

CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union

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EXECUTIVE SUMMARY

In this paper, the CCBE analyses the proposal of the European Commission for a new so-called anti-smuggling directive. The main concerns of the CCBE relate to the vague definitions of the provisions which do not meet the declared objective of clarifying which offences should be criminalised. Therefore, the proposal risks to impact lawyers providing assistance to migrants or civil society acting on humanitarian grounds. The CCBE is particularly worried about the potential chilling effect on lawyers and risks of criminalisation of legal assistance. Consequently, EU legislators should adopt a clearer wording in key provisions of the proposal and include a mandatory, explicit, unambiguous and broad-in-scope solidarity clause.

1. Introduction

On 28 November 2023, the Commission has published a Proposal for a [Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union](#). The directive would replace the current framework, so called “Facilitators Package” (Directive 2002/90/EC¹ establishing a common definition of the offence of facilitation of unauthorised entry, transit and residence, and Framework Decision 2002/946/JHA on strengthening the penal framework to prevent the facilitation). The general objective is to put in place an instrument that “clearly defines and effectively sanctions the offence of facilitation of unauthorised entry, transit and stay in the EU”.² The declared objective of the new proposal is to clarify which offences should be criminalised.

In this paper, the CCBE analyses the proposal and points out the risks that the proposal could provoke and its potential negative impact on fundamental rights and access to justice.

The main concerns relate to the definitions of the proposal which do not meet the declared objective of clarifying which offences should be criminalised and bringing legal certainty.

¹ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0090>

² Page 3 of the Commission proposal

The CCBE draws particular attention to the potential impact of the proposal on lawyers providing legal advice in the field of migration and asylum law, in particular the chilling effect on lawyers and risks of criminalisation of legal assistance.

2. Context

The CCBE stresses that the proposal should not have a deterrent effect on those providing legal advice or humanitarian assistance.

The Commission and stakeholders identified a broad definition in the current framework in force³ as one of the challenges. Absence of exemptions is also seen as a problem. Civil society highlighted risks of criminalisation of assistance provided by NGOs or individuals assisting and/or working with irregular migrants. The explanatory statement of the Commission recognises that there were cases where, due to the broad definition of the offence, people have been prosecuted for providing services to irregular migrants in the context of their professional activities or for providing assistance for selfless reasons.

This is also the context known to the CCBE based on the reports that it receives from lawyers providing assistance to asylum seekers. The current situation is already quite vague and uncertain for lawyers providing advice at the borders. Given this, and the prevailing hostile political environment,⁴ many lawyers feel there is always a risk that they could be connected with smuggling. The CCBE obtained reports that lawyers refrain from providing legal assistance in some circumstances because of the fear that the authorities might use it against them as evidence of being connected with smuggling. The legislation in force has therefore a deterrent effect on the provision of legal assistance to asylum seekers.

Few cases can be quoted to illustrate that lawyers were targeted under the “anti-facilitators legislation”. In 2016, the CCBE expressed its concern over the ongoing harassment of Electra Koutra, a Greek refugee and human rights lawyer who was assisting Syrian refugees.⁵ Other organisations have reported such cases as well.⁶

The CCBE recalls that lawyers should be able to perform their professional duties without fear of reprisal, hindrance, intimidation or harassment, according to the UN basic principles on the role of lawyers.

“16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to

³ The definition in force is as follows: “1. Each Member State shall adopt appropriate sanctions on:

(a) 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;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.”

⁴ On this aspect, [see also the report](#) of the CoE Commissioner for Human Rights: “More generally, high-level public figures in several member states have talked about refugees, asylum seekers and migrants as security threats, as an ‘invasion’ or in even worse terms, which also paints those defending these groups as complicit in threats to the nation. Lawyers representing asylum seekers or migrants, or otherwise litigating existing laws or policies, may be disparaged as acting against the interest of the state, undermining the government’s efforts to control migration, rather than as professionals engaging in the entirely legitimate practice of bringing legal challenges in the interest of their clients”.

⁵ See the CCBE human rights letter [here](#).

