



How the New EU Facilitation Directive Furthers the Criminalisation of Migrants and Human Rights Defenders

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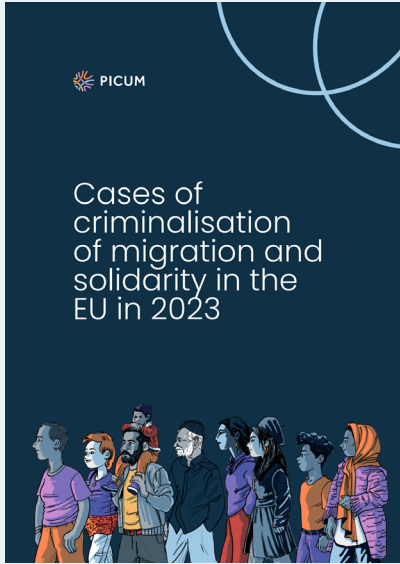
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Introduction

Representing a network of 160 CSOs across 32 countries, PICUM has been working for years on the criminalisation of migration and solidarity with migrants and the impact of counter-smuggling policies. Every year, PICUM publishes a [report](#) analysing the most recent trends in the EU on criminalisation.

Our [latest report](#) found that in 2023, at least 117 individuals faced criminal or administrative proceedings for acting in solidarity with migrants in the EU, and at least 76 migrants were criminalised for crossing borders.¹ The majority of these people faced charges of migrant smuggling or facilitation of entry, transit or stay, as regulated by the [2002 Facilitation Directive](#). **Despite extensive evidence of the direct link between the EU's legal framework on criminalisation², the Commission's [proposal for a new Facilitation Directive](#) not only fails to prevent the widespread criminalisation of migration and solidarity which occurred under the 2002 Facilitation Directive, but will likely dramatically increase it.**

The Commission proposal assumes, without providing any substantial evidence, that smuggling is one of the main causes of irregular migration, and sets forth to crack down on smuggling as a way, among others, to protect "the migration management objectives of the EU". This approach fails to recognise that lack of regular pathways, rather than smuggling, is the main cause of irregular migration. It is also used to justify higher prison sentences for smuggling³, by obliging member states to raise the maximum applicable sanction to at least three years of imprisonment (art. 6).⁴ **This**



PICUM's report "[Cases of criminalisation of migration and solidarity in the EU in 2023](#)" provides an overview of the results of PICUM's media alert system based on different national news outlets over a period of twelve months, from January to December 2023. It identifies reports of 117 people criminalised for acting in solidarity with migrants, and 76 people criminalised for crossing borders. The report also finds that counter-smuggling legislation is the most used tool to criminalise acts of solidarity and crossing of borders.

1 The report has no claim of comprehensiveness, as some news may not be detected by PICUM's alert system. Consequently, the figures presented likely underestimate the true extent of such occurrences. In addition, it is likely that many cases, particularly regarding people who are migrants, go unreported by the media.

2 See, among others: Carrera et al. (2018) [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update](#); ReSOMA (2020) [The criminalisation of solidarity in Europe](#); Amnesty International (2020) [Punishing compassion: Solidarity on trial in Fortress Europe](#); OMCT (2021) [Europe: Open Season on Solidarity](#); Gionco, M; Kanics, J. (2022): [Resilience and Resistance in defiance of the criminalisation of solidarity across Europe](#); PICUM (2023), [More than 100 people criminalised for acting in solidarity with migrants in the EU in 2022](#).

3 As noted by the [Border Violence Monitoring Network](#), the application of a criminal approach to this area represents a departure from the 2002 Facilitation Directive, which referred, more generically, to "sanctions", thus allowing for both administrative or criminal measures.

4 This term is increased to at least ten years of imprisonment for the aggravated criminal offences (art. 4 and 6), which include all situations involving vulnerable people or unaccompanied minors – thus imposing even heavier sanctions to organisations and individuals providing support to vulnerable groups.

criminal approach contradicts broad evidence showing that counter-smuggling legislation often harms, rather than protects, migrants' safety and their rights.

