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Editorial

Reforming the 'Facilitators' Package' through the *Kinsa* litigation: Legality, Effectiveness and taking International Law into account

10th Anniversary of Eurojus

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Background: The Facilitators' Package as an Example of Overcriminalisation

To honour the 10th anniversary of Eurojus, my contribution will focus on a highly topical issue spanning the fields of EU criminal, migration, and human rights law: the criminalisation of the facilitation of unauthorised entry in EU law. A key feature of the EU policy to prevent migrants from reaching the EU external border has been the criminalisation – and in essence the overcriminalisation- of facilitation of unauthorised entry, transit and stay. The EU criminal law

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framework dates back from over twenty years ago, in the third pillar, pre-Lisbon era. This framework is known as the EU 'facilitators' package' and consists of a (then) first pillar Directive on the facilitation of unauthorised entry, transit and residence[1] accompanied by a (then) third pillar Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence confirming that the conduct defined as facilitation in the Directive will be treated as a criminal offence by EU Member States.[2] The criminalisation of facilitation is very broad. In terms of the facilitation of irregular entry or transit, criminal sanctions will be imposed on any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens.[3]

The criminalisation of facilitation in EU law is thus very broad. A 'humanitarian exception' to criminalisation is not mandatory in the facilitators' package, which includes rather an optional clause according to which Member States may decide not to impose sanctions for facilitation of irregular entry and transit for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.[4] In reality, few EU Member States have introduced such humanitarian exception in national law implementing the facilitators' package.[5] The EU has thus introduced in the facilitators package a paradigm of preventive criminalisation of such a breadth that it can cover any form of assistance to enter or transit the territory of an EU Member State in breach of what is essentially administrative law.[6] Practice on the ground has resulted in the use of criminal law on facilitation of unauthorised entry by Member States to target civil society for humanitarian assistance, and even to target migrants themselves for their journeys.[7] The challenges that the overcriminalisation of facilitation of unauthorised entry has been posing on fundamental rights have led to calls for the reform of the outdated facilitators package.[8] Yet the Commission, in an evaluation conducted in 2017, declined to take up the opportunity to reform the facilitators' package. The evaluation defended resolutely the *status quo*.[9]

The *Kinsa* Litigation: background

[1] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/4 (hereinafter Facilitation Directive).
[2] Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence [2002] OJ L328/1 (hereinafter Facilitation Framework Decision).
[3] Article 1(1)(a) of the facilitation Directive combined with Article 1(1) of the facilitation Framework Decision.
[4] Article 1(2) of the facilitation Directive
[5] 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), Brussels, 22.3.2017 SWD(2017) 117 final
[6] V. MITSILEGAS, 'The Normative Foundations of the Criminalisation of Human Smuggling. Exploring the Fault Lines between European and International Law' in *New Journal of European Criminal Law*, vol.10, 2019, pp.68-85 at p.78.

[7] For a detailed analysis of targeting NGOs on the ground , see S. CARRERA, V. MITSILEGAS, J. ALLSOPP and L. VOISILIUTE, *Policing Humanitarianism. EU Policies Against Human Smuggling and their Impact on Civil Society,* Hart, 2019.
[8] V. MITSILEGAS 'The Criminalisation of Migration in the Law of the European Union. Challenging the Preventive Paradigm' in G-L. GATTA, V. MITSILEGAS and S. ZIRULIA (eds.), *Controlling Immigration Through Criminal Law. European and Comparative Perspectives on 'Crimmigration'*, Hart, 2021, pp.25-45.

[9] Commission, supra note 7.

