

Preventing and countering the facilitation of unauthorised entry, transit and stay in the EU

OVERVIEW

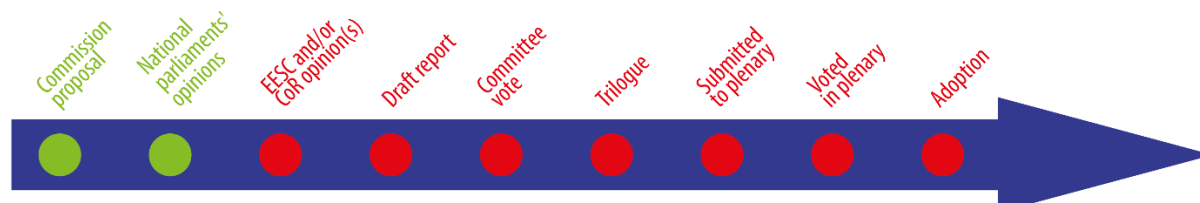
In November 2023, the Commission proposed a directive to modernise and strengthen the legal framework on the fight against migrant smuggling. The proposal addresses the steady rise in irregular arrivals in the EU and the rise in smuggling on all main EU entry routes. The current directive defining the offence of facilitation of unauthorised entry, transit and residence in the EU, and the framework decision on strengthening of the penal framework have both been widely criticised for their failure to provide legal certainty and uniformity of implementation. Parliament has been the main critic of these legal acts since their adoption in 2002. Many human rights players have also warned that the overly broad definition of migrant smuggling has resulted in the investigation and prosecution of innocent people, be they smuggled migrants or individuals providing humanitarian assistance to irregular migrants.

To clearly define and effectively sanction migrant smuggling, the Commission would replace the existing rules with others focused on criminal offences, penalties for natural persons, liability of and sanctions for legal persons, but also on jurisdiction, prevention, investigation and data collection.

In Parliament, the file has been assigned to the LIBE committee, with Birgit Sippel (S&D, Germany) as rapporteur. The next expected step is the publication of a draft report.

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

<i>Committee responsible:</i>	Civil Liberties, Justice and Home Affairs (LIBE)	COM(2023) 755 28.11.2023
<i>Rapporteurs:</i>	Birgit Sippel (S&D, Germany)	2023/0439(COD)
<i>Shadow rapporteurs:</i>	Lena Düpont (EPP, Germany) Fabienne Keller (Renew, France) Erik Marquardt (Greens/EFA, Germany) Jorge Buxadé Villalba (ECR, Spain) Anne-Sophie Pelletier (The Left, France)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Publication of draft report	



Introduction

Migrant smuggling¹ is reaching new heights due to emerging and deepening crises in many third countries, such as economic recessions, environmental disasters caused by climate change, and conflicts and demographic pressure. These factors are increasing the demand for migrant smuggling services to the EU. According to [Europol](#), the EU Agency for Law Enforcement Cooperation, more than 90 % of those who cross the EU borders irregularly do so with the assistance of migrant smugglers, either for their entire journey or parts of it. In most cases, these facilitation services, which range from transportation and accommodation to the production and sale of fraudulent documents, are offered and provided by criminal groups. This criminal activity generates high profits at relatively low risk for the smugglers, but puts those being smuggled at risk of serious harm, exploitation or even death. The International Organization for Migration estimates that in 2023, 3 997 people – the highest number since 2016 – went [missing or died](#) while trying to reach Europe, with the [Central Mediterranean route](#) being the deadliest to reach Europe.

It is estimated that in 2023, around 380 000 [irregular entries](#) – again the highest number since 2016 and a 17 % increase compared to 2022 – were detected at the EU external borders. This increase corresponds to a rise in smuggling activities, as evidenced by a new record high number of migrant smugglers – over 15 000 – as per the [reports](#) by the Member States to the European Border and Coast Guard Agency (Frontex) in 2022. Furthermore, in 2021, Europol's European Migrant Smuggling Centre [detected](#) an increase in smuggling activities on all main entry routes into Europe. In 2022, it [accepted](#) 13 988 new messages/cases of facilitated illegal immigration.