This briefing analyses PICUM's main concerns on the proposal for a new Facilitation Directive and sets forth our main recommendations. It also includes a table (Annex 1) which compares the UN Smuggling Protocol, the 2002 Facilitation Directive, the new proposal and PICUM recommendations .



MIGRANT SMUGGLING: WHY WE NEED A PARADIGM SHIFT

Briefing paper



July 2022

PICUM's briefing "[Migrant Smuggling: Why we need a paradigm shift](#)" (2022) analyses three reasons for which counter-smuggling policies can harm, rather than protect, migrants' safety and their rights: 1. Counter-smuggling legislation is often used against migrants themselves 2. Counter-smuggling policies make crossings more unsafe and 3. Counter-smuggling policies are used to create a hostile environment and deter solidarity with migrants.

1. Migrants will still risk years of prison for steering boats or having to undertake perilous journeys with their children

[Research](#) has shown that counter smuggling policies are often used against migrants themselves and increase the vulnerability of those who are on the move. The criminalisation of migrants is a [phenomenon](#) that has been growing in recent years. In 2023, PICUM's report found that at least [76 migrants](#) faced criminal charges for the sole fact of crossing borders in an irregular manner. However, the numbers are likely to be much higher, as exemplified by reports by national organisation. For instance, in 2022, [Borderline-Europe](#) counted at

least 264 migrants being arrested following their arrival by boat in Italy, and estimates the number to be around 350.

Far from protecting migrants from criminalisation, as it asserts to do, the proposal for a new Facilitation Directive foresees new grounds which could be used to criminalise people who are crossing borders, and fails to provide legal clarity on the non-criminalisation of people who are smuggled.

1.1. The broad reference to what constitutes financial and material benefit risks allowing the criminalisation of mutual aid and the provision of services

The proposal amends the definition of facilitation of irregular entry, transit or stay (art. 3(1)(a)), by clarifying that this should only be criminalised when the person "requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit".

This requirement of a financial or material benefit contributes to further the alignment of the EU legislation with the UN Smuggling Protocol (see Annex 1) and responds to long-standing calls by the [European Parliament](#), experts, and [civil society organisations](#). However, the very broad phrasing of this article risks, in practice, to continue permitting the criminalisation of migrants and people providing services to them. In particular, its very broad definition can open to the criminalisation of mutual aid as well as situations in which migrants who cannot afford to pay for the journey undertake small tasks in exchange for a discount or a free passage. As highlighted by [UNHCR](#), the reference

to the "request, reception or acceptance of a promise of financial or material benefit" can lead to the criminalisation of the "mere fact of having been offered" a benefit, even when refusing it.

This provision can also lead to the criminalisation of the provision of services which are traditionally offered in exchange of money (e.g. landlords, taxi drivers), even when there is no element of exploitation or undue financial benefit. There is also a risk that service providers will deny access to services to racialised communities, for fear of criminalisation.

It should also be reiterated that, in absence of regular pathways, people will be forced to rely on the services of individuals who facilitate their travel in order to enter the EU for purposes of seeking international protection, work, reuniting with their families and other reasons.

In addition, some other important differences between the UN protocol and the EU Directive remain: firstly, the UN protocol only covers irregular entry, while the Directive covers entry, transit and stay. The criminalisation of the facilitation of irregular stay, even when there is a financial or material benefit, is therefore not in line with the UN Protocol and is particularly susceptible to lead to the criminalisation of the provision of services to undocumented people. Secondly, the UN Protocol only criminalises smuggling where the offences are [transnational in nature](#) and involve an organised criminal group (art. 4), while this element is only considered as an aggravated criminal offence under art. 4(a).

Recommendations

We recommend deleting "irregular stay" from article 3(1)(a).

We also recommend deleting "direct or indirect" and substituting this language with "undue financial benefit".

