



DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



*Justice, Freedom &
Security*

Preliminary findings: Update Study
“Fit for purpose? The Facilitation
Directive and the criminalisation of
humanitarian assistance to irregular
migrants”

Criminalisation of solidarity - key issues

- **Vagueness** of EU and national laws – what is not a crime?
- **‘Emergency’** nature of fight against migrant smuggling blending different mandates – migration management, criminal justice, defence
- **Unilateralism** - self-interested (in)actions shifting responsibility to civil society & other Member States

Facilitators' Package – what is (not) criminal?: Entry

- **Directive 2002/90, Article 1 para.1 a):**
‘Each Member State **shall** adopt appropriate sanctions on:
a) any person who intentionally assists a person who is not a national of a Member State **to enter, or transit across**, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

UN standards and realities on the ground

- Not in line with the UN Protocol against the Migrant Smuggling (Art.6) – **‘financial or other material benefit’** requirement in order to establish the facilitation of entry as a base crime.
- **Only 4 out of 28 EU Member States are in line with UN standards** (Germany, Ireland, Luxembourg and Portugal).

Facilitators' Package – what is (not) criminal? Residence

- **Directive 2002/90 , Article 1 para.1b):**

‘Each Member State **shall** adopt appropriate sanctions on:

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

Realities on the ground

- **15** EU MSs are in line with this requirement. In **13 out of 28** EU MS, facilitation of **residence and stay without a profit factor** is sufficient to establish a crime or offence:
 - Belgium, Croatia, Denmark, Estonia, Finland, France, Greece, Latvia, Lithuania, Malta, Romania, Slovenia and the United Kingdom. (FRA 2014):

Facilitators' Package – what is (not) criminal? Humanitarian acts

- **Directive 2002/90, Article 1 para.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.**”

UN standards and realities on the ground

- **UNODC Legislative Guide:**

“the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons” (UNODC 2004).

- **Some forms of explicit exemption**

in Belgium, Greece, Spain, Finland, Italy, Malta and the UK (European Parliament, Committee on Petitions 2017).

European High Level Consensus on Humanitarian Aid

Para. 8:

“The objective of EU humanitarian aid is to provide a needs-based emergency response aimed at **preserving life**, preventing and alleviating **human suffering** and maintaining **human dignity** wherever the need arises if governments and local actors are **overwhelmed, unable or unwilling to act.**”

Key challenges identified in the legal framing of Facilitators' Package	FRA (2014)	House of Lords (2015)	Carrera et al. (2016)	ICF (2016)	UNODC (2017)	REFIT (2017)
Lack of financial or other material benefit requirement	✓	✓	✓	✓	✓	X
Non-obligatory exemption of the humanitarian clause	✓	✓	✓	✓	✓	X
Legal uncertainty among service providers	✓	✓	✓	✓	X	X
Legal uncertainty among humanitarian actors	✓	✓	✓	✓	✓	X
Heterogeneous implementation by Member States	✓	X	✓	✓	✓	✓
Criminalisation of migrants that are victims of smuggling	✓	X	✓	✓	X	X
Disproportionate sanctions and penalties	✓	X	✓	✓	✓	X

Criminalisation Dynamics: SAR NGOs in the Mediterranean

- Being a 'pull factor'
- Who is funding you?
- Who are your volunteers?