According to the European Commission [communication](#) on a new pact on migration and asylum from September 2020, tackling migrant smuggling is essential to dismantling organised crime networks that can cause human rights violations and death, and to countering the increase in irregular migration to the EU. Due to the [increase in irregular arrivals](#) in recent years and the various crises in a range of countries of origin and transit, the Commission expects that migratory flows to the EU and related smuggling criminal activities will remain consistently high and may even increase. In her 2023 [State of the Union address](#), Commission President Ursula von der Leyen called for strengthening all tools at the EU's disposal to effectively counter migrant smuggling, including by updating the 20-year-old legislative framework, the facilitators' package.

Accordingly, in November 2023 the Commission presented a [proposal](#) to modernise and strengthen the legal framework on the fight against migrant smuggling.

Context

The result of the unprecedented number of arrivals of migrants in the EU in 2015 was that both the EU as a whole and the individual Member States faced various challenges that tested their migration policies, and ability to cooperate both internally and with third countries. In its May 2015 communication on the [European agenda on migration](#), the Commission listed saving lives at sea and tackling criminal smuggling networks as key short-term priorities. Cooperation, whether among law enforcement agencies or with non-EU countries, as well as addressing the root causes of migration, were seen as important long-term goals.

On 27 May 2015, shortly after presenting the European agenda on migration, the Commission put forward an [EU action plan against migrant smuggling](#) (2015-2020) outlining the commitments under the agenda in more detail. The action plan listed a number of clearly formulated measures to counter and prevent migrant smuggling, among them revising legislation on smuggling, destroying smugglers' vessels and stepping up the seizure and recovery of criminal assets, while ensuring full respect for and protection of the human rights of migrants. The action plan focused on four areas: enhanced police and judicial response; improved gathering and sharing of information; enhanced prevention of smuggling and assistance to vulnerable migrants; and efforts to enhance cooperation with third countries.

The European Council has paid particular attention to the internal security of the Schengen area. In its [conclusions](#) of 24-25^oJune^o2021, it reaffirmed the importance of fighting smugglers, expressed serious concerns about the developments on some migratory routes, which required urgent action, and called for a whole-of-route approach to eradicate migrant smuggling and human trafficking. In response, the Commission published a [renewed](#) action plan against migrant smuggling (2021-2025) focusing on reinforcing cooperation with partner countries and international organisations, implementing the legal frameworks, sanctioning smugglers, preventing exploitation and ensuring the protection of migrants. It also envisages reinforcing cooperation with and support for law enforcement and the judiciary to respond to new challenges, and improving knowledge on smugglers' *modi operandi*. In 2022, the Commission published specific action plans for tackling irregular migration in the busiest sea and land routes, including the [central Mediterranean](#), the [western Mediterranean and the Atlantic](#), and the [Western Balkans](#).

Existing situation

The facilitators' package, consisting of [Directive 2002/90/EC](#) establishing a common definition of the offence of the facilitation of unauthorised entry, transit and residence, and [Framework Decision 2002/946/JHA](#) on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, is the main legal instrument used to prevent, detect and prosecute migrant smuggling. Its purpose is to harmonise Member States' legal provisions 'in the area of combating illegal immigration in order to strengthen the penal framework to prevent and prosecute the facilitation of unauthorised entry, transit and residence'.

