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**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)**

**Table of Contents**

- 1 INTRODUCTION..... 1
  - 1.1 Purpose and scope of the evaluation ..... 1
  - 1.2 Context ..... 2
  - 1.3 Trends and figures ..... 3
- 2 BACKGROUND..... 5
  - 2.1 Objectives of the Facilitators Package ..... 5
  - 2.2 Description of the Facilitators Package ..... 6
- 3 EVALUATION QUESTIONS..... 10
- 4 METHOD..... 11
  - 4.1 Overview of sources and methods..... 11
  - 4.2 Methodological challenges: limitations and robustness of findings..... 12
- 5 IMPLEMENTATION STATE OF PLAY ..... 13
- 6 ANSWERS TO THE EVALUATION QUESTIONS..... 18
  - 6.1 Effectiveness ..... 18
  - 6.2 Efficiency ..... 25
  - 6.3 Relevance ..... 27
  - 6.4 Coherence..... 28
  - 6.5 EU added value ..... 32
- 7 CONCLUSIONS..... 34
- 8 ANNEXES ..... 38

# 1 INTRODUCTION

## 1.1 Purpose and scope of the evaluation

In December 2012, the Commission launched a regulatory fitness and performance programme (REFIT) aimed at making EU legislation lighter, simpler and less costly to maximise its benefits for citizens and business and support growth and jobs. Evaluations of existing legislation are among the tools used by the REFIT programme to achieve these goals.

In its 2014 Communication on the State of Play and Outlook for the REFIT programme and the accompanying scoreboard<sup>1</sup>, the Commission identified the evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence as one of the medium-term initiatives to assess the performance of existing EU legislation<sup>2</sup>.

This framework is composed of two instruments, that were adopted simultaneously and are referred to as the “Facilitators Package”: Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence<sup>3</sup> (the ‘Directive’) and Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence<sup>4</sup> (the ‘Framework Decision’).

The main purpose of this evaluation is to assess whether the Facilitators Package, which is one component of a wider array of tools to counter migrant smuggling and thus contribute to reducing irregular migration, achieves its objectives and is still fit-for-purpose. The assessment looks at its effectiveness, efficiency, relevance, coherence and EU added-value<sup>5</sup>, as well as at potential areas for improvements. The evaluation findings will therefore be used as a basis to decide if and how subsequent actions, of either legislative or non-legislative nature, could be undertaken. They can serve to inform decisions at both EU and national level.

The evaluation takes stock of the developments in the implementation of the Facilitators Package and provides an updated overview of its application, identifying trends, gaps, problematics and potential areas for improvements. To this aim, within the limit of the

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<sup>1</sup> COM(2014) 368 final and SWD(2014)192 final [http://ec.europa.eu/atwork/pdf/cwp\\_2015\\_refit\\_actions\\_en.pdf](http://ec.europa.eu/atwork/pdf/cwp_2015_refit_actions_en.pdf). The evaluation was then included in Annex III “Refit Actions” to the Commission Work Programme 2015 COM(2014)910.

<sup>2</sup> For ease of read and unless otherwise specified, in this document the terms "migrant smuggling" and "facilitation of irregular immigration" are used interchangeably. They refer to the facilitation of unauthorised entry, transit and residence as defined under EU law.

<sup>3</sup> OJ L 328, 5.12.2002, p. 17.

<sup>4</sup> OJ L 328, 5.12.2002, p. 1.

<sup>5</sup> Since its adoption in 2002, the Facilitators Package has never been evaluated. However, as set out in Art. 9(2) of the Framework Decision, the Commission has adopted a report on the transposition of this instrument in 2006 (COM(2006)700 and SEC(2006)1591). No similar exercise on the implementation of the Directive has been carried out.

available information at national level, both the legal transposition and the application of the Package have been considered.

The evaluation encompasses evidence and opinions from a wide range of sources and stakeholders. It also unveils the existing limitations in terms of available statistical evidence as regards the scale of migrant smuggling and the type of policy and criminal justice response put in place to prevent and counter it.

This exercise mainly looks at the implementation of legislative provisions aimed at countering migrant smuggling. The Commission's overall approach to countering migrant smuggling is however not limited to legislative action but also includes action at the operational level. This evaluation therefore takes due account of such operational developments as they are part of the context of this intervention.

## **1.2 Context**

In a context increasingly marked by a severe migratory and refugee crisis affecting Europe and many of its neighbouring and other third countries, better tackling migrant smuggling has been one of the priorities set at European and national level to address this situation in the last two years<sup>6</sup>.

The importance of having an appropriate and effective EU penal framework on migrant smuggling in place was asserted by the Commission in its Communication on the work of the Task Force Mediterranean<sup>7</sup> and reiterated by both the European Agenda on Security<sup>8</sup> and the European Agenda on Migration<sup>9</sup>. As part of the first package of measures implementing the European Agenda on Migration, on 27 May 2015 the Commission adopted an EU Action Plan against migrant smuggling (2015-2020)<sup>10</sup> ("the Action Plan").

The Action Plan, which represents the main policy framework to prevent and fight migrant smuggling at EU level, revolves around four main priorities: enhancing police and judicial response; improving information gathering, exchange and analysis; enhancing prevention of migrant smuggling and assistance to vulnerable migrants; and better cooperating with third countries of origin and transit of migrants. The review of the EU legal framework on migrant smuggling is one of the specific actions set out in the Action Plan for 2016 in order to ensure that appropriate sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress.

The actions set out in the Action Plan are to be seen in complementarity with the on-going Common Security and Defence Policy (CSDP) Operation EUNAVFOR Sophia in the Central

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<sup>6</sup> The four pillars of the EU response to the crisis, as set out by the European Agenda on Migration, include reducing incentives for irregular migration, improved border management, a stronger common asylum policy and a new policy on legal migration.

<sup>7</sup> COM(2013)869.

<sup>8</sup> COM(2015) 185.

<sup>9</sup> COM(2015) 240.

<sup>10</sup> COM(2015) 285. For further information see [http://europa.eu/rapid/press-release\\_MEMO-15-5038\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5038_en.htm).

Mediterranean<sup>11</sup>. The purpose of this military operation is to disrupt the business model of smugglers by identifying, capturing and disposing of vessels used or suspected of being used by them, as well as to train the Libyan coastguards and navy and contribute to the implementation of the UN arms embargo on the high seas off the coast of Libya<sup>12</sup>.

The Council Conclusions adopted by the Justice and Home Affairs ministers on 10 March 2016<sup>13</sup> echo the commitments to advance concerted action at EU and international levels against migrant smuggling and set out concrete recommendations to Member States, the Commission and EU agencies. Migrant smuggling is also a key aspect of cooperation with third countries, as most recently highlighted in the Communication on establishing a new Framework Partnership with third countries under the European Agenda on Migration<sup>14</sup>.

### 1.3 Trends and figures

Although the actual numbers of smuggled migrants are not known, irregular migration is a limited yet reasonable proxy indicator for migrant smuggling trends. According to Europol, more than 90% of the irregular migrants travelling to the EU have used smugglers' services<sup>15</sup>.

Available data show a significant increase in recent years in the flows of migrants and asylum seekers who are entering the EU irregularly, in particular by sea through the Central and Eastern Mediterranean routes, with a peak of irregular entries registered in 2015<sup>16</sup>.

In the first nine months of 2016, more than 442 721 irregular border crossings have been detected, compared with 844 012 during the same period of 2015, a record breaking year for irregular arrivals to the EU<sup>17</sup>. However, the number of irregular border crossings does not necessarily match the estimated number of persons who have actually crossed borders irregularly, due to possible double counting between certain external borders of the EU<sup>18</sup>. Therefore the 1 822 337 irregular border crossings along the external borders reported in 2015 relate to an estimate of about one million persons who entered the EU irregularly. This extraordinary figure was more than six times the number of irregular border crossings

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<sup>11</sup> Council Decision (CFSP) 2015/972 of 22 June 2015. Upon positive assessment from the Council, EU ambassadors within the Political and Security Committee agreed to start the first step of the second phase of the operation as of 7 October 2015, and approved the corresponding rules of engagement. For further information and updates see [http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index\\_en.htm](http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index_en.htm).

<sup>12</sup> On 20 June 2016 the Operation mandate has been extended by one year, until 27 July 2017, and expanded as to include two new tasks. See <http://www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-eunavfor-med-sophia/>

<sup>13</sup> See <http://data.consilium.europa.eu/doc/document/ST-6995-2016-INIT/en/pdf>.

<sup>14</sup> COM(2016) 385.

<sup>15</sup> Europol report "Migrant smuggling in the EU", (2016), available at: [https://www.europol.europa.eu/content/EMSC\\_launch](https://www.europol.europa.eu/content/EMSC_launch). Similar estimates have also been made in the past. See for example the Migration Policy Institute ("Securing Borders. The Intended, Unintended, and Perverse Consequences", 2014) or the Global Initiative against Transnational Organised Crime ("Smuggled Futures: The dangerous path of the migrant from Africa to Europe" 2014), according to which more than 80% of irregular migrants from Africa reach the EU with the help of smugglers and criminal groups.

<sup>16</sup> For further details on trends and figures, see Annex IV.

<sup>17</sup> Frontex, FRAN Q3 2016, <http://frontex.europa.eu/publications/>

<sup>18</sup> According to Frontex, data should be understood to be based on the assumption that all migrants first detected irregularly crossing in Greece were then detected for a second time re-entering the EU from the Western Balkans  
Frontex Risk Analysis for 2016  
[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf), p. 6.

reported in 2014, which was itself a unprecedented year<sup>19</sup>.

The reasons behind this increase in the flows of asylum seekers and irregular migrants include wars and geo-political instability in either EU neighbouring countries such as Syria and Libya or farther away, in Afghanistan and Iraq, as well as poverty, lack of socio-economic development and global inequalities. These constitute strong push factors for irregular migration to the EU, in particular from Sub-Saharan African countries. According to Eurostat, in 2015 the EU Member States received more than 1 257 030 first time asylum claims, more than double the number registered in 2014 (562 680)<sup>20</sup>.

Migrant smuggling is increasingly associated with serious human rights violations and deaths, in particular when it occurs by sea. According to the International Organization for Migration (IOM), an estimated 5 400 migrants died or were recorded as missing in 2015 worldwide<sup>21</sup>. In 2016, 7 495 migrants are estimated to have lost their lives worldwide, over 68% of those (5 079) while attempting to reach Europe by sea in the Mediterranean<sup>22</sup>. The United Nations High Commissioner for Refugees (UNHCR) also reports similar figures, with some 5 022 reported dead or missing in 2016, while some 361 709 refugees and migrants reached Europe by sea. In 2015, UNHCR reported 1 105 078 arrivals to Europe by sea<sup>23</sup>.

The Facilitators Package does not address the root causes of the demand for facilitation of irregular border crossing or residence in the EU. It focuses instead on the role of the smugglers and the penal framework to tackle this form of crime. In this respect, detections of suspected facilitators of irregular migration rose from 10 234 in 2014 to 12 023 in 2015<sup>24</sup>. In the first nine months of 2016, 9 269 suspected facilitators were detected, is comparable to the numbers reported during the same period of 2015 (9 300)<sup>25</sup>.

The flows of irregular migration across borders are thought to be increasingly controlled by criminal networks<sup>26</sup>, quickly adapting to the policy developments and law enforcement responses, including enhanced border controls. Facilitation of irregular migration takes various forms, from the actual transportation or management of transportation of any person lacking a right to enter or transit in a country of which he/she is not a national, to fabrication and/or provision of fake documents, to the organisation of marriages of convenience, or other means to facilitate unauthorised entry, transit or residence.

These services are offered by organised criminal networks or individuals, who generate substantial profits from migrant smuggling. In 2015 alone, criminal networks involved in

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<sup>19</sup> Frontex Annual Risk Analysis, 2016, available at: [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf).

<sup>20</sup> Eurostat data series (migr\_asyappctza), as of 14 December 2016; <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>.

<sup>21</sup> <http://reliefweb.int/report/world/fatal-journeys-volume-2-identification-and-tracing-dead-and-missing-migrants>.

<sup>22</sup> <http://missingmigrants.iom.int/>

<sup>23</sup> <http://data.unhcr.org/mediterranean/regional.php>.

<sup>24</sup> Frontex Annual Risk Analysis, 2016, available at: [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf), p.64

<sup>25</sup> Frontex, FRAN Q3 2016, <http://frontex.europa.eu/publications>.

<sup>26</sup> <http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/People-smuggling>.

migrant smuggling are estimated to have had a turnover of between EUR 3-6 billion<sup>27</sup>. Besides, an increase in the number of irregular migrants reaching the EU sustains the demand not only for facilitation services related to entry into the EU, but also for those related to irregular residence. Both facilitation of irregular entry, transit and residence are sanctioned by the Facilitators Package.

Increased risks of trafficking in human beings have also been identified in the context of the current migratory and refugee crisis<sup>28</sup>, such as forced marriages<sup>29</sup>, forced labour, prostitution, or crime<sup>30</sup>. Although the crimes of migrant smuggling and trafficking in human beings can be closely entangled, little is known as to the links between them, in terms of similarities and overlaps between criminal networks, routes and *modi operandi*.

In terms of criminal justice response to migrant smuggling, a quantitative overview of investigation, prosecution and conviction for migrant smuggling across EU Member States does not exist yet<sup>31</sup>. Overall, data collected are mostly partial and/or not updated. Where publicly available, figures are provided throughout the report and in Annex IV.

## 2 BACKGROUND

### 2.1 Objectives of the Facilitators Package

The development of a common European migration policy within the EU area of freedom, security and justice is built upon, *inter alia*, the shared commitment among Member States to prevent and fight against irregular migration. This has been consistently recognised as an essential part of a well-managed migration system.

The priority afforded to reducing irregular migration stems from two essential needs. First, the need to tackle human rights abuse and violence, which those who migrate irregularly, in particular by sea, are often subject to. Migrants in an irregular situation are also more vulnerable to labour and other forms of exploitation. Secondly, there is a need to protect the Member States' territorial integrity, social cohesion and welfare through well-managed migration flows.

Against this backdrop, the general objective of the Facilitators Package is to contribute to the fight against irregular migration, by penalising the aiding of unauthorised transit, entry and residence in the EU, both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings<sup>32</sup>.

The specific objectives of the Facilitators Package are to ensure the approximation of the

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<sup>27</sup> Europol report "Migrant smuggling in the EU", *cit.*, p.2

<sup>28</sup> [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/report\\_on\\_the\\_progress\\_made\\_in\\_the\\_fight\\_against\\_trafficking\\_in\\_human\\_beings\\_2016.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/report_on_the_progress_made_in_the_fight_against_trafficking_in_human_beings_2016.pdf).

<sup>29</sup> Europol Situation Report on Trafficking in human beings in the EU, February 2016.

<sup>30</sup> Frontex Annual Risk Analysis 2016.

<sup>31</sup> See also Part 5 "Method" and Part 8 "Conclusions".

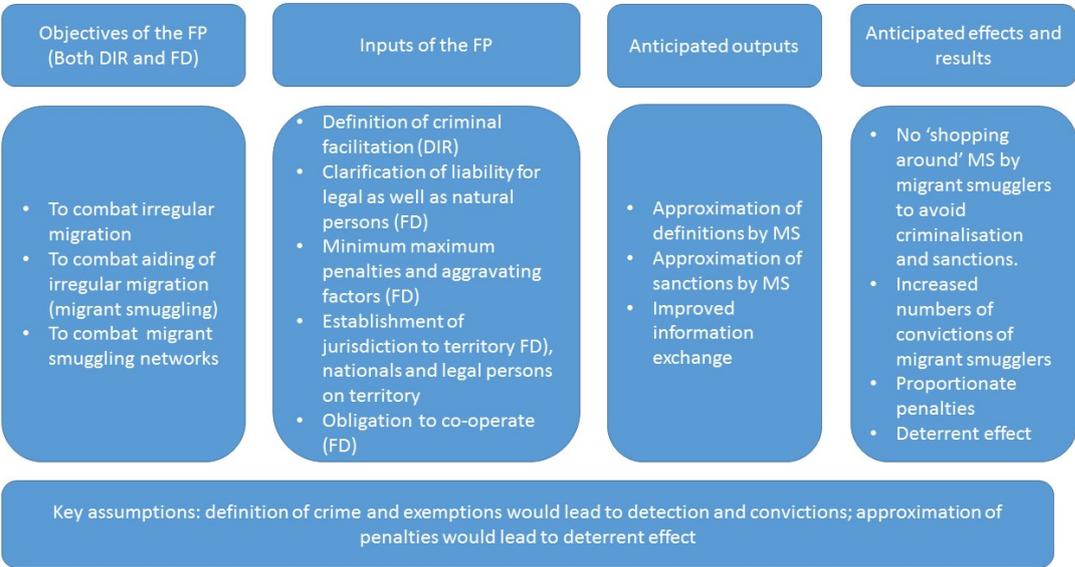
<sup>32</sup> Directive 2002/90/EC, recital 2.

relevant legal provisions across EU Member States, on the one hand by establishing a common definition of the offence, which is the subject of the Directive, and on the other hand by setting out minimum rules for penalties, liability of legal persons and jurisdiction, which are covered in the Framework Decision<sup>33</sup>.

The link between the two instruments is clearly referred to in the recitals of the Directive, which stipulate that its specific purpose "is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of Framework Decision 2002/946/JHA in order to prevent that offence"<sup>34</sup>.

The graphic representation below illustrates the intervention logic of the Facilitators Package, summarising in a schematic way how its different elements were expected to interact.

**Figure 1. Intervention logic of the Facilitators Package**



**2.2 Description of the Facilitators Package**

The Facilitators Package was adopted in 2002 on the basis of a legislative proposal submitted by France in 2000, after more than 50 migrants were found dead in the back of a lorry in Dover (UK), after crossing the Channel clandestinely.

The legal basis for the adoption of the Directive corresponds to Art. 79(2)(c) of the Treaty on the functioning of the European Union (TFEU)<sup>35</sup> on the EU policy in the area of illegal immigration and unauthorised residence, whereas the legal basis of the Framework Decision

<sup>33</sup> For ease of read, when not differently indicated in the report, the term ‘Member States’ in relation to the transposition of the Facilitators Package is used to indicate the States bound by the Facilitators Package under EU law.

<sup>34</sup> Directive 2002/90/EC, recital 4.

<sup>35</sup> Former Art. 61(a) and Art. 63(3)(b) of the Treaty establishing the European Community.

corresponds to 83(2) TFEU<sup>36</sup>, concerning the approximation of criminal laws and regulations essential to the effective implementation of a Union policy. The Facilitators Package constitutes a development of the Schengen *acquis* and it applies therefore to Iceland, Norway, Switzerland and Liechtenstein<sup>37</sup>.

Denmark does not take part in the application of the Facilitators Package under EU law but it is bound by its provisions on the basis of Protocol 22<sup>38</sup>. The Facilitators Package was initially applicable to the UK<sup>39</sup>, but the UK chose to opt-out of the Framework Decision with effect from 1 December 2014 on the basis of Article 10(4) of Protocol 36. Therefore, at the time of writing only the Directive applies to the UK. Considering however that the UK had transposed both instruments in its national legal order, the present evaluation continues to take account of the UK's transposition of the Framework Decision. This is without prejudice to the UK's legal position *vis-à-vis* the Framework Decision. The Facilitators Package does not apply to Ireland yet<sup>40</sup>.

The Facilitators Package relates to the United Nations Protocol against the smuggling of migrants by land, sea and air ("the Protocol") supplementing the United Nations Convention against Transnational Organised Crime<sup>41</sup>, which was adopted in 2000<sup>42</sup> and entered into force in 2004<sup>43</sup>, as the first international instrument that provided a common definition of migrant smuggling.

The Protocol has an encompassing nature, aiming at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties and protecting the rights of smuggled migrants. The European Union concluded the Protocol in 2006<sup>44</sup> and all EU Member States, with the exception of Ireland, have ratified it<sup>45</sup>.

Art. 4 of the Directive and Art. 9 of the Framework Decision required Member States to transpose the Package in national law by 5 December 2004, which is also roughly when the Protocol entered into force. At the moment of the adoption of the Facilitators Package the

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<sup>36</sup> Former Art. 29, Art. 31(e) and Art. 34(2)b of the Treaty establishing the European Union.

<sup>37</sup> See former Art. 27 of the Schengen Convention, which was repealed by the Facilitators Package in 2004. In addition to the information collected in accordance with Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, a concise overview on the implementation of the Facilitators Package by DK as well as LI, CH and NO was collected in the form of national factsheets by one of the external studies underpinning the evaluation. IS did not provide information.

<sup>38</sup> See Art. 2 final sentence of Protocol 22 on the position of Denmark as far as the Framework Decision is concerned and Article 4 as far as the Directive is concerned.

<sup>39</sup> At the time of the adoption of the Facilitators Package, the UK and IE had formally decided to take part in the adoption and application of the Directive and Framework Decision, in accordance with Art. 4 and Art. 5 of Protocol 19 integrating the Schengen *acquis* into the framework of the European Union. However, considering that the Facilitators Package forms part of the Schengen *acquis*, both countries must be evaluated before implementing the relevant provisions according to Council Regulation 1053/2013. In the case of the UK, the procedure has been completed in 2004 (see Council Decision 2004/926/EC).

<sup>40</sup> In the case of IE, the evaluation procedure mentioned in the above footnote has not been initiated and therefore the Package does not apply to it yet.

<sup>41</sup> <https://www.unodc.org/unodc/en/treaties/CTOC/index.html>.

<sup>42</sup> UN General Assembly Resolution 55/25 of 15 December 2000.

<sup>43</sup> [https://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/convention\\_smug\\_eng.pdf](https://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/convention_smug_eng.pdf).

<sup>44</sup> See Council decisions 2006/616/EC and 2006/617/EC.

<sup>45</sup> The status of signatures and ratifications is available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en).

majority of Member States had already some legislation in place as regards this type of crime<sup>46</sup>.

### **Definition of the offence and non-criminalisation of humanitarian assistance**

The Directive defines the facilitation of unauthorised entry, transit and residence to the EU. Pursuant to Art. 1(1), any person who intentionally assists a third country national to enter or transit across the territory of a Member State or assists such a person, for financial gain, to reside within a Member State, must be sanctioned. The Framework Decision criminalises such conduct (Art. 1(1)) and sets out custodial sentences in certain cases (Art. 1(3)).

Therefore, under EU law, facilitation of irregular entry and transit is criminalised irrespective of whether it is conducted for the purpose of a financial or material benefit, contrary to facilitation of irregular residence, which is a criminal offence only when conducted for financial gain (Art. 1(1)(b) of the Directive). The Facilitators Package does not provide any definition of the element of financial gain.

Besides, under the option set out in Art. 1(2), Member States can choose not to criminalise the facilitation of unauthorised entry and transit, where the aim of the behaviour is to provide humanitarian assistance to the person concerned. As for the financial gain element, the Facilitators Package does not contain specific provisions or recitals clarifying the concept of humanitarian assistance.

In this context, it is useful to recall that payments to migrant smugglers tend to occur in third countries of origin and transit. These are often done in cash, through the so-called hawala method - a centuries-old system, which enables the transfer of money on the basis of trust through the use of intermediary brokers operating largely without a paper trail and often outside the law<sup>47</sup> - or via the use of cash couriers and other alternative banking systems<sup>48</sup>.

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<sup>46</sup> See for example the synthesis report concerning Directive 2002/90/EC of the Study on the Conformity checking of the transposition by Member States of the 10 EC Directives in the sector of asylum and immigration" carried out by the Odysseus Network for the Commission in 2007 and available at <http://odysseus-network.eu/wp-content/uploads/2015/03/2002-90-Facilitation-unauthorised-entry-Synthesis.pdf>.

Further information on selected Member States is also contained in study commissioned by the European Parliament's Policy Department for citizens' Rights and Constitutional Affairs at the request of the LIBE Committee on "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants", which notes that "qualitative and quantitative knowledge of the implementation of the Facilitation Directive [...] is by and large lacking at national and EU level" ([http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL\\_STU\(2016\)536490\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf))

Further information in this sense is contained in a Study carried out for the Commission on "Criminal sanction legislation and practice in representative Member States (2103), available at [http://ec.europa.eu/justice/criminal/document/files/sanctions\\_delivery\\_en.pdf](http://ec.europa.eu/justice/criminal/document/files/sanctions_delivery_en.pdf). The study looked among others at Directive 2002/90/EC in 11 Member States and found that "Germany and Sweden implemented the Directive into national legislation. Hungary did not, because their national provisions were, due to the implementation of the Schengen *acquis* in 2002, already in compliance with the Directive. Poland did not adopt the Directive *explicitly*, but adopted new provisions with its EU accession in 2004. In Cyprus, Art. 19A of Law 8(I)/2007 fully incorporated the FD. France implemented the FD in 2004, Italy in 2004, but introduced further amendments later. Latvia joined the EU in 2004. Romania adopted the FD in 2002 and in Spain the national legislation relied upon was from 2001. In UK, most of the legislation predates the FD with some amendments made in 2002".

<sup>47</sup> <http://www.wsj.com/Art.s/following-the-migrant-money-trail-1451471405>.

<sup>48</sup> According to Europol estimates, in 2015 20% of payments were done through the alternative banking systems (*hawala*) and 52% in cash. Source: EPMT Daily Monitoring Report 17 June 2016. See also <http://www.fatf-gafi.org/media/fatf/documents/reports/Trafficking%20in%20Human%20Beings%20and%20Smuggling%20of%20Migrants.pdf>.

Despite progress, to date there is still limited intelligence available on the nature and extent of illicit financial flows associated to migrant smuggling.

The cash intensive nature of the payment methods linked to smuggling makes it difficult to trace illicit financial flows and in turn to conduct investigations on the financial nature of the crime. For example, according to Europol, in 2015, less than 10% of the investigations into migrant smuggling activities produced intelligence on suspicious transactions or money laundering activities<sup>49</sup>.

Since the time of adoption of the Facilitators Package and still today, the risks that such difficulties in tracing financial flows connected to migrant smuggling would disproportionately hamper the investigation and prosecution of this crime, affecting States' legitimate interest to control borders and regulate migration flows, have been raised as a reason to avoid including a constituent financial gain element in the offence of facilitating irregular border crossing. The situation is somewhat different for the facilitation of irregular residence, which at least partially takes place on EU territory thus making financial transactions possibly easier to trace. In this case, the financial gain element is included in the definition of the offence<sup>50</sup>.

### **Sanctions and penalties for natural and legal persons**

The Directive establishes a general obligation for Member States to adopt effective, proportionate and dissuasive sanctions to punish those who are responsible for the crime of facilitation of irregular migration (Art. 3). It also extends the offence to instigators or accomplices, as well as to those who attempt to commit such offence (Art. 2).

The Framework Decision complements the Directive on the criminal law aspect by setting some minimum rules for the approximations of penalties and sanctions for natural and legal persons. Art. 1(3) of the Framework Decision sets out aggravating circumstances by requiring Member States to apply maximum custodial sentences of no less than eight years where the offence is committed for financial gain and either as an activity of a criminal organisation, or endangering the lives of the persons who are subject to the offence. The Framework Decision also provides for the liability of legal persons and related sanctions.

### **Jurisdiction**

Art. 4 of the Framework Decision sets out the cases in which each Member State is obliged to establish jurisdiction concerning intentional assistance to unauthorised entry, transit across or residence.

### **Rights of asylum seekers and refugees**

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<sup>49</sup> Europol report on "Migrant Smuggling in the EU", *cit.*

<sup>50</sup> Public documents on the negotiation of the Facilitators Package can be retrieved at <http://www.consilium.europa.eu/register/en/content/int/?typ=ADV>.

As set out in Art. 6 of the Framework Decision, the Facilitators Package applies without prejudice to the protection of the rights of refugees and asylum seekers in accordance with international law, in particular in relation to Art. 31 (on the non-penalisation of their unlawful entry or presence) and 33 (on non-refoulement) of the Geneva Convention relating to the status of refugees<sup>51</sup>. Apart from Art. 6, it does not contain other specific provisions about human rights protection of smuggled migrants.

### **Extradition and cooperation between Member States**

Art. 5 of the Framework Decision refers to the rules on extradition, which are now regulated by the European Arrest Warrant<sup>52</sup>. Cooperation with Member States is regulated by Art. 7 of the Framework Decision, according to which if a Member State is aware of breaches of the rules on the entry and residence of aliens from another Member State, the former is obliged to inform the Member State concerned.

## **3 EVALUATION QUESTIONS**

The evaluation of the Facilitators Package has been carried out with the aim of assessing whether it is still fit for purpose, both in terms of its general and specific objectives as well as regarding the concrete provisions it sets out to ensure that such objectives are achieved. It has focused on the most relevant dimensions for the type of provisions contained in the Package.

Whereas further information on the methods and sources used for the evaluation are provided in Part 5, the main criteria and questions that guided the analysis can be summarised as follows:

- **Effectiveness:** To what extent did the Facilitators Package achieve its objectives? To what extent did it achieve approximation as regards the definition of the offence and the associated penal framework, including type and level of sanctions, and jurisdiction rules? Was the Package effective in setting out an appropriate legal framework to tackle the offence of migrant smuggling? What effects did the Package have on prosecution and conviction at national level?
- **Efficiency:** What are the main costs and benefits of the Facilitators Package? To what extent are the costs justified and proportionate to the benefits achieved? Did it create administrative burden?
- **Relevance:** To what extent have the objectives of the Facilitators Package been appropriate? To what extent is the Facilitators Package still relevant in the current context where migrant smuggling has significantly increased over the last years?

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<sup>51</sup> The text of the 1951 Convention and 1967 Protocol relating to the Status of refugee are available at <http://www.unhcr.org/3b66c2aa10>.

<sup>52</sup> Framework Decision 2002/584/JHA.

- Coherence: To what extent is the Facilitators Package internally coherent? To what extent is it coherent with wider EU laws in relevant areas such as migration, fundamental rights, fight against organised crime, trafficking in human beings, and with international law?
- EU added value: What is the added value of the Facilitators Package compared to what could be achieved by Member States at national level? To what extent is it still opportune to act at EU level?

## 4 METHOD

### 4.1 Overview of sources and methods

The evaluation was conducted through a mix of methods and is informed by the triangulation of a variety of sources, including evidence and opinion arising from external studies, the survey of national authorities, case studies, reviews of jurisprudence publicly available, expert views and desk research.

The evaluation relies to a large extent on two external studies carried out for the Commission between 2014 and 2016.

The first study focused on the legal assessment of the transposition of the Facilitators Package in national law, by gathering updated information and conducting legal review and desk analysis<sup>53</sup>. Building on the findings of this first study, the second study focused more broadly on the assessment of the practical application of the Facilitators Package, including an evaluation of the Package and an assessment of the impacts of possible modifications<sup>54</sup>. Details on the methodological approach underpinning the study are provided in Annex III.

In parallel to the above-mentioned studies, the evaluation process was accompanied by targeted exchanges of views with a wide range of stakeholders, including civil society organisations, academia, independent experts, practitioners, local and regional authorities, and business associations. These consultations were conducted between March 2014 and March 2016<sup>55</sup>. They covered the nature of the definition of the offence of facilitation of irregular migration and non-criminalisation of humanitarian assistance, but also touched upon non-legislative elements that could complement and support the application of the Facilitators Package. These consultations were either embedded in the studies that underpin this evaluation or organised and/or attended by the Commission autonomously. They were not

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<sup>53</sup> The study was carried out by TIPIK Legal. It covered all Member States except DK.

<sup>54</sup> This study on the "Evaluation and Impact Assessment Study on a proposal for a revision of the EU legal framework related to the facilitation of irregular migration (migrant smuggling)" (2016, catalogue nr. DR0217290ENN, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/icf\\_study\\_eu\\_legal\\_framework\\_related\\_to\\_facilitation\\_of\\_irregular\\_migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/icf_study_eu_legal_framework_related_to_facilitation_of_irregular_migration_en.pdf)) was carried out by ICF International. It covered all Member States and non-EU Schengen Associated countries.

