

DISCUSSION  
BRIEF

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## MIGRATION

Crackdown on NGOs  
assisting refugees and  
other migrants



**ReSOMA Discussion Briefs** aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- the social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

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## Discussion Brief

# Crackdown on NGOs assisting refugees and other migrants\*

## 1. Introduction

Civil society actors, such as non-governmental organisations (NGOs) conducting search and rescue (SAR) operations, and volunteers providing food, shelter and legal advice, have been the first responders to the so called 'refugee humanitarian crisis' in Europe (Carrera et al. 2015). They have filled the gaps left by EU agencies and national governments, for example saving lives at sea in the Aegean and the central Mediterranean. Civil society actors, by monitoring the human rights, treatment and living conditions of refugees and other migrants, also help to uphold the rule of law and enable democratic accountability for what is happening on the ground.

However, the political and operational priority to tackle migrant smuggling has impacted civil society actors assisting refugees and other migrants. In 2015, both the European agenda on migration (European Commission 2015a) and the European agenda on security (European Commission 2015b) declared the fight against migrant smuggling as a key political priority. The EU action plan against migrant smuggling (European Commission 2015c) sets out the specific actions to implement the above-mentioned agendas. In turn, the EU's financial and operational

resources have been channelled to relevant EU and national agencies – the judiciary, law

enforcement, border and coast guard, and even the military.

The implementation of EU and national anti-migrant smuggling operations have taken place where civil society actors provide humanitarian assistance – at sea and in the hotspots – and also during the phases of transit and residence in the EU (Carrera, Allsopp and Vosyliūtė, forthcoming). Research indicates that the careful balancing of the legitimate political objectives of countering and preventing organised criminal groups involved in migrant smuggling with the right of association and humanitarian assistance has been challenged. This has resulted in considerable obstacles in the space for civil society actors – NGOs and volunteers to carry out their work (FRA 2014; Carrera et al. 2016; Fekete et al. 2017; Gkliati 2016). Since 2015, civil society actors providing humanitarian assistance and upholding the fundamental rights of refugees, asylum seekers and undocumented migrants have reported increased criminalisation of their activities (Carrera et al. forthcoming; PICUM 2017; FRA 2018). In addition, multiple restrictions have been adopted against civil society organisations (CSOs) in the member states that do not constitute criminalisation but which have other pervasive and chilling

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effects, leading to “shrinking civil society space” (Youngs and Echague 2017).

This discussion brief explores the kinds of developments taking place across the EU and outlines the political and legal trends limiting civil society space in the member states. The links between insecurities created among civil society actors and broader societal implications, such as effects on the rule of law, democracy and fundamental rights – particularly freedom of assembly and association – are also analysed. This discussion brief underlines that the crackdown on NGOs assisting refugees and other migrants is a multi-faceted phenomenon characterised by the increased restrictions and fear of criminalisation among all civil society actors assisting refugees and other migrants. The crackdown on civil society is especially visible in the context of rule of law backsliding and subsequent reduction of space for civil society to fulfil its mission to uphold the values of democratic society (Szuleka 2018).

## 2. Scoping the debate

### 2.1 Criminalisation of NGOs, facilitated by EU law

Three key factors have contributed to the unfolding of this phenomenon. First is the vagueness of the EU's main legal provisions in the 2002 Facilitators' Package on what constitutes the crime of migrant smuggling. It gives a wide margin of appreciation to the member states as to whether to criminalise actions that have a not-for-profit intent and whether to exclude humanitarian assistance from criminalisation. Second, the ‘emergency’ nature of the EU's response to the, so called, ‘European refugee humanitarian crisis’ has led to a blending of the different mandates of EU asylum, law enforcement and judicial agencies, and those for military operations. The ‘fight against migrant smuggling’ has been used with the underlying rationale of border management –

as a way of preventing new arrivals rather than as a criminal justice one for prosecuting organised criminal groups (Carrera et al. 2015). Third, member states' unilateral decisions to shift the responsibility for the situation to civil society actors have prevailed, thus challenging the EU's founding values on democracy, rule of law and fundamental rights (Carrera and Lannoo 2018).

The 2002 Facilitators' Package represents the main EU legislative instrument to tackle migrant smuggling in the EU. The Facilitators' Package includes the Council Directive (2002/90) defining the crime (Council of the European Union 2002a) and its Framework Decision (2002/946) strengthening the penal framework across the EU (Council of the European Union 2002b). The Facilitators' Package constitutes the cornerstone of European policies tackling migrant smuggling and criminalising the facilitation of unauthorised entry, transit and residence (Carrera et al. 2016).

Yet, unlike the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (UN General Assembly 2000a), the Facilitators' Package does not insist on a “financial or other material benefit” requirement in order to establish the facilitation of entry as the base crime; however, it is a requirement for the facilitation of residence (Council of the European Union 2002a, Art. 1(1)). The current EU legislation contains a facultative exemption under the ‘may’ clause for humanitarian actors (Council of the European Union 2002a, Art. 1(2)). Thus, the vagueness left by the EU legislation on this matter and the lack of an obligatory exemption for humanitarian assistance falls short of the UN Protocol against the Smuggling of Migrants (UN General Assembly 2000a; UNODC 2017).