⁶ See <https://www.barcouncil.org.uk/resource/legal-community-gravely-concerned-joint-statement-from-the-bar-council-and-law-society.html> or <https://ecre.org/op-ed-a-multiple-hazard-area-refugees-and-their-lawyers-in-danger/>

consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”

The UN Special Rapporteur stresses that States must ensure that persons who practise law can exercise their profession without undue restrictions. They must therefore take the necessary steps in law and in practice to ensure that such persons can perform their professional duties without any kind of interference, harassment, threats or intimidation.⁷

Against this background, the CCBE calls on the legislators to amend the proposal in a way that the provisions are legally precise and do not allow any misuse of the directive to intimidate lawyers or other professionals and civil society actors who provide legal or humanitarian assistance to migrants and asylum seekers.

The CCBE thinks that if the proposal was to be amended in the way suggested below, it would lead to the attainment of its objective – establishing more certainty.

3. Analysis of the provisions of the proposal and suggestions for improvements

A. Article 3

The CCBE concurs with the Commission’s conclusion⁸ that it is necessary to clearly define the offence of facilitation.

The proposed text in Article 3 states the following:

“1. Member States shall ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence where:

a) the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit; or

b) there is a high likelihood of causing serious harm to a person.

⁷ See the recent report of the UN Special Rapporteur of 2022, [available here](#): 102. States have a duty to ensure that persons who practise law can exercise their profession without undue restrictions. They must therefore take the necessary steps to ensure that such persons can perform their professional duties without any kind of interference, harassment, threats or intimidation. (...)

112. States should take all necessary measures to ensure the free exercise of the legal profession, in all circumstances, so that lawyers may exercise their legitimate professional rights and duties without fear of reprisals and free from all restrictions, including judicial harassment.

113. Part of States’ duty to guarantee is to protect the physical and psychological integrity and safety of lawyers and their families. This entails taking effective measures to observe, in law and practice, the Basic Principles on the Role of Lawyers and other standards related to the independence and duties of lawyers.

⁸ Commission proposal page 9

2. Member States shall ensure that publicly instigating third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence.”

a) Weakness of the language and definition

With regards to Article 3, par. 1 a) and the notion of direct benefit, the following examples illustrate that it might be problematic.

Activities such as renting out accommodations, selling food, renting hotel rooms, providing legal advice, medical care, and all other direct services in exchange for money that facilitate the illegal entry, transit, and stay of the third-country national are therefore punishable when in violation of the immigration laws of the Union and the Member States and when the "service provider" is aware that his services facilitate illegal entry and/or stay. It could be argued that the salary paid to a lawyer, or the funding received by an NGO from a donor to provide legal assistance, could constitute a direct or indirect financial or material benefit.

As for Article 3 par. 1 b), the CCBE notes that material benefit element, present in par. 1 a), is missing. To qualify as criminal offence, the “high likelihood of causing serious harm to a person” should be combined with a requirement of material benefit. Otherwise, if this element is missing, humanitarian actions to transfer people in difficult circumstance where even the life could be in danger could be criminalised. Therefore, b) cannot be considered as an element of the crime itself.

Finally, the second paragraph of Article 3 regarding public instigation is vague and should be removed. In this regard, the CCBE draws the attention of the EU legislators on the position of the UN Special Rapporteur on human rights defenders that goes in this direction.⁹

These considerations illustrate the vagueness and weakness of the language of Article 3.

b) Absence of humanitarian clause

The text of the directive in force contained an explicit provision foreseeing that Member States may exclude the behaviour whose aim is to provide humanitarian assistance to the person concerned, the so called humanitarian clause.¹⁰

The CCBE draws the attention of the legislators that the directive in force has been questioned before the courts as to its compatibility with the EU Charter for, amongst others, not providing for an obligation on Member States to exclude from criminalisation a conduct facilitating unauthorised entry aimed at providing humanitarian assistance to foreign nationals.¹¹ There are doubts whether the current EU regulatory framework respects the criteria of proportionality and reasonableness, since it allows it to sacrifice fundamental rights (e.g. right to life, right to asylum) worthy of protection in cases in which that sacrifice is not necessary for the pursuit of the objectives that the legislature itself proposes (i.e. controlling migration).

The new proposal contains a Recital 7 that indicates that humanitarian behaviour should not be criminalised. The Commission argues in its explanatory part of the proposal that it “clarifies that the purpose of the directive is not to criminalise third-country nationals for the fact of being smuggled,

⁹ [Position Paper: on the EU Commission's proposed Directive to update the EU legal framework on people smuggling - UN SR Human Rights Defenders \(srdefenders.org\)](#)

¹⁰ See footnote 3.

¹¹ Pending Case C-460/23, [Kinshasa available here](#).

assistance provided to family members, or humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.”

