

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 7 November 2024 (1)

Case C-460/23 [Kinsa] (i)

OB
Criminal proceedings
brought by
Procura della Repubblica presso il Tribunale di Bologna

(Request for a preliminary ruling from the Tribunale di Bologna (District Court, Bologna, Italy))

(Reference for a preliminary ruling – Immigration policy – Directive 2002/90/EC – Criminalisation of the facilitation of unauthorised entry into the territory of a Member State – Article 1(1)(a) – Definition of general infringement – Validity – Article 1(2) – Optional provision exonerating from criminal liability a person who facilitates unauthorised entry into the territory of a Member State for a humanitarian purpose – Charter of Fundamental Rights of the European Union – Article 49 – Principle of the legality and proportionality of criminal offences and penalties – Action by which a mother, a third-country national, contributes to the unauthorised entry into the territory of a Member State of two minor children, members of her family, by using false identity documents)

I. Introduction

1. The question whether it should be a criminal offence under EU law for a person to provide assistance to a third-country national for the purposes of unauthorised entry into the territory of a Member State, whether acting out of compassion, altruism or solidarity, with a humanitarian purpose or because of family obligations, has given rise to a lively debate not only in civil society, but also within European and international institutions since the adoption of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence. (2) The present reference for a preliminary ruling reflects the many concerns expressed on the matter.

2. This reference for a preliminary ruling was submitted after the Italian judicial authorities initiated criminal proceedings against a Congolese national who had helped two members of her family – her daughter and niece, both minors – to enter Italy illegally using false passports. This person has now been charged with the offence of facilitating unauthorised entry into Italy, in conjunction with the offence of holding false identity documents, as provided for under Italian law. Although this is a practice with which the customs and police authorities of the Member States are familiar, the Tribunale di Bologna (District Court, Bologna, Italy) in the present case is considering the question of the criminal liability of that mother and, more generally, that of those who act in a disinterested manner, as well as the question of the penalty applicable to them under Article 1(1)(a) of Directive 2002/90 and the national implementation provision. (3)

3. By its first question referred for a preliminary ruling, the referring court expresses its doubts as to the validity of Article 1(1)(a) of Directive 2002/90, in particular as to its compliance with the principle of proportionality set out in Article 52(1) of the Charter of Fundamental Rights of the European Union. (4) That court considers that, by requiring Member States to criminalise the facilitation of unauthorised entry into the territory of a Member State – irrespective of whether there is any financial gain, and without providing, in the context of a mandatory provision, for an express exoneration from criminal liability for those who act in order to facilitate the exercise by the person concerned of his or her right to life and physical integrity, right to asylum, or right to respect for family life – such criminalisation is unreasonable and does not guarantee respect for the fundamental rights of both the persons who commit the act and the person assisted.

4. By its second question referred for a preliminary ruling, the referring court raises similar doubts as to the transposition into Italian law of Article 1(1)(a) of Directive 2002/90. In essence, the question arises as to whether, in a situation such as that at issue in

the main proceedings, the severity of the sanctions to which the person in question is likely to be exposed is commensurate with the seriousness of the offences committed by him or her, and whether or not it exceeds the limits of what is necessary to achieve the objectives pursued by the national legislature, in accordance with the principle of proportionality of criminal offences and penalties. (5)

5. In this Opinion, I will begin by explaining that the definition of the infringement of facilitating the unauthorised entry into the territory of a Member State, set out in Article 1(1)(a) of Directive 2002/90, does not contain any indication which supports the European Commission's view that the facilitation of unauthorised entry into the territory of a Member State, carried out by a relative by reason of family duty or family solidarity, should not be regarded as falling within the scope of that provision.

6. I will then continue my analysis by explaining why, in my view, there is nothing that may affect the validity of Article 1(1)(a) of Directive 2002/90 having regard to the principles of the legality and proportionality of criminal offences and penalties, enshrined in Article 49(1) and (3) of the Charter.

7. Lastly, as regards the national legislation at issue, I will explain that it is for the referring court to carry out a specific examination of the proportionality of that legislation in the light, in particular, of the possibility of exonerating from criminal liability persons whom have been shown to have acted disinterestedly – in order to provide humanitarian assistance or because of family ties – or the possibility of adapting the system of penalties applicable to them.

II. Legal context

A. European Union law

8. Directive 2002/90 defines the offences relating to the facilitation of unauthorised entry, transit and residence, while Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (6) lays down minimum rules with regard to the nature of penalties that may be imposed, the liability of legal persons and jurisdiction between Member States.

1. Directive 2002/90

9. Directive 2002/90 was adopted on the basis of two provisions. The first is Article 61(a) EC (now Articles 67 and 68 TFEU), which provided that the Council of the European Union would adopt measures aimed at ensuring the free movement of persons and directly related flanking measures with respect to external border controls and immigration, as well as measures to prevent and combat crime. The second is point 3(b) of the first paragraph of Article 63 EC (now Article 79(2)(c) TFEU), which provided for the adoption of measures in the field of illegal immigration and illegal residence.

10. Recitals 1 to 4 of that directive state:

- '(1) One of the objectives of the European Union is the gradual creation of an area of freedom, security and justice, which means, inter alia, that illegal immigration must be combated.
- (2) Consequently, measures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings.
- (3) To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of this Directive and, on the other hand, minimum rules for penalties ... which is the subject of [Framework Decision 2002/946].
- (4) The purpose of this Directive is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of Framework Decision [2002/946] in order to prevent that offence'.

11. Article 1 of Directive 2002/90, entitled 'General infringement', provides:

- '1. Each Member State shall adopt appropriate sanctions on:
 - (a) any person who intentionally assists a person who is not a national of a Member State to enter ... the territory of a Member State in breach of the laws of the State concerned on the entry ... of aliens;

...

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

12. Article 3 of that directive, entitled 'Sanctions', provides:

'Each Member State shall take the measures necessary to ensure that the infringements referred to in Articles 1 and 2 are subject to effective, proportionate and dissuasive sanctions.'

2. Framework Decision 2002/946

13. Framework Decision 2002/946 is based on Article 29 EU (now Article 67 TFEU), Article 31(e) EU (now Article 83(1) TFEU) and Article 34(2)(b) EU.

14. Article 1 of that framework decision, entitled ‘Penalties’, sets out as follows:

‘1. Each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Directive [2002/90] are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.

...

3. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) ... of Directive [2002/90] 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 organisation as defined in Joint Action 98/733/JHA, [(7)]
- the offence was committed while endangering the lives of the persons who are the subject of the offence.

...’

15. Article 6 of Framework Decision 2002/946, entitled ‘International law on refugees’, states:

‘This [F]ramework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States’ compliance with their international obligations pursuant to Articles 31 and 33 of the [Convention relating to the status of refugees, signed in Geneva on 28 July 1951 (8)].’

B. Italian law

1. Legislative Decree No 286/1998

16. Article 12(1) and (2) of decreto legislativo n. 286 – Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero (Legislative Decree No 286 – Consolidated law on the provisions concerning the regulation of immigration and the rules relating to the status of foreigners), (9) of 25 July 1998, provides:

‘1. Save where the act constitutes a more serious criminal offence, any person who, in breach of the provisions of the present consolidated law, promotes, directs, organises, finances or carries out the transportation of foreign nationals into Italy or carries out other acts intended to procure their unauthorised entry into Italy or into the territory of another State of which they are not nationals or in which they are not entitled to permanent residence shall be liable to a term of imprisonment from two to six years and a fine of EUR 15 000 for each individual.

2. Without prejudice to the provisions of Article 54 of the codice penale (Italian Criminal Code), activities of relief and humanitarian assistance provided in Italy in relation to foreign nationals in need, however present on the territory of the State, do not constitute a criminal offence.’

2. The Italian Criminal Code

17. Article 54 of the Italian Criminal Code, entitled ‘State of necessity’, provides, in the first paragraph thereof:

‘A person shall not be liable to punishment if he or she committed an act because he or she was compelled to do so by the necessity of saving himself or herself or others from the present danger of serious personal injury, which danger was not voluntarily caused by him or her or otherwise avoidable, provided that the act is proportionate to the danger.’

III. The facts of the main proceedings and the questions referred for a preliminary ruling

18. The person concerned, a Congolese national, presented herself on 27 August 2019 at the airport border in Bologna (Italy) upon arrival of a flight from Casablanca (Morocco), carrying a false Senegalese passport. She was accompanied by her daughter and niece, aged 8 and 13 respectively, for whom she also presented false identity documents.