Suspicion

- Code of Conduct
- Registrations revoked

Disciplining

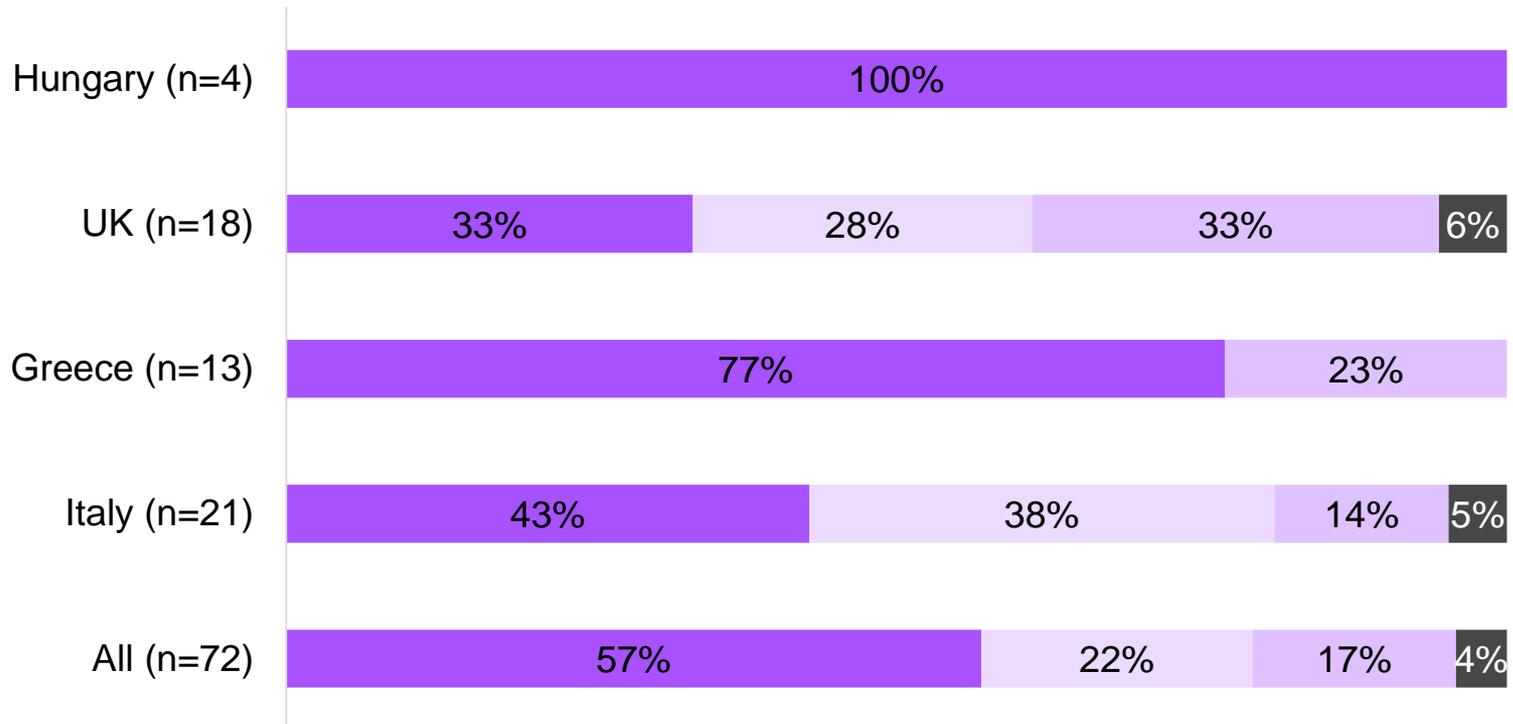
- Cases started against Jugend Rettet & Priest Abu Zerai;
- Boats seized;

Formal prosecution

Intimidation & Harassment

- Arrests of volunteers
- Threats on social media
- Physical threats – Libyan coastguard

QAK. Do you know any cases where civil society actors have been intimidated, stigmatised, accused or punished for assisting irregular migrants/asylum seekers or refugees in your country? (N=72)



■ Yes, I know personally people affected by such cases

■ Yes, I know such things happened, but only from the media

■ No

■ I don't know

77167

People Signed

141

Days left

'We are a
#WelcomingEurope,
let us help!'

**SIGN
THE ECI
PETITION**

We are
a welcoming
Europe



**LET US
HELP!**

170 civil society organisations and institutions supporting it



Citizens mobilizing on 'criminalization of solidarity'