The CCBE does not agree with this conclusion and thinks that a mere recital is not enough to ensure that the proposal does not lead to criminalisation of solidarity, legal or humanitarian assistance. On the contrary, the CCBE notes, what has also been noted by other organisations¹², that the new proposal does not contain any provisions regarding humanitarian clause in the body of the text.

This means that anyone who assists a third-country national to enter, or transit across, or stay within the EU in violation of European and national legislation commits a criminal offense. The scope of this provision is incredibly broad, particularly considering the definition of a third-country national as follows:

‘third-country national’ means any person who is not a citizen of the Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union and who is not a person enjoying the right of free movement under Union law as defined in Article 2, point 5, of Regulation (EU) 2016/399 of the European Parliament and of the Council¹³;

The optional exemption now in force is no longer foreseen in the proposal. Hence, actually, the proposal removes even the optional exemption that is now in force.

Upon closer examination of the text of the proposed directive, the exemption is not explicitly stated anywhere. Therefore, essentially anyone who helps a third-country national to cross borders and illegally stay in one of the Member States, knows about it and receives compensation for it could potentially be prosecuted. For lawyers, this could mean in an extreme case that lawyers can no longer provide advice on residence options or other social rights that a third-country national could have during their stay in the EU. NGOs that cooperate with lawyers or even instruct a lawyer to assist someone could also find themselves in the same situation if they receive subsidies for such actions.

Where previously the rule was that Member States could introduce a rule to exclude humanitarian aid from the scope of the directive, the current line is that it does not explicitly need to be excluded because this would already be provided for in other legislation and case law of the Member States. This argument holds no water because it could just as easily be included.

The UN Special Rapporteur highlighted that *“the optional character of the humanitarian clause in the original legislation opened the door for the criminalisation of support to migrants aimed at seeing their fundamental rights upheld.”*¹⁴ Consequently, it can be deduced that the intention of the proposal is to remove the so-called humanitarian clause to create ambiguity and even a chilling effect both for NGOs and for lawyers.

Taking into account the context explained above, as the proposal removes existing safeguards and does not provide for lawyers to be expressly exempted, it seems to potentially make the situation worse for those assisting migrants and consequently, for the migrants themselves.

It is therefore essential that a clause be reintroduced into the text and be of a wide scope, catching not only lawyers and NGOs, but also ordinary citizens who will also be confronted with this issue; ordinary citizens who will in turn want to rely on NGOs and lawyers. It should cover both individuals and organisations. Clear exemptions should be included in Article 3 explicitly. The exemption should be mandatory for all Member States.

¹² [Position Paper: on the EU Commission's proposed Directive to update the EU legal framework on people smuggling - UN SR Human Rights Defenders \(srdefenders.org\)](#)

¹³ Article 2 par 1. of the proposal, available [here](#).

¹⁴ [Position Paper: on the EU Commission's proposed Directive to update the EU legal framework on people smuggling - UN SR Human Rights Defenders \(srdefenders.org\)](#)

Therefore, the CCBE calls for a mandatory, explicit, unambiguous and broad-in-scope solidarity clause to be introduced in the provisions of the proposal.

This would also be in line with the Commission’s 2020 guidance on the implementation of EU rules on definition and prevention of the facilitation (...) which state that humanitarian assistance mandated by law cannot and must not be criminalised.