19. She was arrested on 28 August 2019 and the two children were placed in care by order of the Tribunale per i minorenni (Juvenile Court, Italy). The Italian judicial authorities initiated criminal proceedings against her for the offence of facilitating unauthorised entry into Italy, in conjunction with the offence of holding false identity documents, as provided for by Italian law. At the hearing to validate her arrest, held on 29 August 2019, before the Giudice per le Indagini Preliminari (Judge responsible for preliminary investigations, Italy) of the Tribunale di Bologna (District Court, Bologna), the person concerned stated that she had fled the Democratic Republic of Congo in order to escape the death threats to which she was exposed following the break-up of her

relationship with her partner, with her also fearing for the physical safety of the two young girls. The judge validated her arrest, but rejected the request by the Pubblico Ministero (Public Prosecutor, Italy) for her to be remanded in custody.

20. On 9 October 2019, the person concerned submitted an application for international protection, which is still being examined, according to the information provided at the hearing held before the Court of Justice on 18 June 2024.

21. The forensic assessment carried out by order of the Tribunale per i minorenni (Juvenile Court), established the parent-child relationship between the person concerned and one of the children, and her parental authority over that child was restored. By contrast, it was not possible to carry out this assessment on the second child because, on 10 September 2019, on her own initiative she left the care facility to which she had been entrusted and could no longer be located. The referring court pointed out that the social services report relating to the interviews with the minors showed that the second child was in fact the niece of the person concerned and that she had been entrusted to her care following her mother's death.

22. At the hearing on 29 May 2023, the person concerned's lawyer requested that a reference be made to the Court for a preliminary ruling. The Tribunale di Bologna (District Court, Bologna), having doubts as to the legality of the criminalisation of the facilitation of unauthorised entry into the territory of a Member State, as set out in EU law in Article 1(1)(a) of Directive 2002/90, and in Italian law in Article 12(1) of Legislative Decree No 286/1998, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Does the [Charter], in particular 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, preclude the provisions of Directive [2002/90] and Framework Decision [2002/946] (implemented in Italian law by the rules laid down in Article 12 of [Legislative Decree No 286/1998]), in so far as they impose on Member States the obligation to provide for penalties of a criminal nature against any person who intentionally facilitates or engages in acts intended to facilitate the unauthorised entry of foreign nationals into the territory of the European Union, 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 to the foreign national?
- (2) Does the [Charter], in particular 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, preclude the criminal offence provisions laid down in Article 12 of [Legislative Decree No 286/1998], in so far as it penalises the conduct of a person who engages in acts intended to procure the unauthorised entry of a foreign national into the territory of the State, even where the conduct is carried out on a non-profit-making basis, without at the same time excluding from criminalisation conduct facilitating unauthorised entry aimed at providing humanitarian assistance to the foreign national?’

23. The applicant, the Italian and Hungarian Governments, as well as the Council and the Commission, presented their written and oral observations at the hearing held on 18 June 2024.

IV. Assessment

A. Preliminary observations

24. As a preliminary point, I would emphasise that the referring court has focused its analysis on the criminalisation of the facilitation of unauthorised entry into the territory of a Member State provided for a humanitarian purpose, which is expressly referred to in Article 1(2) of Directive 2002/90.

25. First, I would like to point out that the terms used in that article, according to which a Member State ‘may decide not to impose sanctions’ if such assistance is provided for a humanitarian purpose, are fraught with ambiguity as to their meaning and scope. (10) In the context of the present Opinion, I will consider that those terms must be interpreted as meaning that Member States may provide a ground for exoneration from criminal liability, pursuant to the aforementioned article. Indeed, given the terminology used by the EU legislature, it seems to me that it intended to draw a parallel between the principle of criminalising the act by which a person provides assistance to unauthorised entry into the territory of a Member State, set out in Article 1(1) of that directive (‘each Member State shall adopt appropriate sanctions’) and the possibility of exonerating that person from criminal liability where that act pursues a humanitarian purpose, set out in Article 1(2) of that directive (‘any Member State may decide not to impose sanctions’).

26. Secondly, in my view, the questions raised in the present case do not require a determination of whether an act such as that at issue falls within the definition of ‘humanitarian assistance’ within the meaning of Article 1(2) of Directive 2002/90. Indeed, the debate is a broader one and relates, above all, to the criminalisation, or rather the absence of an express exoneration from criminal liability, in the text of that directive, of those who provide assistance without any intention of financial gain. The assistance prosecuted in the main proceedings was provided by a mother to her daughter and niece and could therefore be considered from the point of view of a family obligation and/or solidarity, as the Commission set out in its observations.

27. However, a comparative study of international law and EU law shows that in cases where it is established that assistance has been provided solely in the interests of relatives, particularly children, some Member States accept that this is, by its very nature, a humanitarian act, while others consider it to fall within the scope of a family-based immunity.

28. In the light of all of the foregoing, I will therefore refer more broadly, in the context of the present Opinion, to the acts of those who assist unauthorised entry into the territory of a Member State in a disinterested manner, out of altruism, compassion or solidarity, for humanitarian reasons or because of family ties.

B. The first question referred

29. By its first question, the referring court essentially asks the Court whether Article 1(1)(a) of Directive 2002/90 is invalid on the ground that it infringes the principle of proportionality enshrined in Article 52(1) of the Charter.

30. Examining the proportionality of the criminalisation of facilitating unauthorised entry into the territory of a Member State requires determining the scope of that criminalisation beforehand. Indeed, in its observations, the Commission has maintained that that criminalisation does not cover conduct such as that at issue whereby a mother, a third-country national, assists the unauthorised entry into the territory of a Member State of minors over whom she claims to have custody.

1. The scope of the criminalisation of facilitating unauthorised entry into the territory of a Member State (Article 1(1)(a) of Directive 2002/90)

31. Article 1(1)(a) of Directive 2002/90 criminalises the facilitation of unauthorised entry into the territory of a Member State by defining both the material and mental elements of that infringement, leaving it to the discretion of the Member States to choose the most appropriate sanction. (11) While facilitating an offence is, in principle, punishable in accordance with the principles governing the theory of complicity, the EU legislature in this case has sought to free itself from those principles by making facilitation of unauthorised entry a separate offence.

32. First, it is apparent from the title of Article 1 of that directive ('General infringement') and from the terminology used by the EU legislature that the purpose of that article is to set out the general framework of the offence of facilitating unauthorised entry into the territory of a Member State. Indeed, according to recital 3 of that directive, the legislature seeks to harmonise the existing criminal-law provisions of Member States. The criminalisation at issue is based on shared criminal competence between the EU legislature and the national legislature, with the latter being required to transpose such criminalisation into its legal system.

33. And yet, I note that the definition of that offence does not contain any indication that would support the Commission's view. Directive 2002/90 defines the prohibited conduct in the abstract, not excluding any of the forms that facilitating unauthorised entry into the territory of a Member State may take, or any of the persons likely to provide it, all of whom are therefore strictly treated in the same way.

34. In its material element, the offence of facilitating unauthorised entry into the territory of a Member State is constituted when 'any person' 'assists' a third-country national to enter the territory of a Member State unlawfully, whether it is an internal or external border of the Schengen area. (12) The latter concepts are based on terminology commonly used in national law to define a general infringement. (13)

35. The concept of 'facilitation' encompasses all the forms that facilitating unauthorised entry into the territory of a Member State may take, from its financing to the means of transport *stricto sensu*, the management of such transport, the manufacture or supply of forged documents, the organisation of marriages of convenience, or any other means seeking to facilitate such unauthorised entry. (14)

36. In addition, by penalising assistance provided by 'any person', the EU legislature takes into account the number and different kinds of people likely to be involved, including those acting individually and spontaneously or as part of an organised or collective operation (in particular networks or members of a smuggling network, such as smugglers, managers, recruiters or even drivers, skippers, messengers, spotters, passport forgers, suppliers, corrupt officials or service providers). (15)

37. As regards the mental element of this general infringement, the EU legislature makes a distinction between the intention, which contributes to constituting the offence, and the aim pursued by its commission.

38. This means that facilitating unauthorised entry into a Member State is criminalised, regardless of the motives of the person who commits the act. However, that offence is only made out if it is committed intentionally. Indeed, the criminalisation does not target a person, who through carelessness, imprudence or negligence, aids the illegal crossing of the border, but the person who acts 'intentionally', that is who is conscious of the irregular situation of the person concerned with regard to the crossing of the border, but, in spite of this, has the will and awareness to commit the act punishable by law (guilty mind). (16)

39. However, no special intent is required. The EU legislature has in fact ruled out making the prevention of the facilitation of unauthorised entry into the territory of a Member State subject to the pursuit of financial gain, in view, in particular, of the difficulties involved in proving that a material advantage has been obtained, (17) preferring to make it an aggravating circumstance in Article 1(3) of Framework Decision 2002/946. This offence therefore differs from the offence of facilitating unauthorised residence on the territory of a Member State referred to in Article 1(1)(b) of Directive 2002/90, which requires a special intent, namely seeking to make financial gain.

