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Case Report

Decriminalising the Facilitation of Unauthorised Entry in EU Law: *Kinsa* as a first step?

Comments on Case C-460/23,* Kinsa, *ECLI:EU:C:2025:392

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Abstract

The Court of Justice delivered its first ruling on the compatibility of the 'facilitators' package' with EU law in the case of *Kinsa*, on 3 June 2025. The present commentary will evaluate the assessment by the Court of Justice of the compatibility of EU criminal law on the facilitation of unauthorised entry with EU law, including with the Charter, and assess the extent to which the Court's ruling in *Kinsa* constitutes a game-changer towards the decriminalisation of the facilitation of unauthorised entry in EU law.

Keywords

EU Charter – principle of proportionality – right to family life – best interest of the child – right to seek asylum – facilitation of unauthorised entry – migrant smuggling

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1 Introduction

One of the most eagerly awaited judgments by the Court of Justice in recent months has involved the litigation in the case of *Kinsa.* The ruling of the Court was eagerly awaited not only on the grounds that this was the first occasion to interpret the reach and extent of EU criminal law on the facilitation of unauthorised entry and the compatibility of the current overcriminalisation of facilitation with fundamental rights, but also on the grounds of the potential influence of the ruling on the content of future EU criminal law in the field, in view of the current negotiations on a new facilitation Directive to replace the facilitators' package.[1] The present note is an attempt to offer a commentary to the Court's ruling on *Kinsa,* which was delivered on 3 June 2025. The note will begin with outlining the background to EU criminal law on facilitation, and then proceed on presenting the background to the litigation, and then with analysing the Opinion of the Advocate General and the ruling of the Court of Justice. The commentary will evaluate the extent to which the Court's ruling in *Kinsa* constitutes a game-changer towards the decriminalisation of the facilitation of unauthorised entry in EU law.

2 The (Over)criminalisation of Facilitation of Unauthorised Entry in EU Law

The criminalisation of the facilitation of unauthorized entry in EU law has been introduced more than twenty years ago by a combination of instruments labelled as 'the facilitators' package.' This consists of a Directive defining what is called in EU law the "facilitation of unauthorised entry, transit and residence"[2] accompanied – in the light of the first pillar competence limits regarding criminalisation at the time – by a third pillar Framework Decision confirming that the conduct defined as facilitation in the Directive will be treated as a criminal offence.[3] Both instruments of what is rather 'old' law by EU standards predate by far the entry into force of the Lisbon Treaty and, having being proposed

1 V. Mitsilegas, 'Reforming the Facilitators' Package through the *Kinsa* Litigation: Legality, Effectiveness and Taking International Law into Account' in *Eurojus*, editorial of August 2024, pp. 155–160.

2 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, *OJ L* 328, 5.12.2002, pp. 17–18.

3 Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, *OJ L* 328, 5.12.2002, pp. 1–3.

not by the Commission but by a Member State (the French Government), they have been negotiated and adopted with minimal scrutiny and debate.[4] The EU Facilitation Directive goes further than the UN Palermo Convention Smuggling Protocol[5] in that it dispenses with the condition of obtaining a financial or other material benefit for the smuggling offence to be established.[6] The Directive calls upon Member States to adopt criminal sanctions for "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".[7] Instigation, complicity and attempt are also criminalised.[8] The Facilitation Framework Decision contains a general obligation for Member States to criminalise such conduct,[9] includes a general provision on sanctions,[10] which may be accompanied by parallel sanctions including confiscation,[11] and imposes specific high levels of sanctions only when certain aggravating circumstances occur.[12]

Notwithstanding the lack of specificity as regards the level of criminal sanctions to be imposed by Member States, it is clear that the facilitator's package

4 For a background, see V. Mitsilegas, J. Monar and W. Rees, *The European Union and Internal Security* (Hampshire and New York, Palgrave/Macmillan, 2003) 106–108.