Many academics have reached the conclusion that the lack of a clear and mandatory exemption based on a humanitarian purpose risks increasing the criminalisation of NGOs and individuals who



show solidarity with and provide assistance to migrants (e.g. Peers 2016: 477-478; Carrera and Guild 2015; Allsopp 2012; Fekete 2009; Webber 2008; Gkliati 2016; Heller and Pezzani 2017). The recent developments indicate that even when exemptions are made, criminal prosecutions may still take place: for example, in Greece, five volunteers of Team Humanity and PRO-EM Aid were arrested and prosecuted, although the trial in May 2018 eventually acquitted them (European Parliament, Committee on Petitions 2017; Carrera et al. forthcoming).

## **2.2 Harassment and policing of NGOs beyond formal criminalisation**

New trends in policing are emerging outside of formal criminalisation. In a number of EU member states, civil society actors have experienced different forms of policing, ranging from suspicion and intimidation to legal restrictions, limited access to funding, administrative penalties and criminal charges (Carrera, Allsopp and Vosyliute forthcoming; Szuleka 2018; Fekete et al. 2017; PICUM 2017; Gkliati 2016; Heller and Pezzani 2017).

In some countries, like Hungary and Poland, policing has occurred as a result of rule of law backsliding (Szuleka 2018), while in others, like Italy, Greece, France and the UK, as a by-product of formal and informal responses to the refugee humanitarian crisis that have reframed civil society activities as a “pull factor” (Carrera et al., forthcoming). Nevertheless, practices undermining the work of NGOs supporting irregular immigrants are being witnessed across the EU and follow a global trend (Kreienkamp 2017). In addition, academia and civil society have documented shifting attitudes in the public and media that coincide with the systemic interference with civil society actors – CSOs and individual volunteers engaging with refugees and other migrants.

Overall, the restrictive national legal frameworks and hostile policy environments

reduce the capacity of civil society to effectively and independently promote the fundamental rights of refugees and other migrants, and to uphold the EU's founding values, such as rule of law, democracy and fundamental rights (Guild 2010; FRA 2018; Szuleka 2018; Carrera et al. forthcoming).

## **2.3 The ‘criminalisation of solidarity’**

To describe all these developments, after 2015 new labels for the ‘criminalisation of solidarity’ have emerged across EU, such as ‘hostile environment’ in the UK, ‘blaming the rescuers’ in Italy and Greece, ‘*déelits de solidarité*’ in France or ‘shrinking civil society space’ in Hungary and Poland. These terms have (re-)entered national and European debates, essentially questioning what the role of civil society actors should be in upholding fundamental rights of refugees and other migrants, as well as in financial and political accountability for migration management and border controls and EU's values (Carrera et al. forthcoming; Fekete et al. 2017; Heller and Pezzani 2017; Gkliati 2016).

The criminalisation of solidarity was possible partly because of the pre-existing ‘criminalisation of migration’. The underlying rationale was that of using criminal justice tools to discourage migrants from arriving and moving within the EU irregularly (Allsopp 2012; Provera 2015; Carrera and Guild 2016). Criminalisation of migration was also instrumentalised as a tool for ministries of interior to enable migrants’ swift return to countries of origin or ‘safe’ third countries (Guild 2010; Provera 2015; Guild 2010).

# **3. EU policy agenda**

## **3.1 Migrant smuggling**

The fight against migrant smuggling has been high on the EU migration agenda since 2005 in the external dimension. In December 2005, the European Council adopted the Global





Approach to Migration (GAM): Priority actions focusing on Africa and the Mediterranean. It was later transformed into the Global Approach to Migration and Mobility (GAMM) (European Commission 2011). Both the GAM and GAMM had the objective to build the capacity of third countries' agencies to address irregular migration, combating the trafficking in human beings and smuggling of migrants.

In response to the humanitarian refugee crisis, the EU framed migrant smuggling as a top political priority on the European agenda on migration and European security agenda (European Commission 2015a and 2015b). The Commission subsequently followed up the political priority to tackle migrant smuggling and those who profit from it with operational goals. The EU action plan against migrant smuggling (European Commission 2015c) aims to prevent and counter the phenomenon by revising smuggling legislation, disposing of smugglers' vessels and depriving smugglers of their profits and criminal assets, increasing information exchange and operational cooperation with third countries.

EU and national judiciary, law enforcement, border and coast guard, and military agencies were tasked with gathering intelligence, investigating and prosecuting organised criminal groups that are profiting from migrant smuggling. EU military and law enforcement operations have also sought to recover the criminal assets of smugglers and to destroy the vessels or other means of smuggling (European Commission 2015c).

