

Joint letter

Several organisations of lawyers and organisations dealing with legal assistance, together with various individual lawyers, are calling on EU legislators working on the Facilitation Directive to adopt a narrow definition of the offence of ‘smuggling’ in line with [international standards](#) and to include a mandatory and broad-in-scope humanitarian exemption clause.

The signatories believe that having **a mandatory and broad in scope humanitarian clause** is the only way **to bring clarity and legal certainty** to the future directive, and **ensure that legal, humanitarian or family assistance to migrants is not criminalised or discouraged in Member States.**

Lawyers, volunteers, family members of migrants, professional care providers and civil society organisations should be able to provide legal assistance and advice, medical assistance, food, clothing, and shelter. They cannot be prosecuted or punished for their professional or humanitarian activities, or discouraged from providing help, and certainly not under an anti-smuggling framework.

The European Commission (EC) has itself recognised that the broad definition of the offence of ‘facilitation’ in the framework in force is [problematic](#). It acknowledged that due to the broad definition, there were cases of prosecution for the provision of services to irregular migrants in the context of professional activities or for humanitarian reasons. [Civil society actors](#) - among [others](#) - have repeatedly highlighted the risk of criminalisation of assistance provided to irregular migrants. However, the proposal has failed to conclude that a binding humanitarian exemption is necessary.

The Council introduced the material benefit component in the definition of ‘smuggling’ in its general approach. This apparent narrow definition serves as a justification for not including a humanitarian clause in the binding provisions of the text. However, the definition designates a minimum standard and Member States may go beyond it to provide for a broader definition of the offence. As a consequence, the limitative effect of the Council definition is de facto nullified and the text paves the way for the criminalisation of family support and humanitarian assistance in practice.

The requirement of material benefit alone is not sufficient to avoid the criminalisation of solidarity or regular professional activities, given that situations on the ground are varied and unpredictable. For instance, this solution might not be enough to protect lawyers providing advice on immigration avenues in accordance with laws and receiving compensation. In a similar vein, it might not be sufficient to avoid migrants who are forced to drive boats being accused of benefiting, and therefore falling into the scope of the provisions in the same way as organised criminal groups.

Legal clarity and certainty are indispensable components of the rule of law. To maintain clarity and certainty, if the objective of the directive is to tackle organised crime, behaviours that shall not be criminalised must be explicitly excluded.

There has been some debate around whether a mandatory humanitarian exemption can be included in the text of an EU criminal law directive as these are only meant to set minimum standards. In this regard, the EU directive on the definition of criminal offences and penalties for the violation of sanctions should serve as legal precedence, as it contains a humanitarian

exemption.¹ However, we call for a broad humanitarian exemption, that goes beyond this example to also protect people migrating and their relatives.

The crucial role of civil society – including lawyers and NGOs – must be safeguarded across all areas of EU law, including anti-smuggling legislation. The potentially chilling effect of an anti-smuggling directive without a binding solidarity clause would weaken civil society and, thus, the rule of law.

Therefore, we call on EU legislators - especially MEPs working on this file now - to recognise the role of civil society in ensuring dignity, safeguarding fundamental rights of migrants and assisting Member States where their capacities are insufficient. They can give a clear sign by adopting a position that protects legal professionals, civil society, migrants themselves and their family members from any criminalisation or intimidation.

The only solution to ensure that the objective of the Directive – tackling organised crime – is achieved harmoniously throughout the EU is **to combine in the final provisions a narrow definition of the offence and a mandatory exemption**. This would guarantee that the legislation serves Member States in fighting organised crime, while protecting those who carry out their professional duties or act for humanitarian or family reasons, or under constraint.

Signatories



¹ Directive - EU - 2024/1226 - EN - EUR-Lex ; Directive on the Definition of Criminal Offences and Penalties for the Violation of Union Restrictive Measures, Article 3 par. 5 (and Recital 20) : “5. Nothing in paragraphs 1, 2 and 3 shall be understood as criminalising humanitarian assistance for persons in need or activities in support of basic human needs provided in accordance with the principles of impartiality, humanity, neutrality and independence and, where applicable, with international humanitarian law.”



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