Proposal (n 6).

⁴⁸ Europol Regulation Proposal (n 6).

⁴⁹ European Commission, 'EU Action Plan against Migrant Smuggling (2015 - 2020)' COM (2015) 285 final; European Commission, 'A Renewed EU Action Plan against Migrant Smuggling (2021–2025)' COM(2021) 591 final.

⁵⁰ European Commission COM(2015) 285 final (n 49).

⁵¹ Facilitation Directive Proposal (n 6) Preamble, Recital 6.

⁵² Arts 3(a) and 6(1) UN Smuggling Protocol (n 15).

into the EU fails and third-country nationals lose their lives is also welcome. The Preamble also emphasises that the Directive does not seek to criminalise third-country nationals for the fact of being smuggled, for helping family members, for providing humanitarian aid or for meeting basic human needs, when such assistance is given in accordance with the law.⁵³

However, there are several shortcomings within the proposal. The targeted substitute impact assessment drafted by Moreno-Lax notes the misalignment of the proposal with both EU and international legal obligations.⁵⁴ Most importantly, the assessment highlights ‘definitional issues, the lack of sufficient human rights safeguards, and the absence of a clear distinction between facilitation offences and the legitimate provision of services and humanitarian assistance’. These issues are directly linked to key legal principles of criminalisation such as legality, legal certainty, proportionality and *ultima ratio*.

12.4.1 International Legal Standards and Fundamental Rights Safeguards

First of all, the broad concept of facilitation of irregular migration adopted by the proposal by way of facilitating entry, transit or residence does not align with the specific terms of the universal definition as provided by the UN Smuggling Protocol that specifically refers to ‘the procurement’ of ‘illegal entry’ that is ‘committed intentionally’ and ‘in order to obtain’ a financial or other material benefit⁵⁵ and as part of an ‘organised criminal group’.⁵⁶ The twofold objective of the UN Smuggling Protocol is to ‘prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end’, and to do so ‘while protecting the rights of smuggled migrants’.⁵⁷ The EU legislator must address this inconsistency and take an approach that targets acts of organised crime of which migrants themselves are victims.

Moreover, the financial gain requirement is now present only in some respect, thus retaining a leeway for Member States to criminalise acts that are not conducted for the purpose of gaining a financial benefit, such as where acts of facilitation are highly likely to cause serious harm to a person even though conducted without financial or material benefit,⁵⁸ or in cases of ‘public instigation’ of third-country nationals, for instance through the internet, to enter, transit across or stay irregularly in the EU.⁵⁹ It is worth noting that Article 31 of the 1951 Geneva Convention affords migrants who are also asylum-seekers

⁵³ Facilitation Directive Proposal (n 6), Preamble, Recital 7.

⁵⁴ European Parliament, ‘Commission Proposal for a Revised Facilitation Directive: Targeted Substitute Impact Assessment’ (EPRS Publications Office, 2025).

⁵⁵ UN Palermo Protocol (n 15) Arts 3(a) and 6(1).

⁵⁶ *ibid*, Art 4.

⁵⁷ *ibid*, Art 2.

⁵⁸ Facilitation Directive Proposal (n 6), Art 3(1)(b).

⁵⁹ *ibid*, Art 3(2).

immunity against penalisation for their irregular entry, recognising the difficulty they might have to obtain documentation and make their way through a legal route.⁶⁰ The text of the proposed legislation as presented by the Commission does not seem to recognise such basic principles of international refugee law including in the asylum *acquis*.

In addition, the proposal as it stands does not align with the international law of the sea and the duty to rescue,⁶¹ which is important for the maritime context of anti-smuggling laws. According to Article 98 of the UN Convention on the Law of the Sea (UNCLOS), ratified by the EU and all Member States,⁶² 'every State' is obliged to require all ships flying its flag 'to render assistance to any person found at sea in danger of being lost' and 'to proceed to the rescue of persons in distress'. The scope of application benefits 'any person' including migrants.⁶³ Search and Rescue (SAR) obligations must be considered by the EU and its Member States when formulating the anti-smuggling legal framework, so it does not clash with obligations of shipmasters arising under the duty to rescue.

