

# Complaint to the European Ombudsman

**What is the decision or matter about which you complain? When did you become aware of it? Add annexes if necessary.**

We, European Digital Rights (EDRI) and PICUM (Platform for International Cooperation on Undocumented Migrants) are submitting this complaint on behalf of the ProtectNotSurveil coalition (<https://protectnotsurveil.eu/>). We are complaining about the lack of an impact assessment (IA) by the European Commission (EC) on the package proposal to "strengthen EU legislation to prevent and fight migrant smuggling", comprised of two proposals: a Directive on preventing and countering the facilitation of unauthorised entry, transit and stay in the EU (COM/2023/755 final) and a Regulation to reinforce Europol's role in the fight against migrant smuggling and trafficking in human beings (COM/2023/754 final). We consider it maladministration for the following reasons:

## **(A) Failure to meet the requirements for a derogation from the obligation to conduct an IA**

The Better Regulation Guidelines and Toolbox requires the Commission to carry out an impact assessment for initiatives that are likely to have significant economic, environmental or social impacts (page 30). The obligation to conduct impact assessments also entails the obligation to carry out a stakeholder consultation which fulfills the criteria of Chapter II of the Guidelines (p. 15).

Recently, the Ombudsman has submitted a list of questions to the European Commission (case 1379/2024/MIK) inquiring on whether the Commission has in place internal procedures for deciding on whether to derogate from the impact assessment requirements. We believe that the same questions are relevant in the context of the publication of the proposed Facilitation Package.

Indeed, the EC fails to meet the criteria for choosing not to conduct an IA and produce an analytical document instead.

- 1) The urgency ground cannot be used as a blanket exception to the obligation of producing IA – it needs to be duly justified, which EC fails to do in its reply; and
- 2) The Better Regulation Guidelines (p. 30) accept an analytical document where an impact assessment is "not possible and a derogation is granted": the EC reply fails to indicate why carrying out an IA was not possible and whether such a derogation was obtained.
- 3) Timing of the analytical document: even if the exemption conditions are met, the Better Regulation Guidelines require any analytical document to be prepared "within three months of the initiative's adoption" - yet here the EC produced the document after 4.5 months.

There is no doubt that the initiative on migrant smuggling and trafficking in human beings will have significant economic and social impacts. By way of example, while comprehensive statistics on the numbers of people in detention on migrant smuggling grounds are not available, in Greece alone 1,374 people were arrested for smuggling in 2022<sup>1</sup>. As the new Facilitation Package aims to provide a new definition and more severe penalties for smuggling, the proposal will have a significant impact on the number of prosecutions for smuggling-related offences, the number of people imprisoned

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<sup>1</sup> Borderline-EU, "A legal vacuum - the systematic criminalisation of migrants for driving a boat or car to Greece", 2023, [https://www.borderline-europe.de/sites/default/files/readingtips/criminalisation\\_of\\_migrants-study\\_by\\_borderline\\_europe\\_en.pdf](https://www.borderline-europe.de/sites/default/files/readingtips/criminalisation_of_migrants-study_by_borderline_europe_en.pdf)

upon conviction, and the length of their sentences.<sup>2</sup> Therefore, the decision not to carry out an impact assessment and a stakeholder consultation in line with the requirements of Chapter II and III of the Better Regulation Guidelines violates the EC's obligations.

In this regard, it should be noted that in case C-482/17, the Court of Justice of the European Union established that "the preparation of impact assessments is a step in the legislative process that, as a rule, must take place if a legislative initiative is liable to have such implications" (para. 84).

In the context of the Facilitation Package, not only does the Commission fail to adequately clarify the "particular situation" legitimising the lack of impact assessment, but it also fails to take into account, as demonstrated by the staff working document (SWD), an important range of publicly available data. In particular, the staff working document lacks any reference to the two studies carried out by the European Parliament in 2016 and 2018<sup>3</sup> as well as the abundant civil society and academic literature on the topic.<sup>4</sup>

In its reply, sent on 3 September 2024, the European Commission asserts that "the Commission has dispensed with an impact assessment at the time of the presentation of the legislative proposals due to the urgency to prepare the two proposals and the need to act swiftly on tackling migrant smuggling". Nonetheless, the SWD fails to prove such an emergency. On the contrary, most issues identified in the SWD are supported with data from the 2017 REFIT evaluation, as well as Eurojust's 2018 Casework on Migrant Smuggling. It would therefore appear that in the six years between the publication of such data, and the publication of the proposal, the Commission would have had ample time to implement an impact assessment as well as a thorough stakeholders' consultation.

Moreover, the European Commission proposal was presented four months later than the request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023 in case C-460/23, known as 'Kinsa' (formerly Kinshasa). In this case, the Court of Justice of the European Union (CJEU) was asked to examine the current EU legal framework mandating member states to criminalize the facilitation of unauthorized immigration (the 'Facilitators Package'), assessing its compatibility with the EU Charter of Fundamental Rights (CFR). Considering that the CJEU will issue a ruling on one of the core principles of the instrument that the Commission aims to review with the new proposed Directive, it would be important to clarify whether the Commission was aware of the court proceedings, and why it considered it necessary to introduce a legislative proposal without waiting for the Court's interpretative guidance. This is especially relevant because the Commission's proposal does not change the core issue to be assessed by the CJEU, i.e. whether the discretionary nature of the 'humanitarian exception', excluding actions taken for altruistic or humanitarian purposes from criminalisation is compatible with the CFR. Should the Court ruling be issued late or after the revision process, there would be a risk that parts of the new Directive would have to be amended again to avoid being found incompatible with the CFR.

