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ESTUDIOS

Addressing Migrant Smuggling in the European Union. Challenges for a Non-Criminalized, Coordinated and Effective Response

Abordar el tráfico de migrantes en la Unión Europea. Desafíos para una respuesta no criminalizada, coordinada y efectiva

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Addressing Migrant Smuggling in the European Union. Challenges for a Non-Criminalized, Coordinated and Effective Response

*Abordar el tráfico de migrantes en la Unión Europea.
Desafíos para una respuesta no criminalizada, coordinada y efectiva*

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Summary: I. By Way of Introduction: Migrant Smuggling and Organized Criminal Groups.—II. The ‘Facilitators’ Package’ as a Legal Framework: What to Pursue as Migrant Smuggling. 1. The definition of smuggling and the economic benefit as a requirement. 2. About the need to treat smuggled human beings as victims. 3. The shortcomings in the transposition of the Facilitators’ Package.—III. The cooperation in criminal matters: the role of Europol and Eurojust fighting smuggling at the European Union level. 1. Brief reference to some tools of EU cooperation in criminal matters. 2. The fight against smuggling in the Mediterranean.—IV. Final Considerations.

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 in 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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Resumen: *El tráfico ilícito de migrantes es un fenómeno delictivo de alta complejidad. De naturaleza eminentemente transfronteriza, el tráfico de personas conlleva con frecuencia la participación de grupos delictivos organizados. Un enfoque coherente en la lucha contra estas actividades requiere una regulación precisa y correctamente implementada, en el caso de la UE, la regulación de referencia es el «paquete de facilitadores». En la presente contribución se señalarán varios puntos controvertidos que conlleva este marco, en especial, la excesiva criminalización y el descuido de la perspectiva de los derechos humanos.*

Además, la erradicación del tráfico de personas requiere la suma de esfuerzos y la acción coordinada de diferentes actores como autoridades nacionales y agencias europeas. En este trabajo se estudiarán algunas actuaciones llevadas a cabo por Europol en el Mediterráneo. Centrándose en el papel de este organismo en los hotspots, se evaluará la contribución de la información recopilada y los beneficios que esta conlleva para Eurojust.

Palabras clave: *tráfico de personas, grupos de crimen organizado, hotspots, Europol, Eurojust*

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

Migrant smuggling in the European Union (EU) 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 Mediterranean². Due to different factors, including the restrictions derived from the COVID-19 pandemic³, the numbers in 2021 are well below those recorded in 2015 or 2016. In fact, in 2021 the arrival of 144,423 people was recorded⁴. 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 network⁵.

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 field⁶. 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 documents⁷. During their journeys to the EU migrants pay high fees⁸ for services that endanger their physical and

² IOM, “Flow Monitoring. Migration Flows to Europe”, accessed 15 of May 2022, <https://migration.iom.int/europe/arrivals/>.

³ IOM, *World Migration Report 2022*, (2022), 91.

⁴ In 2016, 387,739 people arrived to EU territory by sea, while 5,143 deaths or disappearances were reported. IOM, “Flow Monitoring”.

⁵ Europol, *Migrant smuggling in the EU*, (February 2016), 5.

⁶ Europol, *Serious and Organised Crime Threat Assessment, Crime in the age of technology*, (2017), 15.

⁷ *Ibid.*, 50.

⁸ 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. 6th Annual Report*, (2022), 12. The European Commission has also pointed out “that prices of smuggling services can generally reach EUR 20 000 per individual”, see “A renewed EU action plan against migrant smuggling (2021-2025)”, 29 of September 2021, COM (2021) 591 final, 5.

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 environment⁹. 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.¹⁰ 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.¹¹ 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.

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. Finally, arranging marriages of convenience or sham marriages. Furthermore,

⁹ 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*, (Brussels: Publications Office of the European Union, 2021), 68.

¹⁰ Europol, *Migrant smuggling in the EU*, 9.

¹¹ United Nations Office on Drugs and Crime (UNODC), *The Concept of 'Financial or Other Material Benefit' in the Smuggling of Migrants Protocol*, (2017), 38.

smuggling activities are clearly associated with other crimes such as money laundering and trafficking in human beings¹².

