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Erasmus+ Programme  
of the European Union



Jean Monnet Network on EU Law Enforcement

Working Paper Series

Addressing migrant smuggling in the European Union. Challenges for a non-criminalized, coordinated and effective response

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Abstract

Migrant smuggling is a highly complex criminal phenomenon. Clearly cross-border in nature, smuggling frequently involves the participation of organized criminal groups. A coherent approach to these activities requires a clear and correctly implemented regulation, in the case of the EU the reference regulation is the 'Facilitators' package'. In the present contribution several controversies that this framework entails will be pointed out, especially the excessive criminalization and the neglect of the human rights perspective.

Furthermore, the eradication of smuggling requires the sum of efforts and coordinated action of different actors such as national authorities and European agencies. In this paper some actions carried out by Europol the Mediterranean will be studied. Focusing on the role of this law enforcement agency in the hotspots, the contribution of the information gathered and the benefits for Eurojust will be evaluated.

Keywords:

Smuggling, organised criminal groups, hotspots, Europol, Eurojust

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## I. By Way of Introduction: Migrant Smuggling and Organized Criminal Groups

Migrant smuggling in the European Union is one of the most complex criminal activities from the point of view of investigation and criminal prosecution. The Mediterranean ‘crisis’ has contributed to draw attention to this phenomenon. According to data from the International Organization for Migration (IOM), 1,140,797 people arrived to the EU territory by sea since 2015, at least 14,430 persons have drowned or are missing in the Mediterranean.<sup>1</sup> Due to different factors, including the restrictions derived from the COVID-19 pandemic,<sup>2</sup> the numbers in 2021 are well below those recorded in 2015 or 2016. In fact, in 2021 the arrival of 144,423 people was recorded.<sup>3</sup> Europol stated that more than 90% of the people who arrive irregularly in the Union through the Mediterranean routes have received the support of a criminal network.<sup>4</sup>

The main activity of smugglers is to exploit the despair and vulnerability of migrants with the sole objective of economic gain. In fact, it is a growing criminal practice in the territory of the EU, which is experiencing the emergence of new criminal groups inactive until now in this field.<sup>5</sup> The huge profits, together with the limited information on the financial and laundering flows of the economic proceeds of crime, make smuggling of persons a really attractive activity for these criminal groups.

The organized crime groups that control migrant smuggling in the EU have sophisticated *modus operandi*. These illegal migration networks are designed with the aim of being present at the different stages of the process, being able to offer the ‘services’ required at each stage, such as transportation, accommodation or forgery of documents.<sup>6</sup> During its journeys to the EU migrants pay high fees<sup>7</sup> for services that endanger their physical and psychological integrity. Moreover, they are exposed to being exploited in some of the stages of their trip or upon arrival.

Usually, migrant smuggling groups have a network structure with an enormous adaptability and responsiveness to changes in their environment.<sup>8</sup> The size of the networks clearly affects their *modus operandi* and payment methods. On the one hand, the large international networks offer migrants complete closed packages from the country of origin to the country of destination. In these cases, the migrant makes a single payment and the money hardly leaves the country of origin. On the other hand, regional networks are small in size and tend to operate autonomously and support their activities on independent individuals who act as drivers, migrant recruiters, document forgers or organizers. It is common for these freelancers to work with more than one network at the same time.<sup>9</sup> These are flexible networks, capable of quickly adapting to changes in their environment, for example by modifying routes or creating new hotspots and hubs. The operation of these groups generally means that the migrant's payments are made in different countries and for each service received. In both cases, the leaders run the network from a distance and only maintain contact with a very limited number of people. In addition, the role of migrants in trafficking is increasing, for example on the central route to Italy the same migrants are in charge of manning the boat until the moment of rescue.<sup>10</sup> This technique allows the organizers of the trip to remain far from any direct operation, thus avoiding their arrest.

The characteristics pointed out so far show that the prosecution of the crime of migrant smuggling is complex for several reasons. Indeed, the structures and links between groups and networks are difficult to detect. Furthermore, the flexibility of organized groups makes them almost immune from police arrest since they are capable to easily recover in a short lapse of time.

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<sup>1</sup> IOM, ‘Flow Monitoring. Migration Flows to Europe’ <<https://migration.iom.int/europe/arrivals/>> accessed 15 May 2022.

<sup>2</sup> IOM, ‘World Migration Report 2022’ (2022) 91.