Furthermore, the humanitarian exemption has equally not been included in the body of the law, as a binding provision, except for in a preambular non-binding recital. As a result, there is no distinction between facilitation offences and the provision of humanitarian assistance, and subsequently no protection of the latter that can fall within the scope of criminalisation. Besides, as discussed above with regard to the proposal's misalignment with the UN Smuggling Protocol, the requirement of a financial gain or other material benefit as part of the crime of facilitation vanishes in some undefined cases.⁶⁴ As noted by the Advocate General in the Opinion in *Kinsa*, facilitation offences are 'defined objectively' and 'irrespective of [the] person's motives' without a distinction between exploitative and humanitarian motifs, which opens the Pandora box of policing civil society.⁶⁵

Recital 7 is arguably not sufficient as a safeguard against authorities poised to prosecute humanitarian assistance, and in the current climate of populism and anti-immigration politics an unambiguous and clear legal provision with a mandatory and binding effect is necessary. The inclusion of a mandatory

⁶⁰ John Trajer, Gillian Kane, Marta Minetti and Sarah Craig, 'Input for the Report on the Implementation of the Non-Punishment Principle' [2021] QUB Human Rights Centre, https://pureadmin.qub.ac.uk/ws/portalfiles/portal/231110346/Queen_s_University_Belfast_Human_Rights_Centre_HTRN_Submission.UNSRT.pdf.

⁶¹ The UN Convention on the Law of the Sea (UNCLOS) [1982] 1833 UNTS 3; International Convention on Maritime Search and Rescue, [1979] 1405 UNTS 119 ('SAR Convention'); International Convention for the Safety of Life at Sea, [1974] 1184 UNTS 278 ('SOLAS Convention').

⁶² The Council of the European Union, 'Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof: (98/392/EC)' [1998] OJ L179/1.

⁶³ SAR Convention (n 61) annex, para 2.1.10.

⁶⁴ Where there is a possibility of causing 'serious harm' (Art 3(1)(b)) or in cases of 'public instigation' (Art 3(2)). See Facilitation Directive Proposal (n 6).

⁶⁵ Opinion in *Kinsa* (n 31) paras 40, 46.

humanitarian exception, as currently proposed by the European Parliament,⁶⁶ excluding acts of solidarity is also advocated for by the UN Special Rapporteur on Human Rights Defenders.⁶⁷ Indeed, although the Preamble in Recital 7 highlights that there is no intention to over-criminalise or indeed ‘criminalise third-country nationals for the fact of being smuggled, for helping family members, for providing humanitarian aid or for meeting basic human needs, when such assistance is given in accordance with the law’, this is merely a preambular proclamation and effectively non-binding for states. The Preamble could positively inform a reinterpretation of the law, but with the current climate of policing civil society and anti-migration sentiments across Europe, this is not a sufficient safeguard.

12.4.2 Criminal Law Principles

Having assessed the proposed legislation considering several international legal safeguards, this section turns to key principles of criminal law. In addition to the noted departure from international legal standards, the proposed law does not sit well with the principle of legality in criminal law that requires for criminal law to be well defined. The terms ‘serious harm’ and ‘public instigation’ should be defined or removed, as otherwise they could be used to criminalise human rights defenders. This is a Trojan horse to maintain ambiguity leading to implementation discrepancies. Not surprisingly, *lex certa* is offered as the justification for proposed amendments on three separate occasions by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) in its draft report delivered on 26 March 2025.⁶⁸ The ambiguity might also expand the mandate of the European Police Office (Europol), as the package includes a proposal for a regulation to enhance police cooperation and strengthen Europol’s role in the fight against migrant smuggling and human trafficking.⁶⁹

The conformity of measures with the principle of proportionality should also be assessed.⁷⁰ Proportionality is a general principle of EU law that criminal

⁶⁶ European Parliament Committee on Civil Liberties, Justice and Home Affairs, ‘Amendments 111–586: Draft Report on the proposal for a directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA’ (30 April 2025) PE773.119v01-00.