40. From this textual analysis of Article 1(1)(a) of Directive 2002/90, it follows that the facilitation of unauthorised entry into the territory of a Member State is defined objectively, without the rationale behind it being explicitly included in the definition of that criminal offence. I conclude from this that all acts by which a person knowingly, consciously and deliberately assists in the

unauthorised crossing of the border of a Member State fall within the scope of that provision, irrespective of that person's motives, with that provision not containing any indication such as to restrict its scope.

41. It follows that an act such as that at issue, by which a third-country national intentionally assists, by using false identity documents, the unauthorised entry into the territory of a Member State of two minors in her care, constitutes the offence set out in Article 1(1)(a) of that directive, the material and mental elements of that offence having been made out.

42. Secondly, that interpretation is corroborated by the purpose of Directive 2002/90.

43. Indeed, while that directive and Framework Decision 2002/946 which supplements it are described as a 'facilitators package', (18) these measures go beyond the fight against illegal immigration networks alone. It is very clear from the terms of both recitals 2 of those texts that the EU legislature intended to pursue two objectives, namely 'to combat the aiding of illegal immigration both in connection with *unauthorised crossing of the border in the strict sense* and for the purpose of sustaining networks which exploit human beings'. (19) Consequently, Directive 2002/90 pursues objectives which are much broader than those pursued by the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, to which the European Union is a party. (20)

44. Thus, the first objective of the EU legislature is to combat the facilitation of unauthorised crossing of the borders in the strict sense by criminalising it in general terms in Article 1(1)(a) of Directive 2002/90, leaving it to the Member States to adopt penalties which must be 'appropriate' against those who, irrespective of the nature of their motives, have acted knowingly.

45. The second objective is to take tougher action against the facilitation of unauthorised crossing of the borders where this is provided for financial gain and, thus, to supplement the instruments adopted to combat illegal employment, trafficking in human beings and the sexual exploitation of children. (21) Those objectives are specifically reflected in Article 1(3) of Framework Decision 2002/946 by the introduction of aggravating circumstances to the offence provided for in Article 1(1)(a) of Directive 2002/90, and by the imposition of penalties whose nature and degree of severity are determined by the EU legislature. (22)

46. Those two objectives, one general and the other specific, support the interpretation that, in Article 1(1)(a) of Directive 2002/90, the EU legislature did indeed intend to define a general infringement, covering all actions intended to facilitate unauthorised entry into the territory of a Member State, including where such acts are committed disinterestedly, out of altruism, compassion or solidarity, for humanitarian reasons or because of the existence of family ties. To exclude from the scope of that provision the act by which a parent, a third-country national, contributes to the unauthorised entry into the territory of a Member State of minor children – over whom he or she claims to have custody – by using false identity documents, would clearly run counter to the aforementioned objectives, in particular by diverting the attention of the public authorities from suspicious behaviour likely to harm the interests of such children.

47. The Court confirmed the broad scope of that criminalisation in its judgment of 10 April 2012, *Vo*. (23) Indeed, it ruled that 'European Union law [does] not preclude a Member State from bringing a criminal prosecution against *any person* who has intentionally assisted a third-country national to enter the territory of that Member State in breach of the applicable provisions, it expressly requires the Member State concerned to bring such a prosecution' and 'to prescribe and enforce effective, proportionate and dissuasive penalties against those persons who commit the infringements defined in Framework Decision 2002/946 ... and Directive 2002/90, in particular human smugglers'. (24)

48. Thirdly, this interpretation is supported by the *travaux préparatoires* leading to the adoption of Directive 2002/90.

49. Indeed, while Article 4 of the proposal for a directive formulated by the French Republic (25) allowed '[Member] States which deemed it appropriate, not to recognise the existence of the infringements referred to in Articles 1 and 2 if the persons concerned prove family ties with the alien concerned (spouse, relatives in the ascending or descending line, brothers and sisters and their spouses)', (26) that exemption disappeared from the final text of Directive 2002/90. In addition, while, as part of its amendments, the Parliament proposed incorporating into the definition of the offence the financial gain criterion, referred to in the previous Article 27(1) of the Convention implementing the Schengen Agreement, (27) that amendment was also rejected. (28)

50. In the light of those considerations, I consider that Article 1(1)(a) of Directive 2002/90 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 – minors over whom she has custody – by using false identity documents, constitutes an offence.

51. It is now necessary to examine the validity of this provision, which is at the heart of the first question referred for a preliminary ruling.

2. The assessment of the validity of Article 1(1)(a) of Directive 2002/90

52. The referring court essentially asks the Court of Justice whether Article 1(1)(a) of Directive 2002/90 is invalid on the ground that, by requiring the Member States to criminalise the facilitation of unauthorised entry into the territory of a Member State, irrespective of the existence of financial gain, and without providing, in the form of a mandatory provision, for an express exoneration from criminal liability of those who act in a disinterested manner, for humanitarian reasons or because of family ties, it infringes the principle of proportionality enshrined in Article 52(1) of the Charter.

53. According to the referring court, the EU legislature has failed to strike a fair balance between the interests at stake by not placing any restrictions on the implementation of that criminalisation and by resorting to an optional provision under which Member States are free to exonerate from criminal liability an act committed for humanitarian purposes. In its view, such criminalisation therefore disproportionately infringes the fundamental rights of both the person providing the assistance and the person receiving it, in particular the right to life (Article 2 of the Charter); the right to the integrity of the person (Article 3 of the Charter); the right to liberty (Article 6 of the Charter); the right to respect for family life (Article 7 of the Charter); the right to property (Article 17 of the Charter); and the right to asylum (Article 18 of the Charter).

54. Taking her cue from the criticism levelled by the referring court at the alleged excessively broad nature of that criminalisation, the applicant further criticises the EU legislature for disregarding the principle of the legality of criminal offences and penalties, enshrined in Article 49(1) of the Charter, in its requirements relating to the clarity and foreseeability of criminal law. In her view, the punishable conduct is not clearly defined, as the criminalisation of facilitating unauthorised entry into the territory of a Member State provided for humanitarian purposes is left to the discretion of each Member State.

55. I will examine below the validity of the contested provision from each of those angles, in the light of the fundamental principles of the legality and proportionality of criminal offences and penalties, enshrined in Article 49 of the Charter. Indeed, while the national court refers to Article 52(1) of the Charter, I believe that, having regard, first, to the subject matter of Article 1(1)(a) of Directive 2002/90, which establishes a criminal offence whose commission gives rise to a criminal penalty with a high degree of severity, and, secondly, to its essentially enforcement purpose, the proportionality test must be exercised primarily in the light of Article 49(3) of the Charter. (29)

(a) Validity of Article 1(1)(a) of Directive 2002/90 in the light of the principle of the legality of criminal offences and penalties

56. The criminalisation of the facilitation of unauthorised entry into the territory of a Member State provided for in Article 1(1)(a) of Directive 2002/90 has given rise to a wealth of literature and has been the subject of much criticism, revealing in particular the tension between the harmonisation of substantive criminal-law standards in the European Union and the margin of discretion conferred on the Member States. (30) In line with the observations submitted by the applicant, many consider that, by requiring Member States to criminalise and impose criminal penalties on ‘any person’ who ‘assists’ unauthorised entry into the territory of a Member State, the EU legislature is employing vague and imprecise concepts which are believed to be incompatible with the requirements laid down by the principle of the legality of criminal offences and penalties, as the persons concerned cannot know the extent to which their acts incur criminal liability. (31)

57. However, I do not believe that such criticisms can invalidate the text in question. It is essential to take into account the division of powers between the European Union and the Member States in this area, as well as the nature of the text whose validity is subject to the Court’s assessment.

58. The Court has abundantly recalled in its case-law the full significance, both in the legal order of the European Union and in the national legal orders, of the principle of the legality of criminal offences and penalties, enshrined in Article 49(1) of the Charter, in its requirements relating to the foreseeability, precision and non-retroactivity of the applicable criminal law. (32) This principle has the same meaning and scope as that guaranteed in Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. (33) According to settled case-law, the principle constitutes a specific expression of the general principle of legal certainty and implies, in particular, that the law must clearly define offences and the penalties set for them. (34) The principle of the legality of criminal offences and penalties guides the establishment of rules relating to criminal liability. In so far as it constitutes a general principle of EU law and forms part of the constitutional traditions common to the Member States, it applies not only to the institutions of the European Union but also to the Member States when they transpose and apply EU law. (35)

59. Thus, in requiring Member States to regard the facilitation of unauthorised entry into the territory of a Member State as an offence and to punish it, Article 1(1)(a) of Directive 2002/90, read in conjunction with Article 3 thereof, must comply with the principle of the legality of criminal offences and penalties.