For all the above, the study of the approach adopted by the EU 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 difficulties 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. Lastly, 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

Throughout the last two decades, the fight against smuggling has been configured as an essential objective for the achievement of the Area of Freedom, Security and Justice (AFSJ). The identification of smuggling as an ‘eurocrime’ or its inclusion in the spheres of competence of both Europol and Eurojust considerably facilitates its prosecution in the territory of the Union.

The regulation of migrant smuggling from a criminal point of view in the EU consists of the well-known ‘Facilitators’ Package’. That is, Directive 2002/90/EC that establishes a definition of the crime of migrant smuggling¹³ and Framework Decision 2002/946/JHA created with the aim of strengthening the criminal framework that pursues it¹⁴.

The main objective of both instruments is to reinforce the system of sanctions that repress the facilitation to clandestine immigration. The package provides a common definition at EU level of what facilitation is. Likewise, it harmonizes the legislation of the Member States (MMSS) with respect to sanctions, the responsibility of legal persons; and the jurisdiction over offenses related to facilitating clandestine immigration.

¹² Eurojust, *Report on Eurojust’s casework on migrant smuggling*, (2018), 10.

¹³ Council Directive (EC) 2002/90 defining the facilitation of unauthorised entry, transit and residence (Official Journal of the European Union, L 328, 5 of December 2002, 17), hereinafter the Facilitation Directive.

¹⁴ Council Framework Decision (JHA) 2002/946 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (Official Journal of the European Union, L 328, 5 of December 2002, 1), hereinafter Facilitation Framework Decision.

Said European regulation is not exempt from controversy¹⁵ 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)¹⁶. 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.

1. *The definition of smuggling and the economic benefit as a requirement*

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 transit¹⁷, as well as assistance through economic benefit for irregular residence¹⁸, 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 assistance¹⁹. 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 prosecuted²⁰.

The dissociation between 'facilitation' and 'benefit' is especially worrying, since it can lead to the criminalization of humanitarian tasks, mutual

¹⁵ See Council of Europe Commissioner for Human Rights, *Criminalisation of migration in Europe: Human rights implications* (4 February 2010). See also Mark Provera "The Criminalisation of Irregular Migration in the European Union", *CEPS Papers on Liberty and Security in Europe*, n.º 80 (Brussels: 2015); Valsamis Mitsilegas, "The Criminalisation of Migration in the Law of the European Union. Challenging the preventive Paradigm" in *Controlling Immigrations Through Criminal Law. European and Comparative Perspectives on 'Criminal Migration'*. Ed. by Gian Luigi Gatta, Valsamis Mitsilegas and Stefano Zirulia (Oxford: Hart Publishing, 2021), 25-46.

¹⁶ UNGA Resolution, A/RES/55/25 (15 of November 2000).

¹⁷ Facilitation Directive, art 1(1).

¹⁸ *Ibid.* art 1(2).

¹⁹ 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 of November 2000), para. 88.

²⁰ UNODC, *The Concept of 'Financial...*, 13.

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 of criminalizing certain behaviours related to irregular migration from a human rights perspective²¹. It is true that the Facilitation Directive grants the MMSS 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 MMSS. In 2016, several MMSS claim to have modified their regulations due to the increase in refugee flows²². However, other studies showed that civil organizations fear that their work assisting migrants will be sanctioned²³. 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 MMSS 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.

2. *About the need to treat smuggled human beings as victims*

The omission of the degrading or inhuman treatment 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

²¹ See Fundamental Rights Agency (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).

²² Milan Remác and Gertrud Malmersjo, *Combating migrant smuggling into the EU. Briefing Implementation Appraisal* (Brussels: European Parliamentary Research Service, April 2016), 7.

²³ Michael Collyer, “Cross-Border Cottage Industries and Fragmented Migration” in *Irregular Migration, Trafficking and smuggling of human beings. Policy Dilemmas in the EU*. Ed. by Sergio Carrera and Elspeth Guild, (Brussels: Centre for European Policy Studies, 2016), 18.

approach to the protection of migrants, understanding them as victims²⁴. 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 beings²⁵ incorporates them as a central point of protection²⁶. Although these are distinct phenomena, it is undeniable that trafficking and smuggling are clearly related. In order to characterize trafficking in human beings against smuggling, different factors of special relevance are considered. Such analysis is centred on the cross-border phenomena, the purpose of the acts carried out, the consent of the victims, the protected legal interest or the source of economic benefit for the organized crime group.