Commission proposal	CCBE suggestions for amendments
<p>Recital 6</p> <p>In accordance with the principles of legality and proportionality of criminal law, and in order to address criminal activities that put human life in danger and disrespect the dignity of people for the purpose of obtaining profits, it is necessary to provide a precise and detailed definition of the criminal offences that counter these criminal behaviours. Assistance of unauthorised entry, transit or stay in the Union should constitute a criminal offence when there is a link with an actual or a promised financial or material benefit. This conduct should also be criminalised provided that this is highly likely to cause serious harm to the third-country nationals who were subject to the criminal offence or to any other person, even though there is no financial or material benefit or no promise of such benefit. It is necessary to establish a criminal offence in order to discourage the modus operandi of persons who publicly instigate, for instance through the internet, third-country nationals to enter, transit or stay in the Union without authorisation. Providing objective information or advice to third-country nationals on the conditions for the legal entry and stay in the Union, and on international protection, should not be understood as public instigation.</p>	<p>Recital 6</p> <p>In accordance with the principles of legality and proportionality of criminal law, and in order to address criminal activities that put human life in danger and disrespect the dignity of people for the purpose of obtaining profits, it is necessary to provide a precise and detailed definition of the criminal offences that counter these criminal behaviours. Assistance of unauthorised entry, transit or stay in the Union should constitute a criminal offence when there is a link with an actual or a promised financial or material benefit. This conduct should also be criminalised provided that this is highly likely to cause serious harm to the third-country nationals who were subject to the criminal offence or to any other person, where even though there is no financial or material benefit or no promise of such benefit. It is necessary to establish a criminal offence in order to discourage the modus operandi of persons who publicly instigate, for instance through the internet, third country nationals to enter, transit or stay in the Union without authorisation. Providing objective information or advice to third-country nationals on the conditions for the legal entry and stay in the Union, and on international protection, should not be understood as public instigation. Providing legal advice, including legal information, should not be understood as public instigation.</p>
<p>Recital 7</p> <p>It is appropriate to provide for criminal liability where there is a link to a financial or material benefit, or where migrants are highly likely to be subjected to serious harm. These elements will usually not be fulfilled when it comes to</p>	<p>Recital 7</p> <p>It is appropriate to provide for criminal liability where there is a link to a financial or material benefit, or where migrants are highly likely to be subjected to serious harm. These elements will usually not be fulfilled when it comes to</p>

assistance among family members or the provision of humanitarian assistance or the support of basic human needs. Third-country nationals should not become criminally liable for having been the subject to such criminal offences. Moreover, it is not the purpose of this Directive to criminalise, on the one hand, assistance provided to family members and, on the other hand, humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.

assistance among family members or the provision of humanitarian assistance or the support of basic human needs. Third-country nationals should not become criminally liable for having been the subject to such criminal offences. Moreover, it is not the purpose of this Directive to criminalise, on the one hand, assistance provided to family members and, on the other hand, humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations. ***It is not the purpose of this Directive either to criminalise provision of legal advice, including legal information, by lawyers.***

Article 3

Criminal offences

1. Member States shall ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence where:

a) the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit; or

b) there is a high likelihood of causing serious harm to a person.

2. Member States shall ensure that publicly instigating third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence.

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a) the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit; or

b) there is a high likelihood of causing serious harm to a person ***and when the person carrying out the conduct receives or accepts a financial or material benefit.***

~~2. Member States shall ensure that publicly instigating third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence.~~

2. Members States shall not consider as criminal offence the cases where:

	<p>a) assistance is provided for humanitarian reasons to people without legal residence</p> <p>b) legal assistance is provided by lawyers to people without legal residence</p> <p>Lawyers, volunteers, professional care providers or civil society organisations may provide medical assistance, food, clothing or shelter, or look for and/or suggest legal avenues pertaining to the immigration status and/or the fundamental rights of the person concerned. They cannot be prosecuted or punished for these activities.</p>
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c) Definition of abetting (Article 5)

The key to avoid that this provision - regarding “incitement, aiding and abetting, and attempt” - is misapplied is the definition in Article 3 as discussed above. The CCBE is concerned that this article opens even further the door for intimidation of civil society and lawyers.

B. Other considerations

a) Penalties for natural persons (Article 6)

Article 6 par. 5 a) contains a wording that might give ground to sanctioning of lawyers. It reads:

“In addition to criminal penalties imposed in accordance with paragraphs 1 to 4, Member States shall take the necessary measures to ensure that natural persons that have been convicted of committing one of the criminal offences referred to in Articles 3, 4 and 5 may be subject to criminal or non-criminal sanctions or measures imposed by a competent authority, including:

(a) withdrawal of permits or authorisations to pursue activities which have resulted in committing the criminal offence, or prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the criminal offence was committed;”

While there is no exemption or safeguard for lawyers, this provision might incite governments to intimidate lawyers.

In particular, this could mean that lawyers could face a professional ban if they were to be found guilty of what has been explained above. This is also highly extensive and will only exacerbate the chilling effect.

b) Training (Article 15)

The CCBE suggests to include training for lawyers, along with training for judges, prosecutors, and other categories of persons listed in this provision. As the new legislation will come into force, lawyers should be aware of the updated framework. Ensuring training to legal professionals would allow them to properly apply the new framework. Lawyers are key actors of the justice system and allow asylum seekers to access justice and defend their rights.