5 For a comparison between EU and international law, see V. Mitsilegas, 'The Normative Foundations of the Criminalisation of Human Smuggling. Exploring the Fault Lines between European and International Law' in *New Journal of European Criminal Law*, vol. 10, 2019, pp. 68–85.

6 Article 1(1)(a) of the Facilitation Directive.

7 *Ibid.*

8 Article 2 of the Facilitation Directive.

9 According to Article 1(1) of the Framework Decision, each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of the Directive are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition (Article 1(3)). Article 1(6) of the Facilitation Framework Decision further states that if imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 shall be punishable by custodial sentences with a maximum sentence of not less than six years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

10 Article 1(1) of the Framework Decision, infringements shall be punishable by effective, proportionate and dissuasive penalties which entail extradition.

11 Article 1(2) of the Framework Decision.

12 According to Article 1(3) of the Facilitation Framework Decision, Member States must ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances: the offence was committed as an activity of a criminal organization; and the offence was committed while endangering the lives of the persons who are the subject of the offence.

has resulted in overcriminalisation, based on shaky normative foundations.[13] The scope of criminalisation is very broad, as it can cover any form of assistance to enter or transit the territory of an EU Member State in breach of what is essentially administrative law. The negative impact of the EU approach in criminalising those who assist migrants, but also third country nationals wishing to apply for asylum is evident. The Directive does attempt to address this issue by granting Member States the discretion not to impose sanctions for facilitation and instead apply their national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.[14] However, this provision is discretionary and its value in redressing the balance set out by the broad definition and criminalisation of human smuggling under EU law is questionable. According to a 2017 Commission Report, only seven Member States specifically include in domestic law an exemption from punishment for facilitation for humanitarian assistance.[15]

The overcriminalisation of facilitation of entry in EU law has allowed Member States to use domestic criminal law in order to prosecute a wide range of elements of assistance to migrants, which are not motivated by, and do not involve, any financial benefit. Facilitation offences have been used to prosecute NGOs who are addressing state inaction in saving lives at sea,[16] as part of a broader strategy of generating a hostile environment targeting civil society.[17] The Council of Europe Commissioner for Human Rights has noted that:

> A particularly worrying aspect of certain member states' interaction with NGOs engaged in the monitoring in the Mediterranean and, in case of people in distress, operating a rescue operation, is the frequent smear campaigns and media attacks against them, as well as repeated criminal

13 Mitsilegas, op. cit. (n. 5). See also V. Mitsilegas, 'The Criminalisation of Migration in the Law of the European Union. Challenging the Preventive Paradigm' in G-L. Gatta, V. Mitsilegas and S. Zirulia (eds.), *Controlling Immigration Through Criminal Law. European and Comparative Perspectives on 'Crimmigration'* (Hart, 2021) pp. 25–45.

14 Article 1(2) of the Facilitation Directive.

15 Commission, 'Staff Working Document – REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence' SWD (2017) 117 final, Brussels, 22.3.2017, p. 14.

16 For an overview see S. Carrera, V. Mitsilegas, *Policing Humanitarianism. EU Policies Against Human Smuggling and their Impact on Civil Society,* chapters 4 and 5; https://picum.org/wp-content/uploads/2024/04/Cases-of-criminalisation-of-migration-and-solidarity-in-the-EU-in-2023.pdf, 2024.

17 See V. Mitsilegas, 'Contested Sovereignty in Preventive Border Control: Civil Society, the 'Hostile Environment' and the Rule of Law' in M. Bosworth and L. Zedner (eds), *Privatising Border Control: Law at the Limits of the Sovereign State* (OUP, 2022) pp. 36–56.