We recommend moving article 4(a) requiring that the offence was committed within the framework of a criminal organisation to the definition of what constitutes facilitation of irregular entry in article 3.

1.2. New type of offence for likelihood of causing serious harm, even in absence of financial or material benefit

Article 3(1)(b) creates a new type of offence which should be criminalised by member states: the facilitation of irregular entry, transit or stay when there is a high risk of causing serious harm, even when the accused person hasn't received, requested or accepted any financial or material benefit.

This provision could apply to parents who have to undertake perilous journeys with their children, in order to escape from wars, destitution or in search of livelihoods. It could also apply to people who, being on a vessel at risk of shipwreck, take the steer to save the other passengers' and their lives. The criminalisation of these groups is unfortunately not

new (see box 1), and would risk to be aggravated under the new legislation.

Recommendations

Article 3(1)(b) should be deleted. Alternatively, "causing serious harm" should be moved to the list of aggravating circumstances in article 9, which apply only when all the elements of the definition of "facilitation" are otherwise met, in line with the UN Smuggling Protocol.

Box 1: Examples of situations which could be criminalised under Article 3(1)(b)

In Greece, the [father](#) of a six-year-old child who survived a shipwreck during which his son lost his life has been accused of endangering his son's life, and risks up to 10 years of prison.

In another [case](#), a refugee was arrested in 2021 following a shipwreck during which he tried to save the lives of those on board. He was initially condemned to 142 years in prison in Greece, despite testimonies stating that he was also a boat passenger and acted to save everyone's lives. In January 2023, the Appeal Court reduced his sentence to eight years and ordered his release.

Cases like these could become more frequent if the new offence of endangering someone's life is adopted.

1.3. The provision exempting family members from criminalisation is not binding

A new recital (rec. 7) has been introduced, clarifying that the elements of the offence of facilitating irregular migration are “usually” not met when it comes to assistance among family members, and that “it is not the purpose of this Directive to criminalise [...] assistance provided to family members”.

The recital also clarifies that “third-country nationals should not become criminally liable for having been the subject to such criminal offences”, which is an important message and in line with article 5 of the [UN Smuggling Protocol](#) (see Annex

1). However, these provisions are weakened by their placement in the recitals section, which has no binding legal value.

Recommendations

To ensure that migrants and their families are not criminalised, this provision should be moved from recital 7 to article 3 and the word “usually” should be deleted.

1.4. The exclusive focus on return procedures is harmful and contradicts ECtHR jurisprudence

The proposed text suggests that member states should return people accused of facilitation or public instigation of irregular migration (art. 6(5) (b)). While this is partially mitigated by the provision that any more favourable EU or national legislation should prevail, the automatic focus on return is very concerning and violates ample jurisprudence by the European Court of Human Rights (ECtHR) which requires states to assess the impact of returning people convicted of crimes on their family and private life⁵.

Recommendations

We recommend deleting art. 6(5)(b). If this article is maintained, it should at least be clarified that it should not apply until all remedies are exhausted, as return to a third country would strongly hinder people’s possibility to exercise their rights during the appeal phase and would put them at risk of severe human rights violations in the country in which they are deported.

⁵ See, for instance, ECtHR, 2 August 2001, Case of Boulif v. Switzerland, App. no. 54273/00, para. 48 and 6 ECtHR, 18 October 2006, Case of Üner v. the Netherlands, App. no. 46410/99, para. 58.

2. Human rights defenders will continue facing harassment and persecution

In 2023, [PICUM's media monitoring](#) confirmed a concerning trend: at least 117 individuals and several NGOs faced judicial and other forms of harassment for acting in solidarity with migrants in the EU. More than half of the human rights defenders who were criminalised (59,8%) were

charged with facilitation of entry, stay or transit or migrant smuggling (depending on how the offence is defined in the national legislation). Under the new Facilitation Directive, the criminalisation of solidarity is likely to increase.