A study conducted in 2016 for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) (Carrera et al. 2016) indicated that national and EU policies had the controversial effect. The movements of civil society actors and citizens faced prosecution or administrative penalties for assisting migrants. However, after an evaluation of the Facilitators' Package under

the Commission's Regulatory Fitness and Performance Programme (REFIT), the European Commission (2017) has refrained from changing the legal framework. It concluded that the risks of being criminalised for providing humanitarian assistance "do not appear to be so prominently linked to the legal framework in place as to its understanding and actual application" (European Commission 2017: 22).

This REFIT conclusion was seen as a missed opportunity to provide a comprehensive reform of the Facilitators' Package – first, to bring EU legislation in line with the international standards embodied in the UN Protocol against the Smuggling of Migrants (UN General Assembly 2000a); and second, to renew the old-style Council Directive and Framework Decision via the post-Lisbon Treaty co-decision procedure between the Council and the European Parliament (Carrera et al. forthcoming). As a result, EU law has left a wide margin of discretion to the member states in implementing the directive and has not sufficiently prohibited punishing activities aimed at assisting migrants. Recent empiric research shows that since 2015 civil society actors assisting refugees and other migrants upon and after entering the EU irregularly have experienced increased policing of their activities (Carrera et al. 2016; Fekete 2017; Szuleka 2018; Zhang, Sanchez and Achilli 2018; Carrera et al. forthcoming).

The Aquarius controversy in mid-June 2018 has put back on the EU's agenda the question of the EU's commitment to strike the balance between anti-smuggling operations and SAR at sea and subsequent humanitarian protection. The European Council's meeting on June 28 conclusions emphasised the EU's commitment "to further stem illegal migration on all existing and emerging routes". Regional disembarkation platforms and increased cooperation with third countries were proposed "[i]n order to definitively break the business model of the smugglers, thus preventing the tragic loss of life, it is necessary



to eliminate the incentive to embark on perilous journeys" (Council of the EU 2018, para. 5). The EU agenda is moving potentially towards models that externalise and offshore legal responsibilities for asylum that have failed in Australia, the US, Tunisia and Spain and are even more unfeasible in the EU's legal framework (Carrera et al. 2018). Such proposals without accessible safe and legal migration alternatives are not likely to dismantle 'migrant smuggling' business model, but rather to consolidate involvement of better organised criminal networks, increase the prices and vulnerability of migrants (Zhang, Sanchez and Achilli 2018).

Reacting to the recent political developments and the lack of clarity left by the EU's Facilitators' Package, the European Parliament (2018a) has put forward a resolution on the guidelines for member states to prevent humanitarian assistance from being criminalised. The debate in the European Parliament's LIBE Committee has focused on the definition of what is not a crime and requested member states to provide information about all relevant cases of criminalisation of civil society actors.

### **3.2 New Multiannual Financial Framework**

As many CSOs are facing growing difficulties to secure the necessary funding to develop and perform their activities independently and effectively, funding opportunities under the EU's upcoming programme and funding period (the 2021 to 2027 Multiannual Financial Framework, MFF) have become a crucial element. The funding possibilities for independent, watchdog civil society actors are very limited within the EU, notably for organisations operating at the local and national levels. The funding also can be used as one of the tools to silence them (Carrera et al forthcoming). At the same time, the watchdog efforts of civil society are key to upholding European standards in internal and external border management (such as Schengen Borders Code) as well as in the

functioning of the Common European Asylum System (Carrera and Stefan 2018; Szuleka 2018).

In April 2018, the European Parliament adopted a resolution on the need to establish a European values instrument to support CSOs, which would promote fundamental values within the EU at the local and national levels (European Parliament 2018b). The main proposal of the European Parliament is "to set up a dedicated funding instrument – which could be called European Values Instrument – for the promotion and protection of the values enshrined in Art. 2 TEU [Treaty on European Union], especially democracy, rule of law and fundamental rights" within the next MFF. This instrument should ensure a healthy and sustainable environment for those CSOs operating at the national and local levels. The main goal of this initiative is to strengthen the capacity of CSOs to engage with the general public so as to increase its understanding of pluralistic and participatory democracy, the rule of law and fundamental rights.

In addition, an EU fund for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights has been proposed by the European Parliament, so as to empower CSOs, movements and individuals to uphold a truly democratic EU. All these proposals echo the European Parliament's earlier general resolution on the future MFF from March 2018, calling for a European democracy fund for the support of civil society and NGOs working in the field of human rights (European Parliament 2018c).

Starting with its Communication on the scope and structure of the 2021–27 MFF (European Commission 2018b; 2018c), the European Commission in May and June 2018 tabled the provisions of future programmes relevant for the actions of civil society actors on migration, asylum and integration. Reacting to the developments and criticism, not least



as voiced by the European Parliament, the Commission aims to structurally strengthen the rule of law, fundamental rights and the role of civil society actors in the implementation of the following instruments:

- Asylum and Migration Fund (AMF) (replacing the Asylum, Migration and Integration Fund (AMIF); European Commission 2018d);
- Internal Security Fund (ISF) (European Commission 2018e);
- Border Management and Visa Instrument (BMVI) (European Commission 2018f);
- European Social Fund (ESF)+ (replacing the ESF and intended to become the main funding source for long-term integration; European Commission 2018g); and
- Rights and Values Programme (replacing the Rights, Equality and Citizenship, Justice, Europe for Citizens and Creative Europe programmes; European Commission 2018h).