> investigations, often on the allegation that NGOs-operated vessels have engaged in smuggling. Whilst states have the authority to investigate and prosecute any criminal acts, this power must be used in good faith and should not simply be deployed as a way to prevent NGOs from doing their work.[18]

In addition to targeting of civil society, the overcriminalisation of the facilitation of unauthorised entry has further resulted in the prosecution of citizens assisting migrants.[19] It has also resulted in the prosecution of migrants for assisting other migrants,[20] a practice which would be contrary to international law as also interpreted by the Canadian Supreme Court in *Apulonappa*.[21] In the latter case, the Canadian Supreme Court rejected the broad criminalisation of migrants assisting other migrants and family members advocated by the Canadian Government by interpreting domestic law in conformity with international law, in particular with the Smuggling Protocol. The Court stressed the

18 See Council of Europe Commissioner above.

19 For examples in Greece, see N. Chatzinikolaou, 'Crimmigration in Greece: A Study of Exceptional Derogations from the Rule of Law within a Permanent Situation of Emergency' in Gatta, Mitsilegas and Zirulia, op. cit., pp. 165–192. And in the context of irregular stay, see the 'Fraternité' ruling of the French Conseil Constitutionnel (*Décision* No. 2018/717–718 QPC, 6 July 2018) concerning the prosecution of two individuals (an academic and the activist farmer Cédric Herrou) relating to facilitation offences in the context of the crossing of the land border between Italy and France in Val Roya. The *Conseil Constitutionnel* has used the constitutional principle of *fraternité* as the basis of the freedom to provide humanitarian assistance, without consideration of the regular character of the assisted person's stay in the national territory. However, the *Conseil Constitutionnel* went on to balance (or, in its own words, to reconcile) the principle of *fraternité* with the safeguarding of public order, in whose framework the fight against irregular migration falls. The outcome of this exercise in the particular case was for the *Conseil Constitutionnel* to accept the limitation of criminalisation in cases of facilitating irregular movement (*circulation*) on humanitarian grounds, without this limitation being extended to cases of irregular entry (paras 8–10).

20 F. Patanè and others, 'Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy' (2020) 39 Refugee Survey Quarterly 123. See also F. Patanè, Migrants' Agency in Smuggling Routes: Current Developments, Criminalizing Practices and Socio-Legal Implications in the EU' in V. Mitsilegas, L. Tsourdi, N. Vavoula, *Interwining Criminal Justice and Immigration Control in the EU* (Routledge, forthcoming) who points out situations where migrants have been coerced into acting by smugglers and refers to an article article from 2022 in *The New Humanitarian*, the number of migrants accused of facilitating irregular migration between 2015 and 2021 amount to more than 2000 in Italy, to hundreds in the UK and to around 7000 in Greece, https://www.thenewhumanitarian.org/investigation/2022/09/01/European-courts-prosecution-asylum-seekers.

21 *R. v. Appulonappa* [2015] 3 R.C.S. 754.

requirement of the Protocol to criminalise smuggling for financial or other material benefit and noted that it would depart from the balance struck in the Protocol to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid.[22] According to the Court, Canada's international commitments support the view that the purpose of domestic criminal law is to permit the robust fight against people smuggling in the context of organised crime, which excludes criminalising conduct that amounts solely to humanitarian, mutual or family aid.[23] While the security goals of domestic law are important, they do not supplant Canada's commitment to humanitarian aid and family unity.[24]

3 The *Kinsa* Litigation: Background

A game changer in the reform of EU criminal law on facilitation has appeared in the form of a reference for a preliminary ruling to the Court of Justice by the Tribunale di Bologna in Italy. In the *Kinshasa* reference,[25] (eventually renamed as Kinsa), lodged on 21 July 2023, the referring Court has asked the CJEU whether the criminalisation of the facilitation of unauthorised entry in EU law and in national law, even where the conduct is carried out on a non-profit-making basis, without providing, at the same time, an obligation on Member States to exclude from criminalisation conduct facilitating unauthorised entry aimed at providing humanitarian assistance is compatible with the Charter. The referring Court focused on the principle of proportionality referred to in Article 52(1), read in conjunction with the right to personal liberty and the right to property referred to in Articles 6 and 17, as well as the rights to life and physical integrity referred to in Articles 2 and 3, the right to asylum referred to in Article 18 and respect for family life referred to in Article 7 of the EU Charter. The reference is welcome in stressing the potential adverse effect of the overcriminalisation of facilitation on a wide range of fundamental rights.