<sup>55</sup> See Annex II for further details on targeted stakeholder consultations.

carried out in the framework of a formal evaluation setting or distribution of questionnaires, but provided useful input into the evaluation of the current implementation as well as into the drafting of recommendations for possible improvements.

Member States have been consulted, in particular in the framework of the external studies. They have also systematically been informed of activities linked to the evaluation of the Facilitators Package during the meetings of the Member States Expert Contact Group on facilitation of irregular migration, in particular those held in March 2015, December 2015 and February 2016.

The work carried out by the Working Group on Smuggling of Migrants was also considered to gather opinions and evidence on the current functioning of existing legal rules, when applicable to the EU context<sup>56</sup>. This Working Group was set up by the Conference of States Parties to the UN Convention against Trans-national Organised Crime in which EU Member States as well as the EU participate.

Moreover, an open public consultation on the evaluation and possible improvements of the Facilitators Package was held for 12 weeks between 13 January and 6 April 2016, using a web-based questionnaire<sup>57</sup>. Its main purpose was to collect opinions of the general public and seek views and perspectives on the functioning of the existing EU legal framework, its main challenges and possible improvements. This consultation was based on a different set of questions than those for specialised stakeholders, aimed at ensuring an understanding of the issues at stake and asking for feedback from the general public.

The main findings of the public consultation are discussed in the relevant parts of this evaluation. Individual replies as well as a summary of the public consultation results are available online<sup>58</sup>.

Annex I contains more details on the preparation of this evaluation, whereas specific information on the stakeholder consultation process is provided in Annex II.

#### **4.2 Methodological challenges: limitations and robustness of findings**

One of the main challenges arising in the evaluation of the Facilitators Package concerned the widely recognised limited availability and comparability of data related to facilitation of irregular entry, transit and residence<sup>59</sup>.

This challenge regards both the precise measurements of the scale of migrant smuggling, including availability of crime statistics, as well as of irregular migration to and within the

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<sup>56</sup> The report of the Working Group meeting with the agreed recommendations and related documents is available at <https://www.unodc.org/unodc/en/treaties/CTOC/working-group-on-the-smuggling-of-migrants-2015.html>.

<sup>57</sup> [http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2015/consulting\\_0031\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2015/consulting_0031_en.htm).

<sup>58</sup> See [http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2015/consulting\\_0031\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2015/consulting_0031_en.htm).

<sup>59</sup> Most recently, this knowledge gap has been stressed for example by the EP study on “Fit for purpose? The facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants”, *cit.*, p. 40. See also the Working document of the European Committee on Crime Problems (CDPC) of the Council of Europe on “Preventing and suppressing the smuggling of migrants in Council of Europe Member states- a way forward”, 19 April 2016.

EU. Concerning the first element, there is no data that can directly measure the scale of migrant smuggling. Surrogate measures such as the number of prosecutions of migrant smugglers or estimated irregular migration flows exist to a certain extent, but these are likely to be limited proxies in estimating the real scale of activity. The irregular nature of the phenomenon makes obtaining a reliable overview in terms of figures a particularly challenging task. Equal challenges were encountered as regards obtaining comparable and even non-comparable data at national level that would capture the number of investigations, prosecutions and convictions of migrant smugglers, over the whole period considered.

Despite the efforts carried out, it proved very difficult if not impossible to obtain a reliable, comparable and updated quantitative overview of the phenomenon.

Besides the collection of reliable and comparable evidence, the evaluation of the implementation of the Facilitators Package against the criteria described in Part 3 has also proved challenging. This is mostly due to the fact that the evolution of the crime of migrant smuggling is heavily influenced by a number of external circumstances. These have evolved markedly in recent years and today the legal framework is one of a much wider array of policy measures to prevent and tackle migrant smuggling at EU, as well as national and international level. As a result, it is difficult to assess the direct impact of the Package's provisions in achieving its objectives as compared to the combined action of many other factors, whose effects are often still too recent to measure.

A number of actions were undertaken in the attempt to overcome the challenges mentioned above. These included repeated consultation of Member States through expert group meetings, as well as extensive outreach to other stakeholders such as EU agencies, international organisations, civil society organisations or business associations, which are either involved in migration management and thus collect updated figures and information, or are exposed to the consequences of migrant smuggling and were thus able to provide feedback on specific aspects of the evaluation.

However, despite such efforts, in the current situation the evidence base upon which judgements concerning in particular the effectiveness, efficiency and added-value of the Facilitators Package can be made, remains weak. This includes challenges in establishing a good baseline for the evaluation of the Package, based on reliable and comparable data going back to the time of adoption and first years of implementation of the Package.

## **5 IMPLEMENTATION STATE OF PLAY**

Overall, the provisions of the Directive and the Framework Decision have been transposed<sup>60</sup> into the legislation of all Member States which are bound by it. The deadline to transpose the Directive and the Framework Decision was 5 December 2004. So far, the Commission has not

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<sup>60</sup> The information on the transposition of the Facilitators Package provisions in national law is based on an external study carried out for the Commission by Tipik Legal. All Member States bound by the Facilitators Package under EU law have been given the opportunity to review the relevant factual information contained in this report.

initiated any formal infringement procedures as regards the non-compliance of national provisions transposing the Facilitators Package. Infringement procedures for the non-communication of national measures transposing Directive 2002/90/EC had been initiated in 2005 and the Commission closed most cases. Two cases were brought before the Court of Justice<sup>61</sup>. The Commission has not initiated infringement procedures for the non-communication by Member States of national measures transposing Framework Decision 2002/946/JHA or concerning its correct transposition and application<sup>62</sup>.

The **definition** of the offence to facilitate the irregular entry, transit or residence of third country nationals, set out in Art. 1 of the Directive, has been transposed by all Member States, although some national provisions could raise concerns. For example, SI only sanctions the facilitation of entry or transit when it occurs in the form of repetitive acts, whereas in LT the general offence of facilitation of unauthorised residence refers to third-country nationals who have crossed the border irregularly, which is narrower than the provision of the Directive.

The definition contained in the Facilitators Package is broad and does not specify the different *modi operandi* that can constitute the offence of migrant smuggling. A *modus operandi* increasingly used by facilitators is document fraud, which is widely sanctioned in national law<sup>63</sup>. In several Member States the provision or procurement of false documents is also punishable in terms of facilitation of irregular immigration (BE, CY, FR, HU, LT, NO, PL, SE and UK). In some Member States (CZ, EL, ES, FI, HR, LU, SK) there are specific provisions for the procurement of false documents to facilitate irregular migration, while in two Member States (DE, EE) the provision or procurement of false documents is considered a criminal offence in terms of facilitating third-country nationals' illegal residence in the country. Facilitation of unauthorised entry or residence can also be conducted through the organisation of marriages of convenience. Several Member States reported that the current definition of facilitation of unauthorised entry, transit and residence is wide enough to allow sanctioning such type of conduct<sup>64</sup>.

Art. 1(2) of the Directive provides for the possibility to exempt facilitation of unauthorised entry and transit from criminalisation, when done for humanitarian assistance. Only seven Member States specifically include in national law an exemption from punishment for facilitation of unauthorised entry and/or transit intended to provide some form of

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<sup>61</sup> See C-48/06 *Commission v Luxembourg* and C-485/06 *Commission v Germany* (withdrawn).

<sup>62</sup> Following the adoption of the Lisbon Treaty, the limitations on the Court of Justice's judicial control on the EU rules on police cooperation and judicial cooperation in criminal matters and the Commission's power to monitor the application of EU legislation in that area, have expired as of 1 December 2014. As a result, the Commission may decide to open formal infringement procedures concerning the transposition and/ or the correct implementation of Framework Decision 2002/946/JHA (a former "third-pillar" instrument).

<sup>63</sup> EMN Ad-Hoc Query No. 2016.1036 on Existing legal framework on false documents.

<sup>64</sup> Information as regards sanctioning of marriages of convenience in connection with migrant smuggling was gathered through an ad hoc consultation of Member States in the context of the FREEMO Expert Group. 15 Member States (BE, BG, CZ, DE, FI, FR, HR, LT, NL, PL, PT, RO, SI, SK, UK) provided input. The majority of them reported that the sanctioning of those organising marriages of convenience can take place under the offence of migrant smuggling, or other related offences, while in three Member States (BE, FR, PT) legislation explicitly criminalises marriages of convenience as a separate offence.

**humanitarian assistance** (BE, EL, ES, FI, IT, MT, UK)<sup>65</sup>. BE and ES have adopted almost *verbatim* the language of the Directive on the inclusion of humanitarian assistance as a reason for non-incrimination, while other Member States used different constructions<sup>66</sup>.

Concerning exemptions from the facilitation of unauthorised residence, punished under Art. 1(1)(b) of the Directive only when done for financial gain, Member States appear to have diverging interpretations. Some Member States go further than what is prescribed in the Directive and do not require any financial or material gain for the offence to be constituted (EL, FR, UK for instance)<sup>67</sup>. Others explicitly mention that the gain should be "unfair" (e.g. IT) or "unlawful" (e.g. CZ). On the other hand, several Member States provide diverse and scattered exemptions when the facilitation of irregular residence is carried out for humanitarian purposes (e.g. FR), to a family member (e.g. AT, FR), or as a professional duty (e.g. DE)<sup>68</sup>. One of the most contentious issues concerns the renting of an accommodation. According to research by the European Union Agency for Fundamental rights (FRA)<sup>69</sup>, five Member States have specific legislative provisions, explicitly punishing landlords for renting accommodation to migrants in an irregular situation (CY, DK, EE, EL and LT), whereas at least two Member States explicitly exclude sanctions for those who accommodate a close relative (e.g. FR) or who do not take any "unfair advantage" out of the transaction (IT)<sup>70</sup>.

In general terms, most Member States sanction instigation, complicity and attempt under the same limits of sanction as for the perpetrators, but having due regard to the nature and gravity of the offence committed. However, compliance issues have been identified in BE, DE, FI, HR and RO regarding attempt.

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<sup>65</sup> The same clause is contained in IE (which is however not bound by the Package) where the act is not incriminated if it regards any action which is done to assist an asylum seeker by a person or during the course of their employment by a bona fide organisation whose purpose is to assist asylum seekers. To be noted, AT provides for a specific exemption in cases where the offence of facilitation of unauthorised entry or transit is committed with regards to a spouse, registered partner, children or parents.

<sup>66</sup> EL does not incriminate the assistance provided in view of rescuing a person at sea or of transporting a person under the need of international protection pursuant to the international law by captains and masters of ships and aircrafts as well as by drivers of any means of transport. IT adopted an explicit provision that recalls Art. 54 of the Penal Code, containing a general clause of non-criminalisation when the action is aimed at avoiding serious damage to the subject or the object of the action, as well as if conducted for the rescue and/or humanitarian help to foreigners, however present on the Italian territory. FI's relevant provision states that an act which, when taking into account in particular the humanitarian motives of the person committing it or his/her motives relating to close family relations, and the circumstances pertaining to the safety of the foreigner in his/ her home country or country of permanent residence is to be deemed committed under vindicating circumstances and thus does not constitute arrangement of illegal immigration. MT provides the possibility not to institute proceedings on any person who aids or assists any other person in immediate situation of danger to land or attempt to land or transit through Malta, when such acts have been committed with a view to providing humanitarian assistance. UK's relevant provision provides for an exemption from punishment when the person is acting on behalf of an organisation which aims to assist asylum-seekers and does not charge for its services.

<sup>67</sup> EP study on "Fit for purpose? The facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants", *cit.*, p. 30.

<sup>68</sup> *Idem*, p. 31.

<sup>69</sup> FRA Paper on "Criminalization of migrants in an irregular situation and persons engaging with them" (2014), [http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants_en.pdf).

<sup>70</sup> EP study on "Fit for purpose? The facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants", *cit.*, p. 31. In some other Member States, such as BE or IE, this exclusion can derive from general provisions concerning humanitarian assistance related to the residence of irregular migrants. FRA paper, *cit.*, p. 13.

All Member States impose **criminal sanctions** for facilitation of illegal entry and transit as a basic offence, while three of them provide for both criminal and administrative sanctions (AT, ES, and LT)<sup>71</sup>. Overall, the maximum limit of the custodial sentence can be of 14 years (UK), while the fine can go up to EUR 360 000 (SI). The administrative sanctions consist of fines of up to EUR 100 000 (ES) and imprisonment of up to 60 days (HR)<sup>72</sup>. As regards facilitation of irregular residence, most Member States impose only criminal sanctions, whose maximums are similar to the ones applied to facilitation of unauthorised entry and transit. Only ES and LT provide for administrative sanctions, which consist of fines ranging from a minimum of EUR 72 (LT) to a maximum of EUR 100 000 (ES).

With the exception of LV and PT, all Member States have introduced at least one of the **additional sanctions** set out in Art. 1(2) of the Framework Decision. The most common is confiscation of the means of transport used to commit the offence (only LV and PT have not introduced it), while the prohibition on practicing directly or through an intermediary the occupational activity in the exercise of which the offence was committed and deportation were adopted by almost half of the Member States. Besides, most Member States introduced in their national legislation the **aggravating circumstances** as laid down in the Framework Decision. PL and UK have not explicitly done so but the maximum custodial sentence is already not less than 8 years for the basic offence<sup>73</sup>. On the contrary, compliance issues in this regard might arise for LU<sup>74</sup>. The range of penalties adopted by Member States varies significantly, most of them also imposing stricter penalties than the ones prescribed by the instrument in aggravating circumstances, with custodial sentences of a maximum of 25 years (HU) accompanied by a fine up to EUR 750 000 (FR). The majority of Member States provides that the sanction applies regardless of the existence of a financial gain for the perpetrator when the acts are committed within a criminal organisation. No Member State criminalises irregular migrants who seek the services of facilitators or are the subject of migrant smuggling<sup>75</sup>.

Most Member States introduced administrative or criminal penalties which are explicitly applicable to **legal persons** into their respective laws. However, transposition could be considered problematic in 8 Member States<sup>76</sup> as, on top of the horizontal challenges linked to liability of legal persons across the EU, facilitation of unauthorised entry or residence does not always trigger such liability according to their national legislation. In general, the sanctions have a pecuniary nature and their level varies greatly depending on the gravity of

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<sup>71</sup> This is also the case in IE. Further information on sanctions and penalties levels for natural persons are contained in the table in Annex V.

<sup>72</sup> In IE, imprisonment for administrative sanctions goes up to 12 months.

<sup>73</sup> In addition in PL, the general part of the Penal Code, which applies to all offences, refer to cases where the perpetrator made the commission of offences his permanent source of income. In such case, the court may impose a penalty up to the highest statutory penalty of deprivation of liberty further increased by a half. This can result in ordering the punishment of imprisonment of 12 years of imprisonment (see for example Art. 64-65).

<sup>75</sup> According to Art. 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention against Transnational Organised Crime, "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in Art. 6 of this Protocol."

<sup>76</sup> AT, BG, EL, FI, IT, LU, LT and PL.

the crime committed and the Member State concerned. A vast majority of Member States have included the exclusion from entitlement to public benefits or aid and the placing under judicial supervision as other sanctions than fines as provided in Art. 3(1) of the Framework Decision. Approximately half of them have included a judicial winding-up order as a sanction, and a majority also included the temporary or permanent disqualification from the practice of commercial activities<sup>77</sup>.

All Member States have correctly transposed the obligation on **jurisdiction**, despite possible problems of conformity in two of them, when the offence is committed by one of their own nationals<sup>78</sup>. In general, all Member States retain their jurisdiction for offences committed in whole or in part in their territory and for the crimes committed by one of their nationals. Almost half of the Member States chose to apply limitations of jurisdiction when the crime is committed for the benefit of a legal person established in the country. 8 Member States (BE, EE, ES, FI, FR, HR, IT and RO) chose to apply some limitations to the jurisdiction rule set out by Art. 4(1) (b) and (c) provided by Art. 4(2).

It should be highlighted that, whereas Art. 1(1) of the Directive establishes the offence of facilitation when the conduct concerns entry into, transit across or residence in the territory of “a” Member State, Art. 4(1)(a) of the Framework Decision refers specifically to each Member State's territory. The transposition on this point varies across Member States: most of them chose to sanction only offences which refer to entry, transit or residence in their territory, while others incriminate the offence more broadly<sup>79</sup>.

Despite the relevance of migrant smuggling by sea as one of the main forms in which smuggling towards the EU occurs, neither Art. 4 nor any recital of the Framework Decision provide specific mention to issues linked to the establishment of prescriptive and enforcement jurisdiction on the high seas, for examples in cases of vessels suspected of involvement in migrant smuggling towards an EU Member State. The issue is at present regulated by international law<sup>80</sup>. Noteworthy, recent developments in Italian jurisprudence confirmed by the Supreme Court since 2014 have allowed establishing and enforcing jurisdiction for migrant smuggling and related offences involving flagless vessels, when committed on the high seas<sup>81</sup>.

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<sup>77</sup> See also Annex V.

<sup>78</sup> AT, IT

<sup>79</sup> Some Member States incriminate the offence across the territory of any Member States (e.g. AT, BE, CY, ES, HU-but only for facilitation of unauthorised residence, IT- but only for facilitation of unauthorised entry and transit, UK) or of any country which is part of the Schengen Area (e.g. FR, LU), of the EEA (e.g. HU –but only for facilitation of unauthorised residence, SE) or of the UN Protocol (e.g. FR, LU, NL).

<sup>80</sup> For common Frontex operations, Art. 7 of Regulation 656/2014 ("establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union") contains rules on interception on the high seas, where there are reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea. For an analysis of the main issues linked to the principles of jurisdiction in international law in the case of migrant smuggling, see "The international law of migrant smuggling", A.T. Gallagher and F. David, 2014, Chapter 3.2.

<sup>81</sup> See also Third Session of the Working Group on the Smuggling of Migrants, Conference of the Parties to the UN Palermo Convention, Vienna, 28-20 November 2015. As recalled in par. 4.2 of the orientation note, a recommendation has been issued saying that "States should consider establishing jurisdiction in migrant

Art. 5 of the Framework Decision on extradition and prosecution has been superseded by the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.

Although evidence and opinion gathered during the evaluation suggests that Member States have increased **cooperation and exchange of information** on migrant smuggling cases since the establishment of the Facilitators Package, it is not possible to link this increase directly to the implementation of the Facilitators Package, and in particular Art. 7 of the Framework Decision on communication of information between Member States. Key communication agents and tools available to Member States to exchange information on migrant smuggling are: Europol's National Units and Secure Information Exchange Network Application (SIENA); Eurojust; the European Border Surveillance System; Interpol; Immigration Liaison Officers (ILOs); the Supplementary Information Request at the National Entries (SIRENE); and, the Schengen Information System (SIS). Also, most Member States regularly participate in joint operations aimed at detecting migrant smuggling in the context of border management operations. Some participate in joint operations supported by Europol under the European Multidisciplinary Platform against criminal threats (EMPACT) while others have reported to take part in joint bilateral/trilateral investigations with bodies of (usually immediate) neighbouring states.

## 6 ANSWERS TO THE EVALUATION QUESTIONS

### 6.1 Effectiveness

The Facilitators Package is one piece in a wider array of measures to tackle migrant smuggling. As such, it can be expected to have a partial impact on the reduction of irregular migration and the dismantling of criminal smuggling networks. Besides, when assessing its effectiveness, one should bear in mind that the definition of criminal offences and sanctions is limited to "minimum rules" under Article 83 TFEU, thus ruling out full harmonization and providing significant room of manoeuvre to national authorities<sup>82</sup>.

Reliable, complete, updated and comparable **statistics in terms of investigations, prosecutions and convictions** related to migrant smuggling are lacking. However, available annual figures show that irregular crossings at EU external borders reported in 2015 were six times as high as in 2014<sup>83</sup>, while detections of suspected facilitators increased from 10 234 in 2014 to 12 023 in 2015. The latter rise reflects mostly increases reported in Spain, France and Italy<sup>84</sup>. From such figures it could be deduced that the Facilitators Package has not significantly contributed to reducing irregular migration, particularly in the context of

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smuggling on the high seas involving unflagged vessels, including incidents in which the transportation of the migrants to shore by rescuers is the result of the deliberate conduct of the smugglers aimed at provoking the rescue of smuggled migrants".

<sup>82</sup> Communication from the Commission, Towards an EU Criminal Policy: Ensuring the effective implementation, COM(2011) 573 final, [http://ec.europa.eu/justice/criminal/files/act\\_en.pdf](http://ec.europa.eu/justice/criminal/files/act_en.pdf).

<sup>83</sup> Frontex Annual Risk Analysis, 2016, p. 16.

<sup>84</sup> Frontex Annual Risk Analysis, 2016 p.30.

increasing migratory inflows. However, in the absence of full data and an incomplete baseline, these conclusions remain partial.

The data that could be collected on numbers of prosecutions of facilitators and related offences for 26 Member States and Norway for the period 2009-2016 (up to August) provide only an indicative overview<sup>85</sup>. Definitions in criminal law may differ substantially according to the Member State and data collections, therefore figures are not directly comparable. Furthermore, even when available, such data may not be exhaustive. Also, it does not make the distinction between "low-ranking facilitators", typically those at the end of the criminal chain, sometimes even migrants themselves having taken a more active role for instance in steering the boats in cases of smuggling by sea, and the heads of the criminal rings, who may remain mostly unpunished. It should also be considered that a rise in prosecutions and convictions does not automatically reflect a better tackling of the phenomenon but may also simply mirror its increasing occurrence.

Against this background and limited baseline, it is not possible to assess with accuracy whether prosecution and conviction rates have increased across the EU and to what extent the Facilitators Package may have contributed to it. Moreover, even in the event where statistical data would be complete and comparable, several other factors beyond the legal framework would still be likely to influence any assessment of the effectiveness of the legislation in this regard. These can be for example the degree of political priority afforded to the crime and the consequent level of resources allocated for the investigations, the difficulty to trace the illicit payments and criminal proceeds, and the likelihood of a higher deterrent effect when the activities are not driven by criminal motives or financial gain<sup>86</sup>.

In view of such weaknesses, the assessment is mostly based on the opinion gathered for the evaluation. According to most stakeholders across different categories, such as Member States, experts or other respondents to the public consultation, the Facilitators Package has had **little deterrent effect**. The deterrent effect of the approximation of the definition of the crime and related sanctions was questioned by several Member States and stakeholders<sup>87</sup>. In their view, neither the definitions and sanctions nor their approximation (or the variations in the severity of sanctions) have an impact on the magnitude of the flows of (facilitated) irregular migrants to the EU, nor on the smuggling routes and methods. This is also because the potential gains from migrant smuggling have been reportedly very high compared to the risk of detection, conviction and sanctions.

As regards the definition of the offence, nearly all Member States which replied to the dedicated consultation<sup>88</sup> agreed on the effectiveness of the Facilitators Package in **approximating the definition of the offence**, which is considered sufficiently broad and clear to allow prosecution of different forms of migrant smuggling. Some other experts and practitioners held less positive views about the actual effectiveness of the Package in promoting a harmonised definition and pointed to the variations in the transposition as a

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<sup>85</sup> See Annex IV for further details

<sup>86</sup> UNODC (2011), International Framework for Action To Implement the Smuggling of Migrants Protocol

<sup>87</sup> AT, ES, FR, IT, LT, MT, SE as well as consulted experts. Source: ICF study, *cit.*

<sup>88</sup> ICF study, *cit.*

potential hindrance to cooperation<sup>89</sup>. Overall, when asked about the need to provide a more specific definition, for example by explicitly criminalising conducts such as the organisation of marriages of convenience or the fabrication of false documents, experts and national authorities were generally negative, considering that the current definition already allows the inclusion of these types of offences. Among the respondents to the public consultation, only 15.89 % identified a too narrow definition of the offence as one of the issues affecting the proper functioning of the Package.

An important aspect linked to the definition of the offence provided by the Facilitators Package concerns the protection of **humanitarian assistance** to smuggled migrants. For a minority of Member States, the Package has not been effective in creating **clarity and legal certainty** over the distinction between criminal facilitation and humanitarian assistance, given the lack of the financial gain element as regards facilitation of unauthorised entry and transit. The absence of a provision explicitly exempting humanitarian assistance from criminalisation was mentioned for instance by HR, IT and MT, and the absence of a common definition of the humanitarian grounds was mentioned by CY, EE, ES and NL as contributing to a lack of effectiveness in this regard<sup>90</sup>. However, overall the majority of Member States consulted through different frameworks did not express favourable views or did not share an opinion on the need for revising the current definition of the crime in EU law<sup>91</sup>.

The lack of a mandatory humanitarian exemption has been the subject of ongoing criticism from scholars<sup>92</sup>, European<sup>93</sup> and international<sup>94</sup> institutions and NGO coalitions such as the European Social Platform<sup>95</sup>. The conclusions of the first meeting of the European Migration Forum<sup>96</sup> held in January 2015, pointed inter alia to the need to revise the Facilitation Directive to exempt humanitarian assistance from criminalisation. They stressed the need to "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" and considered that the review "should also make clear that renting accommodation to migrants in an irregular situation without the intention to prevent the migrant's removal

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<sup>89</sup> These stakeholders views are reported in the framework of the ICF study, *cit.*.

<sup>90</sup> ICF study, *cit.*

<sup>91</sup> E.g. Meetings of the Contact Group on facilitation of irregular migration, organised by the Commission in December 2015 and February 2016.

<sup>92</sup> E.g. Peers, S. (2016), *EU Immigration and asylum law* (Vol. I, fourth ed.), Oxford University Press, 477-478; editors Carrera, S. and Guild, E. (2015), *Irregular Migration, trafficking and smuggling of human beings. Policy Dilemmas in the EU*, CEPS paperback; Allsopp, J. C. (2012). *Contesting Fraternité: Vulnerable Migrants and the Politics of Protection in Contemporary France*. Refugee Studies Centre, Oxford Department of International Development, University of Oxford; Fekete, L. (2009). *Europe: crimes of solidarity*. *Race & Class*, 50(4), 83-97; Webber, F. (2008). *Border wars and asylum crimes*. London: Institute of Race Relations.

<sup>93</sup> In its 2010 report on the *Criminalisation of Migration in Europe: Human Rights Implications*, the Council of Europe Commissioner for Human Rights raises the criminalisation of persons engaging with foreign nationals with irregular immigration status as a key concern. See: <https://wcd.coe.int/ViewDoc.jsp?id=1579605>.

<sup>94</sup> United Nations Office on Drugs and Crime (UNODC); International Labour Organization (ILO).

<sup>95</sup> The Social Platform, the largest platform of European rights and value-based NGOs working in the social sector, has called for the Facilitation Directive to be revised as follows: 'member states shall not sanction those who provide humanitarian assistance to persons without EU citizenship'. See at <http://www.socialplatform.org/what-we-do/over-arching-campaigns/migration/decriminalising-solidarity/>.

<sup>96</sup> The European Migration Forum is a civil society dialogue platform on migration, asylum and migrant integration whose participants includes several NGOs. For further information see <http://www.eesc.europa.eu/?i=portal.en.events-and-activities-european-migration-forum-1>.

should not be considered facilitation of unauthorised residence, while ensuring that the legal system punishes those persons who rent accommodation under exploitative conditions".

Analogous conclusions were reached by the participants to the FRA annual conference on "Fundamental rights and migration to the EU" held in November 2014, according to which "renting accommodation cannot be legally interpreted as an act carried out with the intention of facilitating stay; however, the legal system should ensure that those people who rent accommodation under exploitative conditions are punished"<sup>97</sup>. The conclusions of the FRA conference also considered that "in line with the UN Smuggling of Migrants Protocol, legislation to fight smuggling at EU and Member State levels should always include financial and material benefit as a requirement for punishment, or explicitly exclude punishment for humanitarian assistance for entry and stay".

The great majority of the individuals, academics, associations and NGOs who responded to the public consultation have also considered that EU law should impose a mandatory humanitarian exemption. Among the arguments most frequently raised were those stressing that sanctioning facilitation of unauthorised border crossing for humanitarian reasons would be contrary to general moral principles and EU core values, including responsibility to uphold human rights; that the optional character of the current legal framework affects legal certainty and leaves too much space to the appreciation of the national authorities; that the current framework could have the unintended consequence of deterring service providers from providing assistance to migrants for fear of possible criminalisation; or that assistance to migrants on behalf of NGOs and private citizens is ultimately driven by Member States own lack of action to address the refugee crisis. Importantly, while the concept of humanitarian assistance was not clearly defined by respondents, the majority seemed to refer in their answers to "life-saving" type of activities, carried out to "prevent death" or to help people in "desperate need". To the question whether the Package adequately protects the rights of smuggled migrants, around 54% replied negatively, with around 40% having no answer and 6% replying positively. The main arguments among the minority, which did not favour a mandatory exemption on humanitarian grounds was the risk that migrant smugglers would take advantage of such provisions for criminal purposes or the need to keep a broad definition, leaving margin of appreciation to the national jurisdictions.

The study on the Directive commissioned by the LIBE Committee of the European Parliament (EP) recommends making it mandatory for EU Member States to exempt humanitarian assistance from criminalisation in cases of entry, transit and residence<sup>98</sup>. Besides, the EP report on the situation in the Mediterranean and the need for a holistic EU approach to migration adopted on 23 March 2016 "takes the view that anyone, who provides different forms of humanitarian assistance to those in need, should not be criminalised and that Union law should reflect that principle"<sup>99</sup>.

However, as of today there appears to be rather limited evidence that social workers, family members or citizens acting out of compassion have been prosecuted and convicted for

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<sup>97</sup> See at [http://fra.europa.eu/sites/default/files/frc-2014-conclusions\\_en\\_0.pdf](http://fra.europa.eu/sites/default/files/frc-2014-conclusions_en_0.pdf).

<sup>98</sup> EP study on "Fit for purpose? The facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants", *cit.*, p. 64.

<sup>99</sup> (2015/2095(INI)), para. 88.

facilitation of unauthorised entry, transit or residence<sup>100</sup>. According to the study commissioned by the EP, although the fear of sanction remains a great concern in some Member States, it has also decreased in others<sup>101</sup>, including where no exemption on the grounds of humanitarian assistance is provided in the law (e.g. France<sup>102</sup>). Besides, the findings show that only one-fifth of the interviewees actually fear sanctions for their humanitarian assistance-related work with irregular migrants in situation of transit or staying on the national territory, and that only some, among those who actually reported fearing such sanctions, would associate the fear with a possible deterrent effect on providing assistance<sup>103</sup>. These findings seem supported also by recent evidence from a Horizon 2020 study, showing that the number of civil society initiatives devoted to refugees and migrants has increased significantly, particularly from 2010 onwards. This development is especially strong in countries most affected by migration inflows such as Greece and Germany, which have seen clear peaks in 2013 and 2015 respectively<sup>104</sup>.

Although perceived risks of being criminalised for providing humanitarian assistance must be taken into serious consideration, they do not appear to be so prominently linked to the legal framework in place as to its understanding and actual application. The lack of clarity might also stem from the fact that assistance provided in different situations is subject to different legal frameworks. In this respect, it must be stressed that domestic general criminal law provisions usually exempt from sanctions acts committed in a state of necessity to avert a danger, and that the duty of assistance at sea to anybody in distress is an obligation under international law<sup>105</sup>. Nobody rescuing a person at sea can be criminalised for such behaviour, neither under European nor national legislation. In this respect, no significant evidence has been found concerning the deterrent effects of risks or fears of criminalisation perceived by ship-owners. Such fear has been nonetheless reported by the FRA, according to which "such risk for fishermen was also reported by the press following the tragedies off the Italian island of Lampedusa in October 2013"<sup>106</sup>. Despite requests for increased support and expression of

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<sup>100</sup> Problems faced by some individuals or organisations were mentioned by some respondents in the framework of the public consultation and/or have been reported by some NGOs. Other information has been reported in the FRA monthly data collections on the current migration situation in the EU, or in the press. See for instance in France, two recent Court cases: [http://lemonde.fr/police-justice/article/2017/01/06/un-enseignant-chercheur-relaxe-apres-avoir-aide-des-migrants\\_5058581\\_1653578.html](http://lemonde.fr/police-justice/article/2017/01/06/un-enseignant-chercheur-relaxe-apres-avoir-aide-des-migrants_5058581_1653578.html) and <http://www.lefigaro.fr/flash-actu/2016/12/02/97001-20161202FILWWW00130-une-amende-pour-avoir-aide-deux-erythreens.php>. See also references in IOM report on 'Migrant smuggling data and research: a global review', 2016, p. 121, <https://www.iom.int/news/migrant-smuggling-iom-publishes-first-global-report-evidence-base>

<sup>101</sup> EP study on "Fit for purpose? The facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants", *cit.*, pp. 11 and 46.