It is frequently noted that trafficking and smuggling affect different legally protected interests. This distinction justifies a differentiated treatment between victims that is more than questionable. In the case of crimes related to trafficking, depending on the *modus operandi* of the criminal organization, related crimes can be perpetrated such as: rape or sexual abuse, injuries, forced abortion, child pornography, torture, murder, kidnapping, forced marriage, retention of documentation, labour exploitation and even corruption. Therefore, different legal rights linked to the victim can be protected, such as, for example, dignity, physical integrity or sexual indemnity. For its part, smuggling is qualified as a crime without a victim, a characteristic that derives from the high interest of the migrant in the success of

²⁴ 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", *International Journal of Refugee Law*, n.º 2, vol. 17 (2005): 394-415; 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", *Social Inclusion*, n.º 1, vol. 3, (2015): 76-87; Alessandro Spina, "Human Smuggling and irregular immigration in the EU: from complicity to exploitation?", in *Irregular Migration, Trafficking and smuggling of human beings. Policy Dilemmas in the EU*. Ed. by Sergio Carrera and Elspeth Guild, (Centre for European Policy Studies, 2016), 33-40.

²⁵ Directive (EU) 2011/36 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Official Journal of the European Union, L 101, 15 of April 2011, 1), hereinafter THB Directive.

²⁶ 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?", *Nova et Vetera*, n.º 20, vol. 64 (2011): 227-238; Marta Ortega, "La trata de seres humanos en el derecho de la Unión Europea" in *Técnicas y ámbitos de coordinación en el espacio de libertad, seguridad y justicia*. Coord. by Francisco Javier Donaire and Andreu Olesti, (Marcial Pons, 2015), 181-196; Mirentxu Jordana, "La lucha contra la trata en la UE: los retos de la cooperación judicial penal transfronteriza", *CIDOB d'Afers Internacionals*, n.º 111 (2015): 57-77.

the criminal activity. Consequently, from a legal-criminal point of view, the object of protection of the norm is not the migrant, but the State regulation of migratory flows. This approach leaves in the background the grievances that the migrant may have suffered and contributes to dehumanizing the phenomenon.

Although in the case of trafficking the borders crossing is not an essential element, the practice indicates that a considerable number of victims of trafficking cross some border. In the case of irregular entries, the confusion between trafficking victims and smuggled persons continues to be a difficult challenge to overcome. Likewise, it should be remembered that THB Directive does not require exploitation to materialize for certain acts to be qualified as trafficking. According to art. 2.1, situations of trafficking may include threats, coercion, kidnapping, fraud, deception, including abuse of power or vulnerability of the victim. In fact, the Directive clarifies that the consent of the victim becomes irrelevant if any of these means have been used. In considerable cases, the victim of trafficking may have shown an initial consent to be introduced into the territory of a given country. As Frontex reports confirm, many people start their itinerary hiring the services of criminal groups without being aware that, upon arrival at their destination, they will become victims of exploitation, that is, trafficking. In this as in other situations, initial consent becomes worthless due to coercion, deception or abuse carried out by traffickers.

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 circumstance hinders their effective protection and generates distortions in the victim's self-perception as such or reaffirms their erroneous perception. This reality entails to lack of access to justice and also to impunity on the part of the perpetrators. Beyond that the protection of all victims should be considered one of the central objectives of the fight against organized crime in the Union.

From the point of view of criminal prosecution, another dimension is added to the importance of detecting victims: in most cases, said victims are witnesses of illicit actions and, therefore, they can be a key element in issuing a conviction. In this regard Directive 2004/81/EC²⁷ contemplates the possibility that the victims of both crimes who cooperate with the au-

²⁷ 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 (Official Journal of the European Union, L 261, 6 of August 2004, 19), hereinafter Residence Directive.

thorities 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. In fact, according to data from the European Commission, only 10 MMSS have exploited the possibility of granting a residence permit for victims of smuggling²⁸.

Finally, it should be noted that the rights included in the Directive 2012/29/EU²⁹ apply to all victims of crime in a non-discriminatory manner, regardless their residence status. According to these provisions, the victim will be any natural person who has suffered any damage, especially physical or mental injuries, emotional damages or economic damage, caused by action or omission in violation of state criminal law. Bearing in mind the current situation in the Mediterranean, it is really difficult not to think that at least some people who are smuggled should not be considered as victims.