<sup>3</sup> In 2016, 387,739 people arrived to EU territory by sea, while 5,143 deaths or disappearances were reported. IOM (n 1).

<sup>4</sup> Europol, ‘Migrant smuggling in the EU’ (February 2016) 5.

<sup>5</sup> Europol, ‘Serious and Organised Crime Threat Assessment, Crime in the age of technology’ (2017) 15.

<sup>6</sup> *ibid* 50.

<sup>7</sup> In 2019, the smuggling fees were from 300 to 5,000€ depending on the route (2,300€ average per person), see Europol, ‘Migrant Smuggling. The profits of smugglers’ (2019) 1. In 2021, the smuggling fees for the central route increased to 12,000€ average per person, see Europol, ‘European Migrant Smuggling Centre. 6<sup>th</sup> Annual Report’ (2022) 12.

<sup>8</sup> Europol, ‘European Union serious and organised crime threat assessment. A corrupting influence: the infiltration and undermining of Europe's economy and society by organised crime’ (Publications Office of the European Union 2021) 68.

<sup>9</sup> Europol, (n 4) 9.

<sup>10</sup> UNODC, ‘The Concept of ‘Financial or Other Material Benefit’ in the Smuggling of Migrants Protocol’ (Issue Paper 2017) 38.

In addition, the facilitation of irregular migration carried out by the criminal networks can be diverse. At least 3 groups of activities have been identified as forms of smuggling in the EU territory. Firstly, transporting or managing the transportation of a non-national person to enter or transit a country. Secondly, fabricating and/or providing fake documents. And finally, arranging marriages of convenience or sham marriages. Furthermore, smuggling activities are clearly associated with other crimes such as money laundering and trafficking in human beings.<sup>11</sup>

For all the above, the study of the approach adopted by the European Union in the fight against migrant smuggling is of special interest. To this end, first an analysis of the current legal framework will be carried out, delving into the problems that it entails. Secondly, some actions carried out in the Mediterranean will be pointed out, focusing attention on those in the field of cooperation in criminal matters and the actions executed by Europol and Eurojust. And finally, some improvement proposals will be made for a more effective prosecution of the crime of migrant smuggling.

## II. The ‘Facilitators’ Package’ as a Legal Framework: What to Pursue as Migrant Smuggling

The regulation of migrant smuggling from a criminal point of view in the European Union consists of the well-known ‘Facilitators’ Package’. That is, Directive 2002/90/EC that establishes a definition of the crime of migrant smuggling<sup>12</sup> and Framework Decision 2002/946/JHA created with the aim of strengthening the criminal framework that pursues it.<sup>13</sup> Said European regulation is not exempt from controversy<sup>14</sup> for moving away from the international framework provided by the Protocol Against the Smuggling of Migrants by Land, Sea and Air, which Supplements the United Nations Convention Against Transnational Organized Crime (hereinafter the Protocol).<sup>15</sup> Some aspects of the differences established in the definition of smuggling, the treatment of the profit motive and the inclusion of specific protection guarantees for smuggled persons will be analysed below.

The Facilitators’ Package criminalizes any assistance to irregular migrants, that is to say, to nationals of third States who enter, transit or reside in the territory of the Union. According to Directive 2002/90/EC, both support for entry and transit,<sup>16</sup> as well as assistance through economic benefit for irregular residence,<sup>17</sup> can be considered ‘facilitation’ behaviours. The Directive only refers to the ‘economic benefit’ in cases of facilitating irregular residence. This conception is not in line with the definition of trafficking provided by Article 3 of the Protocol, which requires as a *sine qua non* condition the existence of ‘an economic or material benefit’ for the criminalization of the assistance.<sup>18</sup> The inclusion of the ‘benefit’ understood in a broad way, reinforces the content of art. 5 of the Protocol according to which smuggled migrants should not be criminally prosecuted.<sup>19</sup>

The dissociation between ‘facilitation’ and ‘benefit’ is especially worrying, since it can lead to the criminalization of humanitarian tasks, mutual aid between asylum seekers, and even between members of the same family. In fact, on numerous occasions the European Agency for Fundamental Rights (FRA) has highlighted the problem

<sup>11</sup> Eurojust, ‘Report on Eurojust’s casework on migrant smuggling’ (2018) 10.

<sup>12</sup> Council Directive (EC) 2002/90 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/17 (Facilitation Directive).

<sup>13</sup> Council Framework Decision (JHA) 2002/946 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1 (Facilitation Framework Decision).