<sup>102</sup> France provides for a humanitarian assistance exemption under the offence of facilitation of unauthorised residence only.

<sup>103</sup> A total of 69 civil society organisations responded, fully or partially, to the questionnaire administered within the framework of this study. As reported in the methodology section, results are unevenly distributed among the 17 represented Member States. For further details, see EP study on "Fit for purpose? The facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants", *cit.*, p. 47. and pp. 16-17.

<sup>104</sup> TransSOL (Transnational Solidarity in Times of Crisis), Horizon 2020 Grant Agreement No 649435, [www.transsol.eu](http://www.transsol.eu): Provisional Report on Reflective Forms of Transnational Solidarity - Deliverable 2.1, Figure 1.6, p. 36.

<sup>105</sup> United Nations Convention on the Law of the Sea, Art.98; International Convention for the Safety of Life at Sea (SOLAS).

<sup>106</sup> FRA paper, *cit.*, p. 2.

the difficulties faced in the context of the current migratory and refugee crisis, the commercial sector is in fact actively engaging with respect to rescue at sea<sup>107</sup>.

Besides, confusion among civil society was reported as regards humanitarian assistance to irregular migrants staying on the EU territory, although the Facilitators Package criminalises facilitation of unauthorised residence only when committed for financial gain. This might be partly linked to the fact that, as highlighted in Part 6, the appreciation of the financial gain element can vary widely across and within Member States, being left mostly to the discretion of the judicial authority or even ignored in the national law. A recent document of the Council of Europe has also highlighted that “as recent judicial decisions have shown, the specific boundaries of this requirement and the extent to which it requires profits beyond actual expenses remain uncertain and speculative”<sup>108</sup>.

Based on the available quantitative and qualitative data collected through various sources, it is not possible to draw an accurate and conclusive picture on the effects of the crime definition in the Facilitators Package in general and of the humanitarian assistance exemption in particular.

The **level of sanctions** defined in the Facilitators Package (custodial sentences with a maximum sentence of not less than 8 years in aggravating circumstances) is generally considered to be adequate by Member States<sup>109</sup>, although it varies significantly across Member States and is often stricter<sup>110</sup>. According to the UNODC, the sanctions as stipulated by the Directive correspond to penalties for serious offences and would therefore seem appropriate. In the wake of the migratory and refugee crisis of the past two years, a small minority of Member States have reformed their legislation to increase the level of sanctions<sup>111</sup>. Others have regarded the current level of sanctions imposed at national level excessive in certain cases, when imposed to low level facilitators<sup>112</sup>. This concerns for instance the migrants who are steering the vessels trying to reach the European shores. Several courts imposed strict penalties and/or did not apply any attenuating circumstance on the ground that the person itself was a migrant, considering that this status did not relieve him from his criminal responsibility and that the dangerous circumstances of the trip excluded the possibility of attenuating circumstances<sup>113</sup>. Among the respondents to the public consultation, only 7.38% considered that the Facilitators Package is hindered by a too low level of penalties, while the inconsistent application of penalties across Member States was described as problematic by 18.58% of the respondents. When asked whether a wider array of additional sanctions should be added to the Package, the majority of the 2 425 respondents to the public consultation had no answers (43.4%), while 40% replied positively and 16.6 % negatively.

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<sup>107</sup> See for instance updated guidelines on large scale rescue operations at sea published by the International Chamber of Shipping (ICS), July 2015. <http://www.ics-shipping.org/docs/default-source/refugee-migrant-rescue/large-scale-rescue-operations-at-sea33E6D8E4E3B2.pdf?sfvrsn=0>.

<sup>108</sup> Working document on “Preventing and suppressing the smuggling of migrants in Council of Europe Member States- a way forward”, European Committee on Crime Problems (CDPC), Council of Europe, April 2016.

<sup>109</sup> Contact Group on facilitation of irregular migration, organised by the Commission in February 2016 and ICF study, *cit.*

<sup>110</sup> See Annex V

<sup>111</sup> These include HU in 2015 and NL in 2016.

<sup>112</sup> ICF study, *cit.*

<sup>113</sup> See for instance Spanish Supreme Court STS 673/2014 of 15 October 2014 and STS 1268/2009 of 7 December 2009.

Having committed the crime for financial benefit is treated in the majority of Member States as an aggravating circumstance, which therefore leads to higher penalties. Several Member States believe that it would be beneficial to include other aggravating circumstances, in particular where vulnerable migrants are involved. Only 26.43% of the respondents to the public consultation considered that additional aggravating circumstances should be added, with 24.26% responding negatively and the majority (49.31%) having no answer.

In the context of the evaluation of the effectiveness of the legislative framework, some stakeholders pointed out to the negative effect that **criminalisation of irregular migration per se** can have in fighting against migrant smuggling, for example as regards hindrance in non-EU nationals' cooperation (or lack thereof) with the law enforcement and judicial authorities against suspected smugglers<sup>114</sup>.

Finally, cross-border **cooperation and communication of information** between national authorities was also mentioned by the consulted stakeholders, who provided an overall neutral assessment of the effectiveness of the current EU legislation in fostering such cooperation. The Facilitators Package does not contain detailed provisions on the exchange of information and only sets out the obligation upon national authorities, which become aware of a case of irregular entry or transit through another Member State, to inform the latter accordingly<sup>115</sup>.

Three Member States (BG, FR, MT) commented that the Facilitators Package had no impact on cooperation per se, and one (FR) observed that the nature of the provisions does not per se encourage cooperation. Two Member States (EE, ES) indicated that, while the Facilitators Package did not directly provide for new channels of communication, it generated an increased common understanding on the needs and responsibilities of Member States<sup>116</sup>. When asked about the main issues affecting the proper functioning of the EU legal framework, 39.05% of the respondents to the online public consultation pointed out insufficient cooperation between Member States authorities, while 26.52% indicated insufficient cooperation between Member States and third countries and 19.53% insufficient cooperation with/among EU agencies.

No specific obstacles or legal gaps as regards extradition in cases of migrant smuggling were identified. As regards **jurisdiction**, no information on cases of conflicts was collected and the evaluation of the existing provisions of the Package did not raise specific issues. However, the consultation of stakeholders such as criminal law experts and some national authorities unveiled a potential area for improvement concerning the establishment of jurisdiction, consistent with applicable international law, over incidents of migrant smuggling on the high seas onboard flagless vessels<sup>117</sup>. Only around 12% of the respondents to the public

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<sup>114</sup> ICF study, *cit.*

<sup>115</sup> Framework Decision, Art. 7(1).

<sup>116</sup> ICF study, *cit.*

<sup>117</sup> See *infra*. A presentation of the experience of current Italian approach as regards enforcement of jurisdiction on the high seas was also made during the international conference organised by the EMN and the Dutch Ministry of Security and Justice under the Dutch Presidency of the EU on "Promoting a multidisciplinary approach in addressing migrant smuggling" in January 2016 and in a meeting of experts Contact Group on facilitation of irregular migration, organised by the Commission in February 2016. More details about these events are contained in Annex II on stakeholder consultation.

consultation singled out issues linked to extradition and/or jurisdiction as affecting the functioning of the Package.

In conclusion, available data and stakeholders views in relation to the effectiveness of the Facilitators Package in reaching its objectives are mixed, and vary according to the type of provisions and objectives analysed. In particular, the evaluation findings highlighted that, in the context of a European criminal law instrument, which is meant to set minimum standards of approximation, the effectiveness of the Package in approximating the penal framework on this crime has mostly been favourably or neutrally regarded, while some elements in the definition of the offence and in particular legal certainty over the distinction between criminal facilitation and humanitarian assistance have been criticised. The deterrent effect and actual impact of the Package on the reduction of irregular migratory flows have also been seen negatively, while acknowledging the difficulty to evaluate these aspects in the current context. However, as for other evaluation criteria<sup>118</sup>, limited availability of reliable and comparable data hinders the capacity to draw a clear-cut, conclusive picture on each of them.

## 6.2 Efficiency

The efficiency of the Facilitators Package is mainly determined by the link between the costs of transposing and implementing the legislative framework and the results in terms of investigations, prosecutions and convictions.

The costs at EU level are low since the Facilitators Package does not set up any particular structure or programme bearing on the Union budget. As for the national level, as this is the case for most criminal law instruments, it has not been possible to single out and determine the costs incurred for transposing and implementing the Facilitators Package nor a solid quantification of the connected administrative burden. In theory, one can assume that from a financial perspective the transposition of the Package mainly consisted of administrative costs and that efficiency is ensured. In any event, as explained above, no conclusion could be drawn with respect to the effectiveness of the Facilitators Package in terms of prosecutions and convictions rates. Therefore, the lack of accurate statistics or even estimates of the transposition and implementation costs and/or of the prosecution and conviction rates does not allow for a proper assessment of the Package's efficiency.

This being said, against the backdrop of estimated low costs of transposition of the Package, its potential benefit in contributing, even only partially, to cracking down on facilitation of irregular immigration could be high, given the estimated high and widespread costs of this crime and, more broadly, of the irregular migration to which it is inextricably tangled. Given its clandestine nature, data on migrant smuggling are only indicative of the scale of the phenomenon. However, apprehensions of irregular migrants, the number of refusals at the border and number of detections of unauthorised stay can be regarded as proxy indicators of

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<sup>118</sup> As regards limitations and availability of comparable and reliable statistics and ensuing consequences on the robustness of findings, see Annex III on "Methods and Sources", as well as Annex II on "Stakeholder consultation".

the number of irregular migrants whose border-crossing, transit or residence may have been facilitated.

While updated and accurate estimates of the numbers of irregular migrants within the EU are not available, less recent estimates ranged from 1.9 to 3.8 million<sup>119</sup>. The scale of irregular migration has certainly grown in recent years. The flow of migrants across borders is thought to be increasingly controlled by criminal networks<sup>120</sup>. It is likely that the surge in the number of asylum seekers in the EU during 2014 and 2015 has increased the overall flows of third-country nationals using migrant smugglers<sup>121</sup>.

There are several aspects of the costs of migrant smuggling to the EU:

- The detriment to smuggled migrants: each migrant that is the subject of migrant smuggling experiences ‘detriment’ through ‘overpaying’ for illicit services;
- The costs of additional border control measures;
- The cost of processing and returning smuggled migrants;
- The costs of law enforcement, processing and detaining migrant smugglers;
- Costs of rescue missions of smuggled migrants;
- The additional costs to business particularly transport companies due to additional irregular migration due to migrant smuggling<sup>122</sup>;

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<sup>119</sup> Clandestino Project (2009) [http://www.gla.ac.uk/media/media\\_147171\\_en.pdf](http://www.gla.ac.uk/media/media_147171_en.pdf) This is an FP6 project funded by the EU.

<sup>120</sup> <http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/People-smuggling>.

<sup>121</sup> Europol report on "Migrant smuggling in the EU", *cit.*

<sup>122</sup> Partial and/or anecdotal information collected through the ICF study to illustrate some of the costs reported in various forms and for a by the private sector. At the Inter-manager and European Community Shipowners Association (ECSA) Seminar on migrants at sea in Brussels on 2 March 2015, ICS reported that operations of search and rescue at sea can cost to shipowners several millions of euros (approx. USD 400,000 per ship per year). According to the Wall Street Journal, the rescue operations of around 600 migrants ordered by Italian authorities in September 2014 to oil tankers owned by Mediterranea di Navigazione SpA cost the group EUR 100,000 (USD 109,473) in extra costs, such as fuel and personnel (<http://www.wsj.com/articles/boat-people-trying-to-reach-europe-disrupt-mediterranean-mercantile-shipping-1427399702>). According to Maersk Line, the diverted ships lose as much as a week disembarking the migrants, cleaning the vessel and resupplying, at an extra cost of up to USD 500,000 (<http://www.maersk.com/en/people/2015/05/over-3500-and-counting>). Insurance covers only part of the extra costs, and appeals from owners for government compensation have had little impact.

As regards land transport, in particular in the area around Calais and the Eurotunnel between FR and the UK. The Freight Transport Association (FTA) estimates a loss of GBP 750,000 per day as a result of delays and spoiled loads, with GBP 2 million of fresh produce having to be dumped each week. It costs one GBP a minute to run an HGV (heavy goods vehicle): a 100-mile detour to avoid Calais would thus cost an additional GBP 52 in fuel, and every hour's delay adds GBP 60 in costs. Finally, drivers have been fined GBP 6.6 million in the past year when migrants have stowed aboard (<http://www.theguardian.com/uk-news/2015/jul/30/calais-crisis-cost-uk-250m-a-day-trade>) Eurotunnel revealed it has spent nearly EUR 13 million on security measures in the first half of 2015 alone (<http://www.eurotunnelgroup.com/uploadedFiles/assets-uk/Media/Press-Releases/2015-Press-Release/150729-death-Migrant.pdf>) and it has now claimed EUR 9.7 million from the UK and FR Governments in compensation for disruption of its activities to foil nearly 37,000 from entering the tunnel in the first half of 2015. (<http://news.yahoo.com/calais-migrant-situation-very-concerning-065751646.html>) According to the Belgian transport federation FEBETRA, the impact of the crisis in Calais could cost up to EUR 450 000 per day to the sector. (Based on the estimates of EUR 60 per hour = cost of waiting per lorry, a waiting time of up to 25 hours and 300 Belgian lorries crossings registered per year at Calais port. Metro (NL), 4 August 2015.).

- Wider social costs (though these cannot reasonably be monetised). These include deaths and deaths not prevented due to potential rescue being deterred, violence, human rights' abuse and health problems. Credible estimates of costs are not possible.

All above costs are likely to have increased in recent years.

In conclusion, even if it is likely that the existing penal framework contributes to meeting its general objectives, methodologically sound conclusions on the efficiency of the Package *stricto sensu* cannot be drawn from available data.

### 6.3 Relevance

The general objective of the Facilitators Package is to reduce irregular migration by countering the facilitation thereof to the EU<sup>123</sup>. Its specific objectives are to set the definition of the offence and approximate the sanctions of criminal facilitation of irregular entry, transit and residence, to clarify the liability of legal persons and jurisdiction, and to improve cooperation and communication between Member States. As with any legislation that criminalises unwanted behaviour, the deterrent rationale of **criminalisation** is stronger when the potential gains are low compared to the risks of being detected. In the current crisis context, migrant smuggling is a highly profitable criminal activity with relatively low risk<sup>124</sup>. In most cases convictions in EU Member States concern low ranking facilitators and not the organisers or heads of the criminal networks.

The observed low effectiveness of the Package in deterring the crime from taking place does however not entail a diminished relevance of the aim to criminalise such activity per se. On the contrary, in a context of very high occurrence of migrant smuggling and where national authorities have to strengthen their cooperation to tackle this cross-border crime, the relevance of an **EU-wide definition of the crime, and ensuing sanctions and jurisdiction rules**, remains high. Its relevance is increased by implementation in complementarity with other non-legislative measures, which help addressing this multifaceted phenomenon from its many angles.

Also, a clear need for a common understanding of the (de)criminalisation of humanitarian assistance has emerged. The so-called "humanitarian clause" set out in Art. 1(2) of the Directive still corresponds to a need in the EU to differentiate between providing facilitation

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A survey with the European Road Haulers Association (UETR) reported also on similar incidents occurring at the Spanish border with Morocco, while the Dutch Transport Haulers Association (TLN) warned about the attempts of irregular migrants to cross to the UK from Hook of Holland (NL) due to the increased controls at Calais port.

Overall, costs for companies in the transport sector include investment to comply with current legislation, to prevent that their means of transport are being used by smugglers, and on the other hand to deal with the consequences of smuggling, in terms of damages due to, for example, the long waiting times at the borders, being diverted, being fined and costs for cleaning, repair and having to destroy goods.

<sup>123</sup> Acting 'in connection with unauthorised crossing of the border and for the purpose of sustaining networks which exploit human beings' Recitals 1 and 2 of the Directive and of the Framework Decision.

<sup>124</sup> "An estimate of the yearly turnover of migrant smuggling results in an average USD 5 to 6 billion turnover in 2015." See Joint Europol-Interpol Report on "Migrant smuggling networks", May 2016, Executive Summary, p. 4, <https://www.europol.europa.eu/content/europol-and-interpol-issue-comprehensive-review-migrant-smuggling-networks>.

of irregular migration and humanitarian assistance<sup>125</sup>. However, the fact that only seven Member States implemented this optional clause as regards facilitation of irregular entry or transit, moreover in an uneven manner, did not foster clarity and may impact on judicial cooperation. Besides, the relevance of approximation of the penal framework is also compounded by the apparent variation in the desirability of different destinations within the EU, the complexity of migrant flows and the resulting demand for intra-EU movements by irregular migrants and asylum seekers.

Finally, **cooperation** between Member States remains essential for the detection and prosecution of migrant smugglers as defined in the Facilitators Package, in particular considering that today facilitators are organised in loosely connected and multi-national networks<sup>126</sup>. The limited exchange of information through Europol and the lack of coordination between Member States are seen as obstacles in identifying and investigating organised crime groups involved in migrant smuggling<sup>127</sup>. The relevance of achieving better cooperation is evidenced by the many actions undertaken to adequately tackle these challenges through operational work and the implementation of the EU Action Plan against migrant smuggling. Initiatives such as the creation of the European Migrant Smuggling Centre within Europol, acting as an information hub for Member States and EU agencies, fill this purpose<sup>128</sup>.

The underlying rationale of the Facilitators Package is that the availability of facilitation services is one of the factors that increases irregular migration. Thus criminalising the provision of such illegal services should contribute to reducing irregular migration. These objectives remain relevant today.

## 6.4 Coherence

The Directive and the Framework Decision have been adopted simultaneously with the explicit scope of supplementing each other.

As stated in the Directive, its purpose is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of the Framework Decision 2002/946/JHA in order to prevent that offence<sup>129</sup>.

On the basis of the definition of the offence set out by the Directive, the Framework Decision contains provisions that aim to approximate the penalties regime, the liability of and sanctions on legal persons as well as rules on jurisdiction and cooperation.

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<sup>125</sup> EP study on “Fit for purpose? The facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants” *cit.*, p. 46.

<sup>126</sup> Joint Europol-Interpol Report on "Migrant Smuggling Networks", *cit.*

<sup>127</sup> Eurojust members of Prosecutors General and Directors of Public Prosecution Council 855/15.

<sup>128</sup> The European Migrant Smuggling Centre was set up in February 2016. For further info see [https://www.europol.europa.eu/content/EMSC\\_launch](https://www.europol.europa.eu/content/EMSC_launch).

<sup>129</sup> Directive 2002/90, recital 4.

At Union level, the Facilitators Package fits in with the subsequent development of the EU *acquis* in the field of irregular migration, trafficking in human beings and other related instruments. The Employers Sanctions Directive<sup>130</sup> adopted in 2009 provides for sanctions and measures against employers of illegally staying third country nationals. According to this Directive, third parties that provide assistance to migrants in order to lodge complaints against employers cannot be considered facilitators of unlawful residence under Directive 2002/90/EC. Directive 2004/81/EC<sup>131</sup> on the residence permit issued to third-country nationals who are victims of trafficking in human beings allows Member States to choose to apply it also to those who have been subject to migrant smuggling, as defined by Directive 2002/90/EC. Ten Member States applied this option<sup>132</sup>.

The Facilitators Package is complementary to Directive 2011/36/EU on preventing and combating trafficking in human beings<sup>133</sup>. Although migrant smuggling and trafficking in human beings are two different crimes tackled under different sets of instruments, evidence shows that facilitation may develop into trafficking<sup>134</sup>, where migrants who willingly used smugglers' services end up being victims of traffic along their journey to Europe.

Migrants who are smuggled may also be victims of other crimes, committed in the EU or by an EU national. In particular, the Facilitators Package is complementary to Directive 2012/29 on establishing minimum standards on the rights, support and protection of victims of crime (the Victims' Rights Directive)<sup>135</sup>. The Victims' Rights Directive is applicable to all victims without discrimination and independently of the victims' legal status, so it may be applicable also to undocumented migrants. It applies if a crime took place in the EU or if criminal proceedings take place in the EU. The Facilitators Package is also complementary with several more specific instruments on protection measures and financial compensation to victims of crime<sup>136</sup>. Besides, since 1 January 2004 the extradition procedure between Member States has been replaced by the European Arrest Warrant<sup>137</sup>.

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<sup>130</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30.6.2009, p. 24–32.

<sup>131</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261, 06/08/2004 p.19-23.

<sup>132</sup> AT, BE, CZ, EL, EE, LU, MT, PT, RO, SE.

<sup>133</sup> Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>134</sup> Info available at: [https://www.unodc.org/unodc/en/human-trafficking/faqs-migrant-smuggling.html#Overlaps\\_and\\_differences](https://www.unodc.org/unodc/en/human-trafficking/faqs-migrant-smuggling.html#Overlaps_and_differences).

<sup>135</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; OJ L 315, 14.11.2012, p. 57–73.

<sup>136</sup> Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order; OJ L 338, 21.12.2011, p. 2–18; Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters; OJ L 181, 29.6.2013, p. 4–12; Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims; OJ L 261, 6.8.2004, p. 15–18.

<sup>137</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

No specific issues of coherence were identified as regards consistency of the Facilitators Package with EU legislation on organised crime<sup>138</sup>. Countering migrant smuggling is recognised as a priority by the European Agenda on Security<sup>139</sup> and is fully embedded in the EU policy cycle against serious and organised crime, as well as broader EU actions to prevent crime and support practical cooperation in this field. The need to improve links with specific instruments, however, such as enlarging the scope of the Directive on confiscation of crime proceeds through the inclusion of the EU *acquis* on facilitation of irregular migration, could be considered<sup>140</sup>.

The protection of the fundamental rights of migrants and seekers of international protection is a basic principle at the core of any EU legislation. The Facilitators Package does not focus on the migrants but on those who facilitate their irregular entry, transit or residence, and it explicitly recalls that all provisions "shall apply without prejudice to the protection afforded to refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights"<sup>141</sup>.

Both the Directive and the Framework Decision must be interpreted in the light of the provisions of the Charter of Fundamental Rights of the EU, which according to Art. 6 TEU has the same legal value as the Treaties. Member States are equally bound by it when implementing the Facilitators Package. Therefore, the implementation of the migrant smuggling legislation must comply with fundamental rights such as the right to liberty and security, human dignity, right to life, or right to asylum. Member States, which would consider humanitarian assistance actions or rescue at sea operations as facilitation offences whereas the life or the dignity of the person is at stake, would thereby breach Union law.

Finally, since 2015 the Facilitators Package operates in the framework of the EU Action Plan against migrant smuggling, which sets out concrete actions to counter and prevent migrant smuggling while ensuring the protection of the rights of the migrants. Its first pillar is based on an enhanced police and judicial response, to disrupt the business model of criminal groups and bring the perpetrators to justice. To that end it provides for the Commission's review of the Facilitators Package with a view "to ensure that appropriate sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress". There is therefore a strong coherence between the objectives of the Action Plan and Facilitators Package, of which the latter makes part, in complementarity with a number of other non-legislative, more operational actions. The Action Plan responded to a crisis context requiring operational and prompt action to prevent loss of lives at sea, disrupt smuggling activities and better prevent this form of crime, whereas the Facilitators Package does not aim for any immediate operational effect and rather contributes to better preventing and countering the phenomenon in the long term.

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<sup>138</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime.

<sup>139</sup> COM (2015)185.

<sup>140</sup> See art. 3 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

<sup>141</sup> Framework Decision 2002/946/JHA, Art. 6.

As regards the relevant international legal framework, according to Art. 3 of the UN Protocol, migrant smuggling is "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident". Whereas the definition of migrant smuggling *stricto sensu* only refers to facilitation of irregular entry, facilitation of irregular stay is also tackled by the Protocol<sup>142</sup>.

The scope of the Protocol is therefore different from the one of the Facilitators Package insofar as it applies to the prevention, investigation and prosecution of the offences involving an organised crime group and to the protection of the rights of the persons who have been smuggled. The definition of the offence is also different, mainly because the Protocol defines the smuggling of migrants as the facilitation of unauthorised entry or transit for a financial or other material benefit, while the Facilitators Package applies the financial gain element only to the facilitation of unauthorised residence. The offence under EU law is therefore broader. While recalling the State Parties' obligation to afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of migrant smuggling, the UN Protocol does not contain an explicit exemption of humanitarian assistance from criminalisation such as Art. 1(2) of the Directive. In effect, the requirement of a financial or other material benefit as a constituent element of the offence rules out the ambiguity that behaviours aimed at providing humanitarian assistance could be criminalised.

Despite some differences (see Table I), the Protocol and the Facilitators Package remain coherent with each other. Besides, as Parties to the Protocol, both the EU and its Member States are bound to apply it including when passing or implementing legislation within its scope. While inconsistencies with international law have been identified as an issue affecting the application of the Facilitators Package by 24.6% of the stakeholders who replied to the public consultation, the differences between the Facilitators Package and the Protocol did not prove to create difficulties for the EU and its Member States<sup>143</sup>. On the contrary, the Protocol strengthened the EU position on tackling migrant smuggling as a form of organised crime<sup>144</sup>.

**Table I. Main differences between the Facilitators Package and the UN Protocol<sup>145</sup>**

Criteria	EU Facilitators Package	UN Protocol
<b>Definition</b>	Facilitation of irregular migration: Intentionally assisting a third-country national to enter, indirectly, a financial or other	Smuggling is the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

<sup>142</sup> According to Art. 6(1)(c) and (b)(i)(ii), State parties shall establish as a criminal offence, when committed intentionally and in order to obtain a financial or other material benefit, "enabling a person, who is not a national or a permanent resident, to remain in the State concerned without complying with the necessary requirements for legally remaining in the State, by means of producing, procuring providing or possessing a fraudulent travel or identity document, or by any other illegal means".

<sup>143</sup> ICF study, *cit.*

<sup>144</sup> Moreover, the EU supports the UNODC to assist third countries in ratifying and implementing the Protocol. For further info see: [https://www.unodc.org/unodc/en/human-trafficking/glo\\_act.html](https://www.unodc.org/unodc/en/human-trafficking/glo_act.html)

<sup>145</sup> Based on ICF study, *cit.*

<b>Criteria</b>	<b>EU Facilitators Package</b>	<b>UN Protocol</b>
	or transit across or, for financial gain, to reside in the territory of a Member State. (Art.1 Dir.).	<u>material benefit</u> , of the unauthorised entry of a person into a State of which the person is not a national or a permanent resident (Art.3(a)). Facilitation of unauthorised residence is also criminalised by the Protocol (Art.6(1)(C))
<b>Organised crime</b>	Facilitation of irregular migration is criminalised irrespective of whether it is committed as a form of organised crime.	The Protocol supplements UNTOC: migrant smuggling is criminalised as a form of organised crime
<b>Humanitarian assistance</b>	<u>Optional exemption</u> of humanitarian assistance from the definition of assistance to unauthorised entry in or transit across the EU (Art.1 (2) Dir.).	<u>Obligatory safeguard clause</u> (Art.9) obliging state parties, inter alia, to ensure the safety and human treatment of person on board of a vessel.
<b>Rights of refugees</b>	<u>International law applies without prejudice for refugees and asylum seekers in relation to the sanctions</u> (Art.6 FD), in particular in relation to Art.31 (on the non-penalisation of their unlawful entry or presence) and Art.33 (on <i>non-refoulement</i> ) of the Geneva Convention.	<u>Obligatory saving clause</u> (Art.19) stating in general that nothing in the Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including the Geneva Convention.  The protection also applies to <u>irregular migrants</u> .
<b>Criminal liability of migrants</b>	N/A	Explicit exclusion from criminal prosecution of migrants for having been the object of migrant smuggling and (Art. 5)
<b>The return of migrants</b>	N/A in the FP, however regulated under the Return Directive.	To facilitate and accept the return of a smuggled person (Art.18).
<b>Cooperation between the competent authorities</b>	Communication of information between Member States (Art.7 FD)	Cooperation to the fullest extent possible among State Parties (Art.7)
<b>Protection and assistance measures</b>	N/A	Obligation to preserve and protect rights of third country nationals who have been the subject of migrant smuggling (Art.16)

## 6.5 EU added value

The objective of the Facilitators Package was not to establish a new type of criminal offence *ex nihilo* but rather to have a common understanding and minimum rules on how Member States should deal with the migrant smuggling offences in their legislation, in order to better tackle this crime and better cooperate. Considering the heavy cross-border nature of the crime and the current migratory context, this objective, though partially fulfilled, remains fully valid today and could not be attained by Member States alone. Therefore, action at EU level in this field remains necessary.

All Member States transposed the Facilitators Package and amended their legislation accordingly. The study on the transposition of the Package shows that an approximation of the definition of the offence did take place, with all Member States having introduced sanctions for the facilitation of irregular entry and transit for third-country nationals and persisting differences being mainly of a terminological nature. Although variations persist, approximation in definitions and sanctions can also contribute to preventing forms of 'forum shopping' by criminals, to take advantage of systems where penalties are less severe.

The above-mentioned limitations of the findings in terms of effectiveness and efficiency of the Facilitators Package hinder a proper assessment of the actual EU added value. Such difficulties, derived mostly from limited data availability, and therefore the impossibility of assessing how and to what extent increases in detection and prosecution of migrant facilitators or enhanced cooperation between Member States are directly attributable to the Facilitators Package<sup>146</sup>, are common in the field of evaluations of criminal law instruments<sup>147</sup>.

Available data show that the judiciary response to migrant smuggling remains diverse across the EU. In 2014, for instance, 246 persons were found guilty at Magistrates and Crown Courts for assisting unlawful immigration in the United Kingdom, while 894 persons were convicted of the same crime in France<sup>148</sup>. Also, the added value brought by the EU framework pertaining to legal certainty as regards the distinction between migrant smuggling and facilitation of irregular migration for humanitarian assistance is limited. Further thought should be given to ways to improve this aspect, while considering that the assessment of each case ultimately relies on the discretion of the national courts.

In terms of EU added value of the Facilitators Package, it is however interesting to consider that the existence of a legal framework at European level fostered coordination, allowing the

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<sup>146</sup> As regards limitations and availability of comparable and reliable statistics and ensuing consequences on the robustness of findings, see Annex III on "Methods and Sources", as well as Annex II on "Stakeholder consultation".

<sup>147</sup> Persisting weaknesses in the availability of crime and criminal justice statistics have been pointed out in the past. For example, the Commission's Communication on "Measuring Crime in the EU: Statistics Action Plan 2011- 2015" (COM (2011)713) stressed that "Statistics on crime and criminal justice are indispensable tools for developing evidence-based policy at EU level. Impact assessments, evaluations of the implementation of EU legislation from the Member States and assessment of the effectiveness of new laws are only some examples of the use of statistical information. While the need for factual statistics has long been recognised by the Member States and the European Commission, there is still a lack of reliable and comparable statistical information".

<sup>148</sup> EMN Ad-Hoc Query on updating the publically available crime statistics on migrant smuggling (August 2016). See also Annex IV.

crime of facilitation of unauthorised entry, transit and residence to be discussed and enshrined in all Member States legal orders. Such common acknowledgment was the basis for further policy developments at EU level, like the work carried out in this field by the EU agencies such as Europol and Eurojust in the current crisis context. The Facilitators Package also allowed clarifying the distinction between migrant smuggling and trafficking in human beings, which is of particular relevance today when the boundaries between the two crimes are sometimes blurred.