## **(B) The analytical document is inadequate:**

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2 See more details here [https://picum.org/wp-content/uploads/2024/06/How-the-New-EU-Facilitation-Directive-Further-the-Criminalisation-of-Migrants-and-Human-Rights-Defenders\\_EN.pdf](https://picum.org/wp-content/uploads/2024/06/How-the-New-EU-Facilitation-Directive-Further-the-Criminalisation-of-Migrants-and-Human-Rights-Defenders_EN.pdf)

3 "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants" Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union PE 536.490, 2016; and "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update"; Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union PE 608.838, 2018

4 See among others: ReSOMA (2020) The criminalisation of solidarity in Europe; Amnesty International (2020) Punishing compassion: Solidarity on trial in Fortress Europe; OMCT (2021) Europe: Open Season on Solidarity; Gionco, M; Kanics, J. (2022): Resilience and Resistance in defiance of the criminalisation of solidarity across Europe; PICUM (2023), More than 100 people criminalised for acting in solidarity with migrants in the EU in 2022

- 1) The analytical document is based on selective evidence and fails to take account of other evidence sources and fails to address the issues raised by other stakeholders

Please refer to our letter to the Commission of 8 August 2024 attached to this complaint for examples and explanations supporting that claim – given that the Commission did not address them, they remain valid.

As mentioned above, the SWD on the Facilitation Directive exclusively refers to the evaluation of the Facilitators Package conducted in 2017, the 2023 Study on the implementation of the Facilitators Package, the public consultation on the renewed EU action plan against migrant smuggling (2021-2025), the information and evidence provided by Europol, Eurojust and Frontex, the European Court of Auditors (ECA) 2021 Special Report on Europol's support to fight migrant smuggling, as well as "targeted consultations". However, the content of the "targeted consultations" is only referred to briefly in two paragraphs at the end of Annex III. There is no explanation of how such consultations have been taken into account in the presentation of the proposal. Moreover, while the 2017 REFIT presents four different policy options, the staff working document does not refer to them and fails to clarify how these different policy options have been taken into account.

The Milieu study mentioned as one of the sources of information was only made public months after the publication of the proposed Directive. Furthermore, to date, access to the national case studies that form the basis of the final report has not been granted by the Commission, on grounds of "protection of public security" and "protection of the ongoing decision-making process," but without sufficient justifications in line with the CJEU case law (the access to documents request has been ongoing since January 2024<sup>5</sup>).

- 2) Fundamental rights assessment: it emerges from the EC response that none was made, and simply relying on recitals referring to the Charter is wholly inadequate.

In its reply to our complaint, sent on 3 September 2024,<sup>6</sup> the European Commission appears to justify the absence of a fundamental rights impact assessment partly by the work of Europol's Fundamental Rights Officer (FRO): "The FRO is responsible for supporting Europol in safeguarding the respect for fundamental rights in all its activities as the Agency executes its mandate. The FRO's tasks have a particular emphasis on the Agency's operational work and activities." Arguing that it can be an efficient replacement and a satisfactory safeguard is grossly inappropriate because these tools and functions serve different purposes (one, prevention and support to decision-making and the other, activities monitoring and redress) and the role of the FRO was created only in 2022 and has barely any experience and working methods in place yet (see the 2023 FRO Annual Report) as well as due to its inherent limits.

The Europol's FRO is also irrelevant to those parts of the package (i.e. the Directive) which require action by national law enforcement agencies as the Europol's FRO has no mandate to monitor or assess their work in any way.

- 3) No response at all on gender equality: urgency cannot justify ignoring gender equality altogether.

### **In what way do you consider that the EU institution or EU body has acted incorrectly?**

The European Commission failed to provide a proper impact assessment in line with the Better

<sup>5</sup> [https://www.asktheeu.org/en/request/results\\_of\\_2023\\_monitoring\\_and\\_m#incoming-55570](https://www.asktheeu.org/en/request/results_of_2023_monitoring_and_m#incoming-55570)

<sup>6</sup> European Commission, "DG HOME reply EDRI", 3 September 2024, <https://edri.org/wp-content/uploads/2024/10/DG-HOME-reply-EDRI-Facilitation-Package-Impact-Assessment-Complaint.pdf>

Regulation requirements and their arguments for derogating from these important policy-making rules are unsatisfactory and insufficient. As a result, the lack of a proper impact assessment risks negatively affecting the EU policy-making process and the quality of future EU legislation. As a result, the current proposal risks to undermine fundamental rights protection and increase harm.

**What, in your view, should the institution or body do to put things right?**

The European Commission should withdraw its legislative package, carry out a proper impact assessment of several policy options, based notably on the consultation of a variety of stakeholders to ensure transparency, equity in decision-making and participation and propose a new legislative package (if necessary) drawn from its assessment and findings.