60. However, it is clear from the discussions at the hearing that the force of this principle depends on the nature of the powers conferred on the EU legislature and of the text in which the criminalisation in question is included. Indeed, this principle expresses the rule that criminal jurisdiction is vested in the law alone. The principle therefore applies differently depending on whether a substantive criminal-law measure forms part of a directly enforceable act because it is adopted by the EU legislature under exclusive competence, or whether the measure forms part of a directive requiring transposition into national legal orders because it is adopted within the context of shared competence.

61. In the latter case, the principle of the legality of criminal offences and penalties is part of the cooperation between the EU legislature and the national legislature, who do not have the same mandate since they legislate at different levels. While the former lays down minimum rules for the Member States, the latter must then transpose them and give them concrete form in a measure of national law, which is the sole basis for an individual’s criminal liability. (36) The legal literature recognises that compliance with the requirements of the aforementioned principle is therefore more complex in this case because of the two distinct stages which characterise the criminalisation of a conduct or action, namely a European stage and a national stage, and the implementation of that principle, as a means of the legality of EU legislation, is thus thought to be under greater restrictions. (37)

62. Thus, in the judgment of 3 June 2008, *Intertanko and Others*, (38) while the Court did not deny the application of the principle of the legality of criminal offences and penalties to directives, it nevertheless held that the requirements laid down by that principle are binding on national law.

63. In that case, the Court was asked whether Article 4 of Directive 2005/35/EC (39) infringed the general principle of legal certainty in so far as it required Member States to penalise ship-source discharges of polluting substances as a result of ‘serious negligence’, without defining that concept. The Court answered this question in the negative, adopting three-stage reasoning.
64. The Court noted, first of all, that that concept and the concept of ‘with intent’ correspond ‘to tests for the incurring of liability which are to apply to an indeterminate number of situations that it is impossible to envisage in advance and not to specific conduct capable of being set out in detail in a legislative measure, of Community or of national law’. (40) It went on to note that those concepts are ‘fully integrated into, and used in, the Member States’ respective legal systems’, (41) finding, ultimately, that a directive must, in accordance with Article 249 EC (now Article 288 TFEU), be transposed by the Member States into their respective legal orders and that the actual definition of the offences and penalties referred to in that directive is that which results from the rules laid down by the Member States. (42)
65. Indeed, according to settled case-law, a directive cannot of itself create obligations for an individual and, therefore, cannot be invoked as such against him or her. The Court has held on several occasions that a directive cannot, of itself, and independently of a national provision adopted by a Member State for its implementation, have the effect of determining or aggravating the criminal liability of persons who act in contravention of the provisions of that directive. (43)
66. I believe that this reasoning applies here too.
67. Since the EC Treaty, the offence of facilitating unauthorised entry into the territory of a Member State no longer has its source solely in national law, but also in EU law, which aims to harmonise it.
68. At the hearing, the Council explained that the criminalisation of this offence was the result of a compromise between, on the one hand, the need to harmonise existing national legal provisions as regards the ‘precise definition’ of the offence and the applicable criminal penalties (recitals 3 and 4 of Directive 2002/90), so as to achieve a common objective – namely, the gradual creation of an area of freedom, security and justice (recital 1 of that directive) – and, on the other hand, the need to respect the national identities and law-enforcement powers of the Member States. (44) In response to a question addressed by the Court, the Council argued that the ‘precise definition’ of the offence set out in recital 3 of that directive must be understood, in the context of that harmonisation, as an explicit and clear definition which must allow the Member States to have no uncertainty as to the constituent elements of the offence, while, by virtue of its generality, leaving them latitude to incorporate that criminalisation into their national law in accordance with their own criminal systems. (45)
69. Indeed, the legal systems of the Member States in the criminal field are characterised by significant differences, as the Court again recently pointed out. (46) The harmonisation of substantive criminal-law provisions thus represents, according to the legal literature, a legal integration method which makes it possible to maintain a degree of flexibility in relation to existing national laws by entailing their *adaptation* according to the objectives defined by the EU legislature. (47)
70. This is the background to Article 1(1)(a) of Directive 2002/90, which, I recall, defines a ‘general infringement’.
71. First, that provision is neither intended nor designed to detail punishable conduct, as the material and mental elements of this infringement are likely to apply to an indefinite number of situations. In this respect, the European Court of Human Rights has held, in the light of Article 7 ECHR, that, it is a logical consequence of the principle whereby laws must be of general application that the wording of statutes is not always precise, noting in this context that one of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. In this respect, it pointed out that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague so as to avoid excessive rigidity and to keep pace with changing circumstances. With regard to ‘borderline cases’, it found that they are not sufficient in themselves to make a provision incompatible with Article 7 ECHR, provided that the provision proves to be sufficiently clear in the large majority of cases, the court’s role being precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice. (48)
72. Secondly, Article 1(1)(a) of Directive 2002/90 cannot, on its own, give rise to criminal liability for individuals and requires a legal basis for the implementation of that liability, by means of its transposition into national law. That provision therefore preserves the law-enforcement competence for the law adopted by the Member States, the effect of the provision being merely to provide an implementation framework. (49) The EU legislature thus leaves it to the Member States to implement that provision with indisputable binding force, through national legislation which respects the general principles of the European Union and the fundamental rights guaranteed by the Charter and which is therefore proportionate and endowed with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty. (50) I would point out, in this regard, that the principle of the legality of criminal offences and penalties requires that the person subject to the law should be able to know, from the wording of the relevant provision and, if necessary, with the assistance of the interpretation given to it by the courts and legal advice, which acts and omissions will make him or her criminally liable. (51) According to the Court, that principle does not preclude the gradual, case-by-case clarification of the rules on criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time the offence was committed, especially in the light of the interpretation of the relevant provision in the case-law at the material time. (52)
73. Moreover, the EU legislature leaves it to the Member States to set out, in accordance with their own legal systems and, in particular, in accordance with their criteria for incurring criminal liability, the extent to which a person may, in the light of the circumstances of the case, benefit from an exoneration from criminal liability or a ground for exemption from, or reduction in, sentence. In the judgment of 30 April 2024, *Procura della Repubblica presso il Tribunale di Bolzano*, (53) the Court thus held that the definition of mitigating and aggravating circumstances and penalties reflects both social realities and legal traditions, which vary not only between Member States, but also over time. (54) Article 1(2) of Directive 2002/90 leaves it to the Member States to specify, in

accordance with their national rules and practice, whether the person who commits an act with a humanitarian purpose may benefit from exoneration from criminal liability. That provision is fully in line with the foregoing approach, and cannot, moreover, be interpreted as setting out an exhaustive list of situations in which Member States may refrain from imposing penalties.

74. In the light of all those factors, I can find nothing to affect the validity of Article 1(1)(a) of Directive 2002/90 in the light of the principle of the legality of criminal offences and penalties enshrined in Article 49(1) of the Charter.

75. It is now appropriate to examine the validity of Article 1(1)(a) of that directive in the light of the principle of the proportionality of criminal offences and penalties, also guaranteed by Article 49 of the Charter, in paragraph 3 thereof.

(b) Validity of Article 1(1)(a) of Directive 2002/90 in the light of the principle of the proportionality of criminal offences and penalties

76. Under Article 49(3) of the Charter, the severity of penalties must not be disproportionate to the criminal offence. It follows from the Court's case-law that that principle applies not only to the determination of the constituent elements of an offence, but also to the determination of the rules relating to the severity of penalties and the assessment of the factors which may be taken into account in setting those penalties. (55) In accordance with Article 51(1) of the Charter, that principle is binding on the Member States when they implement EU law, including in the absence of harmonisation of EU rules in the field of applicable penalties.

(1) The proportionality of the criminalisation of the facilitation of unauthorised entry into the territory of a Member State laid down in Article 1(1)(a) of Directive 2002/90

77. It is necessary to determine whether Article 1(1)(a) of Directive 2002/90, by requiring the Member States to criminalise the facilitation of unauthorised entry into the territory of a Member State irrespective of the motives of the person who commits the act and by only providing for an optional ground for exemption from criminal liability in the case of assistance provided on humanitarian grounds, on the one hand, is appropriate for achieving the objectives pursued by that directive and, on the other, does not go beyond what is necessary to achieve those objectives. (56)

(i) The appropriateness, in order to achieve the objectives pursued, of criminalising the facilitation of unauthorised entry into the territory of a Member State

78. In the first place, it should be borne in mind that, according to settled case-law of the Court, a national provision is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. (57)

79. I believe that there can be no doubt that criminalising the facilitation of unauthorised entry into the territory of a Member State is appropriate for achieving the objectives pursued by Directive 2002/90. Indeed, if the EU legislature intends to combat the facilitation of unauthorised border crossings as such, but also the assistance provided within the context of criminal networks, in order to guarantee an area of freedom, security and justice, it seems to me to be consistent to criminalise all forms of facilitation of unauthorised entry of third-country nationals into the territory of a Member State, irrespective of the motives and purpose of the persons committing such an offence.