## 7 CONCLUSIONS

The present evaluation has shown how challenging the assessment of the actual implementation of the instrument is, based on the limited data available. The exceptional scale of the migratory and refugee crisis and related migrant smuggling occurrences in the past two years have deeply affected the perceptions and responses to the phenomenon and added an extra layer of complexity to the evaluation of the Facilitators Package.

As regards the assessment of Package's **effectiveness**, it is difficult to disentangle the effects of the legal framework from the wider array of policy tools and enhanced operational cooperation to counter migrant smuggling, which have been triggered by the crisis and whose still recent effects could not yet be fully captured by the evaluation. The development of the policy context in which the Facilitators Package is placed has been shaped by the adoption of the European Agenda on Migration and EU Action Plan against migrant smuggling. In terms of synergy with other existing legal and policy measures, the Action Plan encapsulates the main aspects of the phenomenon that currently need to be addressed.

Overall, the findings of the evaluation in relation to the effectiveness of the Facilitators Package in reaching its objectives remain partial and acknowledge mixed views, stemming from a more critical assessment of the definition of the offence, and in particular legal certainty over the distinction between criminal facilitation and humanitarian assistance, to more positive or neutral considerations as regards the general approximation of the penal framework. Its effects on the actual level of prosecution and conviction cannot be firmly evaluated, due to statistics gaps.

In terms of **efficiency**, a solid quantification of the costs and administrative burden of the Package is severely hindered by available evidence. While the evaluation suggests the costs of increased migrant smuggling to the society as being high<sup>149</sup> and the costs of the Package at EU level as rather low, it is difficult to disentangle different types of costs at EU and national level, and their relations with other external factors. Hence, no firm conclusions can be drawn.

The conclusions on the other evaluation criteria were also affected, although less significantly, by the limitations described above, and broader positive deductions on these

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<sup>149</sup> See in particular section 6.2 Efficiency in the Commission SWD on the evaluation.

criteria could be drawn. In particular, findings suggest that Facilitators Package has proved to be overall **relevant** and continues to be so, in the context of the current refugee and migratory crisis. They also point to the continued **EU added value** of the existence of a common legal framework, which facilitates key elements in the fight against migrant smuggling such as law enforcement and judicial cooperation, and information exchange.

The Package's overall **coherence** with the other parts of the relevant EU *acquis* was positively assessed, including its interplay with international instruments such as the UN Protocol against migrant smuggling, which was also concluded by the EU and whose differences with the Package were not considered to pose specific issues in this respect.

Therefore, based on the findings of the studies supporting this evaluation as well as the opinions and information gathered through broader stakeholder consultations, there is no sufficient evidence to draw firm conclusions about the need for a revision of the Facilitators Package at this point in time. While an EU legal framework addressing migrant smuggling remains necessary in the current context, at present its full and correct implementation should be prioritised, in the context of the Action Plan.

However, **some areas for improvement** in connection with the Package have been identified in the evaluation. They correspond to actions that are already prioritised by the Action Plan, as well as to other measures adopted by the Commission under the Agenda on Migration, such as the new Partnership Framework with third countries to address migration launched in June 2016.

The main areas for improvement that have emerged as a result of the evaluation concern the perceived **risk of criminalisation of humanitarian assistance**. Limited evidence and information collected through a variety of sources do not allow to draw an accurate picture pointing to actual and repeated prosecution and conviction of individuals or organisations facilitating irregular border crossings or transit for reasons of humanitarian assistance. However, fears about perceived risks of criminalisation have been reported. These perceptions seem to concern both humanitarian assistance provided within a Member State territory as well as at borders or even on the high seas, despite the different legal frameworks that apply to such conducts. There might be a lack of legal certainty and/or lack of appropriate communication between authorities and those operating on the ground, which can fuel such perceptions. These may also affect other people engaging with migrants in an irregular situation, such as those who rent out accommodation to them.

The effective implementation of the existing legal framework and a reinforced exchange of knowledge and good practice between prosecutors, law enforcement and civil society could contribute to improving the current situation and avoid criminalisation of genuine humanitarian assistance. This includes enhancing the effectiveness of the legislation on the spot, offsetting the risk of unintended consequences, and in particular the risk that no assistance is provided to those in need, in breach of the EU Charter of Fundamental Rights, the non-refoulement principle and other international human rights commitments. Better exchanges of information could be beneficial also in relation to other aspects of the

Facilitators Package, such as different practices on the assertion of jurisdiction on the high seas among Member States.

The Commission will continue to engage with relevant stakeholders and EU agencies, like the FRA and Eurojust, to provide useful information on existing rules, their applicability and interplay with other legal frameworks at international and national level, as well as on tools that can support the activity of the judicial authorities. In parallel, **instances of non-conformity will continue to be pursued** with Member States to ensure correct transposition and application of the current EU legal framework. If necessary, the Commission will use its powers under Article 258 TFEU, including initiating infringement procedures.

**Lack of robust, comprehensive and comparable public data** has been clearly identified as a hindering element to evaluate the effects of the Facilitators Package<sup>150</sup>. More widespread evidence is important to achieve clarity among all stakeholders on the actual scope, content and implementation of the existing legal provisions and to ensure that any legislative changes that would be undertaken, if and where needed, would be evidence-based.

As set out in the Action Plan, **Eurostat** is working on the extension of its regular collection of crime statistics, with the aim of including data on migrant smuggling as of 2017, on the basis of the evaluation of the data collected in a pilot phase in 2016. This will help address the gaps identified by the evaluation in terms of data availability. In parallel, dialogue with **EU agencies** -such as Europol and Frontex- will be stepped up to streamline the production of global statistics relevant for migrant smuggling and encourage Member States to collect and share this information. Continued cooperation with international organisations, such as the UNODC or IOM, also helps address this challenge. Research on migrant smuggling levels, patterns and links with other forms of crime, as well as legal and policy responses to it, also continues to be promoted. The reliability, comparability and usability of migration data will also be addressed in the framework of the European Commission's Knowledge Centre on Migration and Demography, which has migrant smuggling as one of the priorities in its action plan.

The need to reinforce the **inter-departmental and multi-stakeholder approach** to fighting migrant smuggling, including civil society organisation, was highlighted by numerous stakeholders. Specific attention should be given to the rights of the child and the rights of other categories of vulnerable persons. The Commission will pursue the setting up of a network of single contact points on migrant smuggling, as set out in the Action Plan, to ensure swift exchange of information and promote internal coordination. This will continue to be supported by **funding for training and capacity building** in all areas that relate to migrant smuggling. In line with the Action Plan, a mapping of training needs in this field is also being

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<sup>150</sup> As regards limitations and availability of comparable and reliable statistics and ensuing consequences on the robustness of findings, see Annex III on "Methods and Sources", as well as Annex II on "Stakeholder consultation".

undertaken, in cooperation with the European Agency for Law Enforcement Training and all relevant EU agencies.

**Support for practical cooperation** and information exchange between Member States and with EU agencies is also an ongoing priority area of action. The launch of the European Migrant Smuggling Centre in Europol represents a major opportunity to support all Member States in such endeavours as well as to foster cooperation with third countries, in coordination with international organisations such as Interpol. The work of other EU agencies, such as Frontex and Eurojust, is equally important to ensure information gathering and support for cross-border judicial cooperation, which constitute crucial elements in a comprehensive approach to tackling migrant smuggling.

Cooperation with third countries at all levels is an important way to improve the fight against migrant smuggling, and according to certain stakeholders it is a more effective tool than legislative amendments. The Action Plan already recognises the importance of the **external dimension** of migrant smuggling, which is further reinforced by the launch of the new Partnership Frameworks and by enhanced cooperation with a number of transit and origin countries<sup>151</sup>.

**In view of the above, the conclusion of this evaluation is that at this point in time the Facilitators Package should be maintained in its present form**, while the Commission further pursues the implementation of the Action Plan against migrant smuggling, in cooperation with all relevant actors. In doing so, the Commission can build on the non-legislative measures identified by the respondents to the public consultation, such as for instance increased support for operational cooperation, information exchange, or handbooks for stakeholders and operators in specific sectors, in order to step up the fight against migrant smuggling. **The need for possible legislative amendments to the Facilitators Package could be re-evaluated, once the implementation of the Action Plan has reached greater maturity.**

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<sup>151</sup> COM(2016)385.

## ANNEX I — PROCEDURAL INFORMATION

The evaluation of the Facilitators Package, composed of Directive 2002/90/EC defining 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, has been led by Unit C1 (Irregular Migration and Return Policy) of DG Migration and Home Affairs. The evaluation proper has been carried out between the beginning of 2015 and July 2016. However, preparatory steps including the launch of external studies and evidence gathering were initiated already in the second half of 2014. The Agenda planning reference for this evaluation is 2016/HOME/007.

An **inter-service steering group on migrant smuggling** was set up in February 2015 and was systematically consulted on the evaluation process taking into account the cross-cutting nature of migrant smuggling. The following DGs and Services were invited to participate: Secretariat-General of the Commission (SG), Legal Service of the Commission (LS), DG Justice and Consumers (JUST), DG International Cooperation and Development (DEVCO), DG Neighbourhood and Enlargement Negotiations (NEAR), DG Research and Innovation (RTD), DG Health and Food Safety (SANTE), DG Maritime Affairs and Fisheries (MARE), DG Mobility and Transport (MOVE), DG Employment (EMPL), and the European External Action Service (EEAS).

The group met four times during the evaluation process. The first meeting was set up on 9 March 2015. A second meeting took place on 9 July 2015, a third one was held on 27 October 2015 and fourth one on 12 September 2016. The meetings, chaired by DG HOME, allowed discussing both the evaluation and a possible modification of the current EU legal framework as well as the launch of the EU Action Plan on migrant smuggling, which was adopted in May 2015. All the DGs involved had the opportunity to provide their views, ask for clarifications and submit comments on the developments of the evaluation. Besides meetings, regular written communication among the members of the ISG was maintained. DGs received the draft studies underpinning the evaluation as well as all documents related to the consultation strategy, including the draft questionnaire for the public internet-based consultation. ISG members also received draft versions of the study carried out by ICF, for their comments and review, before the study could be deemed approved.

For the purpose of the evaluation and possible revision of the legislation, **two studies** were conducted by external contractors.

A first study entitled "Overall report on the transposition of Facilitators Package" elaborated by Tipik Legal in 2014-2015, offered an overview of the national legislation on the **transposition** of the Facilitators Package. While the final draft of the Tipik study was delivered in June 2015, Member States have been regularly consulted after the end of the contract in order to keep the report updated in view of ensuing legislative changes.

The findings of this first study were incorporated in a second study elaborated to assess the **implementation** of the criminal law measures sanctioning the facilitation of irregular entry, transit and stay in EU Member States and associated Schengen countries, including relevant case law, examples of such facilitation cases and related investigations at national level. It also looked at the relevance, effectiveness, efficiency, coherence and EU added-value of the current Facilitators Package and options for modification. This second study, entitled "Evaluation and Impact Assessment of the Facilitators Package"<sup>152</sup>, was elaborated by ICF International in 2015-2016 and concluded in June 2016.

**Further details on the external expertise** as well as Commission expert groups used in the context of this evaluation are provided in Annex III on "Methods and Sources", as well as Annex II on "Stakeholder consultation".

**Further details on the evidence used in the evaluation** as well as the discussion of its limitation as regards in particular availability of comparable and reliable statistics and ensuing consequences on the robustness of findings, are detailed in Annex III on "Methods and Sources", as well as Annex II on "Stakeholder consultation".

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<sup>152</sup> ICF study, *cit.*

## ANNEX II — STAKEHOLDER CONSULTATION

### 1. INTRODUCTION

A broad stakeholders' consultation has accompanied the evaluation of the Facilitators Package, in different phases. The Commission organised or participated in a number of seminars, events and bilateral meetings, with a wide range of stakeholders. The aim of this process, which spanned from November 2014 until March 2016, was to gather views and concrete suggestions from authorities, experts and other players working on or interested in migrant smuggling, as well as to gather updated knowledge and address possible information gaps.

### 2. TARGETED STAKEHOLDER CONSULTATIONS

**Targeted consultations** took place in different frameworks and involving different types of stakeholders. Most of the times, such consultation did not entail a systematic discussion of stakeholders opinion on all aspects and criteria covered by the evaluation but aimed at gathering views and suggestions of those consulted, by focusing on the main elements of their expertise or interest. The following list indicates the main events, which have provided the opportunity for such targeted consultations.

#### **1. Member States**

Apart from the opinions gathered in the framework of the external studies, Member States were consulted through meetings of the expert **Contact Group on facilitation of irregular migration**, convened by the Commission (DG HOME) in Brussels between March 2015 and February 2016. In the course of the meetings, discussions on the preliminary findings of the studies underpinning the evaluation were held. Member States also had the opportunity to provide their views on and discuss specific aspects of the current legal framework and its application in national contexts. **Non-EU Schengen associated countries** as well as **EU agencies** were invited to all meetings of the Contact Group.

Member States were also invited to provide their views as well as factual inputs on challenges, costs and suggestions as regards the land and rail transport security aspects linked to migrant smuggling and the existing legal framework, through the expert **Contact Group on Land Security (LANDSEC)** convened by the Commission (DG MOVE). Through this Contact Group the Commission invited **also business associations and research bodies**, participating to the meetings, to provide their input. Meetings were organised in February and October 2015.

Ahead of the adoption of the Action Plan against migrant smuggling, between September 2014 and February 2015, **bilateral meetings** were held with authorities of certain Member States, including NL, IT, DE, FR. During such meetings, input as regards the legal framework was also sought.

Finally, in the process of the preparation of the **Council Conclusions on migrant smuggling** adopted on 10 March 2016, Member States had the opportunity to discuss and prioritise a variety of tools and measures to step up prevention and fight against migrant smuggling.

## **2. Consultation within the framework of the external studies underpinning the evaluation**

Further **targeted consultations of stakeholders** including of national authorities (law enforcement, judiciary), relevant EU Agencies (e.g. EUROPOL, FRONTEX, EUROJUST, FRA, EASO), international organisations (e.g. UNODC, IOM), civil society organisations (e.g. Civil Society Platform), academia, think tanks or business actors (in particular related to the transport sector, along with their representative organisations and platforms e.g. IRU, CORT) took place in the framework of the preparatory study on the evaluation and impact assessment of this legislation as well as through bilateral contacts with the Commission.

These targeted consultations were organized on specific or technical points of the evaluation of the Facilitators' Package (i.e. jurisdiction-related issues, definition of the humanitarian clause, financial aspects of the crime, impact of the legislation on the industry, etc.).

## **3. Meetings and events involving academia, organised civil society, international organisations, business associations and practitioners**

**Participation in international conferences, seminars and other events** also provided opportunities to consult experts and gather views on different aspects of the existing EU legislation and its effects on different types of stakeholders. Examples are included in the following, non-exhaustive list:

On 12-13 January 2016, the **Dutch Presidency of the EU together with the European Migration Network (EMN)** organized a broad international **Conference on promoting a multidisciplinary approach in addressing migrant smuggling**. The conference brought together a wide range of players, including national authorities from the law enforcement, migration and judicial sectors, as well as international organisations, civil society, business associations and academia. Focusing mainly on the implementation of the EU Action Plan against migrant smuggling, the participants to the Conference did not express significant concerns as regards the functioning of the existing legal framework at EU level. However, relevant suggestions regarding the Facilitators' Package were made – including to establish and enforce jurisdiction on the high seas as regards flagless vessels suspected of migrant smuggling or to strengthen judicial cooperation, including with third countries.

The third meeting of the **Working Group on the Smuggling of Migrants, set up by the Conference of the Parties to the United Nations Convention against Transnational**

**Organized Crime**, took place from 18 to 20 November 2015 in Vienna<sup>153</sup>. On that occasion, discussions on smuggling of migrants by sea, practical measures to prevent the smuggling of migrants and children as well as organized crime aspects of the smuggling of migrants, were held. The Working Group saw the participation of the EU and several EU Member State, alongside to other States Parties to the Conference. While the meeting concerned the global scale and patterns of countering migrant smuggling world-side, the situation affecting the Mediterranean was the main focus. A "Report on the Trans-regional Training Workshop on Preventing and Combating the Smuggling of Migrants by Sea Affecting the Mediterranean Region" was submitted by Italy and a presentation in relation to the challenges faced on the exercise of jurisdiction on the high seas was delivered. A report on the meeting of the Working Group contains a number of recommendations.

An **International Lorry Security Conference** was hosted by the UK Home Office in Brussels on 28 September 2015 to address ways to help tackle the impact of illegal immigration on the haulage industry.

A "**Trans-regional Training Workshop on Preventing and Combating the Smuggling of Migrants by Sea affecting the Mediterranean Region**", was organised by the UNODC and the International Institute of Higher Studies in Criminal Sciences (ISISC) from 14 to 16 October 2015 in Syracuse, Italy. The workshop involved participants from four regions, that is three regions covered by regional UNODC offices plus the European Union, and saw the presence of two UNODC Field Representatives. Among other experts, resource persons included representatives from the United Nations High Commissioner for Refugees (UNHCR), the International Organisation for Migration (IOM), European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED), FRONTEX, Save the Children and the Norwegian Shipowners' Association. The event was organized with the financial support of the Government of Italy and the European Union.

On 25 November 2015 a meeting of the **Expert Group on EU Criminal Law Policy** was convened by the Commission in Brussels, to discuss the current legal framework on facilitation of irregular migration, as well as its shortcomings and possible options for improvement<sup>154</sup>. The group includes law professors, judges, prosecutors and defence lawyers from different EU Member States representing the major legal traditions of the EU. The members of the group are appointed for a mandate of 3 years and meet twice a year. The first mandate of the group came to an end in May 2015 and has now been renewed.

"Addressing Irregular Migration, Facilitation and Human Trafficking" was also the subject of a **closed door, expert seminar organised by the Centre for European Policy Studies (CEPS)** in March 2015, under the EU-funded research **project FIDUCIA**<sup>155</sup>. The seminar,

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<sup>153</sup> All documents, including the agenda, reports and adopted recommendations, are available at: <https://www.unodc.org/unodc/en/treaties/CTOC/working-group-on-the-smuggling-of-migrants-2015.html>.

<sup>154</sup> For further info, see: [http://ec.europa.eu/justice/criminal/criminal-law-policy/index\\_en.htm](http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm).

<sup>155</sup> For more information on the outcome of the project related to irregular migration, trafficking and smuggling of human beings, see

mostly bringing together researchers and academics with Commission officials and representative of relevant organisations, represented an occasion to discuss different issues linked to criminalisation of migrant smuggling and human trafficking. The work conducted on these themes within the FIDUCIA project resulted in a publication on "Smuggling, trafficking and irregular migration".

Dedicated roundtables were held in Brussels, with the participation of the Commission, where discussions on the current legal framework were also held. For example, the EU legal framework against facilitation of irregular migration was discussed, among other aspects, in a roundtable discussion co-organised by the Centre for European Policy Studies (CEPS) and PICUM on 2 February 2015 in Brussels, on the occasion of the visit of the UN Special Rapporteur on the human rights of migrants, François Crépeau, who shared his views on the criminalisation of irregular migrants and the need for more regular channels for migration to Europe.

In January 2015, the **European Forum on Migration** held its first meeting, which focused on ‘**Safe routes, safe futures. How to manage the mixed flows of migrants across the Mediterranean?**’. One of the four workshops of the Forum was devoted to discussions on how to achieve *A comprehensive approach to countering migrant smuggling*. The discussions touched both upon the policy and legal framework to counter migrant smuggling at EU level. The conclusions of the working group were discussed in the plenary and fed into the overall conclusions from the Forum, which can be consulted online.

On 10-11 November 2014, the **EU Fundamental Rights Agency (FRA)** together with the Italian Presidency of the EU, held its annual Conference, which focused on “**Fundamental rights and Migration to the EU**”. The Conference brought together over 300 EU and national decision makers, members of national parliaments, the judiciary, law enforcement agencies, and experts from international organisations, as well as national human rights bodies, civil society bodies and academics involved with migration issues on a daily basis. One of the thematic working groups of the conference was devoted to migrant smuggling and touched among others on the EU legal framework and its interplay with the UN Protocol against migrant smuggling. The discussions held in the working group were presented in the plenary and fed into broader conclusions from the Conference, which can be consulted online.

### **3. PUBLIC CONSULTATION**

Secondly, in addition to targeted consultations, the Commission organised a **public consultation on "Tackling migrant smuggling: is the EU legislation fit for purpose?"**. A summary of the results of the public consultation is detailed below<sup>156</sup>.

#### **1. Introduction**

The aim of the 12-week open public consultation, accessible between 13 January 2016 and 6 April 2016, was to collect stakeholders' views on specific aspects of both the Directive and Framework Decision that form the Facilitators Package, both in order to underpin its evaluation and to gather views on what improvements could be made to this legislation. For the purpose of the consultation, the terms 'migrant smuggling' and 'facilitation of unauthorised entry, transit and residence' were used interchangeably, unless otherwise specified.

This summary contains an overview of the main results of the consultation, without providing an exhaustive analysis of each individual reply. The full text of the consultation and the individual answers of those respondents, who consented to the publication of their contribution, either in full or anonymously, are available on DG Migration and Home Affairs website.

#### **2. Overview of the replies to the online survey**

##### **2.1 The profile of the respondents**

A total of 2425 standard contributions were submitted through the online questionnaire. In addition, four contributions were received in the form of email or letters<sup>157</sup>. These contributions were taken into account for the analysis of the replies but do not appear in the graphs and tables, which are generated from the e-survey data.

Out of the total number of respondents, 1072 consented to the publication of their full contribution, while 1043 opted for publication in anonymous form and 310 requested their answer not to be published in any form and to be only used within the Commission. As a result, the analysis and statistics contained in this document is based on the replies provided by a total of 2115 respondents. Respondents were invited to identify themselves as one of the following categories: private individual, academia<sup>158</sup>, representative of a Member State, which included national authorities not necessarily expressing a coordinated position of the

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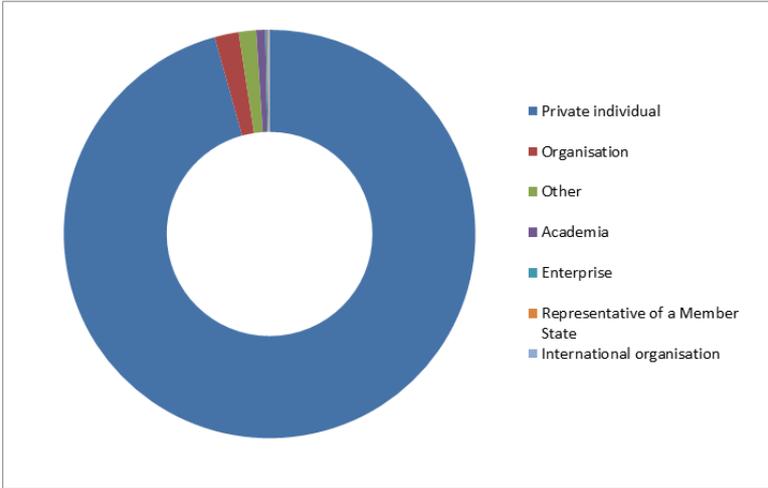
<sup>156</sup> The views expressed below are the ones of the participants to the public consultation alone and may not in any circumstances be regarded as stating an official position of the European Commission.

<sup>157</sup> These were from the Churches' Commission for Migrants in Europe (CCME), the German Federal Association of Road Haulage Logistics and Disposal (BGL), the International Federation of Social Workers (IFSW) and the Bavarian State Ministry of Justice. In addition, the Social platform, a European network of NGOs submitted both a position paper and a reply to the online survey.

<sup>158</sup> Responses from the academia represented the opinion of one person, except for one reply jointly submitted by a group of nine Migration Law scholars, including Professors, University Lecturers, Researchers and PhD Candidates attached to the Migration Law Section of the Law Faculty at the Vrije Universiteit of Amsterdam.

Member State concerned<sup>159</sup>, international organisation<sup>160</sup>, enterprise<sup>161</sup>, organisation<sup>162</sup>, or other. The number of respondents who registered as private individuals largely outnumbered those in any other category (95.65% of the replies). Among them, an overwhelming majority identified as EU citizens (92.91%), with only 12 non-EU citizens residing in the EU and one non-EU citizen intending to migrate to the EU<sup>163</sup>.

**Question 1: Profile of the respondents**



The high majority of the respondents (71.35%) considered their answer as relevant for the EU as a whole. The largest share of those, whose answer related to a Member State in particular, selected Germany (18.68%), and the United Kingdom (4.29%).

<sup>159</sup> Respondents, who identified themselves as a Member State representative and who consented to the full disclosure of their data, include the French office for immigration and integration under the tutelage of the Ministry of the Interior (OFII) and the Migration Policy and Law Enforcement Department of the Ministry of Security and Justice of the Netherlands. In addition, the Bavarian State Ministry of Justice submitted a contribution via letter.

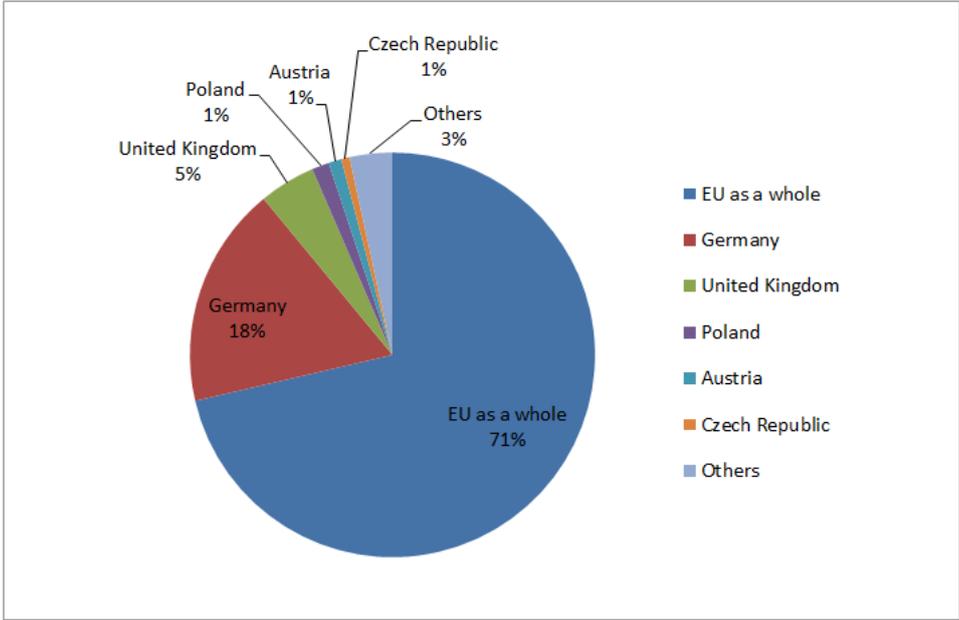
<sup>160</sup> International organisations consenting to the full disclosure of their data include the Regional Representative for Europe Regional Office of the UN High commissioner for Human Rights and the International Centre for Migration Policy Development (ICMPD).

<sup>161</sup> Enterprises consenting to the full disclosure of their data include JSP-Group (GE).

<sup>162</sup> Organisations consenting to the full disclosure of their data included the International Road Transport Union (IRU), the Federation National des Transports Routiers (FNTR) the European Network of Migrant Women (ENoMW), and Asociación de técnicos Superiores y Peritos Judiciales de Andalucía Street Polar 18, Jerez (Spain), NGO UNITY (BG), Cooperazione Internazionale Sud Sud (CISS), SOZE-Society of Citizens Assisting Migrants (CZ), Center for the Study of Democracy (BG) King's Think Tank, Alliance for Childhood European Network Group, Coordination et initiatives pour réfugiés et étrangers (BE), ASOCIACIÓN SALUD Y FAMILIA (ES), Social Platform (BE), ASTI - Association de Soutien aux Travailleurs Immigrés (LU), WID-Stiftung Willkommen in Deutschland (GE), CRAG- Charlbury Refugee Action Group (UK), JRS (CH), Attac Osnabrück (GE), Associazione per la Divulgazione delle Opere di Ingegno Pino Cavanna (IT), Friedenszentrum Braunschweig (GE), Deutscher Anwaltverein- German Bar Association (GE), Johannes Wegener Project Group European Politics of political party SPD (GE), The Swedish Network of Refugee Support Groups, FARR (SE), Association of Estonian International Road Carriers, ERAA (EE), Justice and Peace Netherlands (NL), ANEP associazione nazionale educatori professionali (IT), PICUM (BE), Eurochild (BE). In addition, In addition, three other organisations- mentioned in footnote 5- transmitted a contribution via e-mail.

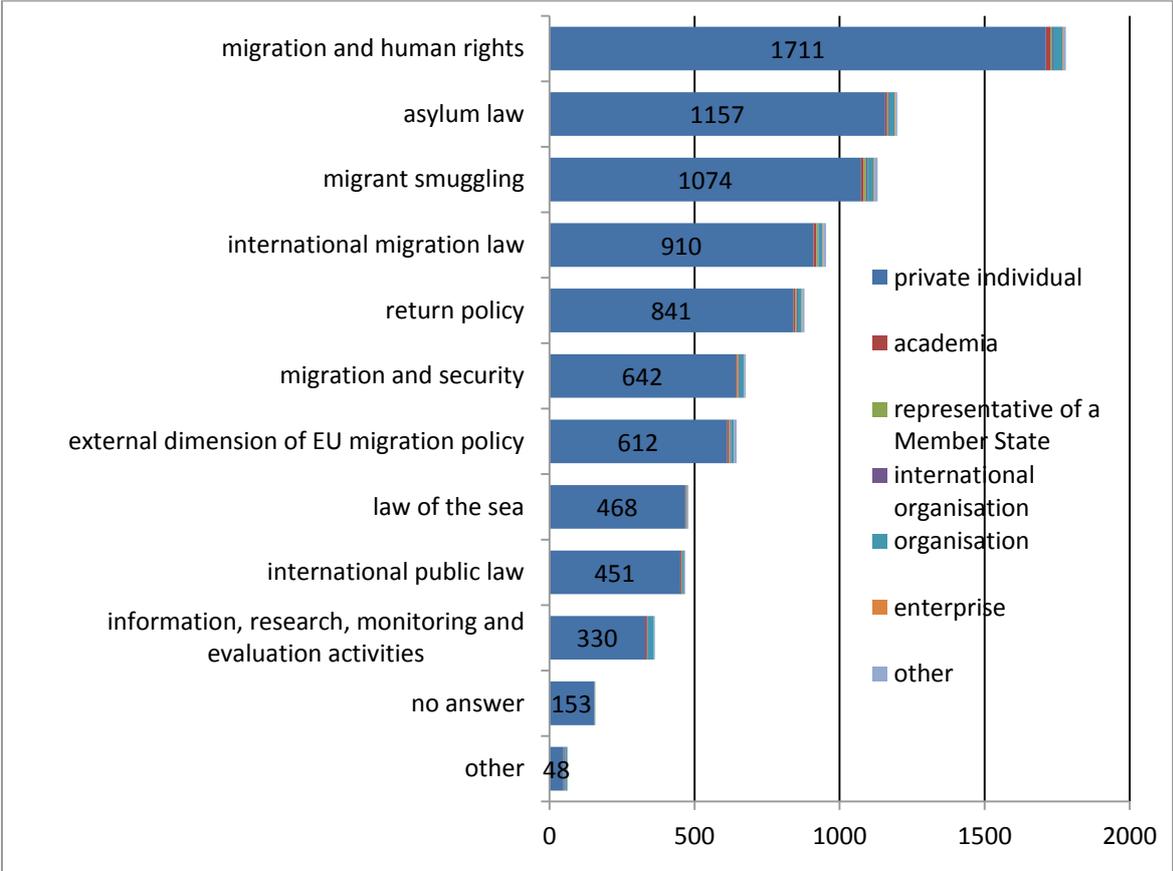
<sup>163</sup> In very few cases, respondents registered in the wrong category. These have been reattributed to what was considered as the correct one.