Directive 2002/90/EC envisages the adoption of appropriate sanctions for the intentional facilitation of irregular entry and transit of a migrant within a Member State's territory, as well as the facilitation of irregular stay with the intention of financial gain (Article 1(1)). However, the directive also allows Member States to exempt individuals providing humanitarian assistance when facilitating entry and transit, excluding stay, from sanctions (Article 1(2)). Framework Decision 2002/946/JHA complements the directive by establishing minimum penalties and requiring national authorities to apply effective, proportionate and dissuasive sanctions. To disrupt big smuggling networks and to protect migrants, penalties can be increased when entry and transit are facilitated for financial gain; are committed by an organised crime group; or endanger the lives of migrants (Article 1(3)). The framework decision also safeguards the rights of refugees and asylum seekers to international protection, particularly in the context of the principle of [non-refoulement](#), which, despite the fact that these people may have been objects of smuggling, should not be undermined (Article 6).

The Commission's 2017 [regulatory fitness and performance \(REFIT\) evaluation](#) of the package concluded that the Member States, which are bound to transpose the provisions of the directive and the framework decision into national law, had all accomplished this task. However, the evaluation notes that in its **definition** for the offence of facilitating the irregular entry, transit or residence of third-country nationals, the directive does not specify the different *modi operandi* for committing the offence of migrant smuggling. This results in very divergent national rules. Furthermore, only a few Member States have specific provisions exempting from punishment those facilitating the unauthorised entry and/or transit of persons in order to provide some form of **humanitarian assistance** to them. Additionally, Member States appear to have diverging interpretations as regards exemptions from punishment for the facilitation of unauthorised residence, which is punishable under Article 1(1)(b) of the directive only when done for financial gain. Differences also exist as regards **criminal sanctions, additional sanctions, aggravating circumstances, legal persons** and **jurisdiction**. These differences in the national-level transposition of specific provisions of the facilitators' package highlight that Member States have been accorded disproportionate discretionary powers in the implementation of the directive and the framework decision.

The facilitators' package has been widely criticised for its lack of legal certainty, which has led to its uneven implementation across Member States. Numerous [international](#) and [regional](#) human rights

bodies, as well as the [EU Agency for Fundamental Rights](#) (FRA), have raised concerns backed by evidence, about the excessively broad definition of migrant smuggling leading to the unjust investigation and prosecution of innocent individuals, including smuggled migrants and those providing humanitarian assistance to irregular migrants.² A 2016 European Parliament [study](#) (updated in [2018](#)), recommended aligning the EU legal framework with the 2000 [UN Protocol against the Smuggling of Migrants](#), which supplements the [UN Convention against Transnational Organized Crime](#). The protocol requires the presence of 'a financial or other material benefit' as a condition for criminalising the procurement of irregular entry or residence. This reference to financial or other material benefit for the perpetrator is there to ensure that family members or support groups, such as religious or non-governmental organisations, are [excluded](#) from punishment. All EU Member States (except Ireland) have signed and ratified the protocol bilaterally. The EU did so as a whole in 2006.

The EU legal framework on facilitating migrant smuggling also includes [Council Directive 2001/51](#), which requires carriers to return non-admitted third-country nationals at their own cost and provides for sanctions against those who transport undocumented migrants into the EU. There are several other legal acts seeking to combat interconnected crimes, such as [Directive 2018/843](#) on money laundering ([under revision](#)), [Directive 2011/36](#) on trafficking in human beings ([under revision](#)), [Directive 2011/93](#) on the sexual exploitation of children ([under revision](#)) and [Directive 2009/52](#) on sanctions against employers.

Parliament's starting position

The European Parliament has been the main critic of the facilitators' package since its adoption. In its [report](#) of 2000, drawn up in response to the French government's proposal to adopt EU legislation on migrant smuggling, the Parliament, which at the time only had consultative powers, presented a number of amendments for the consideration of the Council. These revealed numerous shortcomings in the proposed legislative framework, such as the lack of safeguards for victims of smuggling, people providing humanitarian assistance and service providers. They also revealed legal uncertainty and a strong focus on punishment and deterrence. Despite proposing the above-mentioned amendments, the Parliament rejected the French proposal on 15th February 2001, which was nevertheless adopted by the Council on 28 November 2002.