⁶⁷ UN Special Rapporteur on Human Rights Defenders, *Position Paper: on the EU Commission’s proposed Directive to update the EU legal framework on people smuggling* (February 2024).

⁶⁸ European Parliament Committee on Civil Liberties, Justice and Home Affairs, ‘Draft Report 2023/0439(COD) on the proposal for a directive of the European Parliament and of the Council Laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA (26 March 2025) COM(2023) 0755 – C9-0430/2023 – 2023/0439(COD).

⁶⁹ As defined in the UN Smuggling Protocol (n 15).

⁷⁰ Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (Hart, 2020) ch 3.

sanctions must respect.⁷¹ The proportionality of a sanction or a penalty must be assessed by reference to the importance of its objective. The sanction must not go beyond what is necessary to achieve its aim. Proportionality is rooted in the constitutional traditions of Member States, enshrined in the Charter and recognised by the CJEU.⁷² In this respect, criminalisation of smuggling must not go beyond what is necessary for the law to achieve, which reflects prospective proportionality with regards to criminalisation itself.

One wonders whether the employment of criminal law only serves objectives of criminal law. The legal basis used, Article 83(2) TFEU, refers to the effective implementation of a Union policy in an area which has been subject to harmonisation measures, rather than Article 83(1) TFEU that would refer to addressing major security threats including organised crime, which would be more suitable under the UN Smuggling Protocol. Thus, the justification of the employment of criminal law is linked to the effectiveness of a Union policy. It appears that criminal law is here instrumentalised to achieve migration control objectives. Still, the effectiveness of using criminal sanctions in this respect has been challenged.⁷³ Essentiality can also be put into question, as criminal sanctions are not always essential to ensure the effective implementation of EU law, with non-criminal sanctions being more appropriate where empirical relevant proof justifying criminalisation as effective is missing.⁷⁴ In fact, the Commission asserted that the Package ‘has not significantly contributed to reducing irregular migration’ and that it has had ‘little deterrent effect’.⁷⁵ In the absence of an evaluation report ordered by the Commission, the essentiality question remains open.

Proportionality is also significant for the offence’s penalty range. In the realm of penology, sentencing theories underpin the choice of a form of sanctions over another and the definition of their intensity. Deterrence theories would see harsh penalties as dissuading potential offenders from committing a certain act while emphasising the importance of the public interest in relation to what is harmed. Proportionality would be relevant to demarcate the sanction in question so that it is just and proportionate to the cause of harm. In particular, there are several dimensions of proportionality when considering penalties and, of course,

⁷¹ Takis Tridimas, ‘Wreaking the Wrongs: Balancing Rights and the Public Interest the EU Way’ (2023) 29 *Columbia Journal of European Law* 85.

⁷² Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Art 49; CJEU, Case C-42/17 *Criminal proceedings against MAS and MB* EU:C:2017:936; CJEU, Case C-534/16 *Finančné riaditeľstvo Slovenskej republiky v BB construct sro* EU:C:2017:820; CJEU, Case C-218/15 *Gianpaolo Paoletti and Others v Procura della Repubblica* EU:C:2016:748.

⁷³ Constanza Di Francesco Maesa, ‘(In)Effectiveness of Criminal Sanctions as Regards Irregular Immigrants’ (2018) 8 *European Criminal Law Review* 5.

⁷⁴ Jacob Öberg, ‘Do We Really Need Criminal Sanctions for the Enforcement of EU Law?’ (2014) 5 *New Journal of European Criminal Law* 370, 376.