**Question 3: Respondent answers referring to a specific Member State or the EU as a whole**



When asked to point out their fields of activity or interest in the area of migration policy (the possibility to select multiple close-ended answers was provided), 84.16% of the respondents indicated migration and human rights. The other most important areas of interest included asylum law (56.69%), migrant smuggling (53.48%), and international migration law (45.06%).

**Question 4: Field of activity or interest of respondents**



However, only 12.34% of the respondents affirmed to have taken part in an activity related to the policy area(s) they selected in the period 2013-2016, with 9.31% providing no answer.

**2.2. Replies to questions on the Facilitators Package**

Overall, the survey attracted a very different level of attention and response, depending on the scope of the questions.

The large majority of the respondents chose to reply to a limited number of questions, and namely 6, 7, 8, 9 and 10. These referred mainly to the effectiveness of the current EU legislation in achieving its objectives; the main issues affecting its implementation; and the clarity and effectiveness of the offence definition, in its various elements. In these cases, the percentage of 'no answer' varied between 0% and 7%, and the replies showed a very high level of consensus. On the contrary, for most of the other questions (11, 12, 13, 14, 15, 16, 17 and 18), large shares or in some cases the majority of the respondents did not provide an answer.

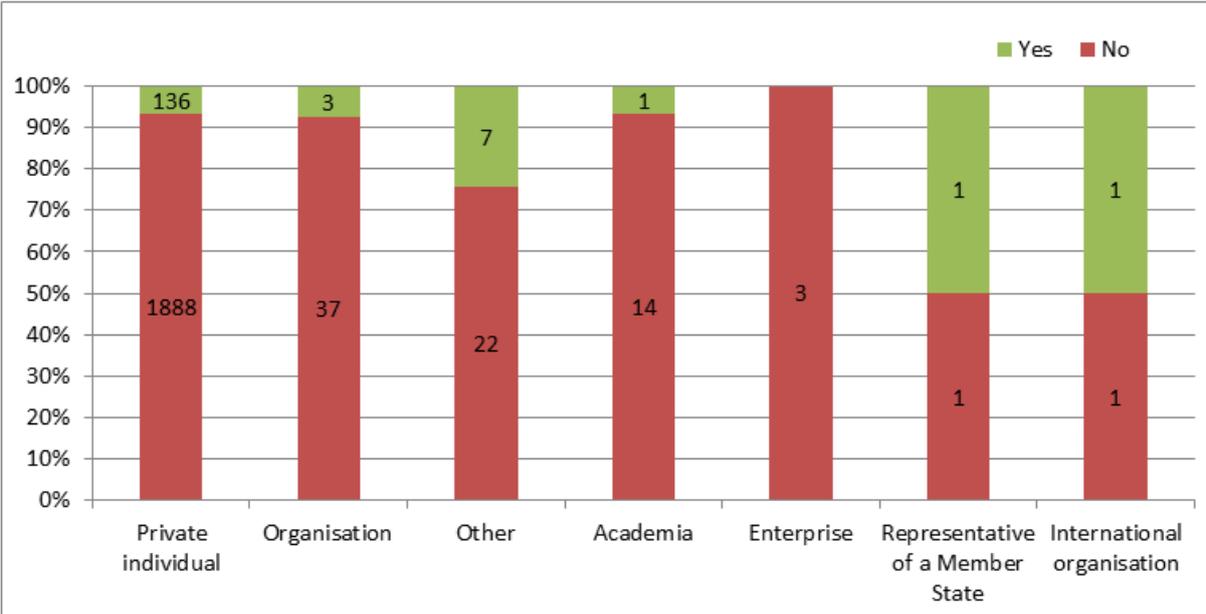
Moreover, respondents tended to elaborate more on Questions 7 to 10 than on the other ones. In the case of certain questions (such as 7, 8, 9, 10, 15 and 17) several and sometimes the majority of those who provided comments used identical sentences or paragraphs. This

concerned private individuals as well as other categories, such as organisations and enterprises. In some cases, they explicitly referred to the position paper of the Social Platform<sup>164</sup> or the study commissioned by the LIBE Committee of the European Parliament on the Facilitation Directive<sup>165</sup>. Respondents often reiterated the same type of comments in response to different Questions, or chose to elaborate only on some questions but addressing issues raised in other parts of the survey. The comments overview developed in this document is based on their recurrence and relevance to the question, across all categories of respondents. For the sake of length and readability, arguments already voiced once might not be repeated for each question.

**Questions 6 and 7: Effectiveness of the current EU legislation and main issues affecting its implementation**

All respondents provided an answer to **Question 6**, with a very high majority of 92.96% considering that the current EU legislation is not effective in meeting its objectives.

**Question 6: Are the provisions of the legislation adequate to meet the objectives?**

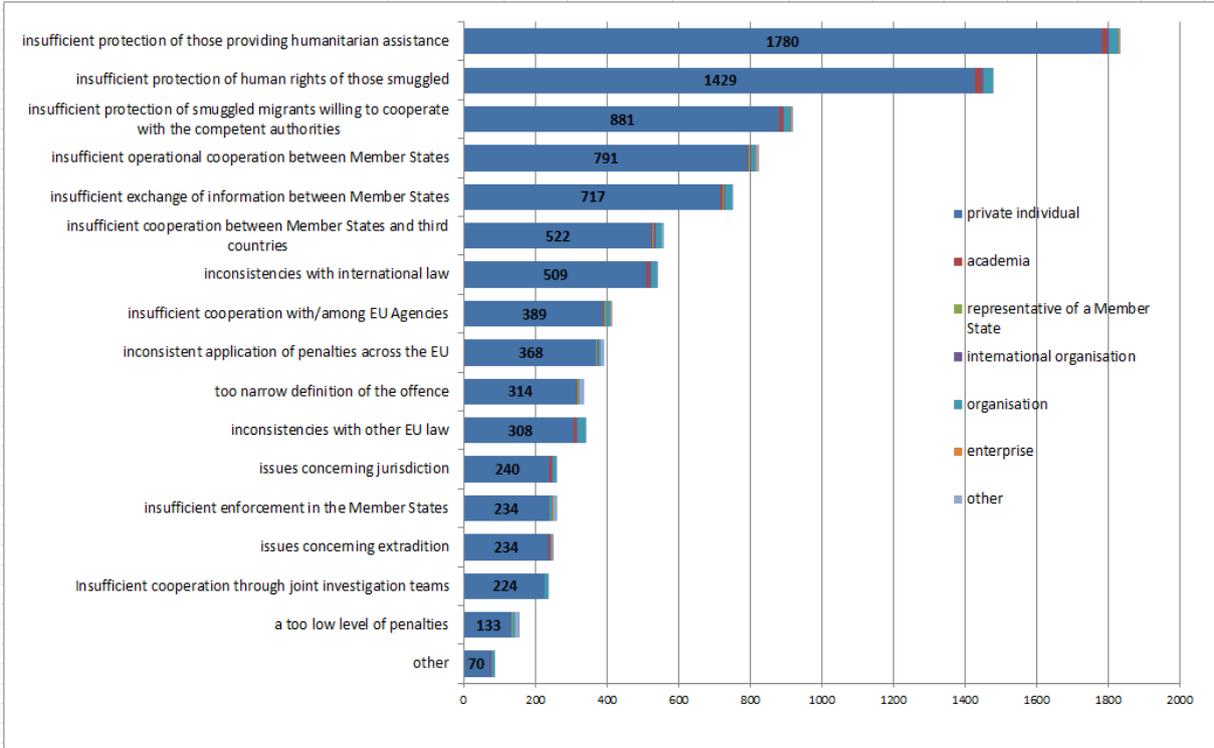


**Question 7** asked the respondents to indicate the main issue(s) affecting the proper functioning of the EU legislation on migrant smuggling, by picking from a number of provided options and/or indicate further elements. Multiple choices were possible. The biggest concerns of respondents appear to be insufficient protection of those providing humanitarian assistance (86.71%) and insufficient protection of the human rights of those who are smuggled (69.93%). This result is coherent with migration and human rights being among the fields of interest most marked by respondents. The other biggest concerns raised by the

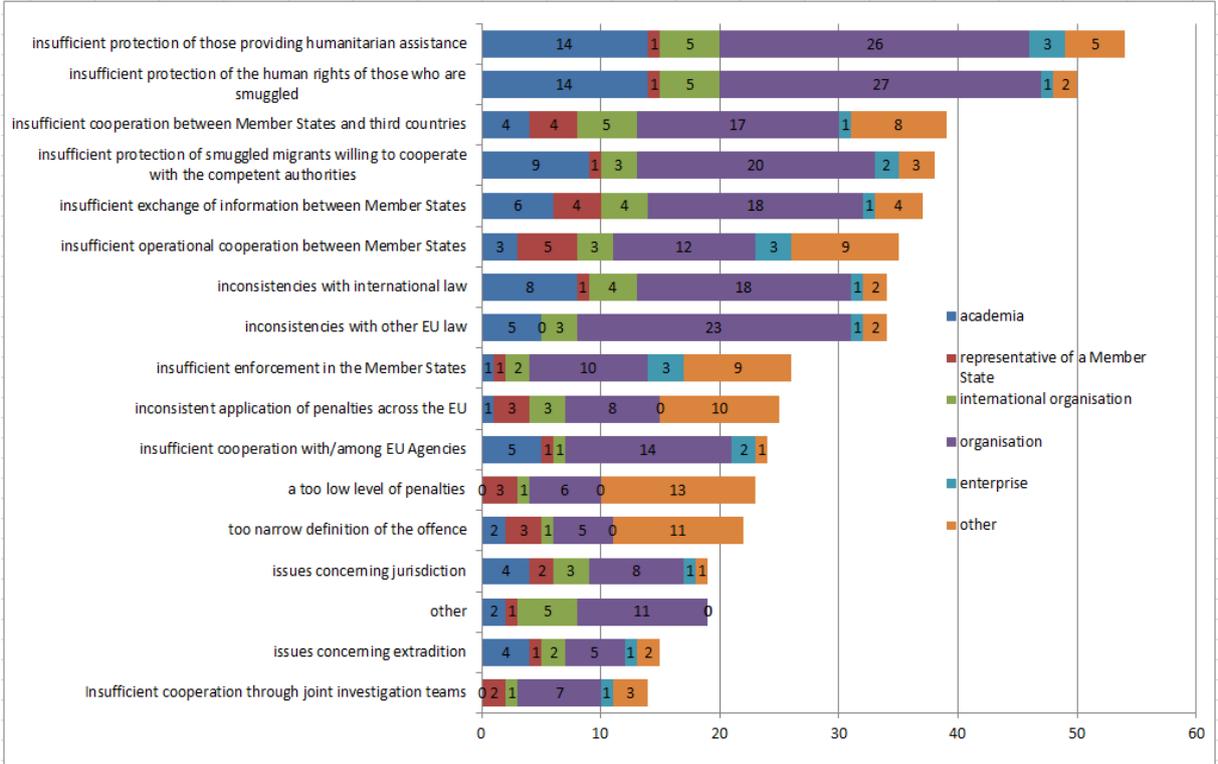
<sup>164</sup> <http://www.socialplatform.org/wp-content/uploads/2016/02/Social-Platform-position-paper-The-revision-of-the-Facilitation-Directive.pdf>.  
<sup>165</sup> [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL\\_STU\(2016\)536490\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf).

respondents were insufficient protection of smuggled migrants willing to cooperate with the competent authorities (43.45%), and insufficient operational cooperation (39.05%) and exchange of information (35.65%) between Member States.

**Question 7: Main issues affecting implementation for all categories of respondents**



**Question 7: Main issues affecting implementation for categories other than private individuals**



When invited to elaborate on their answer to Question 7, the large majority of individuals criticised the risk of humanitarian assistance being sanctioned and/or lamented Art. 1 of Directive 2002/90/EC not containing a clear distinction between migrant smugglers and those providing assistance nor a definition of the concept of humanitarian assistance. Importantly, while the concept of humanitarian assistance was not clearly defined by respondents, most replies to Questions 7 but also 8, 9 and/or 10 tended to qualify it as "life-saving" activities, carried out to "prevent death" or "drowning" or to help people under "dishuman conditions" or in "desperate need".

Smaller shares of the replies referred to more general issues such as EU law on migrant smuggling or EU policies on migration contradicting basic European, Christian or moral values, human rights and/or asylum law. The need to address the root causes of irregular migration, including helping migrants in their origin countries and better cooperating with third countries in general, were also mentioned, as were the lack of legal channels for migrants and asylum seekers, insufficient protection of the rights of smuggled migrants regardless of their administrative status, and insufficient coordination, cooperation and information exchange between Member States.

Among those who took opposite views, a small minority of respondents supported stricter EU polices against irregular migration and underlined the need to curb irregular migration flows.

The main issues raised by national authorities focused on strengthening operational cooperation and joint investigations, enhancing the coordination role of Eurojust and Europol,

mutual judicial and police cooperation within the EU and with third countries, as well as elaborating a definition better adapted to the current circumstances and considering a possible expansion of jurisdiction, along the lines of EU legislation on trafficking in human beings.

Concerns such as the risks of criminalising humanitarian assistance, the need to better define the offence under EU legislation and of ensuring legal avenues and human rights protection for migrants and asylum seekers were shared by several scholars, international and other organisations. Some of these respondents raised additional problematic issues, such as a lack of independent evaluation, impact assessment and consideration of alternative strategies at EU level in addressing the issue of migrant smuggling; the general ineffectiveness of criminalising irregular migration as well as facilitation of irregular entry, which should be an administrative rather than a criminal offense; the need to further differentiate the current legislation to better capture the different roles and responsibilities of those involved in migrant smuggling; inconsistencies with the UN Protocol and refugee law; an excessive focus on security as compared to humanitarian obligations, including also criticism over the increasing use of militarised anti-smuggling initiatives, such as Operation Sophia, as compared to traditional police cooperation; the lack of gender specific policy, placing women at greater risk; and the need to step up financial investigations, including through the use of National Asset Recovery Offices and the Camden Asset Recovery Inter-Agency Network (CARIN).

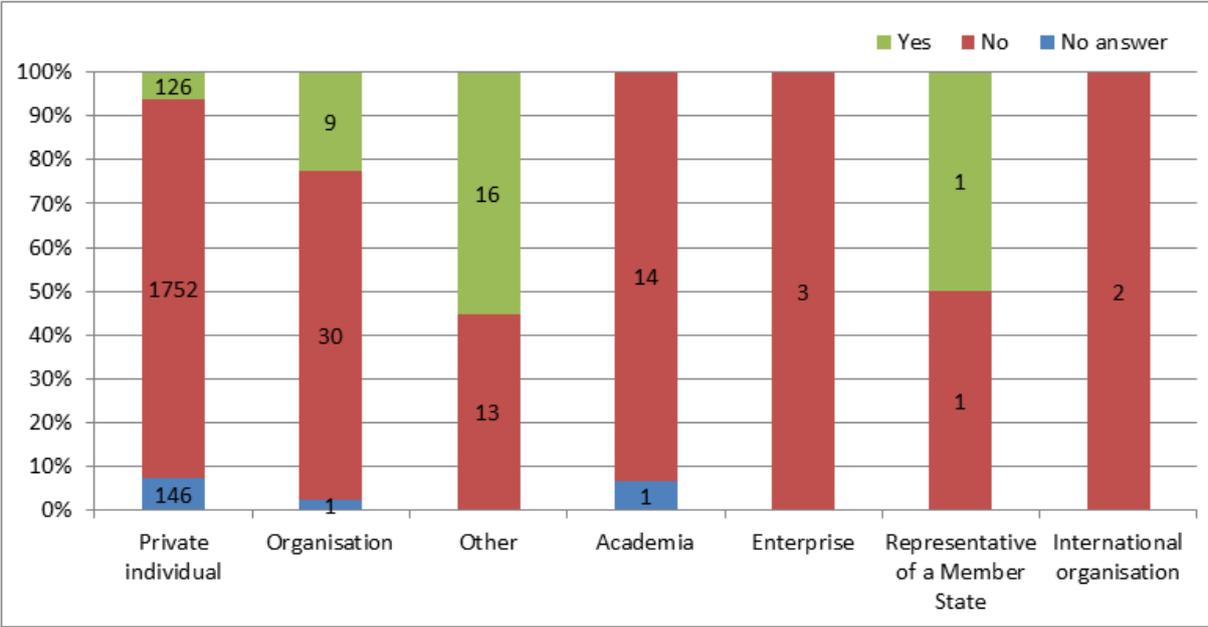
Two organisations also specifically referred to the difficulties faced by the road freight transport industry in relation to migrant smuggling and in particular migrants attempts to illicitly board vehicles, stressing the need for closer and more constructive cooperation between the industry and competent national authorities as well as the fact that the current EU legislation does not address the role of governments in encouraging transport operators taking precautionary security measures and the responsibility of governments in providing adequate security.

### ***Questions 8, 9, 10: Definition and scope of the offence***

Questions 8, 9 and 10 broadly related to the definition and scope of the offence of facilitation of unauthorised entry, transit and residence, seeking respondents' views on whether it was clear and adequate enough to meet the objectives set out by the Facilitators Package. Most of the respondents focused on one specific element of the definition, which relates to the explicit non-criminalization of humanitarian assistance, in response to all three Questions.

85.28% of all the respondents to **Question 8** thought that the definition was not clear enough to meet the objectives of countering facilitation of unauthorised entry, transit and residence in the EU, while only 7.19% thought otherwise, and 7% provided no answer.

**Question 8: Is the definition sufficiently clear and adequate to meet the objectives?**



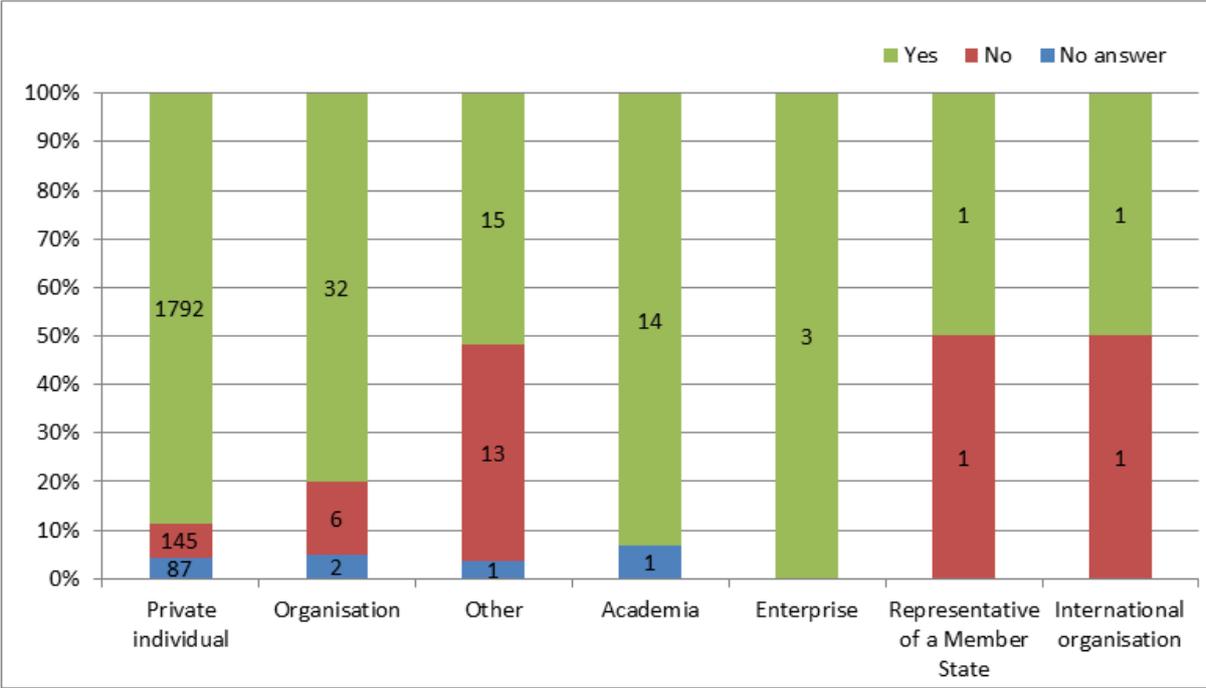
**Question 8** triggered a large number of comments but did not generate a wide variety of answers, as in the case of Questions 6 and 7. The most recurrent reason invoked by the very large majority of those replying negatively concerned the risk of criminalisation of humanitarian assistance. In that respect, respondents underlined the need for a clear distinction between the facilitation of unauthorised entry, transit and residence for humanitarian purposes and for financial gain, or in any case as a criminal act. As for the following questions, numerous organisations used mostly identical answers, recalling also the need to align EU legislation with the UN Protocol. One specifically warned of the risk of migrant smugglers using humanitarian assistance as a way to escape law enforcement authorities, while another recalled difficulties faced by drivers and operators penalised when stowaways are found on board, irrespective of the requirement of intent foreseen by EU and national criminal law. One international organisation specifically referred to the objectives of the current instruments, which should focus on fight against migrant smuggling rather than irregular migration.

Among scholars, some argued that facilitation of irregular migration should be an administrative rather than a criminal offence, considering that harmful aspects of migrant smuggling to persons are already criminalised, while one recommended that aggravating circumstances such as financial gain or organised criminality become constituent elements of the offence. The expansion of the definition to include other aggravating circumstances related to inhumane and degrading treatment was supported by one organisation. The need to explicitly exclude migrants from the personal scope of the instrument was also quoted.

**Question 9** addressed the possibility of narrowing the criminalisation of facilitation of unauthorised entry or transit only to instances when the conduct is carried out in order to achieve a financial or material gain, as it is already the case for the facilitation of unauthorised

residence, pointing that this would also bring the scope of the offence in line with the UN Protocol against migrant smuggling.

**Question 9: Should facilitation of unauthorised entry or transit only be criminalised when committed for financial gain?**

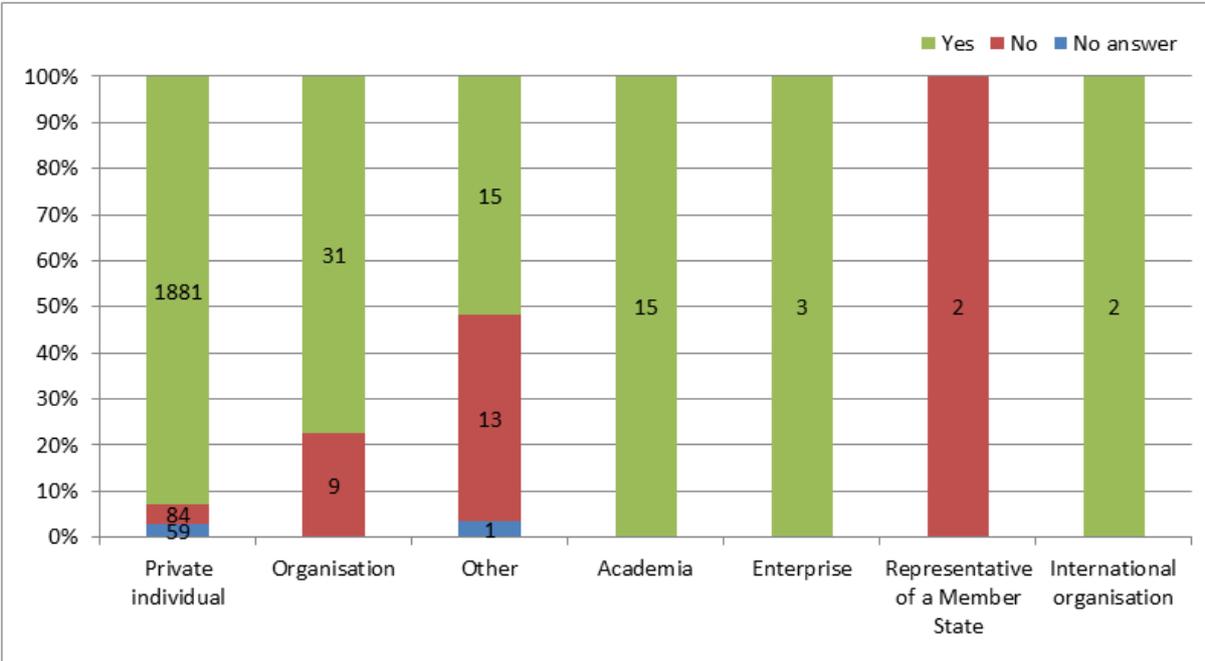


As for Questions 6, 7, 8 and 10, the answer rate for this question was very high, with only 4.3% choosing not to answer. The very large majority of the respondents (87.85%) considered that facilitation of unauthorised entry or transit should only be criminalised when committed for financial gain, as compared to 7.85% who took the opposite view. As for Question 8, the reasons invoked by respondents across different categories were limited and focused on the need to avoid the criminalisation of humanitarian assistance, considering that the financial gain is in essence what distinguishes smugglers from helpers, and bringing EU law in line with the UN Protocol. Several replies further underlined that referring to financial gain without further specification is misleading and that it should be defined as "disproportionate" or "usurious", in order to prevent the criminalisation of organisations or individuals who provide help to or enter in contact with migrants, in the framework of an activity, for which they earn a salary (e.g. humanitarian helpers but also shopkeepers, landlords, etc.). Some underlined that humanitarian assistance provided by volunteers is often a necessity, given the failure of national authorities to provide adequate responses.

Among those who replied negatively to Question 9, some respondents, including a national authority and one organisation, considered that the inclusion of a financial gain element would excessively complicate investigations or stressed that prosecution should remain possible to protect national interests, in cases where the conduct is neither carried out for humanitarian reasons nor for financial gain. According to one international organisation, the burden of proof brought by the inclusion of the "financial gain" element would be mitigated by a broader reference to "or other material benefits".

The last Question concerning the definition of the criminal offence focused on whether non-criminalization of humanitarian assistance should be made mandatory under EU law, considering that, under the current legislation, Member States can already choose not to impose sanctions on those who facilitate unauthorised entry or transit with the aim of providing humanitarian assistance. Together with Questions 7, 8 and 9, **Question 10** elicited a very high rate of answers, with only 2.84% of no answers. 92.6% were in favour of EU law making it obligatory for Member States not to sanction those that facilitate unauthorised entry or transit for humanitarian reasons compared to 5.11% being against it. Overall, a very large number of respondents referred to the same arguments used in their replies to the previous Questions.

**Question 10: Should the EU make it obligatory not to sanction facilitation for humanitarian reasons?**



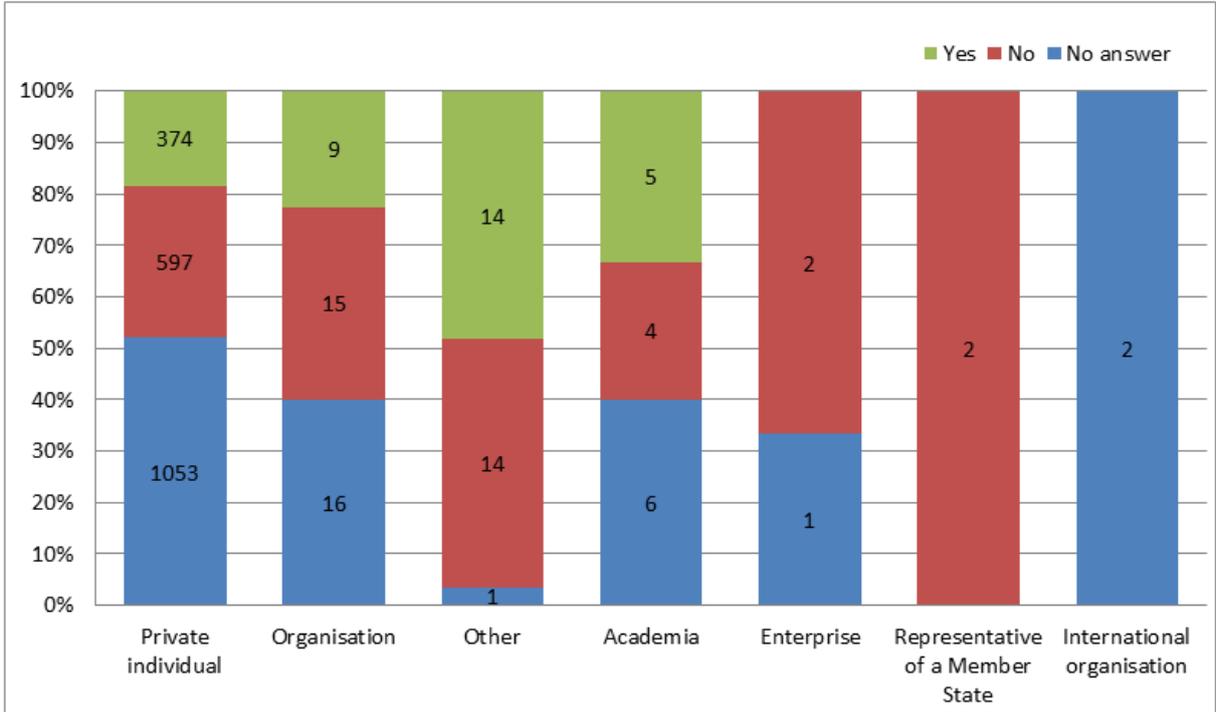
The majority of respondents mentioned again the need to uphold human rights and core European values, as well as need for clarity and the adverse effects of fears of criminalization felt by civil society organisations or service providers engaging with irregular migrants, which deter them from providing services or assistance. The discretion left to Member States in the implementation of Art. 1(2) of the Directive was judged excessive by several respondents. The contradiction of the possible criminalisation of humanitarian assistance with existing obligations to assist any person in danger, under national law, was also mentioned by some private individuals, one organisation and one scholar, while another pointed out how criminalising humanitarian assistance would in any case violate positive obligation, stemming from the ECHR and the EU Charter of Fundamental Rights. Finally, a recurrent argument in favour of a compulsory humanitarian clause used mostly by individuals, but also by organisations and scholars referred to lack of action from Member States as the drive for individuals and NGOs to assist asylum seekers.

The two national authorities were against the inclusion of a mandatory humanitarian clause, with one considering that national law already offered ways not to sanction humanitarian assistance (such as verdicts of guilt without punishment). Overall, the small minority of private individuals who favoured a non-mandatory humanitarian clause frequently chose not to elaborate further. The risk that smugglers or other organized criminal groups would use such possibility for criminal purposes, the need to uphold the sovereignty of the national jurisdictions, and the need to define the concept of humanitarian assistance, should a mandatory clause be introduced, were invoked in a handful of replies.

**Questions 11, 12, 13, 14, 15, 16: Penalties**

Questions 11 to 16 focused on the penal framework set out by Framework Decision 2002/946/JHA in relation to the level and nature of penalties, aggravating circumstances, and accompanying sanctions. As opposed to the previous Questions, these have received a significantly lower rate of answer. A few respondents have confessed to facing challenges in addressing their more technical content. The arguments reported for these Questions are therefore only representing a small fraction of those who answered and an even smaller one of the respondents as a whole.

**Question 11: Are the level of penalties adequate to meet the objectives?**



Only 49.08% of the respondents answered **Question 11**. Out of them, 29.98% did not find the current level of penalties adequate, while 19.01% took the opposite view.

Among those who did not consider the current level adequate, two main categories can be identified: those considering that the level of penalty is altogether not important, in particular if root causes for irregular migration are not addressed or if legislation is not effectively enforced; and those stating that penalties for migrant smugglers are not high enough.