<sup>14</sup> See Council of Europe Commissioner for Human Rights, ‘Criminalisation of migration in Europe: Human rights implications’ (Issue Paper, 4 February 2010). See also Mark Provera ‘The Criminalisation of Irregular Migration in the European Union’ (CEPS Papers on Liberty and Security in Europe 80 2015); Valsamis Mitsilegas, ‘The Criminalisation of Migration in the Law of the European Union. Challenging the preventive Paradigm’ in Gian Luigi Gatta, Valsamis Mitsilegas and Stefano Zirulia (eds), *Controlling Immigrations Through Criminal Law. European and Comparative Perspectives on ‘Crimmigration’* (Hart Publishing 2021).

<sup>15</sup> UNGA Resolution, A/RES/55/25 (15 November 2000).

<sup>16</sup> Facilitation Directive, art 1(1).

<sup>17</sup> *ibid* art 1(2).

<sup>18</sup> According to the *travaux préparatoires*, the inclusion of ‘financial or material benefit’ characterizes migrant smuggling in front of other non-punishable facilitation behaviours, see UNGA, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, A/55/383/Add.1 (3 November 2000) para. 88.

<sup>19</sup> UNODC (n 10) 13.

of criminalizing certain behaviours related to irregular migration from a human rights perspective.<sup>20</sup> It is true that the Facilitation Directive grants the Member States the possibility of including a ‘humanitarian clause’, however it turns out to be non-mandatory and lacks a common definition. As the FRA pointed out in 2014, support for arrival and transit for humanitarian reasons was only exempt from persecution in 8 Member States. In 2016, several Member States claim to have modified their regulations due to the increase in refugee flows.<sup>21</sup> However, other studies showed that civil organizations fear that their work assisting migrants will be sanctioned.<sup>22</sup> In any case, the inclusion of ‘benefit’ as an essential element to all forms of assistance is necessary, or at the very least, a clear exemption to humanitarian aid is urgently needed.

The Framework Decision is committed to considering economic benefit as an aggravating circumstance. In effect, said regulation obliges the Member States to establish no less than maximum 8 years’ prison sentences with maximum sentences when there is economic benefit, in cases of belonging to an organized criminal group or, when the lives of migrants have been put in danger. However, unlike the Protocol, it does not include cases involving degrading or inhuman treatment. This omission is especially worrying if the new tendencies of certain organized criminal groups in which there are flagrant violations of human rights are taken into account.

The current situation implies that the majority of migrants who arrive in the territory of the Union are victims of crimes, such as physical attacks, rape or even exploitation. This reality requires a regulation that contains a sensitive approach to the protection of migrants, understanding them as victims.<sup>23</sup> A brief comparison between the provisions regarding the smuggling of migrants and the trafficking of human beings, points to a differentiated treatment among the victims of said crimes.

Indeed, while the Facilitators’ Package does not refer to the victims, Directive 2011/36/EU on trafficking in human beings<sup>24</sup> incorporates them as a central point of protection.<sup>25</sup> Said regulation points to the application of Directive 2004/81/EC<sup>26</sup> that contemplates the possibility that the victims of both crimes who cooperate with the authorities in criminal investigations can obtain a residence permit. However, it should be noted that while in trafficking the permit is mandatory, in cases of smuggling it is discretionary. And in fact, according to data from the European Commission, only 10 Member States have exploited the possibility of granting a residence permit for victims of smuggling.<sup>27</sup>

<sup>20</sup> See FRA, ‘Fundamental rights of migrants in an irregular situation in the European Union’ (Vienna 2011); FRA, ‘Fundamental Rights at Europe’s southern sea borders’ (Vienna 2013); FRA, ‘Criminalisation of migrants in an irregular situation and of persons engaging with them’ (Vienna 2014).

<sup>21</sup> Milan Remác and Gertrud Malmersjo, ‘Combating migrant smuggling into the EU’ (Briefing Implementation Appraisal, European Parliamentary Research Service, April 2016) 7.

<sup>22</sup> Michael Collyer, ‘Cross-Border Cottage Industries and Fragmented Migration’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and smuggling of human beings. Policy Dilemmas in the EU* (Centre for European Policy Studies 2016) 18.