Moreover, the Commission has proposed a new significant plan to strengthen the link between EU funding and the rule of law – so-called rule of law conditionality (European Commission 2018i). The Commission recognises that the rule of law is “an essential precondition for sound financial management and effective EU funding” and proposes a “new mechanism to protect the EU budget from financial risks linked to generalised deficiencies regarding the rule of law in the member states” (European Commission 2018 b). The new tools would allow the European Commission to suspend, reduce or restrict access to EU funding in a manner proportionate to the nature, gravity and scope of the rule of law deficiencies in the member state.

While this new proposed instrument would kick in only if the Commission observes flagrant breaches of the rule of law in the use

of EU funds, the *ex ante* conditionality from the Structural and Investment Funds is to be expanded. In the proposed common provisions regulation (European Commission 2018j) covering all EU funds that are programmed for the member state level ('shared management'), the effective application and implementation of the EU Charter of Fundamental Rights in operations supported by the funds would be assessed by the Commission. Including the AMF, ISF, BMVI, ESF+, ERDF and CF, the Commission would be able to ultimately suspend funding if it considers this enabling condition no longer fulfilled (Art. 11, Annex III, European Commission 2018 j).

Another key proposal to reinforce the role of CSOs in EU programme development and implementation is a strengthened 'partnership principle' for all EU funds under shared management (Art. 6, European Commission 2018j).

In future the AMF will play an even bigger role in its three operational fields (i.e. the Common European Asylum System, including its external dimension, countering irregular migration and supporting effective return, and supporting legal migration and integration). More funding opportunities for CSOs are proposed in the context of the 'Thematic Facility', the programme part directly managed by the Commission, to cover 40% of all AMF means. Next to emergency assistance, resettlement and 'solidarity and responsibility efforts' in a reformed Dublin system, this facility in particular is to support early integration measures implemented by CSOs (Art. 9(6) and Annex II, European Commission 2018d). With a higher co-funding rate of up to 90% and bypassing the national AMF programmes under shared management. If the proposal is passed, this funding line could potentially benefit many of those NGOs currently harassed for their efforts in providing food, shelter and legal advice.





## 4. Key issues and controversies

### 4.1 'Migrant smuggling' as a 'migration management' tool

The UN Office on Drugs and Crime (UNODC) guidelines have injected a level of scepticism about the (mis)use of criminal justice tools for migration management purposes, which runs the risk of increasing the profits of organised criminal groups and making migrants even more vulnerable (UNODC 2017). A forthcoming study by Carrera et al. provides evidence that 'anti-smuggling' laws in some EU member states are not embedded in the criminal codes, but rather in national migration laws.

Similarly, academic experts commenting on Europol's Serious Organised Crime Threats Assessment (SOCTA) for 2017 (where migrant smuggling was seen as a top operational priority) have cautioned about the counterproductive effects on fundamental rights. Some have emphasised that in the area of migrant smuggling, "criminalisation and prosecution are not the only or necessarily the best strategy for dealing with the harms of organised crime groups and their activities", as the phenomenon is linked to the broader geo-political and socioeconomic factors beyond the reach of criminal justice tools (Taylor et al. 2017).

In addition, in order to justify the increase of funding and swift action against migrant smuggling, the EU's political discourse has progressively conflated the phenomenon of 'human trafficking' with 'migrant smuggling'. At the UN level these are clearly distinct types of crimes (UNODC 2017). The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (UN General Assembly 2000b) provides that human trafficking is a violent crime – traffickers are using or threatening to use violence against the victim as a means and

the very purpose of trafficking is to exploit the victim.

The UN Protocol against the Smuggling of Migrants sets out that "'smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, **a financial or other material benefit**, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (Art. 3(a), UN General Assembly 2000a, emphasis added).

Thus, 'migrant smuggling' is essentially a paid service provided by a smuggler to a migrant in order to bypass legitimate border controls. The migrant's consent is implicit in the very definition and therefore the Protocol does not speak of violent means of 'smuggling'. At the EU level two types of crimes are seen as increasingly 'interlinked' and migrant smuggling is portrayed as an inherently 'violent crime' (Council of the European Union 2016).