A game changer in the reform of EU criminal law on facilitation has appeared in the form of a reference for a preliminary ruling to the Court of Justice by the Tribunale di Bologna in Italy. In the *Kinshasaa* reference,[10] (now renamed as Kinsa), lodged on 21 July 2023, the referring Court has asked the CJEU whether the criminalisation of the facilitation of unauthorised entry in EU law and in national law even where the conduct is carried out on a non-profit-making basis, without providing, at the same time, an obligation on Member States to exclude from criminalisation conduct facilitating unauthorised entry aimed at providing humanitarian assistance is compatible with the Charter. The referring Court focuses on the principle of proportionality referred to in Article 52(1), read in conjunction with the right to personal liberty and the right to property referred to in Articles 6 and 17, as well as the rights to life and physical integrity referred to in Articles 2 and 3, the right to asylum referred to in Article 18 and respect for family life referred to in Article 7 of the Charter. The reference is welcome in stressing the potential adverse effect of the overcriminalisation of facilitation on a wide range of fundamental rights.

The facts in *Kinsa* lay bare the shaky normative foundations and adverse effects of overcriminalisation of facilitation of unauthorised entry in EU and Italian law.[11] They involve the prosecution of a Congolese woman arriving at the air border of Bologna for the facilitation of the unauthorised entry of her minor daughter and niece.[12] The referring court queries the compatibility of the national legislation, and the underlying EU law, with the Charter. It states that the offence of facilitation of unauthorised entry in Italian law is by its nature an offence of danger, in that the Italian legislature, in order to prevent in advance the infringement of a legal interest, already seeks to penalise the conduct in itself, on the sole ground that acts are carried out with the intention of procuring the unauthorised entry of non-EU nationals, irrespective of the reasons for those acts- with the need for a specific intention to make a profit from the offence not being foreseen.[13] The Court adds that the offence is that it is "*free-form*", in the sense that the offence may be committed in any way by the perpetrator, using any means.[14] The criminal penalty also applies to those who have facilitated the unauthorised entry of a foreign national for humanitarian assistance purposes and even if the foreign national is in need.[15] The referring court notes that the Italian legislation complies with the facilitators' package[16] and that in the present cases it is clear that the conduct of the accused objectively corresponds to conduct punishable for the offence provided for in domestic law.[17] Yet the referring court questions the reasonableness of such criminalisation and its compatibility with fundamental rights enshrined in the Charter, noting in particular that in its view the protection of those fundamental rights must be taken into account in the balancing exercise which must form the basis of the common immigration policy; and that in both the EU regulatory framework and the Italian legislation, there is a lack of proportionality in favour of the

[10] Case C-460/23 *Kinshasa,* Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023 — Criminal proceedings against OB (OJ C, C/338, 25.09.2023, p. 12, CELEX: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62023CN0460)

[11] V. MITSILEGAS 'Reforming EU Criminal Law on the Facilitation of Unauthorised Entry: The new Commission proposal in the light of the Kinshasa litigation' in *New Journal of European Criminal Law*, vol.15, 2024, pp.3-11.

[12] Reference- paras. 1-5.
[13] Reference- para. 8.
[14] Reference- para. 9.
[15] Reference- para. 11.
[16] Reference- para. 12.
[17] Reference- para. 22.

protection of the interest in controlling migration flows, which also results in an unnecessary sacrifice of fundamental rights.[18]

The promise of *Kinsa:* reforming the Facilitators' Package

The *Kinsa* litigation presents a first-class opportunity for reform of the paradigm of overriminalisation of migration that the Facilitators' Package has introduced. The hearing in the case took place on June 18 and the Court's ruling is expected in a few months' time (the Advocate General's Opinion at the time of writing is scheduled for November 5). The ruling will be significant not only in interpreting the current Facilitators' Package and its implementation, but also in giving guidance to the negotiations of the new facilitation proposal the Commission tabled in November 2023[19] which appears to be a response to the *Kinsa* litigation but maintains as will be seen below an overciminalisation paradigm.[20] The CJEU will have a number of options if it finds shortcomings in EU law itself- from annulling the facilitators' package in its entirety (following the example of the ruling on data retention[21]) to 're-writing' the package in conformity with the Charter (following the example of the ruling on the EU PNR Directive[22]), in order to limit criminalisation and to inject legal certainty into EU law and its implementation. It is for the Court to further stress the requirement for national legislators and national courts to implement EU law in conformity with the Charter. Moreover, the Court will have the opportunity to provide guidance (as it has done for instance in the *Taricco* ruling in terms of the negotiations of the EU PIF Directive[23]) on the content of the new Commission facilitation proposal as this is negotiated by the EU legislators.