<sup>23</sup> See *inter alia*, Tom Obokata, ‘Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law’ (2005) 17 *International Journal of Refugee Law* 2; Matilde Ventrella, ‘Recognizing Effective Legal Protection to People Smuggled at Sea, by Reviewing the EU Legal Framework on Human Trafficking and Solidarity between Member States’ (2015) 1 *Social Inclusion* 3; Alessandro Spina, ‘Human Smuggling and irregular immigration in the EU: from complicity to exploitation?’ in Sergio Carrera and Elspeth Guild (n 22).

<sup>24</sup> Directive (EU) 2011/36 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1 (THB Directive).

<sup>25</sup> On the approach of the THB Directive see Katarzyna Gromek-Broc ‘EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?’ (2011) 20 *Nova et Vetera* 64; Marta Ortega, ‘La trata de seres humanos en el derecho de la Unión Europea’ in Franciso Javier Donaire and Andreu Olesti (coords), *Técnicas y ámbitos de coordinación en el espacio de libertad, seguridad y justicia* (Marcial Pons 2015); Mirentxu Jordana, ‘La lucha contra la trata en la UE: los retos de la cooperación judicial penal transfronteriza’ (2015) 111 *CIDOB d’Afers Internacionals*.

<sup>26</sup> Council Directive (EC) 2004/81 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 [2004] OJ L 261/19 (Residence Directive).

<sup>27</sup> These are Austria, Belgium, the Czech Republic, Greece, Estonia, Luxembourg, Malta, Portugal, Romania and Sweden. Some States require that the smuggling conduct be carried out by an organized group, in others countries to be a victim of the aggravated type defined according to national law is a requirement. See Commission, ‘Communication on the application of Directive 2004/81 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’ COM (2014) 635 final, 3.

The rights included in the Directive 2012/29/EU<sup>28</sup> apply to all victims of crime in a non-discriminatory manner, regardless their residence status. Migrants in an irregular situation are hardly treated as victims of a crime but as criminals. The fear of being arrested, fined or returned refrain them from reporting crimes, including serious crimes against themselves. This reality entail to lack of access to justice and also to impunity on the part of the perpetrators.

Regarding to the transposition of the Facilitators' Package, considerable differences between the provisions of the Member States should be noted. The Framework Decision states that the Member States must take measures to penalize the 'facilitation' behaviours described in the Directive through effective, proportionate and dissuasive penalties that may include extradition. Other measures may accompany these penalties, such as the confiscation of the means of transport used to commit the crime. The translation of these provisions into national regulations illustrates the existence of different approaches regarding irregular entry and stay in EU territory.<sup>29</sup> More than half of the Member States considered irregular entry into their territory deserving of imprisonment, while others punished it with a fine, only Spain, Malta and Portugal did not establish any penalty. Irregular stay could carry a prison sentence in 11 Member States, in another 14 a fine, while in Portugal, France and Malta there was no punishment. Except in Slovenia, the facilitation of irregular entry to the EU territory carried prison sentences and/or fines. And in turn, the facilitation of the stay was not punishable in Ireland, it carried a fine in 7 Member States and could result in a prison sentence in the rest.<sup>30</sup> Penalties for the same behaviour vary substantially from one Member State to another, ranging from small fines to prison terms of up to 15 years.<sup>31</sup> Only 8 Member States include in its national legislation an exception from punishment for facilitating unauthorised entry and/or transit in order to provide some form of humanitarian assistance<sup>32</sup>.

For all the above, it can be affirmed that the margin of discretion left to the Member States in the Facilitators' Package translates into inconsistencies in its application that may affect its effectiveness. In 2015, the Commission draw attention to the need of an urgent review of the Facilitators' Package.<sup>33</sup> Yet, in 2017, the Commission considered a legal revision to be unnecessary. Several NGO reports suggest that since 2015 acts carried out for humanitarian purposes have been increasingly criminalised<sup>34</sup>. Even accepting the lack of reliable and comparable national criminal statistics, in 2020 the Commission decided to launch a guidance to the Member States on the implementation of the Smuggling Directive. It is still early to evaluate the impact of such guidelines (the Commission intends to report on its implementation in 2023),<sup>35</sup> but not performing the review of the Facilitators' Package is a missing opportunity to reach a regulation that really focuses on the persecution of smugglers and the protection of their victims.

### III. The cooperation in criminal matters: the role of Europol and Eurojust fighting smuggling at the European Union level

The fight against migrant smuggling has taken on a huge role in the last decade. In 2010, the European Strategy for Internal Security identified human trafficking as a case of serious and organized cross-border crime that should be eradicated.<sup>36</sup> Among other actions, it was decided to reinforce border control under the coordination of

<sup>28</sup> Directive (EU) 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57. (Victims' Directive).