(ii) The necessity, in order to achieve the objectives pursued, of criminalising the facilitation of unauthorised entry into the territory of a Member State

80. In the second place, I believe that the choice not to make financial gain a constituent element of the offence, just like the choice not to expressly exempt from criminal liability those who act for humanitarian reasons, or because of the existence of family ties, but to leave that possibility to the Member States, is necessary in the light of the first of the objectives pursued by that directive, namely combating the facilitation of unauthorised entry into the territory of a Member State in the strict sense. (58)

81. First, while the act by which a mother assists her children to enter the territory of a Member State illegally may turn out to be justified in absolute terms, the fact remains that it constitutes facilitation of unauthorised entry into the territory of a Member State, and to fail to provide for the principle of its criminalisation would not enable the aforementioned objective to be achieved. It is clear that it will then be for the national court to determine the motives for such an act and to assess the extent to which that act is required by the protection of an overriding interest and justifies, having regard to the provisions of its national law, exonerating the person concerned from criminal liability or granting him or her an exemption from, or a reduction in, sentence.

82. While it is evident that facilitating illegal immigration constitutes a serious threat to the preservation of public order and border management, it is nevertheless essential to emphasise the risks to which the people concerned are likely to be exposed, due in particular to the illegal activities that may be connected thereto. These risks include undeclared work, document fraud, delinquency, drug trafficking, prostitution, sexual exploitation and human trafficking. While it is clear that the assistance provided to persons who have entered the territory of Member States illegally is not necessarily a profit-making or criminal activity and does not systematically entail a serious risk to the lives of these persons, it nevertheless raises extremely serious problems simply because of the situation of great insecurity and dependence to which these persons are likely to be exposed, particularly the most vulnerable ones among them, such as unaccompanied minors.

83. By bringing all acts contributing to the unauthorised entry of third-country nationals into the territory of a Member State within the scope of intervention of the public authorities and, in particular, within the scope of action of the criminal authorities, the

EU legislature ensures not only better control of migratory flows, but also greater surveillance of those acts; in particular, greater surveillance is ensured of those acts which, under the guise of being committed out of solidarity or because of family ties, could in reality pursue other aims and expose the persons concerned to serious breaches of their fundamental rights.

84. Thus, given the nature of the threats to the persons concerned and their vulnerability, as well as the seriousness of this phenomenon, its multi-faceted nature and the difficulties involved in proving the existence of a material advantage, the EU legislature legitimately considered that it was appropriate to distinguish the intentional element of the offence, which is a constituent element thereof, from the aim pursued by the offence. The EU legislature has therefore made financial gain an aggravating circumstance by providing for a graduated system of penalties. While that legislature leaves it to the Member States to adopt an ‘appropriate’ penalty against anyone who intentionally facilitates unauthorised entry into the territory of a Member State – it being for the national court to assess the motives therefor this and to determine the penalty – it requires the Member States to impose a custodial sentence on anyone who intends to profit from such facilitation (the quantum of which will depend, pursuant to Article 1(3) of Framework Decision 2002/946, on the extent to which the act was committed as an activity of a criminal organisation or endangered the lives of the persons concerned).

85. Secondly, it must again be borne in mind that Article 1(1)(a) of Directive 2002/90 sets out the general framework of the offence which the Member States must transpose into their legal systems. Consequently, it is for the national legislature to set out in a legislative act, on the basis of the rules governing criminal liability laid down in its legal system, all the facts and circumstances justifying an exoneration from criminal liability or an exemption from, or reduction in, punishment. The latter are usually defined by law in a general way and may be specifically provided for on a case-by-case basis for each of the offences concerned. (59) Although Article 1(2) of that directive leaves it to each Member State to determine the extent to which the facilitation of unauthorised entry into the territory of a Member State, for humanitarian purposes, may be exonerated from criminal liability, this does not preclude Member States from providing in their national rules for other circumstances in which the person who commits the act may benefit from such an exoneration or from an exemption from, or reduction in, criminal liability, for example, due to a state of necessity or family ties.

86. Thirdly and lastly, I would point out that the criminalisation of the facilitation of unauthorised entry into the territory of a Member State set out in Article 1(1)(a) of Directive 2002/90 cannot have the effect of allowing Member States to breach their obligations under the Charter or other instruments of EU or international law. Thus, there is no question of preventing a third-country national from exercising his or her fundamental right to seek asylum in a Member State, as guaranteed in Article 18 of the Charter, or to apply for family reunification. (60) Following the reservation it had expressed as to the optional nature of the provision set out in Article 1(2) of Directive 2002/90, (61) the Commission moreover recalled, in its communication cited in footnote 31 to this Opinion, that the Member States are bound to respect international humanitarian law. (62)

87. In the light of the foregoing, I conclude that Article 1(1)(a) and (2) of Directive 2002/90, in so far as it requires the Member States to criminalise any person who knowingly facilitates unauthorised entry into the territory of a Member State without, however, expressly exonerating from criminal liability any person who acts disinterestedly, for humanitarian reasons or out of family obligations or solidarity, while, however, leaving the Member States free to do so, may be regarded, on the one hand, as appropriate to the objectives of combating the facilitation of illegal immigration, both where this concerns the unauthorised crossing of borders in the strict sense and where its purpose is to sustain networks which exploit human beings, and, on the other hand, as not going beyond what is necessary to achieve that objective.

88. It is now necessary to examine the proportionality of the system of penalties provided for in Article 1(1)(a) of Directive 2002/90.

(2) The proportionality of the system of penalties provided for in Article 1(1)(a) of Directive 2002/90

89. Article 1(1)(a) of Directive 2002/90 does not provide for specific criminal penalties applicable to the facilitation of unauthorised entry into the territory of a Member State. However, the EU legislature requires Member States to adopt ‘criminal’ sanctions against the person who commits the infringement (Article 1 of Framework Decision 2002/946) which are ‘appropriate’ (Article 1(1)(a) of Directive 2002/90) and ‘effective, proportionate and dissuasive’ (Article 3 of that directive). (63)

90. These objective criteria should enable each Member State to determine the level of penalties applicable in the light of its own criminal-law policy. It is for the Member States to implement the requirement that penalties be proportionate. The fact that they have a margin of discretion in this respect does not in itself preclude judicial review in order to ascertain that they have not exceeded the limits set on that margin of discretion by providing for disproportionate and/or inappropriate penalties.

91. In the light of the Court’s case-law, each of those two provisions must be regarded as having direct effect and may therefore be relied on by individuals before the national courts against a Member State which has incorrectly transposed them. (64)

92. First, the requirement relating to the appropriate and proportionate nature of penalties which is laid down in those provisions is unconditional. (65) Indeed, the wording of both Article 1(1) and Article 3 of Directive 2002/90 sets out that requirement in absolute terms. On the other hand, that requirement does not require any intervention by the EU institutions and in no way do those provisions confer on the Member States the power to condition or restrict their scope. (66)

93. Pursuant to the Court’s case-law, the fact that those provisions must be transposed is not such as to call into question the unconditional nature of the requirement relating to the appropriate and proportionate nature of penalties. (67)

94. Secondly, Article 1(1) and Article 3 of Directive 2002/90 are sufficiently precise. While it is true that those two provisions leave the Member States a certain latitude in defining the system of penalties applicable to the offence referred to in Article 1(1)(a) of the directive, that latitude is limited by the prohibition on providing for inappropriate and disproportionate penalties.

95. In the light of those considerations, in my view there is no reason to question the proportionality of the system of penalties provided for in those articles.

96. I have, therefore, not identified anything to affect the validity of Article 1(1)(a) of Directive 2002/90 in the light of the principle of the proportionality of criminal offences and penalties, laid down in Article 49(3) of the Charter.

C. The second question referred for a preliminary ruling

97. By its second question, the referring court asks, in essence, whether Article 52(1) and Article 49(3) of the Charter must be interpreted as meaning that the principle of proportionality of criminal offences and penalties precludes national legislation which provides for a penalty against anyone who facilitates unauthorised entry into national territory, even where the person who commits that criminal offence has no intention of financial gain, without at the same time providing for an express exoneration from criminal liability for those who act with a humanitarian purpose.