2.1. The provision on non-criminalisation of human rights defenders is not binding and excessively narrow

For years, the [European Parliament](#), experts, and [civil society organisations](#) have called on the European Commission to make sure that defending or promoting migrants' is not criminalised. Nonetheless, the proposal fails to introduce clear binding language excluding human rights defenders from criminal punishment. In the 2002 Facilitation Directive, which would be repealed by the new text proposed by the Commission, article 1(2) provided that member states "may" decide not to criminalise humanitarian assistance.

In the 2023 revision, this provision is moved to the recital section, with recital 7 now stating that the elements of the offence "will usually not be fulfilled" with regard to humanitarian assistance and that "it is not the purpose of this Directive to criminalise [...] humanitarian assistance or the support of basic human needs provided to third-country nationals *in compliance with legal obligations*".

This provision is welcome but insufficient: the reference to "the support of basic human needs" risks to leave out activities such as provision of information, human rights monitoring and legal aid; while the requirement of acting "in compliance with legal obligations" can be particularly difficult to meet in national contexts which are adopting [increasingly repressive laws against search and rescue \(SAR\) and NGOs \(see box 2\)](#). This recital also risks to be interpreted in a restrictive way, authorising only humanitarian actions which are a legal obligation (e.g. rescuing lives at sea) but excluding acts which are permitted, but not mandated by law, such as providing food or services.

Drawing on a 2019 Council of Europe study, which builds *inter alia* upon two UN General Assembly Resolutions⁶, humanitarian action should be interpreted broadly, as including, but not being limited to:

"classic humanitarian assistance work as well as protection initiatives and the promotion of social cohesion. This encompasses both short and longer-term actions taken to save lives, alleviate suffering and maintain human dignity during and after natural or man-made crises and disasters, including actions to reduce vulnerabilities and promote and protect human rights."⁷

In addition, the placement of this provision in the recital section is problematic, as recitals do not have binding force.

Recommendations

The provision of non-criminalisation of humanitarian actions should be moved to article 3⁸ and its scope significantly broadened to cover all human rights activities.

A non-exhaustive list of activities exempted from criminalisation should include, at a minimum, provision of shelter, food, legal aid and advice, medical care, information and transportation, monitoring and reporting human rights abuses, as well as peaceful disobedience and advocacy for policy change⁹.

Box 2: Examples of SAR operations which risk being criminalised under the new Facilitation Directive

In Italy, a new [law](#) introduced in 2023 forbids search and rescue vessels to carry out more than one rescue operation at a time. Under the proposed Facilitation Directive, search and rescue (SAR) vessels which violate this national requirement would not be covered by the exemption in recital 7 and could therefore be criminalised. This could apply, for instance, to SAR vessels which have already carried out one rescue operation and intervene to rescue other people before having reached the assigned port of safety for the first operation, even if the second operation is in their geographical vicinity.

Similarly, in [Greece](#), Law 4825/2021 provides that SAR NGOs operating in an area of jurisdiction of the Greek Coast Guard (GCG) must be enrolled into the Registry of NGOs of the Ministry of Migration and Asylum, operate under direct command of the GCG and first inform and be granted written permission to act by the GCG. Any SAR operation outside of these conditions could still be criminalized under the new EU Facilitation Directive."

6 UN General Assembly, Resolution 46/182: 'Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations', Annex, Guiding Principles, 19 December 1991; UN General Assembly, [Resolution 58/114](#), 5 February 2004. The Council of Europe further refers to the following sources: ICRC, 'Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief', 1992; [The Core Humanitarian Standard on Quality and Accountability](#), CHS Alliance, Group URD and the Sphere Project, 2014; Council of the European Union and the Representatives of the Governments of the member states meeting within the Council, the European Parliament and the European Commission 'European Consensus on Humanitarian Aid', Joint Statement, 2008/C 25/01, OJ C 25, 30 January 2008.