<sup>29</sup> See Sergio Carrera (coord), 'Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants' (European Parliament Study 2016) 29.

<sup>30</sup> Milan Remác and Gertrud Malmersjo (n 21) 6.

<sup>31</sup> Commission, Report based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence COM (2006) 770 final, 7.

<sup>32</sup> Commission, 'Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence' C (2020) 6470 final.

<sup>33</sup> Commission, 'EU Action Plan against migrant smuggling (2015 - 2020)' COM (2015)285final, 3.

<sup>34</sup> International Amnesty, 'Punishing Compassion. Solidarity on Trial in Fortress Europe' (2020) 25.

<sup>35</sup> Commission, 'A renewed EU action plan against migrant smuggling (2021-2025)' COM (2021) 591, 18.

<sup>36</sup> Commission, 'The EU Internal Security Strategy in Action: Five steps towards a more secure Europe' COM (2010) 673 final, 11.

the European Agency for the management of external borders (Frontex).<sup>37</sup> Following the Lampedusa tragedy and after the end of the Italian Mare Nostrum rescue operation, two Frontex-coordinated operations were launched: Triton off the Italian coast and Poseidon off the Greek coast, expanding the agency's surveillance functions to maritime rescue. Nowadays, Frontex maintains three operations in the Mediterranean: Themis (Central Mediterranean), Poseidon (Eastern Mediterranean) and Indalo (Western Mediterranean).

Following a new tragedy in April 2015, both the European Agenda on Security<sup>38</sup> and the European Agenda on Migration<sup>39</sup> began to highlight the links between deaths at sea and organized criminal groups dedicated to migrant smuggling. The EUNAVFOR MED operation was born from this approach, an eminently military operation with the main objective of detecting, capturing and destroying vessels that could be used by traffickers.<sup>40</sup> In March 2020, replacing the Sophia operation, the EU launched the Irini military operation, aiming to contribute to the disruption of the business model of human smuggling and trafficking networks through information gathering and patrolling by planes.

16. From the perspective of criminal cooperation, in 2015 Europol's efforts were focused on creating a maritime intelligence team known as Joint Operational Team Mare.<sup>41</sup> Hosted at Europol, this initiative aimed to identify and track smuggling networks in the Mediterranean by combining Europol's intelligence resources and Member States' capabilities to carry out coordinated and targeted intelligence actions against smugglers. At the same time, attempts were made to ensure exchanges of information with Frontex and Interpol. Following the demands of the Council,<sup>42</sup> in less than a year, Europol launched the European Migrant Smuggling Centre (EMSC), reinforcement was sought by integrating the objectives of JOT Mare through access to the main hotspots.<sup>43</sup>

The deployment of JOT Mare in the context of a hotspot serves several purposes clearly linked with gathering information. The presence of Europol in the hotspots is expected to improve the collection of intelligence from agencies active in the field, such as Frontex, with the main objective of identifying organized criminal groups and secondary movements in order to initiate and support criminal investigations. In fact, Europol provides on-the-spot support by direct cross matching of data gathered at the arrival of migrants with its information databases. This procedure could take long and sometimes during the debriefings the migrant could be under restrictions on free movement or in closed facilities.

According to the agency, the presence on the ground of certain Europol teams supporting the authorities of the host Member State turns out to be a very useful tool for gathering information at very early stages of investigations. In its first year of life, the EMSC identified more than 17,000 new suspects (an increase of 25% compared to 2015) and opened more than 2,000 investigations.<sup>44</sup> Among other milestones, such as the identification of more than 500 forged or stolen documents and the monitoring of some 500 vessels likely to be used in smuggling, and the increase in operational information exchanges by 34% should be highlighted.<sup>45</sup> In 2021, the EMSC has received 4,889 new cases.<sup>46</sup>

While Europol is in charge of coordinating the police authorities through its National Units, in the same case Eurojust is in charge of the coordination between the judicial authorities.<sup>47</sup> However, both agencies must work

<sup>37</sup> Recently strengthened by Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624 [2019] *OJ L* 295/1.

<sup>38</sup> Commission, 'The European Agenda on Security' COM (2015) 185 final.

<sup>39</sup> Commission, 'A European Agenda on Migration' COM (2015) 240 final.