The Parliament has maintained its position on the matter and pushed for years for a revision of the EU acquis on migrant smuggling. In its 2014 [resolution](#) on the situation of fundamental rights in the EU, it reiterated the need to change the legislation to avoid penalising people for assisting migrants at sea. It urged 'the EU and the Member States to amend or review any legislation sanctioning people assisting migrants in distress at sea' and 'the Commission to review Council Directive 2002/90/EC defining the sanctions in case of facilitation of unauthorized entry, transit and residence in order to clarify that providing humanitarian assistance to migrants at sea who are in distress is to be welcomed and not an action which should ever lead to any form of sanctions'.

In its [resolution](#) of April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, the Parliament noted that the Commission, as part of the forthcoming REFIT evaluation, was 'considering a revision of Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence'. The Parliament furthermore took 'the view that anyone who provides different forms of humanitarian assistance to those in need should not be criminalized and that Union law should reflect that principle'.

In its [resolution](#) of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised, the Parliament presented a number of demands to the Commission and Member States aimed at preventing the criminalisation of humanitarian assistance. The main concern expressed in the resolution were 'the unintended consequences of the Facilitators Package on citizens providing humanitarian assistance to migrants and on the social cohesion of the receiving society as a whole'. In addition, Parliament also called for EU countries to transpose the provision exempting humanitarian assistance from criminal liability into their national law.

Preparation of the proposal

As mentioned earlier, an evaluation of the facilitators' package was carried out in the framework of the Commission's [REFIT](#) programme in 2017. The evaluation aimed to assess the effectiveness, efficiency, relevance, coherence and EU added value of the package to determine if it was fit for purpose. Its findings highlighted critical elements of the legislative package, such as the lack of reliable and comparable data on migrant smuggling offences and criminal justice responses at the national and the EU levels; the perceived risk that humanitarian assistance might be criminalised; and the limited deterrent effect of the legislation amidst increasing migrant smuggling to the EU. Despite these concerns, the Commission decided to maintain the facilitators' package in its current form and to continue implementing the action plan against migrant smuggling in collaboration with all relevant stakeholders.

The Commission also conducted a series of targeted consultations with a wide range of stakeholders on the implementation of the facilitators' package. These consultations included Member States' law enforcement and judicial authorities, relevant EU agencies (Eurojust, Europol, Frontex, FRA) and civil society representatives. These bodies were consulted in the course of the REFIT evaluation in 2017, in the preparation of the [Commission guidance](#) document on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence in 2020, in the drawing up of the renewed EU action plan against smuggling (2021-2025), and as part of the monitoring and mapping of the implementation of the facilitators' package in the Member States in 2023.

The Commission also consulted with the Member States, Eurojust, Europol and Frontex when preparing this proposal. The aim of the consultation was to identify the main gaps and weaknesses in the EU legal and operational framework and propose a possible response to address them.

The changes the proposal would bring

The [proposed](#) directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU would replace Directive 2002/90/EC and Framework Decision 2002/946/JHA. To make the fight against migrant smuggling more effective, the Commission is proposing amendments to a number of provisions in the two legislative acts, 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 **criminalises** the following offences: facilitation conducted for financial or material benefit or the promise thereof; facilitation that is highly likely to cause serious harm to a person even though conducted without financial or material benefit; and public instigation of third-country nationals, for instance through the internet, to enter, transit across or stay irregularly in the EU. The proposal 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. The proposal introduces the concept of **aggravated criminal offences**, which carry a greater degree of criminal penalties. Examples of such offences include those committed by individuals as members of an organised criminal group, as well as those that cause serious harm, jeopardise life or health, or result in death.