22 *Ibid.* para 44.

23 *Ibid.* para 45.

24 *Ibid.* para 57.

25 Case C-460/23 *Kinshasa,* Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023 – Criminal proceedings against OB (OJ C, C/338, 25.09.2023, p. 12), https://curia.europa.eu/juris/showPdf.jsf?text=&docid=277701&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=9103010.

The facts in *Kinsa* lay bare the shaky normative foundations and adverse effects of overcriminalisation of facilitation of unauthorised entry in EU and Italian law.[26] They involve the prosecution of a Congolese woman arriving at the air border of Bologna for the facilitation of the unauthorised entry of her minor daughter and niece.[27] The referring court queried the compatibility of the national legislation, and the underlying EU law, with the Charter. It stated that the offence of facilitation of unauthorised entry in Italian law is by its nature an offence of danger, in that the Italian legislature, in order to prevent in advance the infringement of a legal interest, already seeks to penalise the conduct in itself, on the sole ground that acts are carried out with the intention of procuring the unauthorised entry of non-EU nationals, irrespective of the reasons for those acts – with the need for a specific intention to make a profit from the offence not being foreseen.[28]

The Court added that the offence is "*free-form*", in the sense that the offence may be committed in any way by the perpetrator, using any means.[29] The criminal penalty also applies to those who have facilitated the unauthorised entry of a foreign national for humanitarian assistance purposes and even if the foreign national is in need.[30] The referring court noted that the Italian legislation complied with the facilitators' package[31] and that in the present cases it was clear that the conduct of the accused objectively corresponded to conduct punishable for the offence provided for in domestic law.[32] Yet the referring court questioned the reasonableness of such criminalisation and its compatibility with fundamental rights enshrined in the Charter, noting in particular that in its view the protection of those fundamental rights must be taken into account in the balancing exercise which must form the basis of the common immigration policy; and that in both the EU regulatory framework and the Italian legislation, there is a lack of proportionality in favour of the protection of the interest in controlling migration flows, which also results in an unnecessary sacrifice of fundamental rights.[33]

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

27 C-460/23 Request for a preliminary ruling (n 25), paras 1–5.

28 *Ibid*. para 8.

29 *Ibid*. para 9.

30 *Ibid*. para 11.

31 *Ibid*. para 12.

32 *Ibid*. para 22.

33 *Ibid*. para 17.

4 The AG Opinion

The Opinion of AG de law Tour was delivered on 7 November 2024.[34] The Advocate General did not go as far as challenging the current EU legal framework on criminalisation, but placed national authorities under the duty to scrutinise criminalisation from the prism of the proportionality principle as enshrined in Article 49(3) of the Charter. According to the Advocate General, Article 1(1)(a) of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, must be interpreted as meaning that the act by which a mother, a third-country national, intentionally contributes to the unauthorised entry into the territory of a Member State of two members of her family, namely her daughter and niece – who are minors over whom she has custody – by using false identity documents, constitutes an offence, with the assessment of the question on overcriminalisation having disclosed nothing to affect the validity of Article 1(1)(a) of Directive 2002/90 in the light of the principles of the legality and proportionality of criminal offences and penalties, enshrined in Article 49(1) and (3) of the Charter.

However, according to the Advocate General, the principle of the proportionality of criminal offences and penalties, enshrined in Article 49(3) of the Charter, precludes a system which would not allow the national court, when criminal proceedings are brought against a mother, who is a third-country national and has intentionally facilitated the unauthorised entry into national territory of two minor children, members of her family, by using false identity documents, to balance the interests at stake and to differentiate between the criminalisation of a person who is shown to have acted out of humanity or necessity, in the sole interest of the minors, and that of a person who is motivated solely by the criminal intent to commit for financial gain the very act prohibited by law. It is for the referring court to carry out a specific examination of the proportionality of national legislation which provides for the imposition, on anyone who facilitates unauthorised entry into national territory, of a custodial sentence of between two and six years and a financial penalty of EUR 15 000 per person concerned, having regard, in particular, to the possibility of exonerating from criminal liability persons whom are shown to have acted disinterestedly, out of altruism, compassion or solidarity, for humanitarian reasons or because of family ties, or of adapting the system of penalties applicable to them.[35]