⁷⁵ European Commission, Commission Staff Working Document, ‘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, 18–19.

distinctive functions of proportionality in distinct contexts.⁷⁶ Öberg conceptualises proportionality that is relevant to criminal sanctions in EU law, ie the retrospective version as enshrined in Article 49 of the Charter that requires that ‘the severity of penalties must not be disproportionate to the criminal offence’. Indeed, a proportionality check could serve as a guardrail for preventing the imposition of excessive penalties.

The penalty scheme of the proposal⁷⁷ appears to be exceedingly harsh. The Commission asserts that the Directive ‘ensure[s] the proportionality of the criminal penalties’ and is ‘in line with the principle of proportionality of criminal penalties as enshrined in Article 49(3) of the Charter’.⁷⁸ However, measures such as the ‘permanent’ disqualification and closure of premises, ‘withdrawal of permits or authorisations’ to conduct activities, the confiscation of vehicles (including rescue vessels) are a few examples of disproportionate measures. This would not have been the case if the law offered certainty in terms of its definitional scope and merely targeted exploitative and abusive criminal organisation networks of smugglers. Instead, when the vague scope of the law leads to targeting non-governmental organisations (NGOs), family members, and migrants facilitating their own unauthorised entry, often for the purpose of seeking international protection, the penalties appear to be harsh.⁷⁹

The Advocate General’s opinion in *Kinsa* has for the first time recognised that the Facilitation Package criminalises solidarity, which is an example of disproportionality.⁸⁰ The CJEU has ruled that ‘the principle of proportionality requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question’ and that ‘when there is a choice between several appropriate measures recourse must be had to the least onerous’.⁸¹ The obligation to impose effective, proportionate and dissuasive penalties is well settled in the CJEU case law⁸² and requires that resort to coercive powers must be confined within the limits set by the principle of proportionality.⁸³ Besides, an additional dimension of proportionality is that the sanction imposed must be

⁷⁶ Jacob Öberg, ‘Conceptualising Proportionality and Criminal Sanctions in EU Law: Three Different Visions’ in Lorenzo Grossio, Stefano Montaldo and Valsamis Mitsilegas (eds), *Proportionality of Criminal Penalties in EU Law* (Hart, 2025); Susan Easton, and Christine Piper, *Sentencing and Punishment*, 5th edn (Oxford University Press, 2023).

⁷⁷ Facilitation Directive (n 3) Arts 6 and 8.

⁷⁸ Facilitation Directive Proposal (n 6) explanatory memorandum, 8.

⁷⁹ European Parliament (n 54).

⁸⁰ ‘[T]he EU legislature did indeed intend to define a general infringement, covering all actions intended to facilitate unauthorised entry into the territory of a Member State, including where such acts are committed disinterestedly, out of altruism, compassion or solidarity, for humanitarian reasons or because of the existence of family ties’: Opinion in *Kinsa* (n 31) para 46.

⁸¹ Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk* EU:C:2013:28, parz 50.

⁸² Case C-68/88, *Commission of the European Communities v Hellenic Republic* EU:C:1989:339.

⁸³ Grossio et al (n 76).

commensurate to the gravity of the offence as prescribed by the Charter⁸⁴ and the Court's case law.⁸⁵

In the same spirit, there is no justification of criminalisation as *ultima ratio* meaning that criminal law is the right avenue of regulation as compared to administrative law, for example. This seems to be a typical example of 'criminalisation'⁸⁶ where criminal law is used to foster objectives of immigration and border control. The lack of an impact assessment ordered by the European Commission does not inspire confidence in the justifications provided. Equally, the proposal does not focus at all on protecting the rights of people on the move, while ensuring safe pathways as proposed by the Committee on Migration, International Protection and Economic Co-operation (PACE), in recent deliberations regarding the adoption of a new Council of Europe instrument that takes a much-needed dual approach to tackling migrant smuggling, that both focuses on international co-operation to ensure safe and legal migration pathways while also cracking down on cross-border criminal groups.⁸⁷