The proposal establishes minimum rules on the **penalties** for offences and aggravated offences. These penalties should be effective, proportionate and dissuasive. It also introduces additional sanctions or measures that could be imposed on convicted **natural persons**, such as:

- revocation of licences or permissions to engage in the activities that led to the commission of the crime;

- return following the enforcement of the penalty or serving the whole or a portion of the sentence in the third country of return;
- prohibition to enter and stay on the territory of the Member States for an appropriate period of a maximum of 10 years;
- exclusions from access to public funding; fines;
- seizure and freezing of the resources used to commit the crime as well as the money earned from it.

The proposal also introduces sanctions applicable to **legal persons** involved in criminal offences. These sanctions should be proportionate to the seriousness of the offence. They are as follows:

- criminal or non-criminal fines;
- exclusion from eligibility for public benefits, aid or subsidies;
- temporary or permanent exclusion from access to public funding;
- permanent or temporary exclusion from engaging in business activity;
- placing under judicial supervision;
- permanent or temporary closure of sites used to carry out the illegal act;
- withdrawal of permits and authorisations to pursue activities that led to the commitment of the criminal offence;
- seizure and freezing of the resources used to commit the crime as well as the money earned from it.

The proposed directive expands the **jurisdiction** of Member States to cover situations in which attempts to facilitate illegal entry into the EU fail and result in the loss of life for third-country nationals. This includes situations where unseaworthy boats sink in international waters before reaching the territorial waters of a Member State or a third country. Additionally, the proposed directive broadens the scope of jurisdiction to include offences committed by legal entities that are conducting business in the EU but are not necessarily based in its territory. It also includes offences committed aboard ships or aircraft registered in or flying the flag of a Member State.

To ensure effective prevention, investigation and prosecution of offenders, Member States should ensure adequate resources and sufficient training for the relevant law enforcement and judicial authorities. They should also utilise **special investigative tools**, where appropriate, such as those used in countering organised crime or other cases of serious crime. Additionally, Member States should implement **information and awareness-raising campaigns**, research and education programmes on the prevention of migrant smuggling.

To address the lack of robust, comprehensive and comparable data on migrant smuggling offences and criminal justice responses at the national and the EU levels and to ensure better monitoring, the Member States should **collect and report statistical data** annually. This would improve understanding of the nature and scale of migrant smuggling, the detection of cases and the responses of the criminal justice systems of the Member States.

Advisory committees

The European Economic and Social Committee (EESC) is [expected](#) to deliver its opinion on the proposal at the end of May 2024.

National parliaments

The deadline for the [subsidiarity check](#) in the Member States' national parliaments was 20 March 2024. No reasoned opinions were issued, although several parliaments launched the process of scrutiny, with the Czech Chamber of Deputies initiating political dialogue with the Commission over its concerns about the proposal.

Stakeholder views³

In February 2024, the UN Special Rapporteur on the situation of human rights defenders issued [specific recommendations](#) on the proposal's potential impact on fundamental rights protected under EU and international law, as well as on human rights defenders. According to the paper, the proposal should include a mandatory humanitarian exception, excluding acts of solidarity from the scope of the crime of people smuggling. The new offence of 'public instigation' should be removed or, at a minimum, its definition should be greatly improved, as otherwise it could be used to criminalise human rights defenders. Lastly, the author calls for the removal of the mandate for 'special investigative tools' and for the introduction of clear safeguards against the abuse of investigative tools, to ensure they will only be used in complete conformity with international law.

Academic views

Valsamis Mitsilegas from the University of Liverpool [views](#) the Commission's proposal as a positive step, as it appears to take into account the Kinshasa lawsuit,⁴ which has highlighted the numerous fundamental rights challenges arising from the current facilitators' package. However, Mitsilegas argues that the proposal does not go far enough in addressing the fundamental rights and rule of law concerns. This provides the Court of Justice of the EU, when ruling on the Kinshasa case, with an opportunity to play a decisive role in shaping new legislation in the area.