98. I have explained above why the principle of proportionality of criminal offences and penalties does not, in my view, preclude the criminalisation provided for by the EU legislature in Article 1(1)(a) of Directive 2002/90. That criminalisation was implemented by the Italian legislature in Article 12(1) of Legislative Decree No 286/1998, which also sets out the applicable system of penalties.

99. I have also pointed out that Article 1(2) of that directive leaves it to each Member State to determine the extent to which the person facilitating unauthorised entry into the territory of a Member State for humanitarian purposes may be exonerated from criminal liability or may benefit from an exemption from, or a reduction in, the applicable penalty. I have also pointed out that nothing prevents Member States from providing, in their national legislation, for other circumstances in which the person committing the act could benefit from such an exoneration or from such an exemption from, or reduction in, sentence due, for example, to a state of necessity or family ties.

100. In the present case, I consider that the Court does not have sufficient information to carry out an assessment on the basis of the principle of proportionality, since the file submitted to it does not make it possible to ascertain the conditions for the application of Article 12(1) of Legislative Decree No 286/1998, (68) the precise scope of the grounds of exoneration from criminal liability or of exemption from, or reduction in, sentence which may be provided for by the Italian legislation, or the latitude available to the national court to grant mitigating circumstances or to adapt the penalty to the case.

101. I shall therefore confine myself to several observations.

102. The principle of the proportionality of criminal offences and penalties, which Article 3 of Directive 2002/90 simply reflects, is mandatory in nature. I would point out that, under that principle, the severity of the penalty must be commensurate with the seriousness of the infringement that it punishes, in particular by ensuring a genuinely deterrent effect, while not going beyond what is necessary to achieve the legitimate objectives pursued by the provision in question. (69) In that context, the Court requires that, when determining the penalty as well as the quantum thereof, account be taken of the individual circumstances of the case. (70)

103. Consequently, the principle of proportionality requires not only the national legislature, when transposing the criminalisation in question into its legal order, but also all those involved in criminal proceedings, when ensuring its implementation, to structure their actions in a manner consistent with that principle, guaranteeing, in particular, that the sentence fits the specific case. (71) The Court thus pays particular attention to the possibility available to the national court of amending the criminal categorisation which might appear in an indictment – that possibility being capable of leading to the imposition of a less severe penalty – and that of varying the penalty depending on the seriousness of the infringement found. (72) In this respect, comparative law shows that, at least in the law of the Member States, these have introduced a system which enables the court to ensure that the sentence fits the specific case, on the one hand, by diversifying the penalties which the court may impose and, on the other hand, by making it possible, depending on the particular circumstances surrounding the commission of the offence, either to exonerate from criminal liability, by instituting immunities, or the reduction in, or exemption from, the penalty.

104. According to settled case-law, it is for the national court, which alone has jurisdiction to assess the facts and interpret national law, to determine whether, in the dispute before it, these requirements are met.

105. Article 12(1) of Legislative Decree No 286/1998 makes it a criminal offence to provide assistance in crossing the border illegally, regardless of whether there is financial gain. That provision sets out a particularly severe system of penalties, having regard to the length of the prison sentence provided for, the amount of the financial penalty and the combination of these two types of penalty. (73)

106. Indeed, as regards, first of all, the custodial sentence, the Italian legislature provides for a sentence of between two and six years' imprisonment. I note that a custodial sentence is the penalty that the EU legislature provides for in the specific case where the facilitation of unauthorised entry is provided for financial gain.

107. With regard, next, to the fine, the Italian legislature has set a fixed amount of EUR 15 000 per person concerned. In this respect, it should be noted that that amount also corresponds to that provided for in Article 12(3) of Legislative Decree No 286/1998, when

the facilitation is provided in the context of the illegal trafficking of migrants, endangering the life or safety of the persons transported and exposing the latter to the risk of inhuman or degrading treatment.

108. As regards, lastly, the possibility of accumulation of criminal penalties of different kinds, such as that of pecuniary penalties and custodial sentences, which Article 12(1) of Legislative Decree No 286/1998 appears to allow, according to the Court's case-law such accumulation must be accompanied by rules ensuring that the severity of all the penalties imposed corresponds to the seriousness of the offence concerned. (74) This requirement is all the more compelling given that the criminalisation set out in Article 12(1) of that legislative decree is broad, as it seems to allow criminal proceedings to be brought against both those who are motivated by genuine criminal intent and those who act out of humanity or necessity.

109. Account should therefore be taken of the latitude available to the prosecuting authority to initiate the criminal proceedings provided for in Article 12(1) of Legislative Decree No 286/1998 and to the national court, where appropriate, to adapt the applicable criminal penalty, where the person who committed the offence acted with the aim of providing humanitarian assistance or where those actions were required by a state of necessity or the existence of family ties. (75)

110. In the present case, it is clear that when criminal proceedings are brought against a mother who has contributed to the unauthorised entry into the country of two members of her family, namely her daughter and niece, all three of whom are from the Republic of Congo, such a situation raises the question of her criminalisation and the penalty applicable to her. A comparative case-law study conducted by the UNODC shows that this situation requires an in-depth examination of the factual circumstances surrounding that offence and, in particular, the character and motivations of the person who has committed the offence. (76)

111. Any system which does not allow the national court 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 relatives, in particular his or her children, and that of a person who is motivated solely by the criminal intent to commit the very act prohibited by the law and to profit from it, would breach the principle of proportionality. Thus, while it is true that, in the case in the main proceedings, the person concerned acted, with full knowledge of the facts, in a manifestly considered and deliberate manner by using false passports, that intention must not obscure the potential existence of a desperate action and that action must be distinguished, subject to the checks which it is for the referring court to carry out, from the actions of a person who acts as part of a criminal network or organisation or who endangers the lives of the persons concerned.

112. In the present case, the referring court reasons that Article 12(2) of Legislative Decree No 286/1998, which sets out a ground for exemption from criminal liability in respect of relief and humanitarian assistance provided in Italy to third-country nationals in need who are however 'present on the territory of the State', is by definition not applicable to the offence of facilitating unauthorised entry into the national territory. On the other hand, the Italian Government states that this article, by virtue of the reference made to Article 54 of the Italian Criminal Code, which provides for immunity in a state of necessity, makes it possible not to impose criminal penalties on conduct which, if criminalised, would be contrary to the principle of proportionality set out in Article 52(1) of the Charter. Thus, if it were established at the end of the trial that the person concerned has acted with the aim of saving her daughter and niece from serious and irreparable harm, it would then be possible to declare a state of necessity and exonerate her from criminal liability.

113. In the light of those factors, it will ultimately be for the referring court to determine, having regard to all the factual circumstances surrounding the commission of the offence – and, in particular, the character and the motives underlying the actions of the person who has committed it – whether there are objective circumstances which justified the commission of the offence which, were it not for such a context, would be punishable, and, where applicable, to ascertain whether there are rules to ensure exoneration from criminal liability or exemption from, or reduction in, the penalty provided for in Article 12(1) of Legislative Decree No 286/1998, so that that penalty is appropriate to public policy requirements and corresponds to what is strictly necessary with regard to the seriousness of the offence committed.

114. In the light of the foregoing, it is therefore appropriate, in my view, to reply to the second question referred for a preliminary ruling to the effect that 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.

115. 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.

V. Conclusion

116. In the light of all the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Tribunale di Bologna (District Court, Bologna, Italy) as follows:

- (1) 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.

- (2) The assessment of the first question referred for a preliminary ruling has 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 of Fundamental Rights of the European Union.

- (3) The principle of the proportionality of criminal offences and penalties, enshrined in Article 49(3) of the Charter of Fundamental Rights, 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.

¹ Original language: French.

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

² OJ 2002 L 328, p. 17. On 28 November 2023, the Commission presented a 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 (COM(2023) 755 final).

³ See United Nations Office on Drugs and Crime (UNODC), *Women in Migrant Smuggling: A Case-law Analysis*, 2019, p. 18. This analysis also shows that while women may be involved in smuggling networks, more often than not they facilitate the illegal movement of people they know personally and with whom they have close personal ties, without expecting any financial or material benefit in return (p. 22, third and fourth paragraphs).

⁴ ‘The Charter’.

⁵ See judgment of 19 October 2023, *G. ST. T. (Proportionality of the penalty for trade mark infringement)* (C-655/21, EU:C:2023:791, paragraph 65 and the case-law cited).

⁶ OJ 2002 L 328, p. 1.

⁷ Joint action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (OJ 1998 L 351, p. 1).

⁸ Convention which entered into force on 22 April 1954 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), as supplemented by the Protocol relating to the status of refugees, concluded in New York on 31 January 1967 and which entered into force on 4 October 1967.