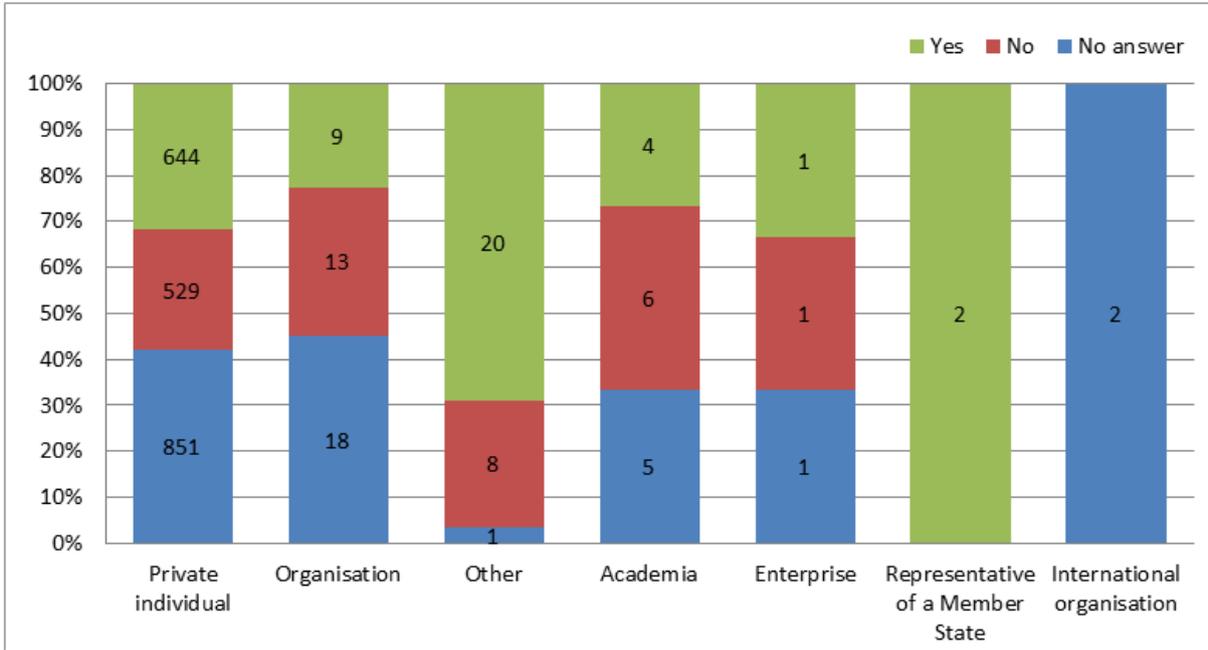
Opinions favourable to increasing the penalties level were mostly voiced by private individuals, but also by one representative of a national authority and one enterprise. Conversely, part of the individuals, organisations and academics supported the view that penalties levels are altogether not relevant in deterring migrant smuggling, considering also that those who are apprehended are often lower-ranked criminals and that focus should be placed on higher-ranked ones.

Replies to this Question also voiced concerns over risks of penalties for those working in the transport industry, with one organisation calling for a more harmonised approach and more clarity regarding drivers' liability and what is expected from the road freight transport industry.

Finally, a smaller number of respondents across various categories considered that a different level of penalties should be applied to different circumstances, including harsher sanctions when migrants are abused or their life endangered.

In reply to **Question 12** on penalties under aggravating circumstances, 32.15% considered the current level adequate while 26.34% disagreed, and 41.51% provided no answer.

**Question 12: Are the penalties under aggravating circumstances adequate to tackle the crime?**

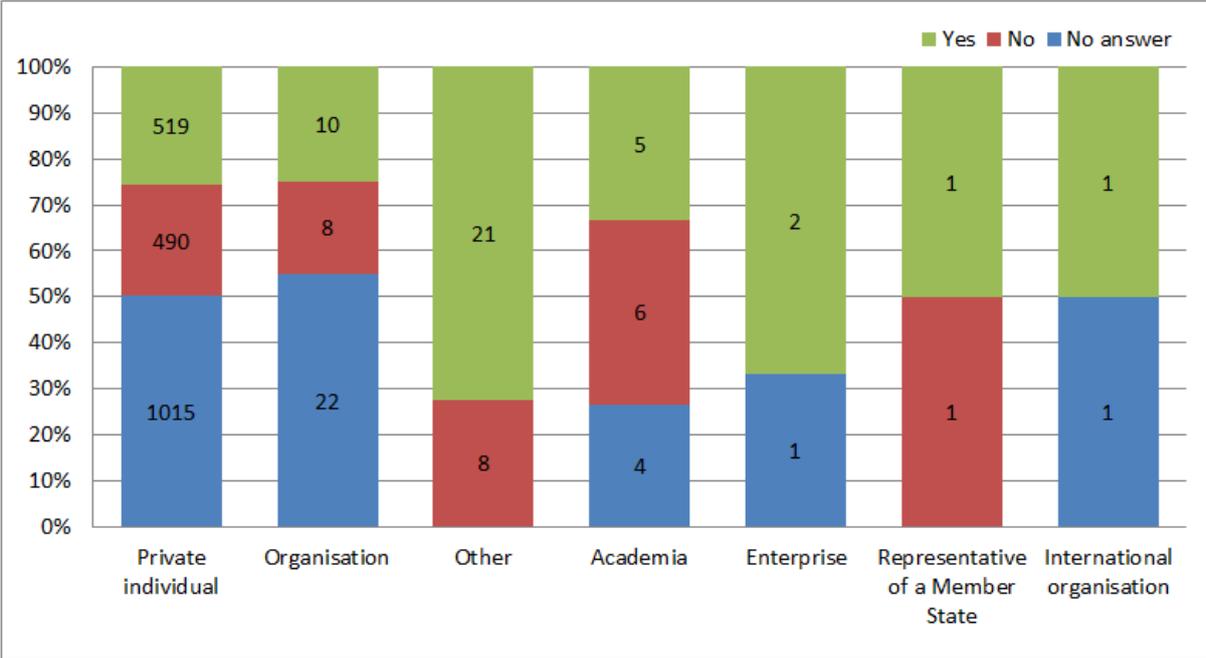


Overall, most of the remarks made echoed those put forward for Question 11. The fact that those found steering boats crossing the sea towards Europe are sometimes asylum seekers, paying a lower price on their trip in exchange for taking up this task, was underscored by a few individuals as well as some scholars and organisations, highlighting how smugglers increasingly outsource risks to migrants. For example, when the latter are found steering the boats, they can face the risk of being charged with smuggling offence. Two organisations

considered that transport operators should not face additional sanctions to those stipulated in Regulation (EC) No. 1071/2009 on access to the occupation of road transport operators.

**Question 13** presented a relatively low answer rate and an almost equally divided opinion among respondents, with 26.43% considering that additional aggravating circumstances should be added in the EU legislation, 24.26% that they should not, and 49.31% having no answer.

**Question 13: Should additional aggravating circumstances be added**

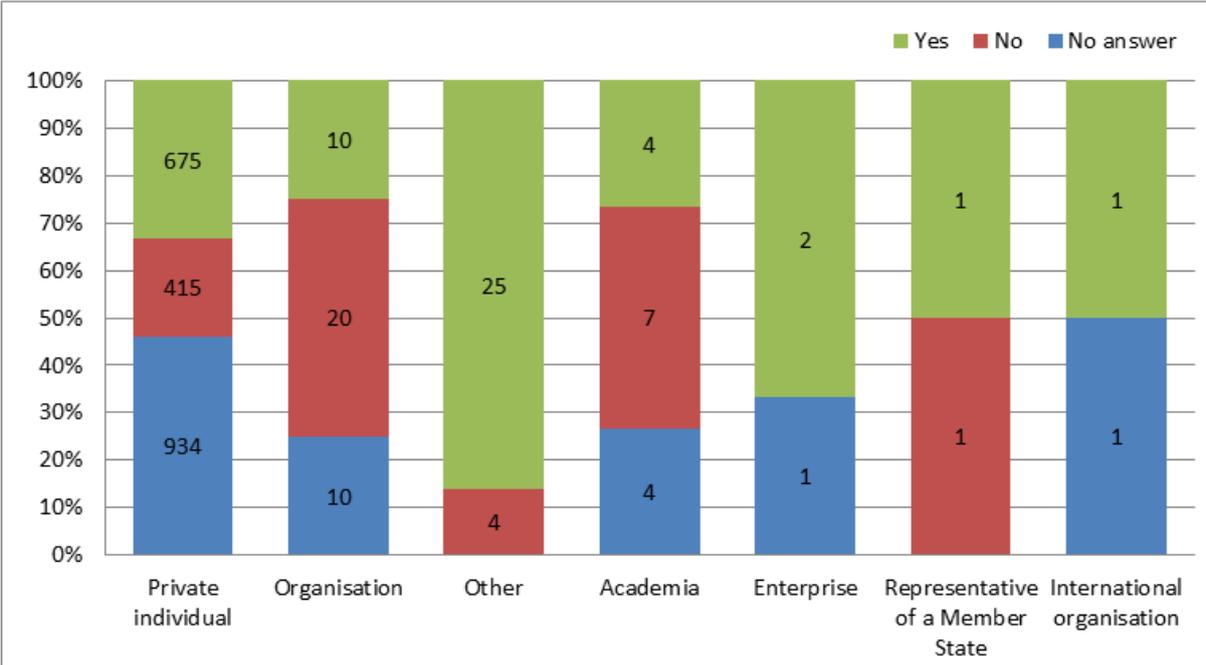


Elaborations on this Question were not numerous and mostly reproduced already voiced arguments. Those advocating additional aggravating circumstances among individuals, academics and organisations mentioned endangering the life of migrants, sexual and physical abuse and mistreatment, and smuggling of vulnerable migrants such as children. A few replies from private individuals also referred to the presence of the organised crime element, the number of smuggled migrants and the repetition of the offence as suitable aggravating circumstances. Others mentioned use of weapons by smugglers and financial gain. Finally, mitigating circumstances were also mentioned in very few replies to Questions 12 and 13.

Arguments voiced by those considering an enumeration of additional aggravating circumstances as not necessary included the fact that the most harmful aspects of migrant smuggling are already criminal offences, the need to leave decisions to national judges and to focus on implementing existing laws more effectively.

In response to **Question 14**, 33.95% expressed a positive opinion on explicit criminalisation of the producing, procuring or possessing a fraudulent document for the purpose of enabling unlawful entry, transit or stay under EU law, while 21.13% took a negative view and 44.92% provided no answer. The vast majority of the comments came from those respondents, who were not in favour of criminalisation.

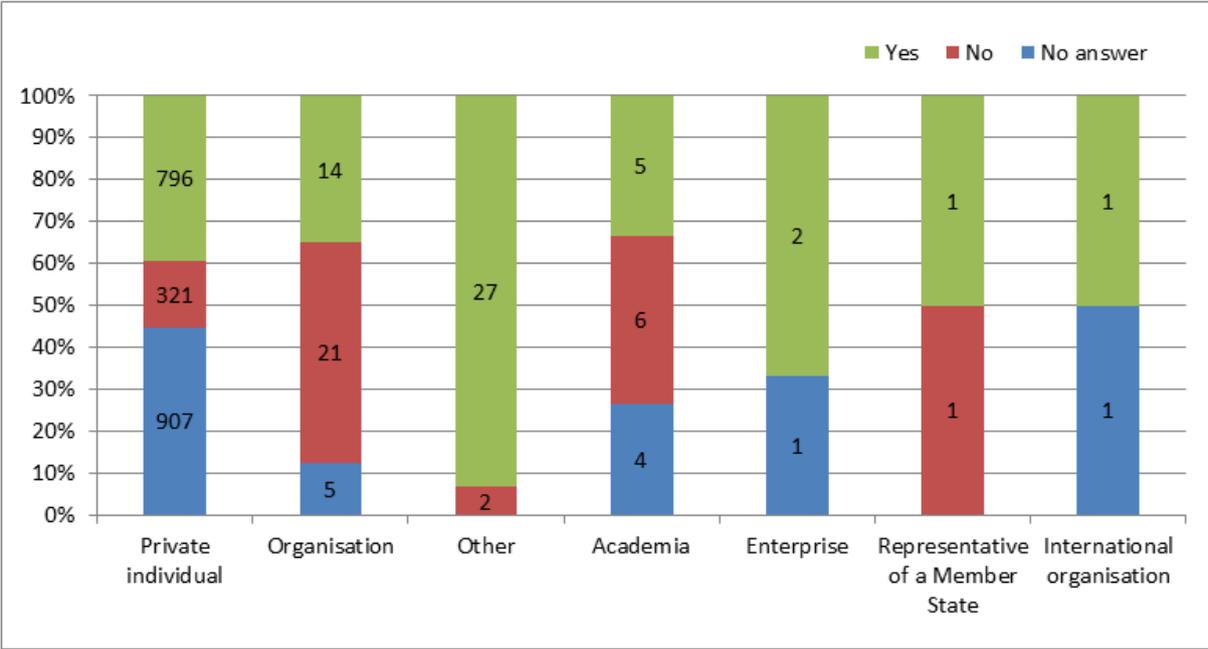
**Question 14: Should document fraud for the purposes of facilitation be criminalised?**



The most recurrent arguments referred to lack of legal avenues making the use of false documents a necessity, the fact that these actions are already punishable under national law, and the need to criminalise only those providing the documents and not the ones using them and/or to only criminalise it when conducted for profit or by an organised criminal group. Two organisations also considered that criminalization would pose an undue burden on the transport passenger sectors and recalled the responsibilities already incurring under EU and national law upon the carriers, while they have access to little training, means or expertise to perform the necessary checks. The need to ensure compliance with Art. 31 of the 1951 Refugee Convention was evoked by scholars, both when against and in favour of criminalisation. Finally, among the latter, a few referred to the need for criminalisation to increase deterrence for what is currently seen as a low risk criminal activity.

**Question 15** on the inclusion of further accompanying sanctions was answered positively by 40% of the respondents, with 16.6% negative opinions and 43.4% having no answer.

**Question 15: Should additional accompanying sanctions be added?**

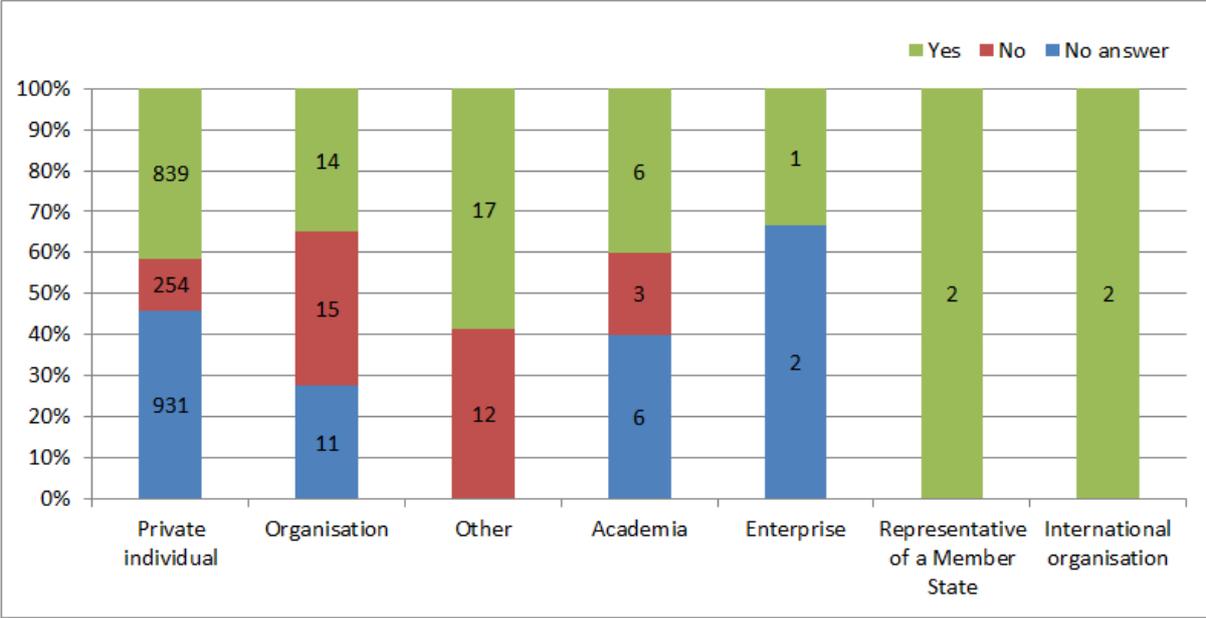


The arguments they put forward are mostly the same as for the previous questions. Negative replies mostly stressed the fact that several additional measures are already covered under national law, that they will hardly deter smuggling and possibly make migrants journeys even more dangerous and expensive. Instead, said some, focus should be placed on enforcing existing law. Several organisations motivated their negative replies with insufficient guarantees for those assisting irregular migrants, risking being sanctioned.

On the contrary, supporters of additional measures stressed that they would indeed have a deterrent effect and be consistent with the policy objective of preventing migrant smuggling, with some among them still recalling the need to provide sanctions only when the offence is carried out for financial gain. Moreover, some respondents invoked events in Calais, with migrants boarding lorries without the knowledge of drivers, who should therefore not face sanctions. In that regard, at least three organisations opposed additional measures considering they would be disproportionately high for the road transport sectors, unless enforced only after a formal conviction by a court of law. The same arguments were voiced for the following question.

44.92% of the respondents chose not to answer **Question 16** on smugglers' assets confiscation, while 41.65% replying positively and only 13.43% negatively. As for other questions related to penalties and sanctions, the number of respondents who chose to elaborate their answer is low, mostly placed among those who replied positively. The arguments put forward across categories echoed those related to Question 15.

**Question 16: Should the legislation explicitly include sanctions for the freezing and confiscation of assets of smugglers?**

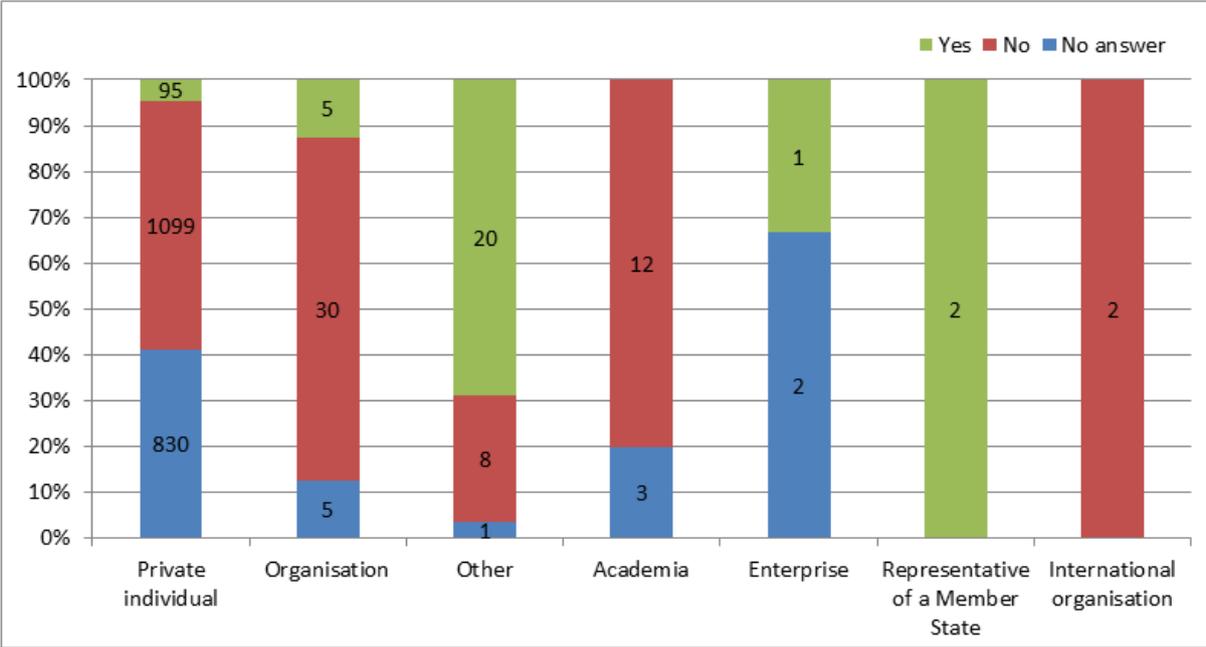


Two respondents representing national authorities also shared their favourable opinion, further specifying that such provisions would need to be considered in conjunction with EU Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU.

**Questions 17, 18: rights of smuggled migrants and additional comments**

The majority of replies (54.42%) to **Question 17** considered that the current legislation does not adequately protect the rights of smuggled migrants, with only 5.82% taking the opposite views, and a substantial share of 39.76% having no answer.

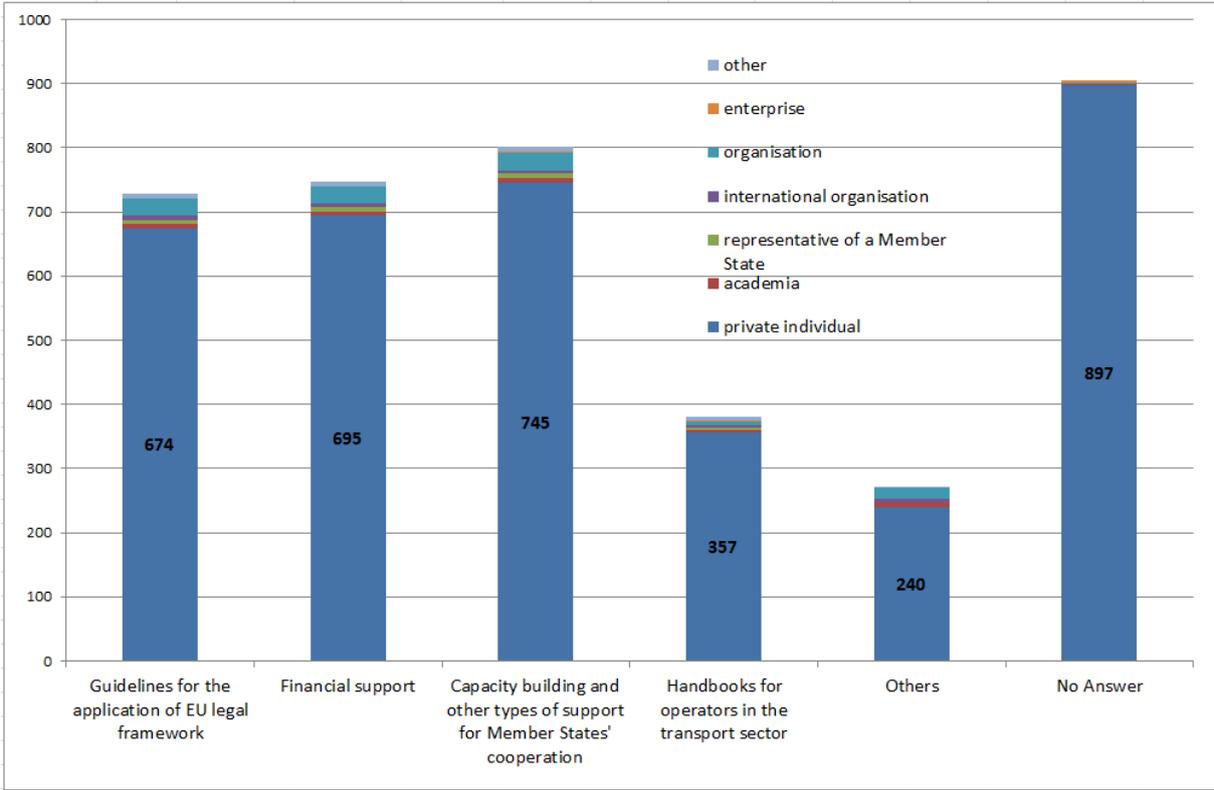
**Question 17: Is the protection of smuggled migrants' rights adequate in the legislation?**



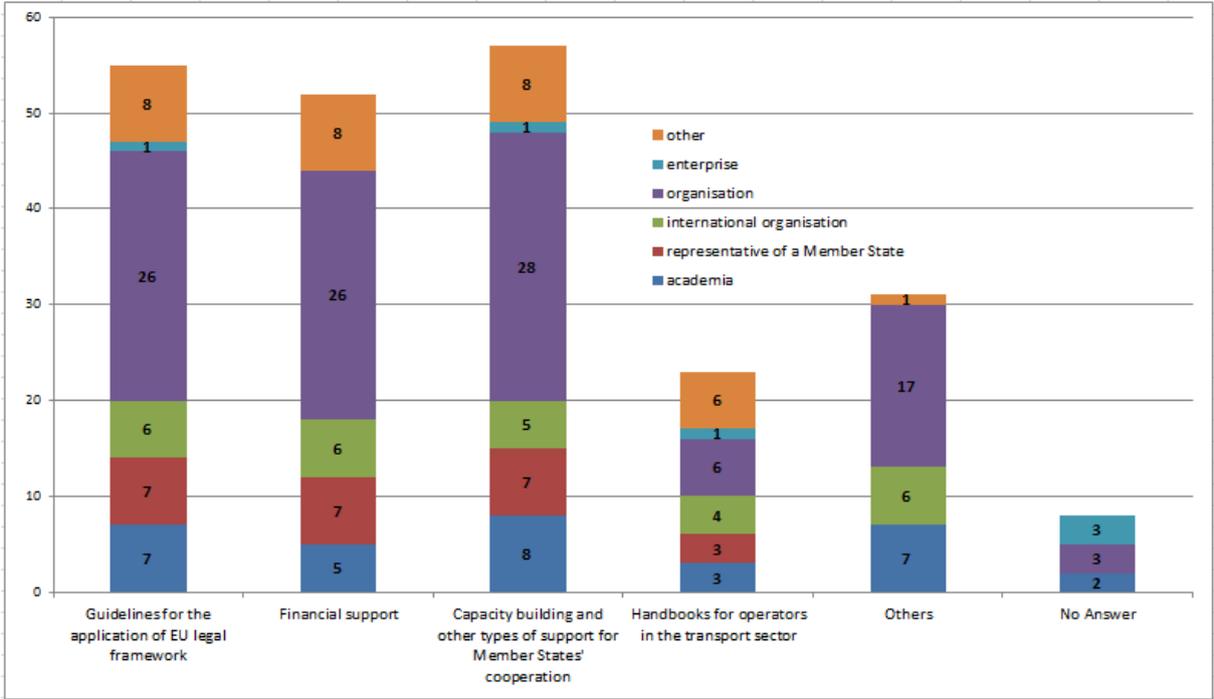
Only a minority of respondents chose to further elaborate on their replies to this question. Arguments voiced across different categories included the need to focus on prosecuting smugglers and enforcing legislation without criminalising migrants, to ensure that the EU framework is in line with international human rights standards, and to include explicit provisions on migrant rights protection, such as healthcare, temporary residence and access to justice for crime victims. Sanctioning of irregular migration and possible expulsion were underscored by some as hampering migrants' access to rights, because of fears to enter in contact with authorities. Broader considerations not directly related to the legislation echoed previously made points, including the need to address root causes and provide legal avenues for migration or, in fewer numbers, criticism over the EU-Turkey statement on migration management. Besides, a group of academics called, amongst other, for a more detailed elaboration on the rights of the broader public, "including protection of data against financial and social media surveillance and cross-border police or judicial cooperation".

**Question 18** invited respondents to indicate which non-legislative measures could complement a possible revision of the law, by providing an indicative list and the possibility to add others. The tables below show the most favoured measures across all categories both including and excluding private individuals, to allow for easier reading.

**Question 18: non legislative measures – all categories**



**Question 18: non legislative measures - all categories except private individuals**



Respondents also provided some suggestions on broader policy measures, beyond migrant smuggling field. Among the most recurrent arguments not already voiced in previous Questions, replies referred to the need to stop selling weapons to countries at war; fighting climate change and ensuring fair trade with third countries; setting up the possibility to apply

for asylum outside the EU, such as in EU embassies or through protected entry procedures; carrying out information campaigns in third countries; stepping up information gathering on organised criminal groups activities; setting up a European Border Guard; and increasing overall migration quota through an equal distribution across Member States.

Among scholars, additional arguments pointed to stepping up independent data collections and impact assessments for evidence-based border and migration policies or establishing the European Public Prosecutors' office to coordinate investigations in between EU Member States and transit and origin countries. Further measures suggested by international and other organisations included specific financial support for cities and CSOs, or transport infrastructure-related programmes; mechanisms to ensure that independent evaluate and monitor the implementation of anti-smuggling law in Member States; improved cooperation between law enforcement services and strengthened operational capacities.

### **ANNEX III- Methods and sources**

This Annex provides more detailed information of what already broached under Section 5 of the Staff Working Document, as regards the **methods and mix of different sources, which inform this evaluation.**

The primary source is represented by **two external studies**, carried out for the Commission by two different contractors between 2014 and 2016.

**1. The first study** conducted by TIPIK Legal carried a legal assessment to evaluate the conformity of national legislation transposing the Facilitator Package. The study looked at all EU Member States, except for Denmark. Information as regards the situation in Denmark, as well as in non-EU Schengen associated countries<sup>166</sup>, was included in the second study described further below.

Before this study, Directive 2002/90/EC was assessed within the framework of a broader study, covering 10 Directives in the field of Justice and Home Affairs<sup>167</sup>. This study included an EU wide assessment of legislation as notified until 2005, with MS specific analysis with relevant article references and an assessment of general conformity by article. However, complete Member State and article specific assessments in the form of correlation tables were not provided. This assessment also did not cover the Member States which had not transposed the Directive at the time of that study, notably Croatia.

Directive 2002/90/EC does not require the Commission to issue an implementation report but requires Member States to communicate relevant national provisions transposing the Directive to the Commission, which "shall inform the other Member States thereof". As a result, an exchange with Member States, based on a questionnaire, took place in 2006 in the framework of the Council's Committee on Immigration and Asylum (CIA).

As regards Framework Decision 2002/946/JHA, an assessment was carried out by the Commission based on communication of relevant national provisions transposition this instrument from Member States, which resulted in the publication of report COM(2006)770 final. According to the report, 5 Member States did not provide the relevant information and 4 Member States provided only preliminary or incomplete information.

The Tipik study was therefore aimed to achieve a comparable, detailed and updated overview of the Facilitators Package implementation and pursue adequate follow-up. Member States' authorities have been consulted on the outcome of the study and invited to provide updates and feedback on possible factual inaccuracies.

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<sup>166</sup> Iceland, Norway, Switzerland and Liechtenstein.

<sup>167</sup> The study was carried out by the Odysseus Academic Network for DG JLS of the European Commission in 2006-2007.

**2. The second study**, conducted by ICF International, had a broader mandate, which included both the evaluation of the implementation of the Facilitators Package, as well as the assessment of impacts of possible modifications<sup>168</sup>.

Building on the legal assessment conducted by the previous study, the contractor undertook the gathering of the relevant information needed to achieve a complete overview on the criminalisation of facilitation of irregular migration and residence in all EU Member States and associated Schengen countries. The study was also tasked to include relevant case law, important examples of such facilitation cases and related investigations at national level. It looked at the relevance, effectiveness, efficiency, coherence and EU added-value of the existing EU legal framework. This work involved a variety of data collection tools such as desk research; consultation through the administration of questionnaires, follow-up interviews and two ad-hoc expert workshops with national authorities, EU Agencies, international organisations, NGOs, business sector and independent experts; and more in depth analysis of selected case studies identified on the basis of desk research and interviews with stakeholders.

The questionnaires administered to the various different stakeholders aimed, through a set of questions and follow-up interviews, to gather views in order to assess the criteria set out in Section 4. This was complemented with the organisation of two expert workshops. The first meeting took place on 27 July 2015 followed by a second one on 28 October 2015. The meetings convened a limited number of experts, including academics, law enforcement and judiciary practitioners, legal advisors, representatives of the private sector and other experts with specific knowledge and experience in this field. Some were interviewed as part of the evaluation phase and/or the case studies.

The analysis in terms of migration (illegally staying third-country nationals in the EU territory, annual illegal EU border crossings) and criminal (number of suspects of / prosecuted for / convicted for migrant smuggling offences) statistics was based on Eurostat<sup>169</sup> data as well as data provided by different sources. The main ones include Frontex, EMN studies and Ad Hoc Queries<sup>170</sup>, and information provided by Member States as well as experts and other stakeholders.

While focusing on the analysis of the Facilitators Package, the study was commissioned to encompass both legislative and non-legislative elements and provided recommendations on how to improve the current situation through a number of possible actions.