The binary understanding of 'ruthless smugglers' and 'helpless migrants' is another misconception that is challenged by the findings of empiric research in Niger, Mexico, Afghanistan and elsewhere (Zhang, Sanchez and Achilli 2018). Nevertheless, the use of criminal justice approaches is still seen by political masters in the Council and Commission as one of the key ways to prevent migration and at the same time to justify increased cooperation with third countries (Barigazzi 2018). For example, the European Council Conclusions of 28 June 2018 emphasised that "efforts to stop smugglers operating out of Libya or elsewhere should be further intensified", stressing the EU's support "for the Sahel region, the Libyan Coastguard, coastal and Southern communities, humane reception conditions, voluntary humanitarian returns, as well as cooperation with other countries of origin and transit" (Council of the European Union 2018, para. 3).



The EU is prepared to enhance financial and operational support also to Turkey, Morocco and the Western Balkans, as well as African countries of origin and transit. Civil society actors and, in particular, NGOs providing SAR and other assistance to migrants and refugees trying to leave the above-mentioned countries, are seen as obstructing or challenging this strategy of containment. The European Council Conclusions of 28 June has implicitly referred to NGO SAR operations when stating that “all vessels operating in the Mediterranean must respect the applicable laws and **not obstruct operations of the Libyan Coastguard**” (Council of the European Union 2018, para. 3, emphasis added). Earlier, some national officials in Italy and Greece and also Frontex have raised suspicions and accused NGOs active in SAR of constituting a ‘pull factor’, though without any solid evidence (Carrera et al. forthcoming; Heller and Pezzani 2017).

#### **4.2 What is (not) criminal according to the Facilitators’ Package?**

The main gap in the 2002 Facilitators’ Package is the lack of a ‘financial or other material benefit’ requirement for classifying ‘migrant smuggling’ as a crime (UNODC 2017). The package falls short of existing UN standards under the Protocol against the Smuggling of Migrants (UN General Assembly 2000a). EU law gives member states a wide margin of discretion to decide what is the base crime of migrant smuggling. As a consequence, for the facilitation of entry, the financial benefit requirement in the majority of EU member states is not part of the base crime but is used merely as an aggravating circumstance.

The facilitation of entry is criminal, even without the intent to gain profit, in 24 out of 28 EU member states, namely Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Slovakia,

Slovenia, Spain, Sweden and the UK (FRA 2014: 9). That leaves only Germany, Ireland, Luxembourg and Portugal as exceptions to the rule, where financial gains need to be proved in a criminal court. Moreover, in half of the EU countries, the facilitation of residence and stay without a profit factor is sufficient to establish a crime or offence (FRA 2014: 11). These are Belgium, Croatia, Denmark, Estonia, Finland, France, Greece, Latvia, Lithuania, Malta, Romania, Slovenia and the United Kingdom.

The Directive 2002/90 contains an Art. 1(2), which is of a facultative nature and allows member states to decide whether civil society actors and family members will be exempted from criminalisation. As of 2017, some forms of explicit exemption from criminalization in national law were reported in Belgium, Greece, Spain, Finland, Italy, Malta and the United Kingdom (European Parliament, Committee on Petitions 2017). However, prosecutions of rescuers happened in the abovementioned member states (Carrera et al. forthcoming). When applying such exemptions, often do so with a narrow understanding of the European consensus on humanitarian aid (Council et al. 2008). The exemptions are limited to situations of life and death (as for example in the context of SAR) and exclude broader notions of upholding the fundamental rights of refugees and other migrants. The EU’s strategy of voluntary exemptions risks a debate about what is ‘genuine’ or ‘pure’ humanitarian assistance, as opposed to UN standards of non-criminalisation of actions without the intent to obtain financial or other material benefits (Carrera et al. forthcoming; UNODC 2017).

This leads to a discussion of what constitutes ‘purely humanitarian’ acts, which narrows the civil society space to situations in which it would actually be criminal for any person not to intervene, in other words to refrain from an obligation to undertake an imminent life-saving activity. For example, in France proposals for the new amendments to asylum



law have suggested the exception from exemptions of those acting under 'ideological' or 'political motives'. This raises new questions as to whether the activities to safeguard human rights can be seen as 'ideological' and not worthy of exemption from criminalisation.

In reaction to evidence gathered by Fekete et al. (2017) of the criminalisation of solidarity cases, the European Commission (2018a) has announced that it will

engage with relevant players, primarily civil society organisations as well as national authorities and EU agencies such as Eurojust and the FRA, to get a better understanding of the application of the existing rules, supporting both the effective implementation of the existing legal framework and a reinforced exchange of knowledge and good practice between prosecutors, law enforcement and civil society [in order to ensure] that criminalisation of genuine humanitarian assistance is avoided.

The UNODC (2017) suggested shifting the discussion to what should not be criminalised. For example, the UNODC Legislative Guide on the application of the Protocol reiterates the drafters' concern: "the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers" (UNODC 2004: 333). As mentioned above, the European Parliament (2018a) has also recently called for clearer guidelines on what should not be seen and prosecuted as migrant smuggling.