7 CoE study (2019) "[Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member states](#)" para. 3. This definition is consistent with the recommendations of the Fundamental Rights Agency: "Such guidance should explicitly exclude punishment for humanitarian assistance at entry (rescue at sea and assisting refugees to seek safety) as well as the provision of non-profit humanitarian assistance (e.g. food, shelter, medical care, legal advice) to migrants in an irregular situation." FRA (2014) "[Criminalisation of migrants in an irregular situation and of persons engaging with them](#)" p. 16.

8 See section 1 for further recommendations on this point.

9 This list is based on a letter sent to the European Commission in February 2020 and signed by 58 civil society organisations.

2.2. NGOs can face severe sanctions and exclusion from public funding

Articles 7 and 8 of the proposal detail the conditions for liability of legal persons and the ensuing sanctions (previously defined by art. 2 and of the Council framework Decision 2002/946/JHA). These provisions risk targeting NGOs whose members or volunteers are criminalised under the very broad provisions of the Directive, and in particular the offences of causing serious harm and publicly instigating irregular entry, transit or stay. In fact, the proposal sets that, for all offences defined by the Facilitation Directive, legal entities can be held liable and subject to "effective, proportionate and dissuasive sanctions", in addition to the individual responsibility of the persons involved (art. 8(1)). The liability of legal persons is defined very broadly, and includes all actions by people with a leading

position within the organisation, or made possible by their "lack of supervision nor control" (art. 7(2)). The consequences of such liability are very harsh, and can include severe fines and temporary or permanent exclusion from public funding (art. 8(2)). As highlighted by [UNHCR](#), these sanctions can have a chilling effect on search and rescue (SAR) NGOs "possibly delaying attempts at rescue, and thereby increasing the risk of loss of life".

Recommendations

We recommend deleting articles 7 and 8.

2.3. New investigative tools likely to violate right to privacy

The revised proposal introduces new provisions on the use of investigative tools, encouraging states to use tools such as interception of communications, covert surveillance and electronic surveillance, among others (art. 16 and rec. 24). These methods have already been [used](#) against migrants' rights defenders as well as lawyers, seriously hindering their right to privacy and ability carry on their work, and putting them at risk of defamation and smear campaigns.

Recommendations

We recommend deleting recital 24 and article 16.

3. New provisions could have a chilling effect on the provision of information and services to migrants, and facilitate censorship

3.1. New offence of “public instigating” irregular migration could target the provision of information and services to migrants

The new Directive introduces a new type of offence defined as “publicly instigating” third country nationals to enter, transit or stay irregularly in the EU, in Article 3(2). This provision is framed very broadly and could apply to civil society organisations and individuals providing legal support and information to migrants, whether they are in the EU, outside the EU or in transit. Recital 6 clarifies that this should not include the provision of “objective information or advice [...] on the conditions for legal entry and stay”, however this provision is not binding and is framed too narrowly.

As highlighted also by the [UN Special Rapporteur on Human Rights Defenders](#), there is a serious risk that Article 3(2) will be used against civil society organisations and will have a chilling effect on the much-needed provision of information and services

to migrants. Unfortunately, this would not be the first time that human rights defenders have been [criminalised](#) for providing legal information and support to migrants (see box 3).

As analysed by the [Border Violence Monitoring Network](#), this provision further conflicts with the objectives of the recently approved [anti-SLAPP Directive](#), creating a situation of legal uncertainty.

Recommendations

We urge the co-legislators to delete the offence of “public instigation” of irregular entry, stay and transit (art. 3(2)).

Box 3: Examples of activities which could be criminalised under art. 3(2)

Under the proposed new legislation, there is a risk, for instance that organisations or individuals providing public information on which services can be accessed by migrants, such as a list of local actors or a map with relevant resources, could be accused of “publicly instigating” irregular migration, or facilitating such action. This would be punished with a prison sentence of at least three years.