<sup>40</sup> See *inter alia*, Giuliana Ziccardi, 'The EUNAVFOR MED Operation and the use of force' (2015) 19 *American Society of International Law*, 27; Félix Vacas Fernandez, 'The European operations in the Mediterranean Sea to deal with migration as a symptom' (2016) 20 *Spanish yearbook of international law*.

<sup>41</sup> Europol, 'Joint Operational Team launched to combat irregular migration in the Mediterranean' (17 March 2015) <<https://www.europol.europa.eu/media-press/newsroom/news/joint-operational-team-launched-to-combat-irregular-migration-in-mediterranean>> accessed 12 April 2022.

<sup>42</sup> Council of the European Union, 'Measures to handle the refugee and migration crisis - Council conclusions (9 November 2015)', 13880/15 para 10.

<sup>43</sup> See David Fernández Rojo, 'Los "hotspots" expansión de las tareas operativas y cooperación multilateral de las agencias europeas Frontex, Easo y Europol' (2018) 61 *Revista de Derecho Comunitario Europeo*.

<sup>44</sup> Europol, 'European Migrant Smuggling Centre. Activity Report, First Year' (January 2017) 6.

<sup>45</sup> *ibid* 14.

<sup>46</sup> EMSC, (n 7) 8.

<sup>47</sup> Mirentxu Jordana, 'El Proceso de Institucionalización de Eurojust y su Contribución al Desarrollo de un Modelo de Cooperación Judicial Penal de la Unión Europea' (Marcial Pons 2018) 142.

together coordinating the requests of the authorities in the Member States. Although Eurojust is not physically in the hotspots, it has liaison magistrates in Italy and Greece who identify and refer to Eurojust those cases that are likely to be coordinated at Union level.<sup>48</sup> In its latest annual report, Eurojust claimed to register 292 cases (170 new cases, 122 ongoing from previous years) and supported 11 Joint Investigation Teams (4 new and 7 ongoing).<sup>49</sup> However, it is not clear how many cases are nourished by the information obtained in the debriefing of migrants at the external border. And surprisingly, only Italy and Slovenian liaison prosecutors confirmed having opened a few cases based on this kind of information.<sup>50</sup> In turn, the Agency itself remarks that several differences between Member States about the legal validity and doubts of the judicial use in criminal proceedings of the information obtained in the hotspots<sup>51</sup>. On one hand, the statements can be classified as evidence or intelligence, and also sometimes both depending on the circumstances. On the other hand, the legal status of the migrant debriefed is not uniform in all the EU territory. In some Member states migrants are considered suspects, other consider them witnesses and other are applying a mixed concept.<sup>52</sup> These differences, and especially mixed situations, can raise suspicions and discourage the migrant's cooperation with the authorities. And in case of a prosecution, there is a risk of violating the right to effective judicial protection of the accused depriving the opportunity to challenge and question witness against them.<sup>53</sup>

Although all these actions contribute to a deeper understanding of the phenomenon of migrant smuggling, to obtaining evidence and information on specific matters and ultimately to a more effective prosecution, some loose ends remain. The Action Plan against migrant smuggling (2015-2020) highlighted the need to focus on disrupting the 'business model' and reinforcing financial investigations. According to Europol data, in 2016 less than 10% of migrant smuggling investigations produced intelligence on financial transactions or money laundering activities.<sup>54</sup> Although the impetus provided by EMPACT and its policy cycle has begun to bear fruit, there is still much work to be done.<sup>55</sup>

The strengthening of financial investigations has clear advantages for a more effective prosecution of crime. Said investigations can contribute to demonstrate the existence of a 'benefit' that, as has been pointed out, is conceived as an aggravating circumstance in most Member States. The importance of establishing the 'benefit' responds not only to achieving higher penalties, but also to the possibility of discovering information necessary to identify and dismantle high-income migrant smuggling criminal organizations. The financial investigation can contribute to uncovering the interactions between the members of the organized group, being able to determine their role, as well as the relationship with other groups and networks.<sup>56</sup> In addition, the study of financial flows can be a good tool for detecting and differentiating cases of smuggling from those of human trafficking.<sup>57</sup>

20. Given some of the advantages, the lack of an economic focus in some investigations remains unknowable. The economic persecution of migrant smuggling entails dealing with numerous obstacles, some of which are intrinsic to criminal cooperation, such as language differences, the slowness in the mechanisms for transmitting requests; the absence of follow-up practices on the execution of requests for judicial assistance; or the requirement of dual criminality. Other obstacles derive from the need to cooperate with third States, such as the lack of response to requests for financial information contained in mutual legal assistance requests due to the contacts and importance of some of the high-level smugglers in their countries of origin.<sup>58</sup> All these issues continue to be solved, the impact of the new financial and operational tools (as the tailored anti-smuggling operational partnerships established as a priority in the new EU Action Plan 2021-2025)<sup>59</sup> remain to be seen. In any case,

<sup>48</sup> Eurojust, 'Annual Report 2016. Criminal Justice across borders' (2016) 33.