34 Case C 460/23 *Kinsa*, Opinion of AG de la Tour delivered on 7 November 2024, ECLI:EU:C:2024:941.

35 *Ibid.*

The Opinion of the Advocate General was a welcome step in placing national courts under a duty to assess the criminalisation of the facilitation of unauthorised entry in conformity with the principle of proportionality as enshrined in Article 49(3) of the Charter. It was also welcome in that it did not limit the proportionality test to the specific circumstances of the present case, but extended the test to lead to the exoneration from criminal liability of any person who is shown to have acted disinterestedly, out of altruism, compassion or solidarity, for humanitarian reasons or because of family ties. On the other hand, the Advocate General's approach would perpetuate overcriminalisation and legal uncertainty, by maintaining the validity of the very broadly and vaguely defined offences in the EU facilitators' package, and subsequently the validity of overbroad national criminal law on facilitation. National courts are only to intervene *ex post*, to exonerate from criminal liability which already exists in national law. In some Member States, assigning this task to national courts could be seen as a challenge in view of the separation of powers between the legislator and the judiciary.[36] The state of legal uncertainty regarding the criminalisation of the facilitation of unauthorised entry is being perpetuated by the Council in negotiations on the new facilitators' Directive: the Council's General Approach[37] adds the requirement for financial gain for criminalisation,[38] but on the other hand leaves Member States free to adopt broader criminalisation in their national law.[39]

5 The Court's Ruling

The Court of Justice delivered its ruling in *Kinsa* on 3 June 2025.[40] The Court held, sitting in Grand Chamber, that Article 1(1)(a) of Directive 2002/90, read in the light of Articles 7 and 24 and Article 52(1) of the Charter, must be

36 A similar issue has arisen in the *Taricco* litigation, also arising in Italy, by the CJEU requirement for national courts to disapply national law on the statute of limitations. See V. Mitsilegas, 'Judicial Dialogue in Three Silences. Unpacking *Taricco*', in *New Journal of European Criminal Law*, vol. 9, issue 1, 2018, pp. 38–42.

37 Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA – General approach, Brussels, 29 November 2024 (OR. en) 15916/1/24 REV 1 LIMITE.

38 Article 3.

39 Preamble, recitals 6 and 6(a).

40 C-460/23, *Kinsa*, ECLI:EU:C:2025:392.

interpreted as meaning that, first, the conduct of a person who, in breach of the rules governing the movement of persons across borders, brings into the territory of a Member State minors who are third-country nationals and are accompanying him or her, and over whom he or she exercises actual care, does not fall within the scope of the general offence of facilitation of unauthorised entry, and, second, those articles preclude national legislation criminalising such conduct.[41]

To reach this conclusion, the Court departed from the approach of both the referring court and the Advocate General. The Court reformulated the questions of the referring court, which extended to the examination of the compatibility of the criminalisation of humanitarian assistance with EU law, to a much narrower scope reflecting the facts of the specific case – the question being of whether Article 1(1)(a) of Directive 2002/90, read in the light of Articles 7, 18 and 24 of the Charter, must be interpreted as meaning that the conduct of a person who, in breach of the rules governing the movement of persons across borders, brings into the territory of a Member State minors who are third-country nationals and are accompanying him or her, and over whom he or she exercises actual care, does not fall within the scope of the general offence of facilitation of unauthorised entry and whether those articles of the Charter must be interpreted as precluding national legislation criminalising such conduct.[42]

Formulating the questions in this manner enabled the Court to avoid examining the validity of Article 1 of Directive 2002/90 or to interpret Article 1(2) of that Directive, which relates to exemption from criminal liability in cases where the aim of the conduct at issue is to provide humanitarian assistance to the person concerned.[43] Unlike the Advocate General, who refrained from challenging EU secondary law and focused instead on the duties of national authorities to interpret national law in conformity with EU law, the Court did proceed to re-interpret the scope of elements of EU law (albeit within the narrower confines resulting from the reformulation of the questions asked). On the other hand, also unlike the Advocate General, the Court refrained from extending its findings to humanitarian assistance more broadly, defining the scope of the questions in a narrower way.