3.2. Information on migrants’ rights and services could be deleted and accounts blocked

Recital 25 foresees the application of the Digital Service Act (Regulation (EU) 2022/2065) to online content which constitutes or facilitates criminal offenses referred to this Directive, foreseeing, for instance, the suspension or termination of the account of the individual or entity publishing the content, and the deletion of the content. This provision could be used to censor or punish organisations or individuals who provide information on migrants’ rights or on services accessible to them, as this could be considered a

form of facilitation of the instigation of irregular entry.

Recommendations

We recommend the deletion of recital 25.

4. The new EU obsession on “instrumentalisation” creeps in as an aggravated circumstance

Lastly, the Directive introduces the concept of instrumentalisation as an aggravated circumstance in article 9. The concept of “instrumentalisation” was first used in 2021 to justify the introduction of serious [limitations](#) to the right of asylum and other fundamental rights in response to the increase in people arriving from Belarus. Recently, it has been codified into law in the context of the [much-criticised](#) EU Pact on Migration and Asylum, where it has been used to [reduce access to the territory and access to asylum](#).

Under the proposed new Facilitation Directive, sanctions should be increased if the facilitation or public instigation of irregular entry has entailed

or resulted in the instrumentation of the person subject to the offence. This risks further expanding the concept of “instrumentalisation” and, when read together with the Crisis Regulation, could lower the safeguards for people considered to be instrumentalised, even in cases in which no third state is involved.

Recommendations

We recommend deleting the reference to instrumentalisation in article 9(d).

5. The proposal was published without an impact assessment, in violation of the Commission’s Better Regulation Guidelines

The proposal was published without an ex-ante impact assessment, which is required by the [Commission’s Better Regulation Guidelines](#) for all cases which are likely to have significant economic, environmental or social impacts and where the Commission has a choice of [different policy options](#). The lack of impact assessment further ignores the first recommendation of an independent [study](#) that the Commission itself had requested in 2023, which recommended a comprehensive evaluation and an impact assessment to be carried out in view of a revision of the Package. In addition, the proposal fails

to take into consideration the recommendations of the [Evaluation and impact assessment study on a proposal for a revision of the EU legal framework related to the facilitation of irregular migration](#), which presented five different policy options and recommended to revise the definition of the offence to include actions undertaken for disproportionate financial or material charge, clearly excluding acts of humanitarian assistance and stating that migrants shall not become liable to criminal prosecution.

Conclusions and Recommendations

While we recognise the need to revise the 2002 Facilitation Directive, which has led to the criminalisation of thousands of migrants and people acting in solidarity with them, we fear that the 2023 proposal for a new Facilitation Directive not only fails to prevent this trend from continuing happening, but is likely to create new grounds for criminalisation.

If these new grounds for criminalisation are not deleted in the proposed revision of the directive, and the safeguards are not significantly strengthened, the proposal is likely to do more harm than good, and should therefore be rejected.

In order to ensure that migrants and people acting in solidarity or providing services to them are not criminalised, we recommend:

- Deleting "direct or indirect" and substituting this language with "undue financial benefit".
- Deleting "irregular stay" from **article 3(1)(a)**;
- Moving **article 4(a)** requiring that the offence was committed within the framework of a criminal organisation to the definition of what constitutes facilitation of irregular entry in **article 3**.
- Deleting **article 3(1)(b)**. If this is not possible, moving "causing serious harm" to the list of aggravating circumstances, which apply only when all the elements of the definition of "facilitation" are otherwise met, in line with the UN Smuggling Protocol;
- Moving the provision of non-criminalisation of family members and humanitarian assistance from **recital 7 to article 3** and deleting the word "usually". In addition, the scope of the non-criminalisation provision should be significantly broadened to cover all human rights activities. A non-exhaustive list of activities exempted from criminalisation should include, at a minimum, provision of shelter, food, legal aid and advice, medical care, information and transportation, monitoring and reporting human rights abuses, as well as peaceful disobedience and advocacy for policy change;
- Deleting **art. 4(d)** which would impose even higher sanctions on individuals and organisations providing support to people in situations of vulnerabilities and unaccompanied children;
- Deleting **art. 6(5)(b)** on the return of people accused of facilitation or public instigation of irregular migration. If this article is maintained, it should at least be clarified that it should not apply until all remedies are exhausted;
- Deleting the offence of "public instigation" of irregular entry, stay and transit (**art. 3(2)**);
- Deleting **articles 7 and 8**;
- Deleting **recital 24 and article 16** on the use of new investigative tools;
- Deleting **recital 25** on the application of the Digital Service Act;
- Deleting the reference to instrumentalisation in **article 9(d)**.