The French Constitutional Council has entered into this discussion and ruled that the "*delit de solidarité*" is partially unconstitutional (Boudou 2018). The Court clarified that "the freedom to help another, for humanitarian reasons, follows from the principle of fraternity, without consideration of the legality of their presence

on the national territory". Therefore, immunity from prosecution should apply to "all assistance provided with a humanitarian aim". This judgment marks an outstanding judicial development that may positively contribute to challenging the criminalisation of solidarity.

### **4.3 Escalation from suspicion to disciplining and criminalisation**

NGOs conducting SAR in both Italy and Greece were initially seen as allies of national border and coast guard authorities, helping to cope with the unprecedented number of arrivals. They were increasingly mistrusted by national authorities and EU agencies, as being a pull factor to encourage irregular migration, or as having 'undercover aims' (Carrera, Allsopp and Vosyliūtė, forthcoming). The allegations started in an article in the *Financial Times* in December 2016, which exaggerated a leaked Annual Frontex Risk Analysis of 2016, to "raise concerns" about "interaction of charities and people smugglers operating in the Mediterranean" (Robinson 2016).

Later, in March 2017, Italian prosecutor Carmelo Zuccaro claimed in the media to possess evidence that NGOs conducting SAR are "colluding with smugglers" and raised widespread suspicion about the activities of civil society at sea (Heller and Pezzani 2017). The Italian prosecutor spoke before a parliamentary committee convened to investigate his claims about NGO links with smugglers. The parliamentary committee concluded that the prosecutor did not have sufficient evidence to make such claims (Scherer 2017). Nonetheless, the accusations have affected the general climate of mistrust in Italian society towards civil society NGOs and it has further facilitated the imposition of the governmental Code of Conduct on NGOs saving lives at sea.



In Italy, the Code of Conduct to regulate the activities of NGOs performing SAR operations in the Mediterranean is a clear example of interference with civil society independence. In the central Mediterranean, the Code of Conduct has discouraged their proactive SAR missions due legal uncertainty, and many NGOs have left. This has led to a nine-fold increase in the death rate per 1,000 sea crossings since 2015, despite drastically reduced numbers of overall sea crossings (Vosyliūtė 2018). Furthermore, as foreseen in the Code of Conduct, NGOs are obliged “to receive on board ... judicial police officers for information and evidence gathering with a view to conducting investigations related to migrant smuggling and/or trafficking in human beings” (Italian Authorities 2017). The Code of Conduct underpins the idea that NGOs are pull factors for migrants and a catalyst of human smuggling. One of the non-signatory NGOs, Jugend Rettet, and Priest Mussie Zerai are now under investigation for facilitation of illegal migrants in Italy and the judicial authorities have seized the organisation's rescue boat *Iuventa* (Osborne 2017). The Open Arms vessel of the NGO Pro-Activa Open Arms was also seized as of 18 March 2018 (Amnesty International 2018), but the Ragusa court decided to lift the seizure of the ship on 16 April 2018 (Cuttritta 2018b).

The hostile political environment against NGOs reached its peak on 10 June 2018, when Matteo Salvini, Italy's new interior minister, declared that all Italian ports were closed to the *Aquarius* ship (Nadeau et al. 2018). The ship is jointly operated by SOS Méditerranée and Doctors Without Borders. It was carrying more than 600 rescued migrants, including 123 unaccompanied minors and 7 pregnant women. It remained stranded in the Mediterranean between Malta and Italy in a standoff between the two nations not willing to become responsible for their asylum claims. Eventually, Spain agreed to disembark the migrants (Nadeau et al. 2018). The Mission Life-Line experienced similar incident. On 27

June, after six days spent at sea with 200 migrants on board, it was finally allowed to dock in Malta, as Portugal agreed to take responsibility for the asylum claims of the rescued persons (InfoMigrants 2018). Therefore, NGOs conducting SAR are being blamed for the unresolved questions of fair responsibility sharing and lack of solidarity with the refugees and with frontier member states (Carrera and Lannoo 2018).

#### **4.4 The role of EU funding**

NGOs are generally affected by legal restrictions in terms of freedom of association, declining public financial support, lack of adequate consultation mechanisms among governments and CSOs, and legislative measures in the area of security, which are likely to generate a “chilling effect” on civic space in the area of migration (CIVICUS 2016).

In this context, EU funding opportunities can play a crucial role for CSOs to finance their activities. However, in the current EU funding and programme period, the limited access to the AMIF and ESF for civil society projects aiming at providing humanitarian assistance to irregular migrants is a key challenge (Westerby 2018). Most EU funds are allocated directly to member states, which may apply funding constraints for those CSOs and cities that ensure essential services for irregular migrants. A recent report on AMIF funding shows that whereas in other countries, like Finland, Portugal, Slovakia and Spain, civil society is a main implementer of AMIF projects, in others, like “Estonia and Poland, for example, AMIF National Programme implementation remains largely state-led” (Westerby 2018). The report illustrates the hurdles for NGOs to access funding due to very peculiar requirements and difficulties in getting co-funding.