⁹ Ordinary supplement to GURI No 191 of 18 August 1998, as amended by Legge n. 94 – Disposizioni in materia di sicurezza pubblica (Law No 94 laying down provisions on public safety), of 15 July 2009 (Ordinary Supplement to GURI No 170 of 24 July 2009), ‘Legislative Decree No 286/1998’.

¹⁰ ‘Peut décider de ne pas imposer de sanctions’, in the French-language version, ‘può decidere di non adottare sanzioni’ in the Italian-language version.

¹¹ According to Gérard Cornu, criminalisation is a criminal policy measure consisting, for the competent authority (in principle, the legislative power), in making a given conduct an offence, by determining its constituent elements and the applicable penalty (Cornu, G., *Vocabulaire juridique*, PUF, Paris, 15th ed., 2024).

¹² Indeed, the EU legislature criminalises the facilitation of illegal immigration in connection with entry ‘into the territory of a Member State’, that legislature having previously stated in recital 2 of Directive 2002/90 that it was necessary to combat the aiding of illegal immigration in connection with unauthorised crossing of the border ‘in the strict sense’.

¹³ For example, Article 225-5(1) of the French Criminal Code defines the offence of procurement as including ‘the act, by any person, in any manner whatsoever ... of facilitating, assisting or protecting the prostitution of others’.

¹⁴ In its briefing entitled ‘Combating migrant smuggling into the EU, main instruments’, of April 2016, available at the web address https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581391/EPRS_BRI%282016%29581391_EN.pdf, the European Parliament emphasises that ‘smuggling is a complex issue and the *modus operandi* of smugglers is often very flexible and changes frequently. It is therefore important to tackle smuggling from a holistic perspective’ (p. 14). See, also, Commission Staff Working Document of 22 March 2017, REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA) (SWD(2017) 117 final), available in English, at the following Internet address [https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD\(2017\)0117_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD(2017)0117_EN.pdf).

¹⁵ See European Parliament briefing cited in footnote 14 to the present Opinion (p. 9), as well as European Commission, Directorate-General for Migration & Home Affairs, *A study on smuggling of migrants: Characteristics, responses and cooperation with third countries, Final report*, September 2015 (Section 1.3.2).

¹⁶ The term ‘intentionally’ is translated interchangeably in other language-versions of Directive 2002/90 with the terms ‘knowingly’, ‘deliberately’ or ‘voluntarily’.

¹⁷ See Commission Working Document cited in footnote 14 to this Opinion (p. 19).

¹⁸ See European Parliament briefing cited in footnote 14 to this Opinion (pp. 2, 6 and 14).

¹⁹ My emphasis.

²⁰ See Council Decision 2001/87/EC of 8 December 2000 on the signing, on behalf of the European Community, of the United Nations Convention against transnational organised crime and its Protocols on combating trafficking in persons, especially women and children, and the smuggling of migrants by land, air and sea (OJ 2001 L 30, p. 44); Council Decision 2006/616/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community (OJ 2006 L 262, p. 24); and Council Decision 2006/617/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community (OJ 2006 L 262, p. 34).

²¹ See also recital 5 of Directive 2002/90.

²² Article 1(3) of that framework decision and both recitals 2 of Directive 2002/90 and the framework decision clearly and unequivocally reflect the origin of that package of measures, which was adopted following the macabre discovery in Dover (United Kingdom), in June 2000, of the lifeless bodies of 58 would-be Chinese illegal immigrants inside a sealed container in a lorry registered in the Netherlands; the Member States instructed the French Republic, then holding the EU rotating presidency, to propose measures to combat these crimes and the rapid development of illegal immigration networks in the European Union.

²³ C-83/12 PPU, EU:C:2012:202.

[24](#) Judgment of 10 April 2012, *Vo* (C-83/12 PPU, EU:C:2012:202, paragraphs 44 and 45). My emphasis.

[25](#) Initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence (OJ 2000 C 253, p. 1).

[26](#) See explanatory note 10711/00, dated 28 July 2000, concerning this proposal. Article 4 of the proposal set out: ‘Each Member State may exempt from criminal prosecution, for the offences referred to in Articles 1 and 2, persons whose link to the alien who has benefited from the aiding ... is as follows: – a relative in the ascending or descending line, brothers and sisters and their spouses, ... his spouse or the person who is known to cohabit with him’.

[27](#) Convention of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which was signed in Schengen on 19 June 1990 and entered into force on 26 March 1995 (OJ 2000 L 239, p. 19), as amended by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 (OJ 2010 L 85, p. 1), and by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1).

[28](#) See European Parliament final report A5-0315/2000 of 25 October 2000 on the initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence (Amendment 8, concerning Article 1 of that initiative).

[29](#) See, in that regard, judgment of 4 May 2023, *Agenția Națională de Integritate* (C-40/21, EU:C:2023:367, paragraphs 33 and 34 and the case-law cited). In the judgment of 6 October 2021, *ECOTEX BULGARIA* (C-544/19, EU:C:2021:803, paragraph 97 and the case-law cited), the Court emphasised that ‘the severity of a penalty must correspond to the seriousness of the infringement concerned, that requirement following both from Article 52(1) of the Charter and from the principle of proportionality of penalties in Article 49(3) of the Charter’.

[30](#) See, in particular, Galli, F. and Weyembergh, A., *Approximation of substantive criminal law in the EU – The way forward*, Éditions de l’Université de Bruxelles, Brussels, 2013, and Zoumpoulakis, K., ‘The unresolved tension between the approximation of criminal norms in the EU and the question of national discretion: What is the role of minimum rules in EU criminal law?’, *Boom Strafblad*, Vol. 6, Boom uitgevers, Amsterdam, pp. 315 to 318.

[31](#) See, to this effect, point 1 of the Commission Communication entitled ‘Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence’ (OJ 2020 C 323, p. 1). In the legal literature, see, in particular, Weyembergh, A., ‘Le rapprochement des incriminations et des sanctions pénales, introduction’, *Revue internationale de droit pénal*, Vol. 77, Éres, Toulouse, Nos 1 and 2, 2006, pp. 185 to 192. According to that author, ‘in addition to the democratic deficit from which it cruelly suffers, the harmonisation effort is also affected by a lack of coherence and a tendency to react to events. It is also marked by a clear enforcement orientation, as illustrated by the use of broad definitions of pre-existing offences, as evidenced by the definition of facilitation of unauthorised entry Such definitions or concepts, focused on the effectiveness of the fight against the forms of crime targeted, carry the risk of misuse, and neglect other concerns related to the achievement of criminal justice, in particular the requirements relating to the substantive component of the principle of legality, a principle which has, however, been recognised as a fundamental right’ (p. 192).

[32](#) See, in particular, judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 51 to 56 and the case-law cited).

[33](#) Signed in Rome on 4 November 1950 (‘the ECHR’). See, in this respect, the European Court of Human Rights (‘ECtHR’) of 15 November 1996, *Cantoni v. France* (CE:ECHR:1996:1115JUD001786291, § 29); of 7 February 2002, *E.K. v. Turkey* (CE:ECHR:2002:0207JUD002849695, § 51); of 29 March 2006, *Achour v. France* (CE:ECHR:2006:0329JUD006733501, § 41); and of 20 September 2011, *AO Neftyanaya Kompaniya Yukos v. Russia* (CE:ECHR:2011:0920JUD001490204, §§ 567 to 570).

[34](#) See judgments of 3 May 2007, *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraphs 49 and 50 and the case-law cited); of 5 May 2022, *BV* (C-570/20, EU:C:2022:348, paragraph 38); and of 19 October 2023, *G. ST. T. (Proportionality of the penalty for trade mark infringement)* (C-655/21, EU:C:2023:791, paragraph 49 et seq. and the case-law cited).

[35](#) See Peristeridou, C., ‘Chapter VI – Fragments of the Legality Principle in European Criminal Law’, *The Principle of Legality in European Criminal Law*, Intersentia, Cambridge, 2015, pp. 177 to 220, in particular pp. 182 and 199.

[36](#) See Peristeridou, C., op. cit., p. 199.

[37](#) See, in particular, Kaiafa-Gbandi, M., ‘Approximation of substantive criminal law provisions in the EU and fundamental principles of criminal law’, in Galli, F. and Weyembergh, A., op. cit., in particular p. 103, as well as Peristeridou, C., op. cit., p. 199.

[38](#) C-308/06, EU:C:2008:312.

[39](#) Directive of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (OJ 2005 L 255, p. 11; corrigenda OJ 2006 L 33, p. 87, and OJ 2006 L 105, p. 65).

[40](#) Judgment of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 73).

[41](#) Judgment of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 74).

[42](#) See judgment of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 78).