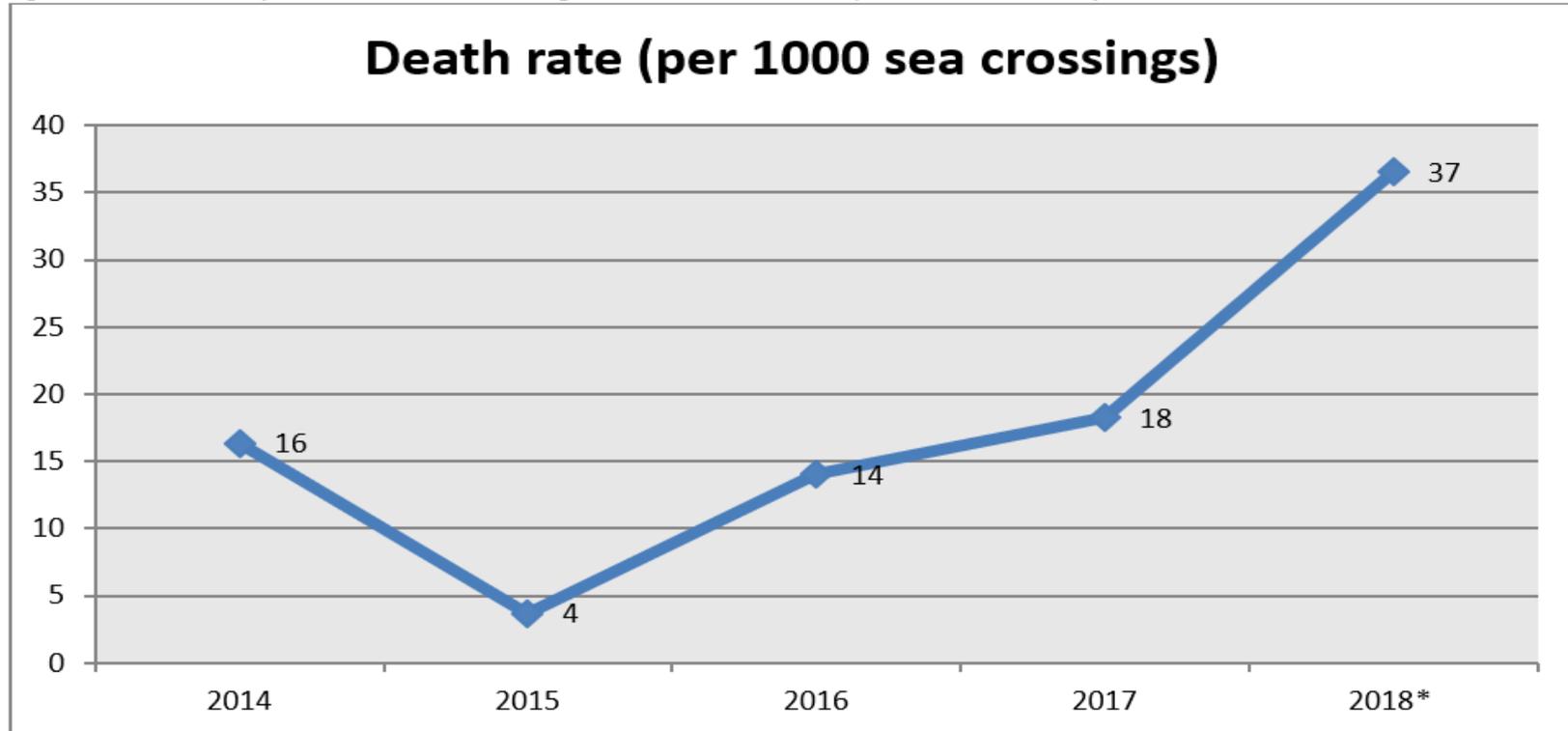
- In 2016 October, Paula Schmid Porras, presented the Petition 1247/2016
 - WeMove.org campaign - "Criminalising Humanity"
- European Civic Forum - 'Civic space Watch'
- World Organisation Against Torture – started monitoring Human Rights Defenders in the EU

What is at stake when fighting ‘crimes of solidarity’?

- **Fundamental Rights of EU citizens:**
 - Freedom of assembly and association
 - Freedom of conscience and speech
 - Presumption of innocence and fair trial
- **Rights of refugees and other migrants:**
 - Right to life
 - Right to human dignity

Increasing death rates in the Mediterranean

Figure 1. Death rates per thousand sea crossings in the Mediterranean (2014 – 2018 March)



Note: * 2018 data as of 23 March 2018. Source: UNHCR, "Mediterranean situation", as of 23 March 2018 (<http://data2.unhcr.org/en/situations/mediterranean>).

Wider societal impacts

- **Undermines societal trust:**
 - Drop in trust in all NGOs in Italy
 - Undermines public institutions on the side of civil society, security and justice– i.e. police
- **Opens gates for dismantling Rule of Law**
 - Exploits divisions in society
 - Promotes (self)-silencing of ‘watch-dog’ civil society

Impacts on criminality

- Opportunity costs to investigate other crimes
- Makes migrants more vulnerable for exploitation and human trafficking
 - A respondent from Italy:

“[W]here the collective is prevented from providing these services, the migrants either end up in the street or are forced to turn back to smugglers for assistance.”

Recommendation 1

What should **not** be criminalised?

- EU Directive on Trafficking exempts victims from criminalisation
- Civil society actors should be exempted for conducting humanitarian operations and upholding human dignity
- Family members and friends as well as service providers and professionals that are doing their job without unjust enrichment

Recommendation 2

How to monitor it?

- **European Court of Auditors** - whether the money to counter migrant smuggling are well spent - taking into account the Fundamental Rights as a criteria for efficiency
- **European Ombudsman** - follow up with fundamental rights impact assessment;
- **Independent observatory** established in cooperation with academia, civil society and European Institutions to gather reports

Recommendation 3

In light of holistic approach to migration:

- **Humanitarian visas** & protected entry channels to refugees and asylum seekers
- **More safe and legal migration** channels to persons who would like to come to the EU for work, studies, family reunification
- **EU's proactive Search and Rescue operation** – all rescued persons subject to obligatory relocation key

Recommendations	FRA (2014)	House of Lords (2015)	Carrera et al. (2016)	ICF (2016)	UNODC (2017)	REFIT (2017)
Legislative reform of Facilitators' Package is needed	√	√	√	√	X	X
Guidelines / more effective implementation of the current Facilitator's Package is needed	√	X	X	X	√	√
Mandatory exception of humanitarian assistance	√	√	√	√	√	X
Inclusion of financial benefit or other material benefit requirement for facilitation of entry, transit and residence	X	√	√	√	√	X
Include unjust enrichment / unjust profit requirement as to exclude bona fide service providers	√	X	√	√	X	X

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