Annex 1: Comparison of the 2000 UN Smuggling Protocol, the 2002 Facilitation Directive, the 2023 proposal for a new Facilitation Directive and PICUM recommendations

	2000 UN Smuggling Protocol	2002 Facilitation Directive	2023 proposal for a new Facilitation Directive	PICUM recommendations
Elements of the offence	Criminalisation of the procurement of irregular entry , only if there is direct or indirect financial or material benefit (art.3(a)).	Criminalisation of the facilitation irregular entry or transit, even in absence of material or financial benefit (art.1(1)(a)).	Criminalisation of the facilitation of irregular entry or transit is criminalised if the person "requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof" (art.3(1)(a)).	We recommend replacing "a financial or material benefit" with "undue financial benefit" to ensure that service provision and mutual aid are not criminalised.
Facilitation of irregular stay	Facilitation of irregular stay is not criminalised (art.3(a)).	Criminalisation of facilitation irregular stay, if there is financial gain (art.1(1)(b)).	Criminalisation of the facilitation of irregular stay is criminalised if the person "requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof " (art.3(1)(a)).	Non-criminalisation is the preferred option. If, however, facilitation of irregular stay remains, we recommend referring to "undue financial benefit" to ensure that service provision and mutual aid are not criminalised.
Link with transnational group	Criminalisation occurs only if the offences are transnational in nature and involve an organised criminal group (art. 4).	The link with a transnational organized criminal group is not required.	The link with a transnational organised criminal group is not required.	The link with a transnational organised criminal group should be an element of the offence.
Criminalisation of migrants and family members	Non-criminalisation of smuggled migrants (art. 4).	The criminalisation of smuggled migrants is possible.	Recital 7, which is not binding , exempts migrants and their family members from the scope of the Directive.	Non-criminalisation of migrants and family members should be included in a binding provision.

	2000 UN Smuggling Protocol	2002 Facilitation Directive	2023 proposal for a new Facilitation Directive	PICUM recommendations
Criminalisation of human rights defenders	Humanitarian actors are <i>de facto</i> not criminalised because they don't receive a financial or material benefit.	Member states may decide not to criminalise humanitarian assistance (art.1(2)).	Recital 7, which is not binding , exempts humanitarian assistance or the support of basic need provided "in compliance with legal obligations" from the scope of the Directive.	There should be a binding exemption of all human rights activities from criminalisation. A non-exhaustive list of activities exempted from criminalisation should include, at a minimum, provision of shelter, food, legal aid and advice, medical care, information and transportation, monitoring and reporting human rights abuses, as well as peaceful disobedience and advocacy for policy change. This should not be limited to activities carried out in compliance with legal obligations.
Endangering people's lives	Endangering the life of people concerned is an aggravating circumstance (art. 6(3)(a)).	No reference in the 2002 Directive.	Criminalises the facilitation of irregular entry, transit or stay if there is a high likelihood of causing serious harm, even if there is no financial or material benefit (art. 3(1)(b)).	Endangering the life of people should not be an independent offence. If this is maintained, it should be an aggravating circumstance.
Public instigation	The offence of public instigation does not exist.	The offence of public instigation does not exist.	Criminalises public instigation of irregular migration even if there is no financial or material benefit (art. 3(2)).	Delete.



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