A [research paper](#) by Federico Alagna and Gabriella Sanchez criticises the Commission's narrow and limited approach to the facilitation of irregular migration. As part of this approach, smuggling is considered as a criminal phenomenon exclusively linked to organised crime or ruthless smugglers. According to the authors, the evidence shows that those targeted by counter-smuggling measures are in most cases individuals (not organised criminal groups) who take control of the boats or perform other tasks on board to reach safety and save lives. The authors argue that this policy will result in harsher penalties against the said individuals, increasing the number of people detained and criminally charged instead of reducing the incidence of smuggling.

[Others](#) have made similar observations, referring to the motivation to help people on the run as multifaceted. Many facing prosecution are refugees themselves, who receive benefits from their helpers for doing things such as operating the boat engine during a trip. Others help people in need at sea or on land without asking for anything in return. These volunteers could potentially be criminalised under the new EU law, as the directive states that their actions should be punished if the victims suffer 'serious harm'.

Legislative process

The Commission presented the current proposal for a directive ([COM\(2023\) 755](#)) at an [international conference](#) on 28 November 2023, where it also launched a call to action for a [global alliance to counter migrant smuggling](#). The proposal was presented as a package, which also includes a proposal for a [regulation](#) to reinforce Europol's role and inter-agency cooperation in the fight against migrant smuggling and trafficking in human beings.

The proposal for a directive falls under the ordinary legislative procedure (2023/439(COD)). In the Parliament, it was assigned to the Committee on Civil Liberties, Justice and Home Affairs (LIBE), with Birgit Sippel (S&D, Germany) as rapporteur. She has now to prepare a report which, once adopted, will form the basis for negotiations with the Council.

On 23 January 2024, the Commission [presented](#) the proposal to the LIBE committee members, who received it with reservations. The rapporteur, Birgit Sippel inquired why the proposal has no legally binding provisions ensuring that humanitarian assistance will not be criminalised. She observed that the Commission had not published the results of its consultation with the relevant stakeholders, even though the proposal was not accompanied by an impact assessment. She asked how the Commission would ensure that the criminal offences relating to facilitation as defined in Article 3

would not have unintended consequences, especially the further criminalisation of migrants, refugees and those who assist them. Shadow rapporteur Erik Marquardt (Greens/EFA, Germany) wanted to know why the exemption of humanitarian aid is mentioned in the recitals but not in the articles of the legal act and why the Commission only proposed harmonisation of minimum but not of maximum penalties for smugglers.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Ahamad Matadali H. with Blanckaert J., [Revision of the anti-smuggling package: The 'facilitators package' and Europol's mandate](#), EPRS, February 2024.

Carrera S., Vosyliute L., Smialowski S., Allsopp J. and Sanchez G., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants](#), study for the LIBE committee, Policy Department for Citizens' Rights and Constitutional Affairs, 2018.

Luyten K., [Stronger role for Europol to fight migrant smuggling and human trafficking](#), EPRS, February 2024.

Luyten K., [Understanding EU action against migrant smuggling](#), EPRS, December 2023.

OTHER SOURCES

[Combating illegal immigration: minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union](#), Legislative Observatory (OEIL), European Parliament.

ENDNOTES

- ¹ For a thorough analysis of migrant smuggling and EU action in this area, see K. Luyten, [Understanding EU action against migrant smuggling](#), EPRS, European Parliament, December 2023.
- ² On 21 July 2023, the Criminal Court of Bologna [presented](#) to the Court of Justice of the EU a request for a preliminary ruling regarding the compatibility of the facilitators' package and the related Italian implementing provisions, with the [Charter of Fundamental Rights of the EU](#) (Kinshasa case). The primary question at hand is whether that legislation, as regards the offence of facilitating the unauthorised entry of foreign nationals, is compatible with the principle of proportionality referred to in Article 52(1) of the Charter, to the extent that the legislation does not provide that the purpose of humanitarian assistance can be regarded as a justificatory ground for excluding criminal liability.
- ³ This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.
- ⁴ See endnote 2.

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