For all these reasons, there is the necessity to rethink the Facilitators' Package, including a human rights approach, as was done in the case of trafficking several years ago.

3. *The shortcomings in the transposition of the Facilitators' Package*

Regarding to the transposition of the Facilitators' Package, considerable differences between the provisions of the MMSS should be noted. The Framework Decision points out that the member countries 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

²⁸ 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 European 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", 17 of October 2014, COM (2014) 635 final, 3.

²⁹ 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 (Official Journal of the European Union, L 315, 14 of November 2012, 57), hereinafter Victims' Directive.

irregular entry and stay in EU territory³⁰. More than half of the MMSS 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 MMSS, 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 MMSS and could result in a prison sentence in the rest³¹. Penalties for the same behaviour vary substantially from one MS to another, ranging from small fines to prison terms of up to 15 years³². Only 8 MMSS include in their national legislations an exception from punishment for facilitating unauthorised entry and/or transit in order to provide some form of humanitarian assistance³³.

For all the above, it can be affirmed that the margin of discretion left to the member countries in the Facilitators' Package translates into inconsistencies in its application that may affect its effectiveness. In 2015, the Commission drew attention to the need of an urgent review of the Facilitators' Package³⁴. 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 criminalised³⁵. Even accepting the lack of reliable and comparable national criminal statistics, in 2020 the Commission decided to launch a guidance to the MMSS on the implementation of the Smuggling Directive.

It is still early to evaluate the impact of such guidelines (the Commission intends to report on their implementation in 2023)³⁶, but not

³⁰ See Sergio Carrera (coord.), *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, (European Parliament Study, 2016), 29.

³¹ Remác and Malmersjo, *Combating migrant smuggling...*, 6.

³² European 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", 6 of December 2006, COM (2006) 770 final, 7.

³³ European Commission, "Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence", 23 of September 2020, C (2020) 6470 final.

³⁴ European Commission, "EU Action Plan against migrant smuggling (2015-2020)", 27 of May 2015, COM (2015) 285 final, 3.

³⁵ International Amnesty, *Punishing Compassion. Solidarity on Trial in Fortress Europe*, (2020), 25.

³⁶ COM (2021) 591 final, 18.

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. Indeed, human smuggling has been identified as a case of serious and organized cross-border crime that should be eradicated³⁷.

Smuggling is characterized by considerable complexity. As Europol points out, almost half of these groups are 'poly-criminals' involved also in trafficking in human beings, drug trafficking, excise fraud, firearms trafficking and money laundering³⁸. Likewise, organized groups are highly specialized and operate offering various services along the migrant route.

Due to the cross-border nature of smuggling, the actions of criminals can be dispersed and affect territories of different States. In these cases, part of the members of the organized group are not in the same State as the smuggled people or the proceeds of crime. Addressing a case requires the cooperation of several jurisdictions, since evidence must be collected and arrests and surrenders of certain suspects or seizures of goods must be executed in different territories. In addition, the collaboration of the victims of smuggling may be essential if their testimonies are to be heard at the time of the trial. A fact that, as has been seen, is sometimes not easy for various reasons, such as the victim being expelled from the territory of the Union or after deciding not to collaborate with the authorities.

Various obstacles must be added, such as the differences between penal systems or conflicts of jurisdiction, which are closely linked to the exercise of state sovereignty. The heterogeneity in penal systems is identified from a practical point of view as one of the greatest obstacles for the investigation and prosecution of cross-border crime. This causes legal and procedural obstacles to arise, such as those related to taking evidence, the different degree of witness protection that exists in each State or the procedural guarantees in taking witness statements.

³⁷ European Commission, "The EU Internal Security Strategy in Action: Five steps towards a more secure Europe", 22 of November 2010, COM (2010) 673 final, 11. Along the same lines, see European Commission, "EU Security Union Strategy (2021-2025)", COM (2020) 605.

³⁸ Europol, *EU Serious and Organised crime Threat Assessment. A corrupting influence: the infiltration and undermining of Europe's economy and society by organised crime*, 2021, 68.

As shown below, cooperation in criminal matters in the EU seeks to increase the criminal prosecution of this type of crime through the joint and coordinated work of the Union agencies.