<sup>49</sup> Eurojust, 'Annual Report 2021. 20 years of criminal justice across borders' (2022) 45.

<sup>50</sup> Eurojust, 'Judicial use of information following the debriefing of migrants at external borders' (27 October 2021) 1 *Migrant smuggling in Focus* 1.

<sup>51</sup> *ibid* 3.

<sup>52</sup> *ibid* 7.

<sup>53</sup> See *Al-Khawaja and Thery v. UK* App no 26766/05 and 22228/06 (ECtHR, 15 December 2011).

<sup>54</sup> Europol, (n 4) 9.

<sup>55</sup> Council of the European Union, 'General Factsheet. Operational Action Plans (OAPS) 2020 Results', 2. <<https://www.consilium.europa.eu/media/50206/combined-factsheets.pdf>> accessed 5 May 2022.

<sup>56</sup> See UNODC (n 10) 34.

<sup>57</sup> See Organisation for Security and Co-operation in Europe, 'Leveraging Anti-Money Laundering Regimes to Combat Trafficking in Human Beings' (2014).

<sup>58</sup> UNODC (n 10) 27.

<sup>59</sup> COM (2021) 591 final.

human smuggling will hardly be eradicated if the economic element is not understood as a central piece of all the criminal investigations.

#### IV. Final Considerations

The criminal prosecution of migrant smuggling is a challenge for the European Union that is difficult to solve. Several EU reports show that there is a considerable number of organized criminal groups with an infinite number of modus operandi and an exceptional ability to adapt to change.

An analysis of the current regulation on the crime of migrant smuggling points to the urgency of reforming the Facilitators' Package. Indeed, there are significant discrepancies between European regulations and the United Nations Trafficking Protocol. These differences reveal the gaps in the European acquis that blur the real traffic problem and affect the efficiency of the provisions. The Facilitators' Package lead to discrepancies in transposition into domestic law and has contributed to the criminalisation of the migration phenomena. The Directive fails to remind the Member States of the international obligation to assist persons in distress at the sea. Taking into account the legislative evolution of the last decade, some guidance note by the Commission will be not enough to solve the issues regarding fundamental rights, a rewording of the Directive is needed. It is necessary to extend the requirement of 'economic or material benefit' to all aspects of assistance to migrants and introduce a true 'humanitarian clause' without conditions.

Beyond clarifying punishable conduct, the introduction of a fundamental rights perspective is also needed regarding migrants. Efforts should also focus on reinforcing the content of Facilitation Framework Decision with the criminal framework for action in cases of trafficking of human beings, for example by bringing it closer to the content of THB Directive. In any case, any victim should be able to enjoy the status conferred in the Victim's Directive 2012/29/EU.

Undoubtedly, the presence of Europol in the hotspots implies access to a huge amount of intelligence by said agency. This reality together with the creation of the EMSC show an evident growth in the number of cases of smuggling registered by Europol. However, if we focus on the cases in which open judicial investigations reach Eurojust, a direct impact on the proliferation of prosecuted due to the presence of Europol in the hotspots cannot be easily assessed. Much of the information collected by Europol is useful in police investigations but cannot be admitted as evidence. In this sense, a harmonization of the nature of the statements made by migrants is essential. It is also necessary to incorporate practices that are respectful with human rights. For instance, to establish completely transparent procedures in which the legal status of the migrant debriefed is known.

In addition, an effective prosecution of smuggling requires the development of efficient investigation techniques, as well as coordinated work between the Member States and the EU agencies (particularly Europol and Eurojust) that attack financial flows. An approach to the actions initiated in response to the 'crisis' in the Mediterranean show the need to strengthen cooperation in this regard. Unfortunately, not much information or data is available on the results obtained. However, if the ultimate goal of the Union is to put an end to migrant smuggling, cooperation is essential to allow the confiscation and freezing of smugglers' assets.



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