For example, in Bulgaria, the responsible authority requires “NGOs applying for AMIF funding to have previously implemented





projects with a financial value of 50% of the project they are applying for" (Westerby 2018: 41). In Hungary, when disbursing funding for civil society, the Ministry of Interior asked for "blanket authorisation to directly withdraw money from the organisation's bank account at any point during and after the project implementation" (Westerby 2018: 41), thus making CSOs highly dependent on the Ministry of Interior. In Hungary and Romania, national authorities have decided not to provide 25% of AMIF co-financing for civil society, "meaning that civil society organisations must independently source financing for any proposed AMIF initiative" (Westerby 2018: 41). Szuleka (2018) further highlights that in Poland funding has been one of the sources of pressure: "The government has limited access to public funds for certain NGOs, especially those dealing with migrants and refugees as well as helping victims of domestic violence. For example, in 2016, the Ministry of Interior announced that the call for proposals within the Asylum, Migration and Integration Fund was annulled" (Szuleka 2018: 16).

As a result, the available amount of financial resources for carrying out humanitarian activities and providing irregular migrants with access to fundamental services is reduced at the local and national levels.

As proposed by the Commission and enjoying considerable support in the European Parliament (cf. section 3.2), the future 2021–27 MFF will offer facilitated access for CSOs to EU funding and stress rule of law and fundamental rights considerations in the implementation of funds. Contradicting the line of many member state governments, which seek a reduced NGO role, the whole range of relevant legislative provisions (European Commission 2018b-j) is set to be contested in the Council and very likely to become the subject of intense debate within the European Parliament, as well as between Parliament and the Council.

#### **4.5 Denying NGOs access to migrants within a hostile political environment**

In Europe, NGOs rely on service-provision projects and contracts in order to serve their beneficiaries. The increasingly hostile political environment significantly reduces the access of NGOs to their population of interest and negatively impacts their mission to carry out strategic litigation, advocacy and evidence-based research. This section gives different examples showing the extent to which member states are narrowing NGOs' access to migrants.

In **Austria**, a proposal of the government seeks to create a federal agency that, assisted by the Ministry of Interior, will provide legal advice for asylum seekers. The establishment of the agency would negatively affect the fundamental role of those NGOs that ensure legal assistance to asylum seekers in Austria. This proposal has been publicly criticised by several prominent citizens in an open letter addressed to the federal government, as it will undermine the quality and independence of the legal assistance provided to asylum seekers (*Menschenwürde Österreich 2018*). The adoption of this bill would compromise independent refugee law advice and deny the access of NGOs to the population of interest.

In **Slovenia**, reports show that NGOs were denied access to registration facilities at the Slavonski Brod winter transit camp, where registration and identification of new arrivals take place (FRA 2015). The hardships and restrictions imposed on NGOs and other civil society representatives hinder their capacity to effectively reach out to their population of interest and deliver those essential services that would improve the conditions of migrants.

The work and independence of NGOs can also be jeopardised by burdensome regulatory requirements (FRA 2018). In





**Greece**, NGOs are required to be accredited by the minister of interior to access hotspots and provide assistance to migrants. On numerous occasions, NGOs have reported being turned down at the gates of the hotspots even when having the formal permission of the competent authorities (Carrera et al. forthcoming; PICUM 2017). This measure imposes undue obstacles to the freedom of association of NGOs by means of administrative and legal barriers (FRA 2018). Moreover, unregistered NGOs and volunteers who conduct human rights work to support migrants may risk being criminalised, intimidated or disciplined. Civil society has reported calls 'for better coordination and registration' to 'avoid duplication' as seeking leverage and control over their operations (Carrera et al. forthcoming).

Similarly, in **Italy** for example, the Council of Europe's Human Rights Commissioner Tomas Bocek has highlighted that access to hotspots, such as the one in Lampedusa, is also restricted for the majority of NGOs and CSOs willing to provide assistance or monitor human rights (Council of Europe 2016).

The imposition of administrative barriers and discretionary procedures may also be a political tool to deny NGOs access to migrants and quell dissenting views or beliefs. For instance, **Hungary's** government proposed the 'Stop Soros' legislative package, which enables the minister of interior to ban civil groups deemed to support migration. The bill was formally adopted by the Hungarian Parliament on 20 June 2018. The bill targets any NGOs that "sponsor, organise or otherwise support a third country national's entry or stay in Hungary via a safe third country in order to ensure international protection" (Eötvös Károly Policy Institute et al. 2017). Under the bill, NGOs will be required to register and obtain a government authorisation for carrying out fundamental activities such as advocating or campaigning for immigrant rights. The Hungarian interior minister will also have the power to deny

permission to these organisations if the government assesses a "national security risk". The bill imposes a 25% tax on foreign donations to NGOs aimed at "supporting migration". The risk is that the law will "criminalise" CSOs and weaken independent and critical voices. This proposal is not in line with the basic values of the EU and undermines the rule of law and democratic standards, as well as the freedom of assembly and ability of NGOs to effectively work in Hungary (Eötvös Károly Policy Institute et al. 2017). As a result of the hostile political and legal environment in Hungary, the Open Society Foundations are moving their international operations and staff from Hungary.