1. *Brief reference to some tools of EU cooperation in criminal matters*

With the objective of achieving an AFSJ, the EU has adopted different legal and institutional instruments. These tools allow the maximum potential of criminal matters cooperation to be exploited, such as the European Arrest Warrant or the Joint Investigation Teams (JITs). Among the institutional instruments, the European Union Agency for Law Enforcement Cooperation (Europol) and the European Union Agency for Criminal Justice Cooperation (Eurojust) are particularly relevant, providing all the support that the State authorities in charge of criminal prosecution may require. While Europol is responsible of coordinating the police authorities through its National Units, Eurojust is in charge of the coordination between the judicial authorities³⁹. However, both agencies must work together coordinating the received requests from the MMSS.

The functions that Eurojust carries out in the judicial field are not a reflection of the tasks that Europol assumes in the police field. The main objectives of Eurojust mainly consist in three types of actions. In the first place, Eurojust is in charge of the coordination of judicial actions and investigations that affect two or more MMSS. The performance of Eurojust is always conditioned by the request presented and the information that has been provided by the State authorities. Secondly, Eurojust seeks to improve cooperation between the competent authorities of the MMSS. In other words, Eurojust facilitates the execution of both requests and decisions also with respect to the instruments that give effect to the principle of mutual recognition. Finally, Eurojust must provide support seeking greater efficiency in investigations and prosecutions by organizing coordination meetings between national authorities.

Europol's main task is to facilitate exchanges of information between MMSS. The agency works through a network of Liaison Officers and National Units who have access to all databases in their State. In order to fulfil its broader mandate, Europol organizes its information in its own databases. However, it must be taken into account that Europol has a

³⁹ A detailed analysis of Eurojust and Europol common work is included in Mirentxu Jordana Santiago, *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 *et seq.*

limited capacity in terms of access to external databases, and in general it is at the expense of the information that the police of the MMSS provide it. The national authorities retain the ownership of the data and may decide not to share it with certain MMSS or other Europol partners. In addition to facilitating exchanges of information, Europol is also responsible for providing MMSS with analytical information in its areas of competence through strategic reports⁴⁰.

According to article 49.5 of the Eurojust Regulation, relations between Eurojust and Europol must be based on ‘close cooperation’ always in pursuit of their objectives and avoiding ‘useless duplication’. For this reason, the efforts of the agencies focus on maintaining cooperation to increase effectiveness and avoid duplication in their actions through regular exchanges of information and coordination of activities. The collaboration between the two agencies also extends to the preparation of joint reports or documents, the organization of training activities and the designation of contact points. In this sense, the contributions that Eurojust regularly makes to Europol’s strategic reports such as the OCTA or the TE-SAT must be highlighted.

Information exchanges play a major role in the agencies’ joint work. Europol provides Eurojust with reports on the findings of the data analysis, whether of a specific result, of a general nature or of a strategic nature. If an information provided by Eurojust matches with the information stored in Europol’s systems, Europol supplies Eurojust with its data and the analytical results. When judicial follow-up is necessary in an Eurojust case, Europol make available the necessary data and analysis, in particular hit notifications and cross-match reports; as well as operational reports and strategic reports. In all these cases, Europol must obtain permission from the national authority that has provided the information. Besides, Eurojust will be responsible for promoting the provision of data to Europol among the judicial authorities. Furthermore, Eurojust may provide Europol with data resulting from a general analysis. In this case, Eurojust will be in charge of requesting permission from the corresponding National Members to provide Europol with the content of the Eurojust file. In turn, it will provide information to Europol on the cases that may be within its competence or in which its experience may be needed; in particular, when the request for assistance may be related to the purpose of one of the Europol Analysis Project.

⁴⁰ Such as the well-known OCTA (EU Organized Crime Threat Assessment), IOCTA (Internet Organized Crime Threat Assessment) or TE-SAT (EU Terrorism Situation & Trend Report).

Eurojust role with respect to Europol's Analysis Projects is to promote a follow-up at the judicial level. This includes facilitating the identification and coordination of the competent national authorities, solving problems related to the execution of European Arrest and Surrender Orders, organizing actions to obtain evidence in different MMSS, or finally, promoting the initiation or reopening of investigations to national level. The association of Eurojust with Europol's Analysis Projects also entails the invitation of Eurojust experts to participate in the activities of a certain Europol analysis group. This participation consists to be invited to the work meetings of the analysis group; be informed by Europol of the development of the Analysis Project; or to receive –as well as transmit– data and analytical results related to a specific case from Eurojust. Regarding the role of Europol in the strategic or coordination meetings of Eurojust, in general, Europol must be invited to the meetings, and may it request to be invited to those Eurojust meetings that are related to some analysis file.