12.4.3 EU Constitutional Challenges and *Kinsa*

A key issue at the heart of the debate pertains to EU constitutional law and a broader constraint regarding the limits of EU law vis-a-vis national law. In principle, a Directive cannot require Member States to decriminalise or not to criminalise, and this presents a broader constitutional challenge for EU criminal law. In the absence of a clear legal basis under the TFEU to legitimise decriminalisation, it is not clear whether a Directive can require Member States not to render acts illegal under their domestic criminal law. Such absence highlights a broader structural constitutional difficulty when challenging the nature of the humanitarian exemption as non-mandatory. Article 83 TFEU only provides for an approximated floor rather than a ceiling. This allows Member States some room for manoeuvre and offers a constitutional exegesis of the drafting of the Directive without a mandatory exemption that might be seen as encroaching upon Member States' competence on shaping their degree of criminalisation to the extent not shaped by EU minimum rules under Article 83.⁸⁸

⁸⁴ Art 49(4) Charter.

⁸⁵ eg Case C-743/24, *Alchaster II* EU:C:2025:230.

⁸⁶ Juliet P Stumpf, 'The Process is the Punishment in Crimmigration Law' in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press, 2013) 58–75.

⁸⁷ Lord Simon Russel, *Setting out New Ways to Tackle Migrant Smuggling, Proposes a Council of Europe Instrument* (PACE committee report, 2024).

⁸⁸ Konstantinos Zoumpoulakis, 'Approximation of Criminal Sanctions in the European Union: A Wild Goose Chase?' (2022) 13 *New Journal of European Criminal Law* 333, 335.

Nevertheless, as Member States have signed and ratified the UN Smuggling Protocol, they are obliged to exempt humanitarian acts of rescue or compassionate acts of accompanying a family member that have no element of profiteering. Considering that the EU has also signed the UN Smuggling Protocol and that the Charter is a binding instrument enshrining an array of relevant rights, as analysed above, a secondary EU legislation, even when not requiring Member States to decriminalise, must be interpreted in a way that aligns with the Charter and international law. An article stating such mandatory obligations in clear terms would be preferable to the current optional exemption as it would at least provide clearer guidance to national judiciary, if domestic national legislators choose to ignore their states' obligations to uphold the UN Smuggling Protocol. The Directive might not itself be able to oblige Member States to decriminalise or criminalise less, but it can set clearly the framework by which both EU and Member States are bound to respect as an interpretative guide.

Besides, the decriminalisation potential of EU law is now well recognised.⁸⁹ The CJEU had early confirmed that EU law can place limits on the application of national criminal law, where the latter disproportionately interfered with the effective exercise of rights to free movement.⁹⁰ In *El-Dridi*,⁹¹ the Court even confirmed this limiting potential of EU law for national criminalisation of immigration offences, this time to ensure the effectiveness of the EU Returns Directive, an instrument of immigration enforcement. The decriminalisation effect of the rulings in *Cassati* and *El-Dridi* is linked to effectiveness, and by analogy the effectiveness of Charter rights could be invoked before national courts.⁹²

In a similar vein, the ruling of *Kinsa* presented an opportunity for the Court to set limits on disproportionality and potentially expand the decriminalisation potential of EU law. *Kinsa* has revealed a potential effect of decriminalisation through a judicial refining of the interpretation of secondary EU law provisions. The message of *Kinsa* ruling was clear in that 'those articles preclude national legislation criminalising such conduct'.⁹³ Indeed, the Court held in *Kinsa* that when transposing Article 1(1)(a) of Directive 2002/90, Member States may not establish, in national law, rules that would go beyond the scope of the general offence of facilitating unauthorised entry in breach of Articles 7 and 24 and Article 52(1) of the Charter.⁹⁴ Therefore, any new legislation must not ignore this.

⁸⁹ Valsamis Mitsilegas, 'From Overcriminalisation to Decriminalisation. The Many Faces of Effectiveness in European Criminal Law' (2014) 5 *New Journal of European Criminal Law* 415.