The question of compliance of the existing and future facilitators' package with the Charter, viewed from the prism of proportionality, is obviously central to the litigation. However, this contribution argues that these matters must be viewed in conjunction with, and in the context of, further EU law principles including legality, effectiveness and conformity with international law. It is also argued that *Kinsa* must be an avenue for a holistic assessment of the facilitators' package, examining criminalisation as a whole and not only in terms of the specific facts of the case.

Legality and the Rule of Law

When examining the current facilitators' package it is worth noting its drawbacks in terms of rule of law and quality of law making. This is 'old' third pillar law, more than 20 years old. Unlike measures in related areas of criminal law (such as trafficking in human beings where legislation has constantly been revised, also after the entry into force of the Lisbon Treaty), the Commission was for many years reluctant to revise the facilitators' package (arguing as recently as 2017 that such reform was not necessary)[24] and only putting forward a new proposal in response to litigation before the CJEU. The facilitators' package was a third pillar Member State initiative, adopted with minimal justification and with no impact assessment. The adopted text fails to comply with the principle of legality under **Article 49(1)** of the Charter in terms of the elliptical use of terms, the breadth of criminalisation and the lack of legal certainty and

[18] Reference- para. 17.
[19] COM(2023) 755 final, Brussels, 28.11.2023.
[20] MITSILEGAS, *op. cit., NECL 2024.*
[21] Case C-293/12, *Digital Rights Ireland,* ECLI:EU:C:2014:238.
[22] Case C-817/19, *Ligue des Droits Humains,* ECLI:EU:C:2022:491.
[23] C-105/14, *Taricco and Others,* EU:C:2015:555.
[24] See reference to the Commission REFIT package above.

foreseeability regarding the extent, reach and existence of a humanitarian exception to criminalisation.

Effectiveness – EU Asylum Law

Another principle that it is worth considering is the principle of effectiveness of EU law. The Court has used this principle to set limits to the criminalisation of irregular entry and stay under the national law of Member States,[25] assessing national criminalisation in the light of the effectiveness not of a rights giving EU law provision, but rather in the light of the effectiveness of the EU Return Directive.[26] *Kinsa* is an opportunity for the Court to utilise the principle of effectiveness in order to assess the compatibility of EU and national criminal law on facilitation with EU law. Zirulia has argued that the current criminalisation of facilitation falls short of the principle of effectiveness regarding EU border management policies.[27] I would argue that the criminalisation of facilitation in the facilitators' package and in the Commission's new proposal falls fundamentally short of the principle of effectiveness in EU asylum law. Both the existing package in force and the new proposals have a negative impact on access to asylum in the EU, which is a fundamental element of EU asylum law[28] and which forms an essential part of the right to asylum in the Charter.

Taking into account international law

Examining the conformity of the facilitators' package with international law is important in view of the considerably adverse consequences the hostile environment generated by the facilitators' package has for international law obligations of saving lives at sea and of enabling access to asylum.[29] The CJEU has already stressed the requirement for EU law to be interpreted taking into account international law (in that case the SOLAS Convention and the Convention on the Law of the Sea) in its ruling in *Sea Watch.*[30] The *Sea Watch* litigation involved the generation of a parallel framework of hostile environment towards NGOs saving lives at sea through the imposition by the state of administrative penalties aiming at de facto stoppjng the search and rescue operations of NGOs in the high seas. The CJEU took into account

[25] Case C-61/11 PPU *Hassen El Dridi, alias Karim Soufi* [2011] ECR I-3031.
[25] Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* [2011] ECR I-12709.
[26] V MITSILEGAS, 'The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law', in M GUIA, M VAN DER WOUDE and J VAN DER LEUN (eds), *Social Control and Justice: Crimmigration in an Age of Fear* (The Hague, Eleven International Publishing, 2012) 87-114.