Beyond the institutional tools, a reference to the JITs must be done. Due to their impact on criminal investigations, it is common to link JITs to police cooperation⁴¹; however, they are also an important part of judicial cooperation, especially, of course, in the investigation initial stages.

JITs are established through an agreement between the competent authorities of two or more States with the aim that a specific group of law enforcement professionals cooperate operationally. The JIT is born linked to a specific case, only for a certain period of time and with certain participants. Although the character of the JIT is essentially operational, its members will not necessarily be police authorities of the MMSS, but also judges, prosecutors, members of Europol or Eurojust, representatives of the European Anti-Fraud Office (OLAF), among others.

The creation of a JIT seeks to respond to the need to resolve the difficulties encountered by a specific State in carrying out investigations. In general, these are considerably complex investigations with strong transnational components and in which connections with other States frequently appear. On some occasions, there is the possibility that the JIT is created due to the existence of parallel investigations in different MMSS that require coordinated and common action.

The activity of the JIT can be carried out on the territory of all the MMSS that have created it. However, with respect to the law applicable to

⁴¹ An interesting analysis of the JITs from the police cooperation point of view can be found in Tom Schalken and Maarten Pronk, "On Joint Investigation Teams, Europol and supervision of their joint actions", in *Crime, Criminal Law and Criminal Justice in Europe*, ed. by Hans-Jörg Albercht and André Klip (Leiden: Martinus Nijhoff Publishers, 2013), 423-437.

investigations, a kind of principle of territoriality applies⁴². This means that the JIT's actions in the territory of a particular MS will be led by the competent authority involved in the investigation in that State, and that the JIT's practice will be based on national law. Therefore, when the activity of the JIT changes to the territory of another MS, the authorities that assume the leadership of the JIT as well as the law applicable to its activities also change.

The greatest advantages of the JITs consist in the possibility of exchanging information between their members or collecting evidence without the need to activate mutual legal assistance through letters of request. However, this possibility is restricted by various conditions. Thus, in general, the results obtained by the JIT may not be used beyond the purposes for which the team was created. However, the States Parties to the JIT may agree otherwise. In the event that through the information obtained it is desired to discover, investigate or prosecute other infractions, prior authorization must be obtained from the MS in which the information was obtained, which may deny the request if it considers that other criminal investigations could be jeopardized. This issue can be truly limiting when investigating cases of smuggling carried out by organized poly-criminal groups. Although the number of JITs being created is increasing, it cannot be said that they are extremely popular. The low use of the JITs seems to respond to different reasons, such as the lack of knowledge of the instrument by the authorities of the MMSS; problems of admissibility of evidence; or the financial costs of setting up and running the team.

2. *The fight against smuggling in the Mediterranean*

The smuggling of people from Africa to Europe has increased considerably over the last two decades, becoming a key element in the EU agenda on border management in the Mediterranean area. Among other actions, it was decided to reinforce border control under the coordination of the European Agency for the management of external borders (Frontex)⁴³. Following the Lampedusa tragedy and after the end of the Italian Mare Nostrum rescue operation, two Frontex-coordinated operations were

⁴² See André Klip, *European Criminal Law: An Integrative Approach*, (Intersentia, 2016) 447 *et seq.*

⁴³ 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 (Official Journal of the European Union, L 295, 14 of November 2019, 1).

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 Security⁴⁴ and the European Agenda on Migration⁴⁵ 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 traffickers⁴⁶. 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.

From the perspective of criminal cooperation, in 2015 Europol's efforts were focused on creating a maritime intelligence team known as Joint Operational Team (JOT) Mare⁴⁷. Hosted at Europol, this initiative aimed to identify and track smuggling networks in the Mediterranean by combining Europol's intelligence resources and MMSS' 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 Council⁴⁸, 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 hotspots⁴⁹.

⁴⁴ European Commission, "The European Agenda on Security", 28 of April 2015, COM (2015) 185 final.

⁴⁵ European Commission, "A European Agenda on Migration", 13 of May 2015, COM (2015) 240 final.