⁹⁰ Case 203/ 80, *Cassati* [1981] EU:C:1981:261, para 27.

⁹¹ Case C- 61/11 PPU, *El- Dridi* [2011] EU:C:2011:268.

⁹² Valsamis Mitsilegas, 'Reforming the "Facilitators' Package" through the *Kinsa* litigation: Legality, Effectiveness and taking International Law into account' (2024) 3 *Eurojus* 155, 159.

⁹³ *Kinsa* (n 7) para 73.

⁹⁴ *ibid*, para 71.

12.4.4 A Laborious Legislative Process

At the time of writing, a new law is not yet adopted and deliberations are ongoing. Several reasoned opinions were issued by Member States' national parliaments such as by the Netherlands Senate, Czech Chamber of Deputies, Italian Chamber of Deputies, Czech Senate, Romanian Chamber of Deputies and the Spanish Parliament.⁹⁵ The Working Party on Judicial Cooperation in Criminal Matters (COPEN) examined the proposal under the Spanish, Belgian and Hungarian Presidency and, on 29 November 2024, the Council adopted its own position.⁹⁶

In its turn, the Council's proposed version simplifies the main criminal offence by removing the provision about causing serious harm as well as the 'public instigation' offence. The offence is then defined as assistance to illegal entry or stay, with a financial benefit element. However, the Council version maintains the absence of a humanitarian exemption and clearly reserves the discretion of Member States to criminalise solidarity acts, which is justified in the Preamble in the name of 'interests of enhancing the effectiveness of the fight against migrant smugglers. Indeed, the Council version emphasises the role of the Directive in setting minimum rules of criminalisation.⁹⁷

As far as the European Parliament is concerned, LIBE has the lead responsibility. On 23 January 2024, the Commission presented the proposal to the LIBE committee members, who received it with reservations that point to several shortcomings. No impact assessment was completed for either proposal which sparked criticisms, in response to which, the Commission produced an analytical staff working document for each of the proposals in spring 2024⁹⁸ and a

⁹⁵ Czech Chamber of Deputies, 'Contribution on COM(2023) 755' (21 February 2024) Procedure 2023/0439(COD); Spanish Parliament, 'Contribution on COM(2023) 755' (18 March 2024) Procedure 2023/0439(COD); Czech Senate, 'Contribution on COM(2023)755' (18 March 2024) Procedure 2023/0439(COD); Netherlands Senate, 'Contribution on COM(18 March 2024) 755' (2024) Procedure 2023/0439(COD); Italian Chamber of Deputies, 'Contribution on COM(2023) 755' (27 March 2024) Procedure 2023/0439(COD); Romanian Chamber of Deputies, 'Contribution on COM(2023) 755' (15 May 2024) Procedure 2023/0439(COD); Netherlands Senate, 'Contribution on COM(2023)0755', (24 January 2025) Procedure 2023/0439(COD).

⁹⁶ Council of the European Union, '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' [2024] ST-15916/1/24.

⁹⁷ *ibid*, Preamble, Recital 6a. 'This Directive is an instrument of minimum harmonisation. As a consequence, Member States are free to adopt or maintain legislation providing for a broader incrimination than what is set out in this Directive, in the interests of enhancing the effectiveness of the fight against migrant smugglers.'

⁹⁸ European Commission, 'Analytical document accompanying the document Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794', SWD(2024) 94 final; European Commission, 'Analytical supporting document accompanying the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry,

supporting study on the implementation of the existing Package.⁹⁹ In March 2025, the European Parliamentary Research Service (EPRS) published a targeted substitute impact assessment, written by Professor Dr Violeta Moreno-Lax, in the absence of one delivered by the Commission.¹⁰⁰ This document is prepared for, and addressed to, the members and staff of the European Parliament as background material to assist them in their parliamentary work.