Commission proposal	CCBE suggestions for amendments
<p>Article 15</p> <p><i>Training</i></p> <p>1. Member States shall take the necessary measures to ensure adequate resources for and the provision of specialised training at regular intervals for the members of the law enforcement, the judiciary and the staff of authorities tasked with criminal investigations and proceedings of criminal offences referred to in Articles 3, 4 and 5.</p> <p>2. Without prejudice to judicial independence, Member States shall take the necessary measures to ensure that specialised regular training is provided to judges, prosecutors, law enforcement and judicial staff and competent authorities' staff involved in criminal proceedings and investigations with respect to the objectives of this Directive.</p>	<p>Article 15</p> <p><i>Training</i></p> <p>1. Member States shall take the necessary measures to ensure adequate resources for and the provision of specialised training at regular intervals for the members of the law enforcement, the judiciary, lawyers and the staff of authorities tasked with criminal investigations and proceedings of criminal offences referred to in Articles 3, 4 and 5.</p> <p>2. Without prejudice to judicial independence, Member States shall take the necessary measures to ensure that specialised regular training is provided to judges, prosecutors, law enforcement, and judicial staff, lawyers and competent authorities' staff involved in criminal proceedings and investigations with respect to the objectives of this Directive.</p>

c) Article 16

The CCBE supports the plead of the UN Special Rapporteur to remove the mandate for “special investigative tools” in this provision. Surveillance of lawyers by investigative authorities presents risks for defence rights and confidentiality of lawyer-clients communications. This provision could exacerbate these risks by providing further grounds for potentially disproportionate tools.

Commission proposal	CCBE suggestions for amendments
<p>Article 16</p> <p><i>Investigative tools</i></p> <p>Member States shall take the necessary measures to ensure that effective and proportionate investigative tools are available for investigating or prosecuting criminal offences referred to in Articles 3, 4 and 5. Where appropriate, these tools shall include special investigative tools, such as those which are used in countering organised crime or other serious crime cases.</p>	<p>Article 16</p> <p><i>Investigative tools</i></p> <p>Member States shall take the necessary measures to ensure that effective and proportionate investigative tools are available for investigating or prosecuting criminal offences referred to in Articles 3, 4 and 5. Where appropriate, these tools shall include special investigative tools, such as those which are used in countering organised crime or other serious crime cases.</p>

d) Respect for fundamental rights

Although recitals mention that the proposal safeguards fundamental rights, provisions actually ensuring that this would be the case, are lacking. Merely stating, like in Recital 28, that the proposal respects fundamental rights is not enough to ensure that. Admittedly, Recital 10 is an exception as it mentions the necessity to comply with Geneva Convention. The CCBE calls for the inclusion of fundamental rights safeguards in the provisions of the proposal. The CCBE's suggestions for amendments to Article 3, par. 2, second subparagraph (see above) illustrate exactly how fundamental rights should be included in the provisions of the proposal.

4. Conclusion

The Commission's proposal for a new "anti-smuggling directive" removes the old humanitarian clause. Whereas the old directive had incorporated it as an option, it appears that only a handful of countries had implemented it. Strangely enough, this is now used as an argument to suggest that it is unnecessary. Nothing could be further from the truth. Removing this clause will indicate precisely a change in course, namely a tightening. The Commission refers to other legislation and case law of the Member States, which already interprets the humanitarian clause in alternative ways. The analysis it provides is vague. It is not inconceivable that the reflex in case law stems precisely from the old clause of the currently applicable directive. Whatever the case may be, **a solidarity clause including lawyers in Article 3 is essential for the independence of the legal profession in immigration matters.** If it did not exist, it is very realistic that a chilling effect would arise. The additional provisions in Articles 5 and 6 only reinforce this. **The CCBE proposal is to make a very clear demarcation for the exception as proposed in the above text. Migration lawyers should be able to perform their professional duties without fear of reprisal, hindrance, intimidation or harassment, according to the UN basic principles on the role of lawyers.**

The CCBE also notes that the Commission proposal illustrates a tendency to tackle the issue of smuggling from a law-enforcement and criminal law perspective to the detriment of the safeguards and protection that are needed for victims or potential victims of smuggling and people who try to help them. The CCBE notes that the Council of Europe is assessing the feasibility of a new legal instrument to protect those who risk being smuggled with full respect for their human rights. The CCBE would welcome such an instrument.¹⁵

¹⁵ In this regards, see for example remark of the CoE Secretary General [here](#).