⁴⁶ See *inter alia*, Giuliana Ziccardi, "The EUNAVFOR MED Operation and the use of force" *American Society of International Law*, n.º 19, vol. 27, (2015); Félix Vacas Fernandez, "The European operations in the Mediterranean Sea to deal with migration as a symptom", *Spanish yearbook of international law*, n.º 20 (2016): 93-117.

⁴⁷ Europol, *Joint Operational Team launched to combat irregular migration in the Mediterranean*, (17 March 2015), accessed 12 of April 2022 <https://www.europol.europa.eu/media-press/newsroom/news/joint-operational-team-launched-to-combat-irregular-migration-in-mediterranean>.

⁴⁸ Council of the European Union, "Measures to handle the refugee and migration crisis", 9 of November 2015, doc. n.º 13880/15, para. 10.

⁴⁹ See David Fernández Rojo, "Los "hotspots": expansión de las tareas operativas y cooperación multilateral de las agencias europeas Frontex, Easo y Europol", *Revista de Derecho Comunitario Europeo*, n.º 61 (2018).

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 MS 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 investigations⁵⁰. 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 highlighted⁵¹. In 2021, the EMSC has received 4,889 new cases⁵².

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 level⁵³. In its latest annual report, Eurojust claimed to register 292 cases (170 new cases, 122 ongoing from previous years) and supported 11 JITs (4 new and 7 ongoing)⁵⁴. 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 information⁵⁵. In turn, the Agency itself remarks that several differences between MMSS about the legal validity and doubts of the judicial use in criminal proceedings of the information obtained in the hotspots⁵⁶. On one hand, the statements can be classified as evidence or intelligence, and also sometimes both depending

⁵⁰ Europol, *European Migrant Smuggling Centre. Activity Report, First Year*, (January 2017), 6.

⁵¹ *Ibid.*, 14.

⁵² Europol, *European Migrant Smuggling Centre. 6th Annual Report*, 8.

⁵³ Eurojust, *Annual Report 2016. Criminal Justice across borders*, (2017), 33.

⁵⁴ Eurojust, *Annual Report 2021. 20 years of criminal justice across borders*, (2022), 45.

⁵⁵ Eurojust, *Judicial use of information following the debriefing of migrants at external borders*, (27 October 2021), 1.

⁵⁶ *Ibid.*, 3.

on the circumstances. On the other hand, the legal status of the migrant debriefed is not uniform in all the EU territory. In some MMSS migrants are considered suspects, other consider them witnesses and other are applying a mixed concept⁵⁷. These differences, and especially mixed situations, can raise suspicions and discourage the migrant's cooperation with the authorities. Moreover, 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 them⁵⁸.

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, but 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 activities⁵⁹. Although the impetus provided by the European Multidisciplinary Platform Against Criminal Threats (EMPACT) and its policy cycle has begun to bear fruit, there is still much work to be done⁶⁰.

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 MMSS. 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 networks⁶¹. In addition, the study of financial flows can be a good tool for detecting and differentiating cases of smuggling from those of human trafficking⁶².

⁵⁷ *Ibid.*, 7.

⁵⁸ See ECtHR, App. n.º 26766/05 and 22228/06, *Al-Khawaja and Taery v. UK*, (15 December 2011).

⁵⁹ Europol, *Migrant smuggling in the EU*, 9.

⁶⁰ Council of the European Union, "General Factsheet. Operational Action Plans (OAPS) 2020 Results", 2, accessed 5 of May 2022, <https://www.consilium.europa.eu/media/50206/combined-factsheets.pdf>.

⁶¹ See UNODC, *The Concept of 'Financial...*, 34.

⁶² See Organisation for Security and Co-operation in Europe, *Leveraging Anti-Money Laundering Regimes to Combat Trafficking in Human Beings* (2014).

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 origin⁶³. 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)⁶⁴ remain to be seen. In any case, 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 has a difficult solution. 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 smuggling 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 MMSS 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. Therefore, a redrafting of the Directive is necessary. Specifically, to extend the requirement of 'economic or material benefit' to all aspects of assistance to migrants and introduce a true 'humanitarian clause' without conditions.

⁶³ UNODC, *The Concept of 'Financial...*, 27.

⁶⁴ COM (2021) 591 final.

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.

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 MMSS 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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