A draft report was issued on 26 March 2025 that welcomes the intention to modernise the law and align it with the UN Smuggling Protocol and includes several amendments to the proposed legislation,¹⁰¹ with the aim of addressing persisting criticism. The Rapporteur welcomed the introduction of the financial or material gain to the definition of the criminal offence but noted the absence of an exemption for humanitarian assistance and in this respect proposed amendments. For example, Amendment 32 expressly includes the addition of a subparagraph in Article 3 that stipulates that ‘The provision of “humanitarian assistance” shall not constitute a criminal offence.’ The justification for this addition directly relies on the principle of legal certainty and the requirement of legality in criminal law. When ‘establishing a criminal offence, it is necessary to allow an individual to ascertain whether their actions lead to criminal liability or not’.¹⁰² Amendment 33 also adds a provision stating that ‘Third country nationals shall not become liable under this Article for the sole fact of having been the object of the conduct set out in paragraph 1’ which aims to protect smuggled migrants. Most of the proposed amendments of the European Parliament reflect the targeted substitute impact assessment that elaborately analyses persisting issues which, if left unaddressed, would risk the law’s compliance with both international legal standards and criminal law principles. Parliament’s thorough report is welcome and much needed under a pan-European climate of populism and deterrence permeating asylum and immigration law.¹⁰³

transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, SWD(2024) 134 (‘Analytical supporting document’).

⁹⁹ European Commission: Directorate-General for Migration and Home Affairs, Law and Policy Consulting and Milieu, Study supporting the implementation of the facilitators package: final report (Publications Office of the European Union, 2024) (‘Milieu Study’).

¹⁰⁰ European Parliament, ‘Commission proposal for a revised Facilitation Directive: Targeted substitute impact assessment’ (EPRS Publications Office, 2025).

¹⁰¹ European Parliament Committee on Civil Liberties, Justice and Home Affairs, ‘DRAFT REPORT 2023/0439(COD) on the proposal for a directive of the European Parliament and of the Council Laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA (26 March 2025) COM(2023) 0755 – C9-0430/2023 – 2023/0439(COD)’.

¹⁰² *ibid.*, 26.

¹⁰³ Marta Minetti, ‘The Facilitators Package, Penal Populism and the Rule of Law: Lessons from Italy’ (2020) 11 (3) *New Journal of European Criminal Law* 335; Vladislava Stoyanova and Stijn Smet (eds), *Migrants’ Rights, Populism and Legal Resilience in Europe* (Cambridge University Press, 2022) 118–38.

12.5 CONCLUSION: CRIMINALISING SOLIDARITY IN A POPULIST CONTEXT

The Facilitators' Package, both in its current and proposed reformed version, is an example of 'cimmigration', a term referring to the use of criminal law in the field of immigration. Criminal law is instrumentalised to control mobility and leads to policing civil society offering humanitarian assistance.¹⁰⁴ 'Cimmigration' is associated with the climate of populism whose shadow hangs over politics and policymaking. Borrowing from the methodological approach entitled 'law in context' would be a useful approach here to evaluate the social pressures that shape law-making.¹⁰⁵ Under this methodological lens, law is a product of society and is not autonomous from social tendencies. In the current widespread climate of populism in Europe, anti-immigration voices have infiltrated policymaking.

Criminalisation of solidarity is arguably connected to a populist turn in immigration law¹⁰⁶ and the policy of deterrence.¹⁰⁷ These are realised by a plethora of measures ranging from the elimination of safe and legal routes, the externalisation of immigration control, pushbacks and pullbacks to the prosecution, intimidation and weakening of civil society.¹⁰⁸ While a counter-smuggling law is designated to tackle migrant smugglers exploiting and abusing vulnerable people on the move, it has systematically been used to police and disempower civil society. Indeed, the prosecution of humanitarian acts of rescue appears to be on the rise.¹⁰⁹ There is an alarming increase of prosecution of NGOs that offer humanitarian assistance to irregular migrants including refugees who need rescue after crossing borders.¹¹⁰ In 2023 alone, at least 117 individuals faced criminal or administrative proceedings for acting in solidarity with migrants¹¹¹ while in 2022 at least 102 individuals faced criminal or administrative proceedings for

¹⁰⁴ Stumpf (n 86); Valsamis Mitsilegas, 'The Criminalisation of Migration in the Law of the European Union. Challenging the Preventive Paradigm' in Gian Luigi Gatta, Valsamis Mitsilegas and Stefano Zirulia (eds), *Controlling Immigration Through Criminal Law. European and Comparative Perspectives on 'Cimmigration'* (Hart, 2021).