[43](#) See, inter alia, judgment of 20 December 2017, *Vaditrans* (C-102/16, EU:C:2017:1012, paragraph 56 and the case-law cited).

[44](#) See Zoumpoulakis, K., ‘Approximation of criminal sanctions in the European Union: A wild goose chase?’, *New Journal of European Criminal Law*, Vol. 13, No 3, Intersentia, Morsel, 2022, pp. 333 to 345.

[45](#) See, to that effect, Peristeridou, C., ‘The principle of *Lex certa* in national law and European perspectives’, in Klip, A., H., *Substantive Criminal Law of the European Union*, Maklu, Antwerp, 2011, pp. 69 to 95, in particular p. 91. Wieczorek, I., ‘EU constitutional limits to the Europeanisation of punishment: A case study on offenders’ rehabilitation’, *Maastricht Journal of European and Comparative Law*, Sage Publications, London, 2018, No 6, pp. 655 to 671, in particular pp. 659 and 660.

[46](#) See judgment of 30 April 2024, *Procura della Repubblica presso il Tribunale di Bolzano* (C-178/22, EU:C:2024:371, paragraph 45).

[47](#) See Weyembergh, A., ‘Le rapprochement des incriminations et des sanctions pénales, introduction’, op. cit., according to whom harmonisation constitutes a more accomplished legal integration method than coordination and cooperation under which national laws remain the same, but one less advanced than unification, which would involve the substitution of a new criminal-law provision for pre-existing national rules, which would correspond to the hypothesis of a transfer of competence (p. 186).

[48](#) See judgment of the ECtHR of 15 November 1996, *Cantoni v. France* (CE:ECHR:1996:1115JUD001786291, §§ 31 and 32), concerning the legal definition of the concept of ‘medicinal product’ contained in Article L. 511 of the Code de la santé publique (French Public Health Code) then in force.

[49](#) Rebut, D., ‘Le principe de la légalité des délits et des peines’, *Libertés et droits fondamentaux*, Dalloz, Paris, 2005, pp. 595 to 610, in particular paragraph 753.

[50](#) See, by way of illustration, judgment of 30 April 2024, *Procura della Repubblica presso il Tribunale di Bolzano* (C-178/22, EU:C:2024:371, paragraph 49 and the case-law cited).

[51](#) See judgment of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 71 and the case-law cited).

[52](#) See judgments of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 167 and the case-law cited), and of 5 May 2022, *BV* (C-570/20, EU:C:2022:348, paragraph 41).

[53](#) C-178/22, EU:C:2024:371.

[54](#) See judgment of 30 April 2024, *Procura della Repubblica presso il Tribunale di Bolzano* (C-178/22, EU:C:2024:371, paragraph 45).

[55](#) See judgment of 6 October 2021, *ECOTEX BULGARIA* (C-544/19, EU:C:2021:803, paragraph 98 and the case-law cited).

[56](#) See judgment of 26 January 2021, *Hessischer Rundfunk* (C-422/19 and C-423/19, EU:C:2021:63, paragraph 70).

[57](#) See, in this regard, judgments of 2 March 2023, *PrivatBank and Others* (C-78/21, EU:C:2023:137, paragraph 72 and the case-law cited), and of 29 July 2024, *BP France* (C-624/22, EU:C:2024:640, paragraph 73 and the case-law cited).

[58](#) This distinguishes Article 1(1)(a) of Directive 2002/90 from Section 117 of the Canadian Immigration and Refugee Protection Act, which was censured by the Supreme Court of Canada in the judgment of 27 November 2015, *R. v. Appulonappa*. Since the purpose of the Act was to combat trafficking in human beings linked to transnational organised crime, that court held that making it a criminal offence to induce, aid or abet the unauthorised entry of third-country nationals, even where that act was carried out for the purposes of mutual assistance, assisting a family member or for humanitarian reasons, infringed the principle of proportionality (paragraphs 70, 72 to 74, 77 and 84).

[59](#) A parallel should, in my view, be established between that provision and those which, in national criminal codes, set out, in general terms, crimes and offences, before specifying their scope, the rules for incurring liability, mitigating or aggravating circumstances, exonerating factors and penalties (for example, Article 221-1 of the Code pénal (French Criminal Code), which makes it an offence to ‘wilfully cause death to another person’, or Article 311-1 of that code, which makes it an offence to ‘fraudulently misappropriate another person’s property’).

[60](#) In particular, Member States are required not to act in such a way as to impede the entry into their territory of applicants for international protection (see Article 6 of Framework Decision 2002/946). In the judgment of 16 November 2021, *Commission v Hungary (Criminalisation of assistance to asylum seekers)* (C-821/19, EU:C:2021:930, paragraph 136 and the case-law cited), the Court recalled that any third-country national or stateless person has the right 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. That right must be recognised, irrespective of the prospects of success of such a claim.

[61](#) See Report of the Mixed Committee at the level of the Article 36 Committee, of 3 and 4 May 2001, to the Mixed Committee at the level of Ambassadors (document 8632/01), p. 3.

[62](#) See also 2014 report by the European Union Agency for Fundamental Rights (FRA), ‘Criminalisation of migrants in an irregular situation and of persons engaging with them’, in particular p. 16: ‘... practical guidance to support EU Member States to implement the directive in a fundamental rights compliant manner should be considered. Such guidance should explicitly exclude punishment for humanitarian assistance at entry (rescue at sea and assisting refugees to seek safety) as well as the provision of non-profit humanitarian assistance (e.g. food, shelter, medical care, legal advice) to migrants in an irregular situation’.

[63](#) According to settled case-law, the Member States must exercise their powers in compliance with EU law and its general principles and, as is apparent from Article 3 of Directive 2002/90, in compliance with the principle of proportionality (see judgment of 6 October 2021, *ECOTEX BULGARIA*, C-544/19, EU:C:2021:803, paragraph 84 and the case-law cited).

[64](#) See, with regard to Article 20 of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) (OJ 2014 L 159, p. 11), judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* (C-205/20, EU:C:2022:168, paragraphs 16 to 32).

[65](#) According to settled case-law, even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it (see judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 19).

[66](#) See, by analogy, judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* (C-205/20, EU:C:2022:168, paragraphs 23 and 24).

[67](#) In the Court’s view, an interpretation according to which the need to transpose the requirement of proportionality of penalties laid down by the directive at issue is such as to deprive it of its unconditional nature would amount to preventing the individuals concerned from relying, where appropriate, on the prohibition on the adoption of disproportionate penalties imposed by that requirement. It would be incompatible with the binding nature conferred on the directive in question by Article 288 TFEU to exclude, as a matter of principle, that such a prohibition could be relied on by the persons concerned (see judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraphs 25 and 26).

[68](#) According to the case-law of the Court, a Member State implements EU law, within the meaning of Article 51(1) of the Charter, when it discharges an obligation laid down in a provision of EU law to provide for effective, proportionate and dissuasive penalties in respect of persons responsible for the offences referred to in that provision (see judgment of 19 October 2023, *G. ST. T. (Proportionality of the penalty for trade mark infringement)*, C-655/21, EU:C:2023:791, paragraph 43 and the case-law cited).

[69](#) See judgment of 19 October 2023, *G. ST. T. (Proportionality of the penalty for trade mark infringement)* (C-655/21, EU:C:2023:791, paragraph 65 and the case-law cited).

[70](#) See judgment of 4 October 2018, *Link Logistik N&N* (C-384/17, EU:C:2018:810, paragraph 45).

[71](#) See De Bondt, W., ‘The Missing Link between “Necessity” and “Approximation of Criminal Sanctions” in the EU’, *European Criminal Law Review*, Beck, Munich, 2014, No 4, pp. 147 to 168.

[72](#) See judgment of 19 October 2023, *G. ST. T. (Proportionality of the penalty for trade mark infringement)* (C-655/21, EU:C:2023:791, paragraph 68 and the case-law cited).

[73](#) I would point out that, in accordance with the case-law of the Court, where a Member State exceeds its discretion by adopting national legislation providing for disproportionate penalties for infringement of national provisions adopted pursuant to a directive, the person concerned must be able to rely directly on the requirement of proportionality of penalties laid down by that directive against such legislation (see judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 30 and the case-law cited).

[74](#) See, to that effect, judgments of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 55), and of 5 May 2022, *BV* (C-570/20, EU:C:2022:348, paragraph 50).

[75](#) See judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 58).

[76](#) Where it is established that the assistance was provided solely in the interests of relatives and, in particular, children, some countries accept that this is, by its nature, a humanitarian act, requiring the non-criminalisation of the act, whereas, for others, the existence of family ties does not prevent the mother from being recognised as liable (see UNODC analysis cited in footnote 3 to this Opinion, p. 3).