The Court justified the exclusion of the conduct under examination in this case from the scope of EU criminal law on facilitation of unauthorised entry on the basis of the requirement to respect Articles 7 and 24 of the Charter, on

41 *Ibid.* para 73.
42 *Ibid.* para 39.
43 *Ibid*. para 68.

the right to private life and best interests of the child respectively.[44] The Court held that a contrary interpretation of that provision would entail a particularly serious interference with the right to respect for family life and the rights of the child, to such an extent that it would undermine the essence of those fundamental rights, within the meaning of Article 52(1) of the Charter.[45] The Court held that a person such as the mother subject to prosecution in the present case, in principle merely assumes in concrete terms an obligation inherent to his or her personal responsibility, based on his or her family relationship with those minors, in order to secure their protection and the care necessary for their well-being and development – with their conduct being, above all, the concrete expression of his or her general responsibility towards those minors.[46] In addition to the fundamental rights justification, the Court held that criminalising such conduct is contrary to the objectives of Directive 2002/90 as such conduct does not constitute facilitation of illegal immigration, which that directive seeks to combat, but stems from the assumption by the person concerned of his or her personal responsibility by virtue of the care that he or she exercises over those minors.[47]

Importantly, the Court of Justice did not stop in the examination of the compatibility of the criminalisation of facilitation on the basis of the facts of the case with Articles 7 and 24 of the Charter, but proceeded to hold that the interpretation adopted by the Court is also necessary in the light of the right to asylum enshrined in Article 18 of the Charter.[48] The Court further cited a number of protective provisions of secondary law in this context, including Article 6 of the facilitation Framework Decision[49] and Article 3(b) of the Schengen Borders Code.[50] Importantly, the Court reiterates its earlier case-law to hold that the right of any third-country national or stateless person to make an application for international protection on the territory of a Member State, including at its borders or in its transit zones, even if he or she is staying illegally in that Member State, must be recognised, irrespective of the prospects of success of such a claim. When such an application is made, an applicant cannot, in principle, be regarded as staying illegally on the territory of the Member State concerned, so long as no decision has been given on that application at first instance, if the effectiveness of the right to asylum, as guaranteed by

44 *Ibid.* paras 46–51.
45 *Ibid.* paras 52–53.
46 *Ibid.* para 54.
47 *Ibid.* para 45.
48 *Ibid.* paras 57–58.
49 *Ibid.* para 59 referring to the Geneva Convention.
50 *Ibid.* para 60 referring to the Schengen Borders Code.

Article 18 of the Charter, is not to be compromised;[51] and that that measures which, without reasonable justification, result in a third-country national being discouraged from submitting his or her application for international protection to the competent authorities are liable to undermine the effectiveness of the right to asylum, as guaranteed by Article 18 of the Charter.[52]

In terms of the impact of this interpretation of EU law on national criminal law, the Court held thus that when transposing Article 1(1)(a) of Directive 2002/90, Member States may not establish, in national law, rules that would go beyond the scope of the general offence of facilitating unauthorised entry, as defined by that provision, by including conduct not covered by it, in breach of Articles 7 and 24 and Article 52(1) of the Charter.[53] The Court added that Articles 7 and 24 of the Charter are sufficient in themselves and do not need to be made more specific by provisions of EU or national law to confer on individuals rights which they may rely on as such. Consequently, if the referring court were to find that it is not conceivable to interpret its national law in conformity with EU law, it would be required to ensure within its jurisdiction the judicial protection for individuals flowing from those articles, and to guarantee their full effectiveness by disapplying, if need be, Article 12 of the Consolidated Law on Immigration.[54]