**3. Besides these studies, data was gathered through consultation and review of documents, studies and reports** produced by EU institutions and agencies, international organisations,

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<sup>168</sup> ICF Study, *cit.*

<sup>169</sup> Eurostat collects annual data on third-country nationals found to be illegally present in the EU territory as well as those denied entry at the external border See at <http://ec.europa.eu/eurostat/data/database>.

<sup>170</sup> See at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/index_en.htm)

civil society and academia. Below are examples of more recent sources and academic literature used in the context of the evaluation that were consulted:

- ⇒ Joint Europol and Interpol report on “Migrant smuggling networks”, May 2016
- ⇒ Europol report on "Migrant Smuggling in the EU", February 2016
- ⇒ Working documents of the European Committee on Crime problems (CDPC) of the Council of Europe, including those on “preventing and suppressing the smuggling of migrants in council of Europe Member States: a way forward” (CDPC 2016/4 rev), "national laws relating to smuggling of migrant networks in council of Europe Member States" (CDPC 2016/3) and "compilation of replies to the questionnaire concerning smuggling of migrants"(CDPC 2015/22), available at [http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/Bureau%20documents/CDPC%20\(2016\)%20oj%201%20-%20e%20-%20Draft%20agenda%20June%202016.asp](http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/Bureau%20documents/CDPC%20(2016)%20oj%201%20-%20e%20-%20Draft%20agenda%20June%202016.asp)
- ⇒ Study "Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants" commissioned by European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the LIBE Committee, December 2015
- ⇒ Outcomes of the meetings of the Eurojust Consultative Forum of Prosecutors general of December 2014 and December 2015
- ⇒ Fundamental Rights Agency paper on "Criminalisation of migrants in an irregular situation and of persons engaging with them", March 2014
- ⇒ Study on "Smuggling of migrants: characteristics, responses and cooperation with third countries", carried out within the framework of the European Migration Network (EMN), September 2015
- ⇒ Other sources included Frontex Risk Analysis and data and reports from other EU agencies, including Europol, Eurojust and FRA; EMN documents such as Ad Hoc Queries, studies and reports; IOM, OECD, International Maritime Organisation (IMO), and UN agencies data and reports; the Study on "Criminal sanction legislation and practice in representative Member States" conducted for DG JUST in (2013), and further relevant academic and open source research on migrant smuggling.

4. All instances that were used, to different extents, in order to **gather stakeholders views** on the Facilitators Package are detailed in Annex II on stakeholder consultation.

### **Challenges as regards data availability and comparability**

One of the main challenges arising in the completion of the evaluation was the limited availability and comparability of data. This was mainly evident during the conduction of the ICF study as well as in the interaction with other stakeholders. This concerns both migration and crime statistics, although in the latter case the unavailability of data proved more significant.

In several cases, Member States do not gather regular, centralised statistics at national level or, when they do, these are not systematically comparable or updated. In other cases, the burden brought by the management of the migratory crisis of the past two years has made data gathering more cumbersome and hence difficult for national authorities. When crime statistics are gathered, their comparability at EU level is a recognized challenge<sup>171</sup>, and one which horizontally affects several crime areas.

The response to questionnaires administered in the framework of the ICF study to the various stakeholders, and in particular Member States, was partial. Questions which received the lowest number of replies concerned aspects linked to the budgets allocated to countering migrant smuggling, cooperation on extraditions with Member States and third countries, as well as coherence, relevance and added value of the Facilitators Package. The fact that not all questions were answered or that replies were not always uniform or exhaustive was due, in some cases, to resources being devoted to tackle emergencies at national level, linked to the spiking migratory crisis. In some cases, this has been identified as a cause for the unavailability or limited possibility to provide feedback from some respondents in national administrations.

Concerning the specific criterion of efficiency, it must be stressed that, as pointed out by the Commission in previous assessments, “an empirical demonstration of exactly how much EU public money could be recovered, or losses of it be avoided, by criminal law measures is not possible due to the absence of, and methodological challenges in generating, empirical data on the preventive effect and thus financial impact of any given criminal law provision”.<sup>172</sup> Criminal law does not save nor recover money as such, but it exerts influence on individuals who might otherwise or do commit illegal acts, and it gives tools to investigators in order to enforce recovery, which would otherwise remain theoretical. The causal link between criminal law and avoidance of losses is therefore dependent on human beings acting in accordance with it, which makes empirical demonstration difficult. However, a reasoned and robust estimate is possible. Such an estimate can be based on a criminological analysis, which also looks into behavioural effects of legal norms”<sup>173</sup>.

Apart from data availability, broader methodological challenges were encountered in evaluating the Facilitators Package against the criteria set out in Part 3 of the evaluation, and more significantly those of effectiveness, efficiency, and EU added-value. Based on the external expertise that has supported this evaluation, rigorous comparisons between ‘policy on’ and ‘policy off’ contexts, either between jurisdictions or over time have not be possible, because the differences between the legislation concerning migrant smuggling in migrant destination countries are small and there are few relevant data. Furthermore, there are no well-established ‘models’ or ‘theories of change’ that can be used to inform the likely magnitude of

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<sup>171</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0713&from=EN>

<sup>172</sup> Eisenberg, *Kriminologie*, 5th edition 2000 § 41 at no. 6.

<sup>173</sup> Commission Staff Working Paper on the impact assessment accompanying the proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law, SWD(2012)195, p. 10.

impacts that are likely to accrue as a consequence of changes to the Facilitators Package or related policy measures<sup>174</sup>. As a result, the conclusions drawn in the study supporting this evaluation are greatly relying on opinion and reasoned argument.

Migrant smuggling to the EU arises from a combination of factors. While strongly driven by demand, the increasing operation of criminal groups who engage in facilitation of irregular migration can contribute to maintaining high flows, through a more active recruitment of individuals in need of or willing to use smugglers services to undertake an irregular migration journey.

There are many actions apart from the EU legal framework on the criminalisation of migrant smuggling and approximation of sanctions that can help to tackle migrant smuggling. Separating the specific influence of the Facilitators Package from these other factors and measures is difficult and remains based on judgements, albeit supported by external expertise, collection of expert opinions and available evidence.

Whenever possible, estimations were made based on the partial information available and the assessments of the experts, who worked on the main study on the practical application of the Package, supporting this evaluation.

A number of actions were undertaken to overcome the challenges described above. Methodological issues were discussed and analysed with the experts who carried out the study supporting this evaluation as regards the implementation of the framework. In terms of data availability, repeated consultation of Member States through questionnaires by external contractors as well as requests for relevant updates in terms of figures at national level were carried out through the Commission expert Contact Group on facilitation of irregular immigration both in 2015 and 2016.

The Commission expert Group on policy needs for data on crime was also consulted with targeted questions between February and March 2016 in order to gather an overview of publically available data<sup>175</sup>. Other MS authorities were consulted with targeted questions to gather an overview through the Commission expert group on freedom of movement (FREEMO) on sham marriages. Authorities represented in the Commission expert group on land transport security (LANDSEC) were also invited to contribute with any relevant input on issues linked to the policy and legal framework against migrant smuggling, including costs faced by authorities and business.

Specific EMN Ad Hoc Queries were launched to supplement the data gathered in the study, such as for instance a query on criminalization of document fraud<sup>176</sup>. Further details on stakeholder consultation are contained in Annex II.

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<sup>174</sup> ICF study, *cit.*

<sup>175</sup> See *infra*, Annex IV.

<sup>176</sup> EMN Ad Hoc query, 2016-1036.

## **ANNEX IV- Overview of mains trends and figures on facilitation of irregular migration**

This Annex aims to provide a concise overview of the main figures and trends, relevant for setting the context and understanding recent trends related to facilitation of irregular migration to the EU. On the one hand, it looks at migration trends, which also offer a certain amount of information on the number, main nationality, gender and rate of fatalities of migrants arriving to Europe. On the other, it touches on available crime statistics related to the facilitation of unauthorised entry, transit and residence in the EU. Figures and graphs are based on a variety of publically available sources, ranging from Member States, International Organisations, EU Agencies such as Europol and Frontex, as well as academic sources.

To illustrate the scale of the migratory movements towards Europe, certain statistical indicators have been analysed. 2013 saw the number of **illegal border crossings** by migrants reach a record high at the time, totalling 140 000 detections<sup>177</sup>. This record high kept being topped, first in 2014 reaching 283 532<sup>178</sup> and again in 2015 to around 1 822 337 detections. In the first 9 months of 2016, 442 721 irregular border crossings have been detected, compared with 844 012 during the same period in 2015<sup>179</sup>.

**Table 1 – Irregular border crossings between border crossing points EU wide<sup>180</sup>**

Irregular border crossings between BCPs	2008	2009	2010	2011	2012	2013	2014	2015
	<b>159,881</b>	<b>104,599</b>	<b>104,060</b>	<b>141,051</b>	<b>72,437</b>	<b>107,365</b>	<b>282,933</b>	<b>1,822,177</b>

The number of illegal border crossings in 2015 should be understood to be based on the assumption that all migrants first detected irregularly crossing in Greece were then detected for a second time re-entering the EU from the Western Balkans<sup>181</sup>. Therefore in 2015 the 1 822 337 illegal border crossings relate to an estimate of **about 1 000 000 persons**.

According to Eurostat, in 2015 the EU 28 Member States received more than 1 257 030 **first time asylum claims**, more than double the number registered in 2014 (562 680)<sup>182</sup>.

According to UNHCR, the number of arrivals by sea towards Europe in 2016 were 361 709 with the main nationalities being Syrians, Afghans and Nigerians<sup>183</sup>.

<sup>177</sup>Frontex Annual Risk Analysis, 2015, available at: [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2015.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf).

<sup>178</sup> *Ibid.*

<sup>179</sup> Frontex FRAN Q3 2016, <http://frontex.europa.eu/publications/>

<sup>180</sup> Frontex Annual Risk Analyses.

<sup>181</sup> Frontex Risk Analysis for 2016, available at:

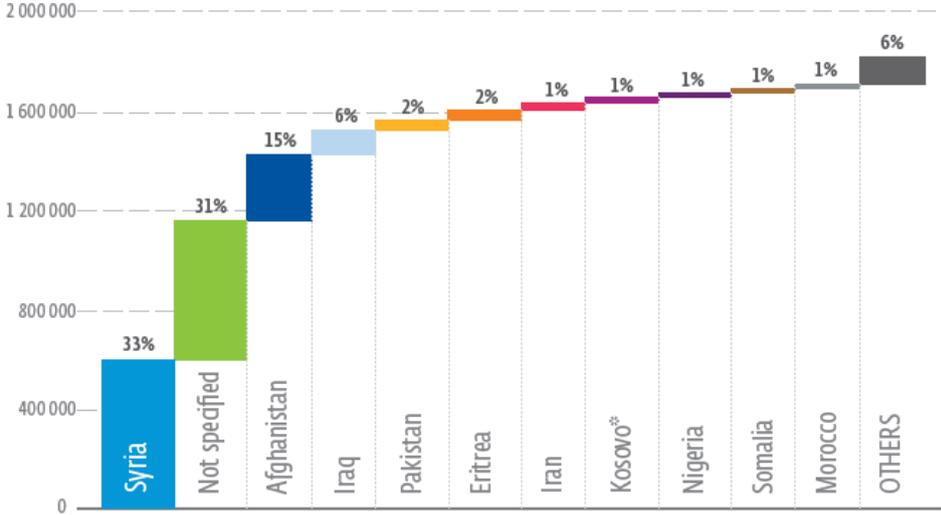
[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf)

<sup>182</sup> Eurostat [data](#) series (migr\_asyappctza), as of 14 December 2016; <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>.

<sup>183</sup> <http://data.unhcr.org/mediterranean/regional.php>.

The main nationalities arriving thus far in 2016 roughly also correspond to the most commonly detected nationalities arriving to the EU during the course of 2015 (see Figure 1), namely Syrians as the primary nationality. However, according to Frontex data<sup>184</sup>, the second

Figure 1 - Detections of illegal border crossings by main nationalities in 2015



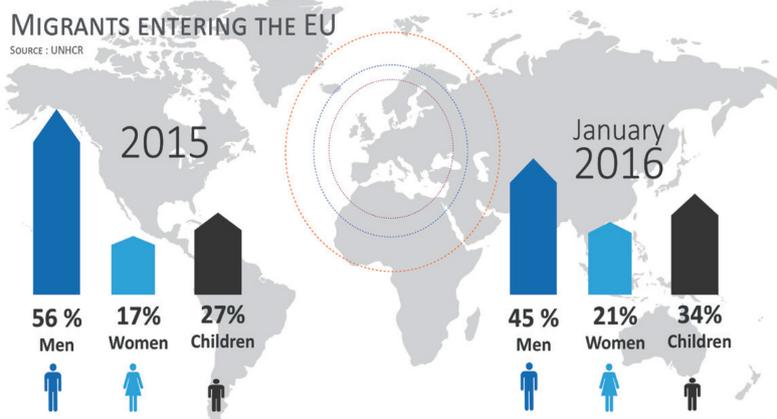
Source: Frontex Risk Analysis for 2016

largest group of migrants were actually not possible to specify in their nationality. Thereafter the nationalities that were possible to ascertain remain the same in 2016 when compared with the arrivals data of UNHCR for 2016, except

Nigerians who were not amongst the top 3 nationalities of migrants arriving during 2015 (Afghans, Iraqis, Pakistanis), but where the third most detected nationality according to UNHCR in 2016.

Figure 2 illustrates the breakdown in proportion of migrants who entered the EU in 2015 and

Figure 2 – Gender and age breakdown of migrants entering the EU in 2015 and early 2016



Source: "Migrant Smuggling in the EU" - Europol, February 2016

in the first month of 2016<sup>185</sup> according to UNHCR as presented by Europol. In 2016, the ratio of children was 26%, while women made up 17% and men the remaining 57% of the migratory flow<sup>186</sup>.

The journey that most of the migrants took to Europe in 2015 was perilous, as reflected in the fact that according to IOM's Missing Migrant project, migrant

<sup>184</sup> Frontex Risk Analysis for 2016, p.16 available at: [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf)  
<sup>185</sup> "Migrant Smuggling in the EU", Europol, February 2016.  
<sup>186</sup> <http://data.unhcr.org/mediterranean/regional.php>

fatalities reached 3 770 during 2015, which meant an increase by 15% compared to the previous year.<sup>187</sup> According to UNHCR 5 022 migrants died or went missing in 2016<sup>188</sup>.

The need for state action to ensure the protection of human rights, such as the right to life and the right to asylum, has increased. This has been met to a certain extent through enhanced border patrol, as well as search and rescue efforts. The joint efforts of Frontex Operation Triton and the Common Security and Defence Policy Operation EUNAVFORMED Sophia along with the merchant and NGO vessels involved in SAR interventions in the Mediterranean Sea have allowed to save over 228 651 lives in 2016 alone<sup>189</sup>.

Nevertheless, compared to 2014 the death toll on the Mediterranean rose by 15% in 2015, while during the same period the number of detected irregular border crossings grew by 544%. According to the IOM the number of migrant deaths in the Mediterranean in 2016 rose further to 5 079, which is 42% higher than during the same period in 2015 (3 777 fatalities)<sup>190</sup>, despite less detections of irregular border crossings. According to Frontex, this is due to smugglers overcrowding rubber boats even more than previously, as well as using smaller boats<sup>191</sup>.

War, poverty, social and political instability, as well as lack of or limited access to legal channels to reach the EU determine migrants and asylum seekers to seek the services of criminals who facilitate their unauthorized entry, transit or stay into the EU and constitute the root causes of the phenomenon.

As regards criminal statistics linked to facilitation of irregular migration, public availability and comparability of data across EU Member States is very limited.

Available evidence in some instances does suggest that the greater the number of migrants on a given route, the more likely it is that the smuggling is conducted by a professional criminal network.<sup>192</sup>

**Table 2 – Detection of suspected facilitators<sup>193</sup>**

Detections of facilitators	2008	2009	2010	2011	2012	2013	2014	2015
	<b>9,884</b>	<b>9,171</b>	<b>8,629</b>	<b>6,957</b>	<b>7,662</b>	<b>7,252</b>	<b>10,234</b>	<b>12,023</b>

This unprecedented increase in the demand for smugglers' services is enhanced by the protracted situation of crisis in the EU's neighbourhood, and more specifically by war and political instability in Syria, Iraq, Afghanistan, as well as other countries in Africa, Asia and the Middle East, pushing people to flee their countries and seek protection in the EU.

<sup>187</sup> <http://iomgmdac.org/global-trends-2015-factsheet/>

<sup>188</sup> <http://data.unhcr.org/mediterranean/regional.php>

<sup>189</sup> Frontex Operational data as of 21 December 2016.

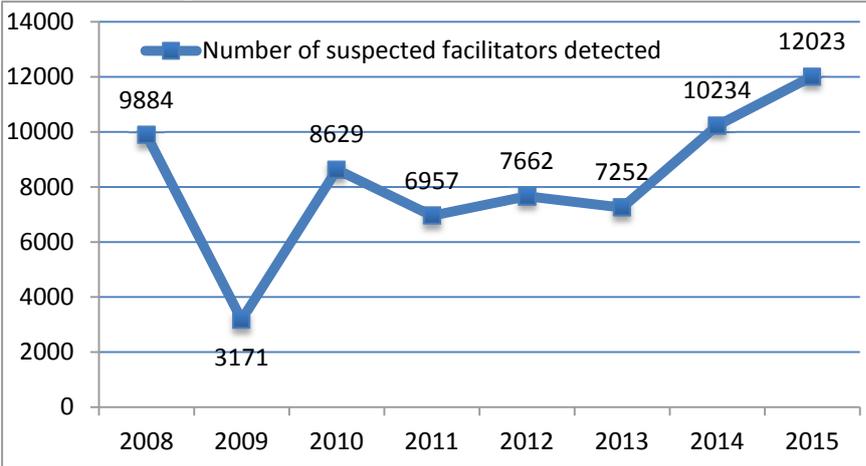
<sup>190</sup> IOM Mediterranean update, Migration Flows Europe: Arrivals and Fatalities, 29<sup>th</sup> July 2016.

<sup>191</sup> See interview with EU Observer, 2<sup>nd</sup> August 2016, at <https://euobserver.com/migration/134555>

<sup>192</sup> Migration and Asylum in Malta and the European Union: Rights and Realities, ed. Peter G. Xuereb (Malta: Malta University Press - 2012).

<sup>193</sup> Frontex Annual Risk Analyses.

**Figure 3 - Number of suspected facilitators detected at external borders as reported to Frontex since 2008**



Source - Frontex Risk Analysis for 2016

Despite the dangers of the journey, there is an unprecedented demand for facilitators' services. This is also reflected in the number of suspected facilitators detected at the EU's external border or within the EU trying to facilitate secondary movements, which has been on the rise in the last few years, peaking in 2015 (see figure 3)<sup>194</sup>. Between 2013 and 2014

the number of suspected facilitators detected at the external borders and within the EU rose by 41% and in 2015 this number rose again by 17%. Between January and September 2016, the number of suspected facilitators reported to Frontex was 9 269. This figure has not yet been included in the table above, since the latter collates annual figures. Instead, the table below compares the number of suspected facilitators reported to Frontex in the first 9 months of each of the previous 5 years, which indicates a marked year on year increase from 2013 onwards to 2015, while the number of facilitators reported to Frontex in the first nine months of 2016 remained similar to the numbers reported during the same period of 2015.

**Table 3 – Detection of suspected facilitators in the first nine months of the previous 5 years<sup>195</sup>**

Detection of suspected facilitators	Jan-Sep 2012	Jan-Sep 2013	Jan-Sep 2014	Jan-Sep 2015	Jan-Sep 2016
	<b>5 602</b>	<b>5 342</b>	<b>7 472</b>	<b>9 300</b>	<b>9 269</b>

At the same time, since 22<sup>nd</sup> June 2015, when EUNAVFORMED Operation Sofia was launched to target people smugglers and traffickers in the central Mediterranean Sea, the

<sup>194</sup> Frontex Annual Risk Analysis 2016, p.64  
<sup>195</sup> FRAN Q3 2016 and FRAN Q3 2013, Frontex, <http://frontex.europa.eu/publications/>

number of suspected smugglers and traffickers arrested following the direct activities and support activities of the naval operation amounted to 87 and 146 respectively (up to 31<sup>st</sup> August 2016)<sup>196</sup>. Frontex Operation Triton and the Common Security and Defence Policy Operation EUNAVFORMED Sophia along with the merchant and NGO vessels involved in SAR interventions in the Mediterranean Sea have supported the arrest of more than 930 suspected facilitators in 2016 alone<sup>197</sup>.

In response to a request of information circulated through the Commission's expert group on policy needs for data on crime in March 2016, 18 Member States<sup>198</sup> provided responses on the availability of statistics on the number of investigations, prosecutions and eventual convictions of facilitators at national level. Albeit patchy, the most complete data on facilitators that Member States have provided and indeed data they collect relate to identified suspects linked to facilitation of unauthorised entry, transit or residence (Table 4). This data is complemented by data gathered through the European Migration Network national contact points, as well as monthly reports on the migration situation in the EU by the Fundamental Rights Agency. It is important to note that definitions in criminal law differ substantially according to the Member State and data collection, therefore figures are not directly comparable. Furthermore, even when available, such data may not be exhaustive.

**Table 4 - Suspects of facilitation of migrant smuggling (including pre-trial investigations)**<sup>199</sup>

	2012	2013	2014	2015	2016 (up to August)
<b>Austria</b>	-	543	559	1148	
<b>Bulgaria</b> <sup>200</sup>	-	-	-	-	129
<b>Croatia</b>	-	116	80	72	
<b>Finland</b> <sup>201</sup>	-	-	42	91	-
<b>Germany</b> <sup>202</sup>	2 049	2 558	2 994	-	-
<b>Greece</b> <sup>203</sup>	726	843	1,171	1501	657
<b>Hungary</b> <sup>204</sup>	-	-	-	1176	209

<sup>196</sup> European External Action Service, EUNAVFORMED data factsheet, 31<sup>st</sup> August 2016.

<sup>197</sup> Frontex Operational data as of 21 December 2016.

<sup>198</sup> Austria, Croatia, Cyprus, Denmark, Finland, France, Greece, Ireland, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Sweden, Slovakia, Spain, United Kingdom.

<sup>199</sup> Data from Member States collected through the Commission expert group on policy needs for data on crime (April 2016) unless referenced otherwise.

<sup>200</sup> Monthly data collection on the current migration situation in the EU, May 2016, European Union Agency for Fundamental Rights, p.6

<sup>201</sup> "Number of defendants", as from data from European Migration Network ad-hoc query on updating the publically available crime statistics on migrant smuggling (August 2016).

<sup>202</sup> IOM - Migrant Smuggling Data and Research: A global review of the emerging evidence base ([https://publications.iom.int/system/files/smuggling\\_report.pdf](https://publications.iom.int/system/files/smuggling_report.pdf))

<sup>203</sup> Data between 2012-2014 from the IOM - Migrant Smuggling Data and Research: A global review of the emerging evidence base ([https://publications.iom.int/system/files/smuggling\\_report.pdf](https://publications.iom.int/system/files/smuggling_report.pdf)), supplemented by data sent to the European Commission from the Hellenic Police. Data in 2016 covering the first 9 months.

<sup>204</sup> Data from European Migration Network ad-hoc query on updating the publically available crime statistics on migrant smuggling (August 2016).

<b>Italy</b> <sup>205</sup>	1655	1499	1498	-	-
<b>Poland</b> <sup>206</sup>	36	37	20	57	9
<b>Sweden</b>	-	31	41	-	-
<b>Slovakia</b>		91	81	98	
<b>Spain</b> <sup>207</sup>	836	746	-	-	-

According to Europol's data for 2015<sup>208</sup>, the Figures 4 and 5 below detail the main nationalities or countries of birth of suspected migrant smugglers, as well as their countries of activity and of residence.

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<sup>205</sup> Law enforcement data, collated via the European Migration Network (EMN), "Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU: national institutional frameworks, policies and other knowledge-based evidence" of 2014. Figures for 2014 refer to January-September. The same query also reports 3033, 1978 and 1 655 facilitators reported to courts respectively for the years 2010, 2011 and 2012.

<sup>206</sup> Data refers only to the number of people against who the Border Guard brought charges and who were temporarily arrested. Data from European Migration Network ad-hoc query on updating the publicly available crime statistics on migrant smuggling (August 2016).

<sup>207</sup> European Migration Network (EMN) Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU: national institutional frameworks, policies and other knowledge-based evidence", 2014, p. 89

<sup>208</sup> "Migrant Smuggling in the EU", Europol, February 2016.

Figure 4 - Main nationalities or countries of birth of suspected facilitators<sup>209</sup>



Source: "Migrant Smuggling in the EU" – Europol, 2016

<sup>209</sup> "Migrant Smuggling in the EU", Europol, February 2016.

Figure 5 - Nationalities of reported suspects of migrant smuggling in 2016<sup>210</sup>

## Key changes in nationalities of reported suspects

Source: Europol data  
 Timeframe: 2015 & 2016 (24/08/2016)  
 Suspects of which the nationality is known: N 2015= 4081; N 2016= 3992.  
 Total N of different nationalities reported in 2015= 107, 2016= 93.

TOP 10 Nationality of suspects	2015	TOP 10 Nationality of suspects	Jan-Aug 2016*	Variation in %
Romania	350	Turkey	423	+295,3
Egypt	336	Syria	364	+39,5
Syria	261	Romania	216	-38,3
Poland	259	Bulgaria	168	+1,2
Tunisia	180	Egypt	167	-50,3
Hungary	178	Iraq	152	+12,6
Bulgaria	166	Ukraine	149	+156,9
Iraq	135	Poland	136	-47,5
Turkey	107	United Kingdom	136	+32
United Kingdom	103	Senegal	103	+28,8

\*Top MS Contributors in 2016: Italy, United Kingdom, Greece, Austria, Belgium, Hungary, France, Spain, Ireland, Bulgaria, Netherlands, Romania and Poland.

Source: Europol Infographic, September 2016

As for other criminal statistics, available data on the number of prosecutions against facilitators is incomplete and not directly comparable across Member states, also due to differences in national legal systems and recording methods, at judicial and police level. Even when available, it may not be exhaustive. The complexity of investigating and proving migrant smuggling provide solid reasons to believe that the actual "prevalence of smuggling is also higher than the number of proceedings might indicate. This may in part be due to the fact that the police prioritise expulsion over prosecution, as reported from Sweden, particularly in times of many arrivals"<sup>211</sup>. An indicative overview based on the information available for 26 Member States and Norway for the period 2009-2016 (up to August) is shown in Table 5.

<sup>210</sup>See at <https://www.europol.europa.eu/content/latest-trends-migrant-smuggling-epmt-one-year-anniversary-infographic-0>.

<sup>211</sup> Monthly Data collection on the current migration situation in the EU, May 2016, European Union Agency for Fundamental Rights, p.7.

**Table 5 – Indicative overview of number of prosecutions of facilitators of unauthorised entry, transit and residence (and related offences)<sup>212</sup>**

Number of prosecutions of facilitators of unauthorised entry, transit and residence (and related offences)								
	2009	2010	2011	2012	2013	2014	2015	2016 (up to August)
<b>Austria*</b>	438	327	288	235	352	511	1 108	68
<b>Belgium</b>	362	325	515	323	-	-	-	-
<b>Bulgaria</b>	-	264	213	318	390	610	-	-
<b>Denmark<sup>213</sup></b>	134	71	74	70	130	208	249	153
<b>Estonia<sup>214</sup></b>	-	-	18	39	37	19	8	7
<b>Croatia<sup>215</sup></b>	-	-	-	-	116	80	72	24
<b>Cyprus</b>	-	-	-	-	-	-	-	1
<b>Czech Republic</b>	142	62	126	238	145	120	167	30
<b>Finland<sup>216</sup></b>	113	125	91	107	124	38	70	-
<b>France</b>	-	-	-	804	758	933	1,075	-
<b>Germany<sup>217</sup></b>	2,274	2,228	2,030	2,342	2,846	3,221	5,226	-
<b>Hungary</b>	141	123	166	181	205	276	-	-
<b>Italy<sup>218</sup></b>	-	-	-	-	99	510	514	336
<b>Latvia</b>	17	13	4	7	7	31	87	35
<b>Lithuania</b>	28	11	27	26	25	54	61	-
<b>Luxembourg</b>	-	-	-	1	6	1	2	-
<b>Malta</b>	8	10	3	-	7	-	-	-

<sup>212</sup> The data contained in this table is based on different sources and is not directly comparable across all Member States. Unless differently specified, figures refer to the responses to questionnaires by Member States within the framework of the ICF study, *cit.*. In addition: \* refers to data collected through the EMN Ad-Hoc Query 605 on “Facilitation of irregular immigration (migrants smuggling) to the EU: national institutional frameworks, policies and other knowledge-based evidence (2014); colour code – refers to EMN Ad-Hoc Query on updating the publically available crime statistics on migrant smuggling (August 2016); colour code - refers to data collected through a query to the Commission expert group on policy needs for data on crime.

<sup>213</sup> Data from the Danish Ministry of Justice sent upon request of the European Commission

<sup>214</sup> Estonian Ministry of Justice Criminal Policy Department Analysis Division.

<sup>215</sup> In addition, the Croatian response to consultation within the framework of the ICF study indicate 41 prosecutions for 2013 and 44 for 2014.

<sup>216</sup> The data refers to "number of criminal charges" in the response sent to the from EMN ad-hoc query on updating the publically available crime statistics on migrant smuggling (August 2016). Data collected through the Commission expert group on policy needs for data on crime (March 2016) point to 60 prosecutions in 2013 and 39 in 2014.

<sup>217</sup> Further information on, among others, cases on smuggling of human beings completed by the prosecutor at district court and other criminal court proceedings data can be found at Destatis, Statistisches Bundesamt, Rechtspflege Staatsanwaltschaften, Fachserie 10. <https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften.html>

<sup>218</sup> This data, reported by the Ministry of Justice, refers only the following public prosecutors offices, mostly affected by the phenomenon because of their geographical position: Agrigento, Bari, Bolzano, Brindisi, Catania, Catanzaro, Crotone, Gorizia, Imperia, Lecce, Messina, Milano, Napoli, Palermo, Ragusa, Reggio Calabria, Roma, Salerno, Siracusa, Trapani, Trieste.

<b>Netherlands</b>	-	-	137	99	114	121	109	108
<b>Norway</b>	62	71	79	62	56	67	146	46
<b>Poland</b> <sup>219</sup>	-	-	121	192	161	136	247	121
<b>Portugal</b>	87	74	69	79	75	-	-	-
<b>Romania</b>	12	7	10	6	12	15	-	-
<b>Slovakia</b>	92	81	92	87	72	52	82	-
<b>Slovenia*</b>	-	-	-	-	257	-	-	-
<b>Spain</b>	104	47	45	89	83	-	-	-
<b>Sweden</b>	2	3	2	2	1	12	-	-
<b>United Kingdom</b> <sup>220</sup>	199	206	276	245	268	311	288	-

The Monthly data collection on the current migration situation in the EU, compiled by the European Union Agency for Fundamental Rights, reports up until 31 August 2016, 80 suspected smugglers being prosecuted in Greece<sup>221</sup>.

In addition to the above table on prosecution, information on convictions could be retrieved for some Member States. However, as for the rest of the crime statistics on migrant smuggling, such data is not directly comparable and it is not specified whether these refer to first convictions. The table below gives a limited snapshot.

**Table 6 - Number of convictions of facilitators**<sup>222</sup>

	2011	2012	2013	2014	2015	2016
<b>Czech Republic</b> <sup>223</sup>	88	88	121	103	84	
<b>Finland</b>	-	-	41	32	-	
<b>France</b> <sup>224</sup>	974	887	844	893	-	
<b>Germany</b> <sup>225</sup>	-	-	622	970		

<sup>219</sup> This represents the number of people against who the Polish Border Guard brought charges over facilitation of unauthorised entry and residence, including attempt and accessory.