[27] **https://verfassungsblog.de/waiting-for-kinsa/**

[28] See V. MITSILEGAS, 'The EU External Border as a Site of Preventive (In)justice' in ***European Law Journal,*** vol.28, 2022, pp.263-280
[29] V. MITSILEGAS, 'Contested Sovereignty in Preventive Border Control: Civil Society, the 'Hostile Environment' and the Rule of Law' in M. BOSWORTH and L. ZEDNER (eds), *Privatising Border Control: Law at the Limits of the Sovereign State,* OUP, 2022, pp.36-56.

[30] Joined Cases C-14/21 and C-15/21, *Sea Watch,* ECLI:EU:C:2022:604

international law obligations and set out a series of limits to state enforcement challenging state arbitrariness and the rule of law deficit inherent in this hostile environment.[31]

Sea Watch is entirely relevant to the *Kinsa* litigation both in terms of the approach towards the rule of law and in terms of the need to take into account international law when examining the legality of EU law. In the case of *Kinsa,* a further- and key- international law instrument to be considered is the UN Convention on Transnational Organised Crime (the Palermo Convention). Criminalisation of facilitation (or migrant smuggling as per UN legal terminology) in international law differs significantly from the EU law paradigm as it frames criminalisation within the specific aim and context of fighting transnational organised crime, and thus makes criminalisation expressly conditional upon the existence of financial gain- a condition absent in EU law, which leads to overcriminalisation and the hostile environment. [32]*Kinsa* is an opportunity for the Court to limit and set clear parameters to the criminalisation of facilitation in EU law by framing criminalisation within the specific objective of fighting organised crime.

An opportunity for broader reform

The *Kinsa* litigation presents an opportunity for broader reform of EU criminal law on facilitation, with the ruling providing a framing of criminal law within the Charter and key international law obligations, providing thus legal certainty and setting clear limits to criminalisation. The intervention of the Court is even more significant in view of the recent proposal pf the Commission for a reform of the criminal law of facilitation. Criminalisation remains broad in the new proposal, including by the continuation of not expressly including a humanitarian exception in the legally binding part of the text; the introduction of the criminalisation of facilitation where there is a high likelihood of causing serious harm to a person; and the introduction of a criminal offence of publicly instigating facilitation.[33] The Commission proposal thus maintains the hostile environment towards those who help migrants, and does little to enhance legal certainty and to take the Charter and international obligations seriously. It may be tempting for certain litigants to ask the Court to focus on the facts of the individual case narrowly (which reveal a family context and present a key example of overcriminalisation under the current system) and to focus on the existing legislation in force rather than also on the Commission new proposal, arguing that further discussions on the scope of criminalisation will take pace in negotiations. This contribution is a plea for the Court to take a broader approach, and examine the impact of criminalisation on fundamental rights, international obligations and the rule of law more broadly, by focusing on access to asylum. *Kinsa* is a golden opportunity to take rights and the rule of law seriously in an issue which has been dominated by executive overreach.

[31] For an analysis see V.MITSILEGAS, 'Challenging the Hostile Environment for Search and Rescue at Sea: Reflections from the *Sea Watch* litigation' in V. MILITELLO and A. SPENA (eds.), *The Challenges of Illegal Trafficking in the Mediterranean Area,* Springer, 2023, pp.141-149.

[32] On the differences between international and EU law see MITSILEGAS *op. cit. (*Normative Foundations).
[33] For an analysis see MITSILEGAS *op. cit. (NJECL 2024).*