6 Decriminalising Facilitation? An Appraisal

For those who view the glass as half empty, the Court's ruling in *Kinsa* is a missed opportunity to examine the compatibility of the criminalisation of humanitarian assistance with fundamental rights. The narrow focus of the Court to the facts of the case perpetuates legal uncertainty regarding the position of those providing humanitarian assistance to migrants, including civil society organisations subject to a sustained establishment of a hostile environment. On the other hand, those who view the glass as half full, will hail *Kinsa* as a significant step forward: the Court relied expressly on an array of fundamental rights and

51 The Court referred to its judgments of 17 December 2020, *Commission* v *Hungary* (*Reception of applicants for international protection*), C-808/18, EU:C:2020:1029, para 102, and of 16 November 2021, *Commission* v *Hungary* (*Criminalisation of assistance to asylum seekers*), C-821/19, EU:C:2021:930, paras 136 and 137- para 61.

52 The Court referred to its judgments of 17 December 2020, *Commission* v *Hungary* (*Reception of applicants for international protection*), C-808/18, EU:C:2020:1029, paras 102, 103, 118 and 119, and of 22 June 2023, *Commission* v *Hungary* (*Declaration of intent prior to an asylum application*), C-823/21, EU:C:2023:504, paragraphs 47 to 51- para 62.

53 C 460/23, *Kinsa*, para 71.

54 *Ibid*. para 72.

Article 52(1) of the Charter to interpret EU criminal law on facilitation, leading to a degree of decriminalisation at EU and at national level. In addition to family life and the rights of children, the Court examined specifically the impact of criminalisation on the right to asylum, in a significant finding that irregular entry leading to the submission of an asylum application, and until the issuance of a first instance decision, is not to be treated as a criminal offence. It is significant in this context that the Court referred expressly to its rulings in the Commission v Hungary cases, where the Court upheld the rule of law giving effect to the right to asylum in the face of state practices aiming to evade the application of the law granting rights to asylum seekers.

The emphasis of the Court on the right to asylum, along with the Court's express reliance on international law not only in terms of refugee law, but also in terms of the Palermo Convention,[55] can open the door towards the decriminalisation of humanitarian assistance, if the latter is linked to enabling the exercise of the right to asylum.[56] The Court's ruling was eagerly awaited to gauge the extent to which it could influence the current negotiations for a Directive revising the facilitators' package, the proposal of which has been arguably forced upon the Commission (which, in 2017, declined to table new legislation in the field) as a response to the *Kinsa* litigation.[57] The general approach reached by the Council in November 2024 is not encouraging, in failing to expressly exclude humanitarian assistance from criminalisation.[58] *Kinsa* may be viewed as a missed opportunity in this context, if seen as limiting decriminalisation to cases of assistance of a migrant to those in her case and to cases where a migrant applies for asylum. However, the very emphasis of the Court on the requirement to uphold the right to asylum and to interpret EU law in conformity with the Palermo Convention (which has a narrower scope and which purports to protect the rights of migrants) supports the argument that this interpretation will serve to exclude the criminalisation of humanitarian assistance in cases where such criminalisation would hinder access of asylum seekers to the jurisdiction of EU Member States.

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55 The Court's interpretation is supported by the Palermo Protocol against the Smuggling of Migrants, in the light of which that directive must be read – indeed, in accordance with Article 2 of that protocol, the purpose of the protocol is to criminalise the smuggling of migrants, while protecting the rights of the migrants themselves para. 66.

56 For a call for the Court to take into account of the right to asylum and of international law as emanating from the Palermo Convention in its interpretation of EU law in *Kinsa*, see Mitsilegas above (Eurojus).

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

58 Council doc. 15916/1/24 REV 1 LIMITE, Brussels, 29 November 2024, recitals 6 and 6a.