<sup>220</sup> Data correspond to Home Office statistics for England and Wales from Crown Courts, for the following three offences: "assisting unlawful immigration to the UK; Assisting entry to UK in breach of deportation or exclusion order; Helping asylum seeker to enter the UK". Corresponding data from Magistrates Courts between 2009 and 2015 are, 249; 282; 441; 344; 376; 378; 345 respectively. Further information can be found at <https://www.gov.uk/government/statistics/immigration-statistics-april-to-june-2016-data-tables>.

<sup>221</sup> Data collated through the FRA Monthly data collection on the current migration situation in the EU between January and September 2016.

<sup>222</sup> Data from Member States collected through the Commission expert group on policy needs for data on crime (April 2016).

<sup>223</sup> EMN Ad-Hoc Query on updating the publically available crime statistics on migrant smuggling (August 2016)

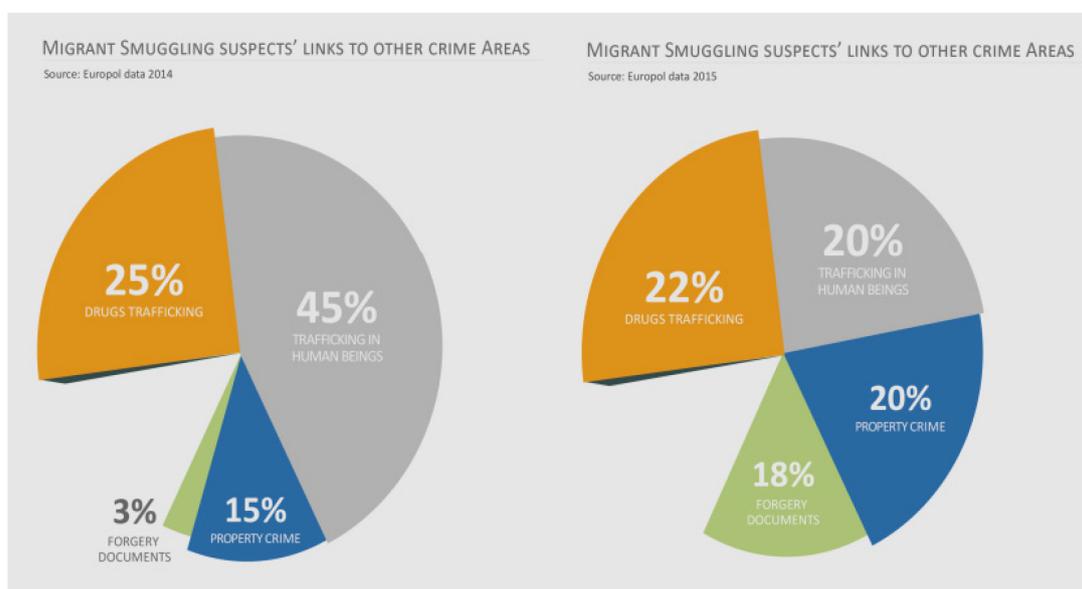
<sup>224</sup> Data for 2014 is only temporary data at the time of contribution to the EMN Ad-Hoc Query on updating the publically available crime statistics on migrant smuggling (August 2016).

<sup>225</sup> Individuals convicted under criminal law proceedings for the smuggling of foreigners (section 96). Further information can be found at Destatis, Statistisches Bundesamt, Rechtspflege Staatsanwaltschaften, Fachserie 10 Reihe 3, [www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften2100260137004.pdf?\\_\\_blob=publicationFile](http://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften2100260137004.pdf?__blob=publicationFile)

<b>Italy</b> <sup>226</sup>	-	-	36	99	114	87
<b>Poland</b> <sup>227</sup>	143	86	96	86	107	
<b>Slovakia</b>	-	-	50	42	89	
<b>United Kingdom</b> <sup>228</sup>	221	176	211	239	243	

Document fraud is playing an increasing part in the share of migrant smuggling services offered by criminal rings. According to Europol, an increasing number of migrant smuggling cases involve to documentary fraud, since this type of crime can be used both for the illegal crossing of the border as well as to legalise stay through illicit means.

**Figure 6 – Migrant Smuggling suspects' links to other crime areas, including document fraud**



Source: "Migrant Smuggling Networks" – Joint Europol-Interpol Report, Executive Summary – May 2016

The European Commission launched an ad-hoc query in March 2016 asking Member States to indicate any statistics on investigations, prosecutions and convictions for documentary fraud related offences<sup>229</sup>. It is important to note that in some Member States legal provisions related to the provision or procurement of false documents are explicitly linked and punishable under

<sup>226</sup> This data, reported by the Ministry of Justice, refers only the following public prosecutors offices, mostly affected by the phenomenon because of their geographical position: Agrigento, Bari, Bolzano, Brindisi, Catania, Catanzaro, Crotone, Gorizia, Imperia, Lecce, Messina, Milano, Napoli, Palermo, Ragusa, Reggio Calabria, Roma, Salerno, Siracusa, Trapani, Trieste.

<sup>227</sup> EMN Ad-Hoc Query on updating the publically available crime statistics on migrant smuggling (August 2016)

<sup>228</sup> Data correspond to Home Office statistics for England and Wales from Crown Courts, for the "assisting unlawful immigration to the UK; Assisting entry to UK in breach of deportation or exclusion order; Helping asylum seeker to enter the UK". Corresponding data on convictions from Magistrates Courts between 2011 and 2015 are, 41; 38; 21; 7; 16 respectively. Further information can be found at <https://www.gov.uk/government/statistics/immigration-statistics-april-to-june-2016-data-tables>.

<sup>229</sup> EMN ad-hoc query 2016.1036, [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/adhocqueries/results/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/adhocqueries/results/index_en.htm)

legislation to facilitate irregular migration<sup>230</sup>, while in others separate specific legal provisions exist for the provision and procurement of false documents, with no explicit link to the facilitation of irregular migration<sup>231</sup>, therefore the numbers below are not directly comparable.

In the case of DE and EE, the provision or procurement of false documents is also considered a criminal offence when facilitating the stay of third country nationals in the country illegally.

Relevant statistics on the number of forged documents identified or cases initiated were provided by AT, CZ, CY, EE, FI, FR, HR, HU, LT, LV, PL and SE.

**Table 7 - Statistics of forged documents or initiated cases**

Member State	2014	2015
<b>Number of forged documents identified</b>		
Austria <sup>232</sup>	5276 <sup>233</sup>	5105 <sup>234</sup>
Croatia	331	312
Cyprus	159	97
Finland	515	563
Hungary	2,335	2,436
Malta	173 <sup>235</sup>	174 <sup>236</sup>
Norway	866	767
Slovak Republic	82	179

<b>Number of cases initiated</b>		
Czech Republic	457	550
Estonia <sup>237</sup>	322	352
Finland (against carriers)	84	150

<sup>230</sup> BE, CY, FR, HU, LT, NO, PL, SE, UK.

<sup>231</sup> CZ, EL, ES, FI, HR, LU, SK

<sup>232</sup> Total sum of offences related to each article relevant to the subject of the Ad-Hoc Query

<sup>233</sup> including criminal code 223, 224, 224a and 228 offences as described in contribution

<sup>234</sup> including criminal code 223, 224, 224a and 228 offences as described in contribution

<sup>235</sup> Includes detections of forged (32) counterfeit (115) and imposter (26)

<sup>236</sup> Includes detections of forged (26), counterfeit (104) and imposter (44)

<sup>237</sup> Prosecutions (criminal law)

Latvia <sup>238</sup>	186	77
Lithuania <sup>239</sup>	106	93
Poland <sup>240</sup>	1,593 <sup>241</sup>	2,892 <sup>242</sup>
Sweden <sup>243</sup>	247 <sup>244</sup>	

Number of convictions		
Czech Republic	291	329
Finland (carrier sanction confirmed)	168	148
Slovak Republic <sup>245</sup>	76	152

The exchange of payments between migrant and smugglers is an important aspect to consider in terms of trying to tackle migrant smuggling from a financial perspective. Pursuing a "follow the money approach" through financial investigations has been established as a priority at EU level in relation to all forms of serious and organised crime, as an effective way of targeting the main players of organised criminal groups, including those involved with migrant smuggling. However, there are limitations and challenges to this approach. According to Europol data from 2015, in the case of migrant smuggling nearly half of the times the payment is made in cash, making it more difficult to track money flows.

The second most common way of paying for facilitation services is through alternative banking or money transfer systems, such as the so-called Hawala method. Transfers effectuated through these methods are more difficult to trace.

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<sup>238</sup> Prosecutions (criminal law)

<sup>239</sup> Pre-trial investigations

<sup>240</sup> Proceedings initiated by Border Guard (Penal Code)

<sup>241</sup> 1551 for using false documents – 42 for sending/carrying false documents across the border

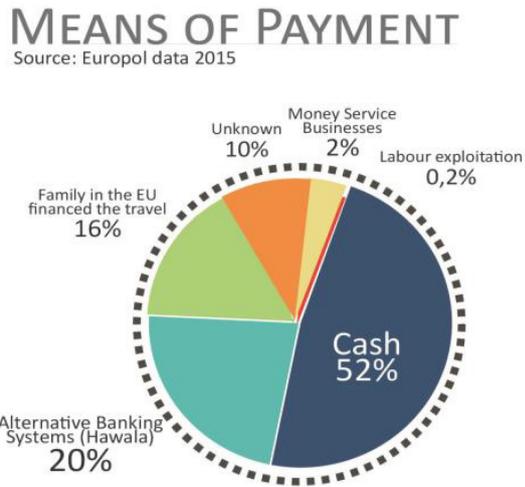
<sup>242</sup> 2852 for using false documents – 40 for sending/carrying false documents across the border

<sup>243</sup> Total for 2014 and 2015

<sup>244</sup> For 2014 and 2015 together, of which 105 of these cases were handed from the police authority to a prosecutor

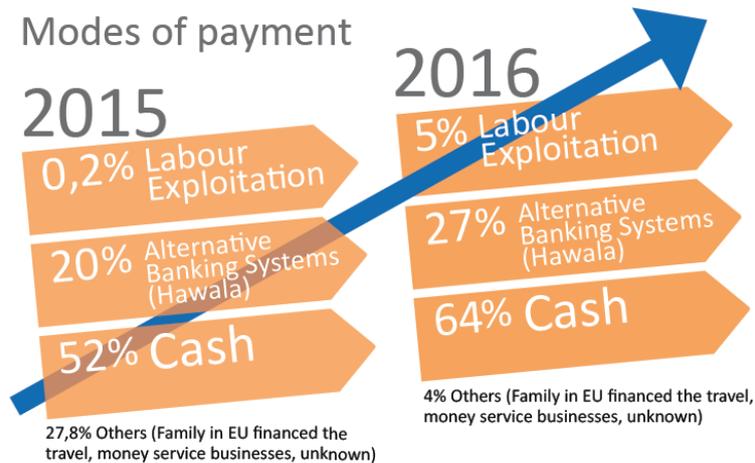
<sup>245</sup> Sentences of imprisonment: 31 (2014) and 39 (2015)

**Figure 7 – Means of payment for facilitation of irregular migration**



Source: "Migrant Smuggling Networks" – Joint Europol-Interpol Report Executive Summary – May 2016

**Figure 8 – Changes in modes of payment between 2015 and 2016 for facilitation services<sup>246</sup>**



Source: Europol Infographic, September 2016

<sup>246</sup> See at <https://www.europol.europa.eu/content/latest-trends-migrant-smuggling-epmt-one-year-anniversary-infographic-0>.

## ANNEX V- Overview tables on the Facilitators Package transposition<sup>247</sup>

### Application of the option provided in Article 1(2) of the Directive not to criminalise facilitation of entry or transit when carried out for humanitarian purposes

Option	Member States that provide for an exemption <sup>248</sup>	Member States that do not provide for an exemption
<b>Exemption from criminalisation of facilitation of entry or transit based on humanitarian grounds (Article 1(2))</b>	BE, EL, ES, FI,, IT, MT, UK	AT, BG, CY, CZ, DE, EE, FR, HR, HU, LT, LU, LV, NL, PL, PT, RO, SE, SI, SK, UK

<sup>247</sup> These tables are based on the study carried out by Tipik, *cit.*, which covers all EU MS except DK.

<sup>248</sup> The same clause is contained in IE (which is however not bound by the Package) where the act is not incriminated if it regards any action which is done to assist an asylum seeker by a person or during the course of their employment by a bona fide organisation whose purpose is to assist asylum seekers.

MS	Sanctions (natural persons)			
	Facilitation of irregular entry / transit Article 1(1)(a) Directive 2002/90/EC		Facilitation of unauthorised residence Article 1(1)(b) Directive 2002/90/EC	
	Administrative offence	Criminal offence	Administrative offence	Criminal offence
AT	A fine from EUR 1 000 to EUR 5 000, in case the fine is irrecoverable an imprisonment up to 3 weeks	Imprisonment up to 2 years <sup>1</sup>	N/A	Imprisonment up to 1 year <i>or</i> a fine up to 360 daily fees (a daily fee ranges from EUR 4 to EUR 5 000)
BE	N/A	Imprisonment from 8 days to 1 year <i>and/or</i> a fine from EUR 1 700 to EUR 6 000	N/A	Imprisonment from 1 year to 5 years <i>and</i> a fine of EUR 5 000 to EUR 50 000
BG	N/A	Imprisonment from 1 to 10 years <i>and</i> a fine of BGN 10 000 to 30 000 (approximately EUR 5000 to EUR 15 000) and confiscation of the part or entire property of the perpetrator	N/A	Imprisonment of up to 5 years and a fine of BGN 3 000 to 10 000. (approximately EUR 1 500 to EUR 5 000)
CY	N/A	Imprisonment up to 8 years <i>or/and</i> a fine up to 20 000 Cypriot pounds (EUR 34 172)	N/A	Imprisonment up to 8 years <i>or/and</i> a fine up to 20 000 Cypriot pounds (EUR 34 172)
CZ	N/A	Imprisonment up to 2 years <i>or</i> prohibition to practice a professional activity.	N/A	Imprisonment up to 1 year <i>or</i> prohibition to practice a professional activity
DE <sup>1</sup>	N/A	Imprisonment up to three years <i>or</i> a fine. When for pecuniary advantage or promise thereof, or acting repeatedly, imprisonment from 3 months up to 5	N/A	imprisonment from 3 months up to 5 years, or in in case of minor offence imprisonment up to five years <i>or</i> a fine.

		years, or in in case of minor offence imprisonment up to five years <u>or</u> a fine.		
<b>EE</b>	N/A	A pecuniary punishment of 30 to 500 daily rates (the minimum daily rate of the pecuniary punishment is EUR 10) <u>or</u> imprisonment up to 3 years (7 years if life threatening or likely to cause serious health harm)	N/A	A pecuniary punishment <u>or</u> up to one year of imprisonment.
<b>EL</b>	N/A	Imprisonment up to 10 years of <u>and</u> a minimum fine up to EUR 20 000	N/A	Imprisonment up to 2 years <u>and</u> a minimum fine of least EUR 10 000
<b>ES</b>	Pecuniary penalties of EUR 10 001 to EUR 100 000	A fine from 3 to 12 months or imprisonment from 3 months to 1year A day of fine amounts between a minimum of EUR 30 to a maximum of EUR 5 000	Pecuniary penalties of EUR 10 001 to EUR 100 000	A fine from 3 to 12 months or imprisonment from 3 months to 1year A day of fine amounts between a minimum of EUR 30 to a maximum of EUR 5 000
<b>FI</b>	N/A	A fine <u>or</u> a imprisonment up to 2 years	N/A	Sentencing for abetting on the basis of the sentence for the perpetrator who is a third-country national residing illegally in Finland.
<b>FR</b>	N/A	Imprisonment of 5 years <u>and</u> a fine of EUR 30 000	N/A	Imprisonment of 5 years <u>and</u> a fine of EUR 30 000
<b>HR</b>	N/A	Imprisonment of 60 days <u>and</u> a fine in the amount of HRK 23 000 (EUR 3 000) for each assisted foreigner  Imprisonment from 6 months to 5 years <sup>iii</sup>	N/A	Imprisonment of 60 days <u>and</u> a fine in the amount of HRK 23 000 (EUR 3 000) for each assisted foreigner  Imprisonment from 6 months to 5 years <sup>iv</sup>
<b>HU</b>	N/A	Imprisonment from	N/A	Imprisonment up to 2

		1 to 5 years		years
<b>IE</b>	A fine up to EUR 5 000 <i>or/and</i> imprisonment up to 12 months.	A fine <i>or/and</i> imprisonment up to 10 years	N/A	N/A
<b>IT</b>	N/A	Imprisonment for 1 to 5 years <i>and</i> a fine of EUR 15 000 per each person whose illegal entry on the Italian territory has been facilitated	N/A	Imprisonment for 1 to 4 years <i>and</i> a fine of EUR 15 000
<b>LT</b>	A fine of EUR 289 up to EUR 868	A fine or imprisonment up to 6 years.	A fine of EUR 72 up to EUR 868	N/A
<b>LU</b>	N/A	Imprisonment from 3 to 5 years <i>or/and</i> a fine of EUR 10 000 to EUR 50 000	N/A	Imprisonment from 3 to 5 years <i>or/and</i> a fine of EUR 10 000 to EUR 50 000
<b>LV</b>	N/A	Imprisonment up to 2 years	N/A	Imprisonment up to 4 years <i>or</i> temporary deprivation of liberty up to 1 month <i>or</i> community service, <i>or</i> a fine with deprivation of the right to take up a specific office for a term not exceeding five years and with or without confiscation of property
<b>MT</b>	N/A	Imprisonment up to 2 years <i>or/and</i> a fine of EUR 11 646.87	N/A	Imprisonment up to 2 years <i>or/and</i> a fine of EUR 11 646.87
<b>NL</b>	N/A	Imprisonment up to 4 years <i>or</i> a monetary penalty of the fifth category (maximum of EUR 81 000 as of 1 January 2014)	N/A	Imprisonment up to 4 years or a monetary penalty of the fifth category (maximum of EUR 81 000 as of 1 January 2014)
<b>PL</b>	N/A	Imprisonment of 6 months up to 8 years	N/A	Imprisonment of 3 months up to 5 years
<b>PT</b>	N/A	Imprisonment up to 3 years	N/A	Imprisonment of 1 up to 5 years
<b>RO</b>	N/A	Imprisonment of 2 to 7 years	N/A	Imprisonment of 2 to 7 years
<b>SE</b>	N/A	A fine <i>or</i>	N/A	A fine <i>or</i>

		imprisonment up to 2 years (6 years if the offence is "gross")		imprisonment up to 2 years
<b>SI</b>	N/A	Imprisonment up to 5 years <i>and</i> a financial fine. The limits of the financial fines are 360 daily fines which cannot exceed EUR 1 000 for each day, thus maximum EUR 360 000	N/A	Imprisonment of 1 to 5 years <i>and</i> a financial fine. The limits of the financial fines are 360 daily fines which cannot exceed EUR 1 000 for each day, thus maximum EUR 360 000
<b>SK</b>	N/A	Imprisonment from 1 to 5 years	N/A	Imprisonment from 2 to 8 years
<b>UK<sup>v</sup></b>	N/A	<u>Conviction in indictment</u> Imprisonment up to 14 years <i>or/and</i> a fine <u>Summary conviction</u> Imprisonment up to 6 months <i>or/and</i> a fine not exceeding the statutory maximum	N/A	<u>Conviction in indictment</u> Imprisonment up to 14 years <i>or/and</i> a fine <u>Summary conviction</u> Imprisonment up to 6 months <i>or/and</i> a fine not exceeding the statutory maximum

- i)** AT criminalises facilitation to enter and transit when committed for financial gain
- ii)** German legislation sanctions only participants (principal perpetrators, instigators and aiders) to crimes under Article 1 and 2 of the Directive
- iii)** In HR facilitation to enter and transit across is foreseen to be a misdemeanor, while when committed for financial gain is a criminal offence.
- iv)** In HR facilitation to reside is foreseen to be a misdemeanor, while when committed for financial gain is a criminal offence.
- v)** The United Kingdom criminal court system at first instance is divided into Crown and magistrates courts. When the matter is comparatively not very serious is it tried at a magistrates court (summary conviction) as opposed to a Crown court (conviction in indictment).

**Application of the options provided for in Article 1(2) of the Framework Decision**

	<b>Member States that have applied the option</b>	<b>Member States that have not applied the option</b>
<b>Confiscation of the means of transport used to commit the offence</b>	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU, LT, MT, NL, PL, RO, SE, SI, SK, UK	LV, PT
<b>A prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed</b>	AT, CY, CZ, DE, ES, FR, HR, HU, IE, LU, LT, PL, RO, SE, SI, SK	BE, BG, EE, EL, FI, IT, LV, MT, NL, PT, UK
<b>Deportation</b>	CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, NL, RO, SE, SK, UK	AT, BE, BG, CY, IT, LT, LV, LU, MT, PL, PT, SI

## Sanctions for legal persons

MS	Sanctions (legal persons)			
	Facilitation of irregular entry / transit Article 1(1)(a) Directive 2002/90/EC		Facilitation of unauthorised residence Article 1(1)(b) Directive 2002/90/EC	
	Administrative Offence	Criminal Offence	Administrative Offence	Criminal Offence
<b>AT</b>	Liability of the legal persons is not triggered for the administrative infringements under Article 1(1)(a) of the Directive.	A fine up to 130 daily fees depending on the person's daily income	N/A	A fine up to 130 daily fees depending on the person's daily income
<b>BE</b>	N/A	A fine calculated based on the sanction for natural persons which ranges from EUR 1 700 to EUR 24 000	N/A	A fine calculated based on the sanction for natural persons which ranges from EUR 1 700 to EUR 24 000
<b>BG</b>	A fine from BGN 5 000 to 100 000 (approximately from EUR 2 500 to EUR 50 000) when the amount of the benefit is established <i>or</i> a fine up to BGN 1 000 000 (approximately EUR 500 000), but not less than the equivalent of the benefit in the form of the property nature.	N/A	Liability of the legal persons is not triggered for facilitation of illegal residence.	Liability of the legal persons is not triggered for facilitation of illegal residence.
<b>CY</b>	N/A	A fine up to 200 000 Cypriot pounds (EUR	N/A	A fine up to 200 000 Cypriot pounds (EUR

		117 042)		117 042)
<b>CZ</b>	N/A	A fine up to EUR 16 560 000. The Court establishes a fine which ranges from 70 to 230 daily rates. The daily rate amounts from CZK 1 000 (approximately EUR 36) to CZK 2 000 000 (approximately EUR 72 000), taking into consideration the property situation of the legal entity.	N/A	A fine up to EUR 16 560 000. The Court establishes a fine which ranges from 70 to 230 daily rates. The daily rate amounts from CZK 1 000 (approximately EUR 36) to CZK 2 000 000 (approximately EUR 72 000), taking into consideration the property situation of the legal entity.
<b>DE<sup>1</sup></b>	A fine up to EUR 10 000 000	N/A	A fine up to EUR 10 000 000	N/A
<b>EE</b>	N/A	A pecuniary punishment between EUR 4 000 to EUR 16 000 000	N/A	A pecuniary punishment between EUR 4 000 to EUR 16 000 000
<b>EL</b>	N/A	Air companies are punished by a fine of EUR 5 000 to EUR 10 000 for every illegal transport. The exact level of the fine is determined by the Head of air authorities. Maritime companies or any other legal person performing sea carrier activities, a fine of EUR 5 000 to EUR 10 000 euros as well for every illegal transport. In case of recidivism within the same calendar year, the relevant competent authority doubles the fine up to a maximum level of EUR 30 000.	Liability of the legal persons is not triggered for facilitation of illegal residence.	Liability of the legal persons is not triggered for facilitation of illegal residence.
<b>ES</b>	A fine of EUR 10 001 to EUR 100 000	A fine from two to five years <i>or</i> a fine from three to five times the profit obtained if the resulting amount were to be higher. A day of fine amounts	A fine of EUR 10 001 to EUR 100 000	A fine from two to five years <i>or</i> a fine from three to five times the profit obtained if the resulting amount were to be higher. A day of fine amounts

		between minimum EUR 30 to maximum of EUR 5 000.		between minimum EUR 30 to maximum of EUR 5 000.
<b>FI</b>	N/A	A fine from EUR 850 to EUR 850 000	Liability of the legal persons is not triggered for facilitation of illegal residence.	Liability of the legal persons is not triggered for facilitation of illegal residence.
<b>FR</b>	N/A	A fine between EUR 150 000 and EUR 3 750 000	N/A	A fine between EUR 150 000 and EUR 3 750 000
<b>HR</b>	N/A	A fine of HRK 50 000 (EUR 6 600) and a fine in the amount of HRK 23 000 (EUR 3 000) for the responsible person within the legal person, per transported or assisted foreigner.  For financial gain: A fine of HRK 15 000 (EUR 2 000) to HRK 10 000 000 (EUR 1 320 000)	N/A	A fine of HRK 50 000 (EUR 6 600) and a fine in the amount of HRK 23 000 (EUR 3 000) for the responsible person within the legal person, per transported or assisted foreigner.  For financial gain: A fine of HRK 15 000 (EUR 2 000) to HRK 10 000 000 (EUR 1 320 000)
<b>HU</b>	N/A	The highest fine that can be imposed on the legal entity shall be three times the financial advantage gained or intended to be gained through the criminal act, but at least HUF 500 000 (approximately EUR 1 655). If the benefit gained or intended to be gained through the criminal act is not financial advantage, the court imposes the fine considering the financial situation of the legal entity, but at least HUF 500 000 (approximately EUR 1 655).	N/A	The highest fine that can be imposed on the legal entity shall be three times the financial advantage gained or intended to be gained through the criminal act, but at least HUF 500 000 (approximately EUR 1 655). If the benefit gained or intended to be gained through the criminal act is not financial advantage, the court imposes the fine considering the financial situation of the legal entity, but at least HUF 500 000 (approximately EUR 1 655).
<b>IE</b>	N/A	<u>Summary conviction</u>	N/A	N/A

		A fine up to EUR 5 000. <u>Conviction in indictment</u> A fine		
<b>IT<sup>ii</sup></b>	N/A	A fine up to EUR 1 500 000 The Courts establishes a fine which ranges from EUR 400 to EUR 1 000 quotas. A quota amounts between EUR 250 to EUR 1 500 <sup>ii</sup> .	N/A	N/A
<b>LT</b>	Invitation to enter Lithuania: A fine from EUR 289 up to EUR 868.	A fine up to EUR 1 900 000	Granting of the living space to the aliens without the passport or without other travel: A fine from EUR 72 to EUR 868	A fine up to EUR 1 900 000
<b>LU</b>	N/A	A fine of EUR 500 to EUR 100 000	N/A	A fine of EUR 500 to EUR 100 000
<b>LV</b>	N/A	A fine up to EUR 32 000 000. The Court establishes a fine which can be 10 000 or 100 000 higher than the minimum wage which is approximately EUR 320.	N/A	A fine up to EUR 32 000 000. The Court establishes a fine which can be 10 000 or 100 000 higher than the minimum wage which is approximately EUR 320.
<b>MT</b>	N/A	A fine of EUR 11 646.87 to EUR 2 329 373.40.	N/A	A fine of EUR 11 646.87 to EUR 2 329 373.40.
<b>NL</b>	N/A	A fine of EUR 81 000.	N/A	A fine of EUR 81 000.
<b>PL</b>	N/A	A fine of 1 000 PLN (approximately EUR 250) to 5 000 000 PLN (approximately EUR 1 242 550), but not higher than 3% of the revenue in the financial year in which the offence was committed.	N/A	No sanction is foreseen for legal persons when committing the offence of facilitating illegal residence.
<b>PT</b>	N/A	A fine of minimum 20 days and a maximum of 720 days. Each day corresponds to a fine from EUR 5 to EUR	N/A	A fine of minimum 20 days and a maximum of 720 days. Each day corresponds to a fine from EUR 5 to EUR

		500, which the tribunal fixes in regard to the economic and financial conditions of the convict and his personal duties.		500, which the tribunal fixes in regard to the economic and financial conditions of the convict and his personal duties.
<b>RO</b>	N/A	A fine up to 1 500 000 lei (approximately EUR 337 000) The fine ranges between 180 and 300 days of fine. The amount of the fine for one day may be disposed by the Court between 100 and 5 000 lei (EUR 23 to EUR 1 126)taking into account the turnover of the legal person, if the legal person operates for profit, or taking into account the value of the assets and other obligations with regard to other legal persons.	N/A	A fine up to 1 200 000 lei (approximately EUR 270 000) The fine ranges between 120 and 240 days of fine. The amount of the fine for one day may be disposed by the Court between 100 and 5 000 lei (EUR 23 to EUR 1 126)taking into account the turnover of the legal person, if the legal person operates for profit, or taking into account the value of the assets and other obligations with regard to other legal persons.
<b>SE</b>	N/A	A fine from 5 000 SEK (approximately EUR 560) to 10 000 000 SEK (approximately EUR 1 100 000)	N/A	A fine from 5 000 SEK (approximately EUR 560) to 10 000 000 SEK (approximately EUR 1 100 000)
<b>SI</b>	N/A	A fine of at least EUR 50 000 and a maximum of 200 times the amount of a damage caused or benefits obtained by the illegal acts.	N/A	A fine of at least EUR 50 000 and a maximum of 200 times the amount of a damage caused or benefits obtained by the illegal acts.
<b>SK</b>	N/A	A fine of EUR 800 to EUR 1 660 000.	N/A	A fine of EUR 1500 to EUR 1 660 000.
<b>UK</b>	N/A	<u>Conviction in indictment</u> A fine <u>Summary conviction</u> A fine not exceeding the statutory maximum	N/A	<u>Conviction in indictment</u> A fine <u>Summary conviction</u> A fine not exceeding the statutory maximum

**i)** German legislation sanctions only participants (principal perpetrators, instigators and aiders) to crimes under Article 1 and 2 of the Directive

**ii)** The legal persons are sanctioned only if the facilitation to entry is committed as an activity part of a criminal association.

**Application of additional sanctions provided for in Article 3(1) of the Framework Decision**

<b>Additional measures</b>	<b>Member States that have applied the option</b>	<b>Member States that have not applied the option</b>
<b>Exclusion from entitlement to public benefits or aid</b>	CY, CZ, ES, HR, HU, IT, PL, PT, SK	AT, BE, BG, DE, EE, EL, FI, FR, IE, LT, LU, LV, MT, NL, RO, SE, SI, UK
<b>Temporary or permanent disqualification from the practice of commercial activities</b>	AT, BE, CY, CZ, DE, ES, FR, HR, HU, IE, IT, LT, LV, MT, PT, RO, SE, SI, SK	BG, EE, EL, FI, LU, NL, PL, UK
<b>Placing under judicial supervision</b>	CY, ES, FR, IT, PT, RO	AT, BE, BG, CZ, DE, EE, EL, HR, HU, FI, FR, IE, LT, LU, LV, MT, NL, SE, SI, SK, UK
<b>A judicial winding-up order</b>	BE, CY, CZ, ES, FR, HR, HU, LT, LU, LV, MT, NL, PT, RO, SI, SK	AT, BG, DE, EE, EL, FI, IE, IT, PL, SE, UK

**Application of limitation of jurisdiction provided for in Article 4(2) of the Framework Decision**

<b>Limitation of jurisdiction</b>	<b>Member States that have applied the option</b>	<b>Member States that have not applied the option</b>
<b>Limitation of jurisdiction as regards infringements committed by one of its nationals</b>	BE, EE, ES, FI, FR, HR, IT, PT, RO	AT, BG, CY, CZ, DE, EL, HU, IE, LT, LU, LV, MT, NL, PL, SE, SI, SK, UK
<b>Limitation of jurisdiction as regards infringements committed for the benefit of a legal person established in the territory of that Member State</b>	BE, BG, DE, EE, ES, FI, FR, HR, HU, IT, LT, NL, RO, SE, SI	AT, CY, CZ, EL, IE, LU, LV, MT, PL, PT, SK, UK