¹⁰⁵ Selznick (n 8) 177.

¹⁰⁶ Mohammad Nayyeri, 'Populism, Backlash Morality and Immigrants' (2025) 21 *International Journal of Law and Context* 58; Minetti (n 103).

¹⁰⁷ Matilde Rosina, *The Criminalisation of Irregular Migration in Europe: Globalisation, Deterrence, and Vicious Cycles* (Springer, 2022).

¹⁰⁸ Ermioni Xanthopoulou, 'Mapping EU Externalisation Devices through a Critical Eye' (2024) 26 *European Journal of Migration and Law* 108.

¹⁰⁹ Council of Europe Commissioner for Human Rights, 'Protecting the Defenders Ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe' (Recommendation, CommHR(2024)11), www.ecoi.net/en/file/local/2106504/CommHR%282024%2911_Recommendation+on+Migration+HRD_EN.pdf.

¹¹⁰ Carrera et al (n 5).

¹¹¹ Platform for International Cooperation on Undocumented Migrants, 'Cases of Criminalisation of Migration and Solidarity in the EU in 2023' (PICUM Briefing, 2024).

acts of solidarity with migrants.¹¹² The prosecution is widespread, ranging from acts of rescuing migrants at sea and photographing coastguard vessels to driving migrants by car or assisting them during a train ride, and even providing food and water.¹¹³

The recent proposal tabled by the European Commission for a new instrument to regulate the facilitation of unauthorised migration would require Member States to criminalise the facilitation of irregular entry only when it is carried out for profit or when conducted in a way that endangers human life. However, the proposal is still missing an explicit clause to exempt humanitarian assistance from criminal liability. On the contrary, the Parliament and civil society propose the clear introduction of a humanitarian exception due to persisting concerns about overcriminalisation, legality and proportionality. A major challenge is that the EU Treaties do not provide for a legal basis for decriminalisation. Instead, Article 83 TFEU provides the EU legislator power only for establishing minimum rules concerning the definition of the offence rather than maximum rules. Therefore, from an EU constitutional perspective, it transpires that a Directive itself cannot require Member States not to criminalise beyond the point of the Directive. Yet, both the EU and Member States are bound by their obligation to respect international law, and particularly the UN Smuggling Protocol, which specifically requires signatory parties not to criminalise humanitarian acts. So, unless a solution is found to bypass the constitutional constraints of Article 83 TFEU, signing the Treaty would risk being devoid of substantive effect.

The chapter contends that a reformed Directive must contain a provision that will clearly refer to these international law obligations not to criminalise humanitarian or compassionate acts of facilitation, to serve at least as an interpretative guide for national legislators and judicial authorities. On a positive note, the Court's ruling in *Kinsa* serves as a shining beacon in the dark times of populism, as it confirms that the Charter may be relied on for a rights-oriented interpretation of the new Directive. Article 52(1) in tandem with *Kinsa* could be invoked before trying courts to challenge the prosecution of a conduct that is merely of humanitarian nature. At times of populist penal agenda, where criminal law is used as a tool of migration deterrence, the principle of proportionality and the CJEU case law can serve as a guardrail to prevent excessive criminalisation.

¹¹² Platform for International Cooperation on Undocumented Migrants, 'More than 100 People Criminalised for Acting in Solidarity with Migrants in the EU in 2022' (PICUM Briefing, 2023).

¹¹³ *ibid.*, 5.