In this political context, the European Parliament's rapporteur Judith Sargentini (2018) presented a report emphasising that Hungary is posing a "clear risk of a serious breach" to the EU's democratic values (Sargentini 2018). This report recommends triggering an Art. 7(1) TEU procedure and follows the resolution adopted by the European Parliament on 17 May 2017 on the situation in Hungary (European Parliament 2017). The Venice Commission also acknowledged that the new law in Hungary unfairly criminalises organisational activities that are not directly related to the materialisation of illegal migration, including "preparing or distributing informational materials" or "initiating asylum requests for migrants" (Council of Europe, 2018).

#### **4.6 Systemic nature of intimidation and harassment**

The increase in the policing of NGOs across the EU is also affecting those citizens and volunteers who spontaneously provide humanitarian assistance for migrants. Local authorities may impose administrative fines to prevent people from giving food or erecting shelters for irregular migrants, and several acts of intimidation have been carried out by police forces against citizens supporting



migrants blocked or rejected at the border between Italy and France (Allsopp 2017). A number of volunteers have received restraining orders to prevent them from coming to the places where asylum seekers arrive (Carrera et al. forthcoming).

The examples show that policing does not happen as a one-off exercise but is rather systemic. For example, an organisation providing food for refugees and other migrants in Rome was charged with the occupation of public land, in order to discourage activities. The organisation moved to another location and was followed by the police there as well. On Lesbos island, for example, volunteers who are EU citizens reported having their identity documents checked and receiving parking fines or requests to register car numbers repetitively, not because it was not clear who they were, but precisely because authorities knew what they were doing (Carrera et al. forthcoming).

Testimonies from Ventimiglia, Athens and Thessaloniki indicate consecutive raids by anti-riot police, sometimes even with the use of tear gas against volunteers. In some instances, volunteers also reported cases of rape (Carrera, Allsopp and Vosyliūtė forthcoming; PICUM 2017). In the central Mediterranean, NGOs providing SAR have been prevented from conducting their operations, threatened by the Libyan coast guard with gunshots and death threats (Flori and Bagnoli 2017). It may be said that the Italian and EU authorities have indirect responsibility for failing to protect NGO vessels from abuses carried out by the Libyan coast guard and navy. Since the maritime missions performed by Italy (Mare Sicuro) and the EU (Eunavfor Med – Sophia, Frontex Triton) have stopped their systematic patrolling of the high seas next to Libyan national waters, Libyan authorities have increasingly harassed and intimidated NGOs (Cuttitta 2018a and 2018b).

## 5. Potential impacts of policies adopted



### EU and international human rights standards

The EU Facilitation Package is not in line with the UN Protocol against the Smuggling of Migrants, supplementing the UN Convention against Transnational Organized Crime, as it does not include an express reference to the requirement of financial gain or other material benefit to define the crime of facilitating the entry, transit and stay of irregular migrants in the EU.

EU law does not oblige the exclusion of humanitarian actors from criminalisation. Even in countries where such exclusions have been made, questions have been raised about what is 'purely humanitarian' and what should not be considered criminal activity.

The hurdles that NGOs are encountering across the EU raise significant legal issues with regard to respect for the rule of law in the member states. CSOs are indeed vital actors for upholding and promoting the values enshrined in Art. 2 TEU, i.e. the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Organisations operating in the Mediterranean now are obliged, for example, to hand over migrant boats or stabilise the situation until those rescued or the vessels are towed back by the Libyan coast guard. The UN High Commissioner for Human Rights concluded that this practice is 'inhuman' and in contradiction of universally accepted human rights standards, such as the right to seek asylum and non-refoulement (*The Guardian* 2017). Similar concerns have been expressed by 29 academics who are leading research in this area.



### Political implications

After the adoption of the Code of Conduct in Italy, there have only been a few NGOs that, on a regular basis, keep providing SAR services. The situation is constantly changing and it is difficult to properly assess the exact number of vessels and NGOs operating in the Mediterranean. As of 12 June 2018, there were five NGOs carrying out rescue activities: Sea Watch and Sea Eye with one ship, SOS Méditerranée in partnership with MSF with one ship, and Proactiva Open Arms with two ships. Mission Lifeline expressed the intention to resume its activities and Save the Children may also restart SAR operations during summer 2018. A similar trend has developed in the Aegean, where the majority NGOs performing SAR have either left, or gone through vetting and are integrated in the grid of the Hellenic coast guard, whereas the remaining ones are conducting 'boat spotting' on the shores and informing Greek authorities.

Civil society actors are pushed to 'choose sides' – either to align with the positions of national authorities or to oppose them.



### Human and societal costs

The EU legal framework negatively impacts irregular migrants and the organisations and individuals providing assistance to them by growing intimidation and fear of sanctions, as well as on social trust and social cohesion for society as a whole (Carrera et al. 2016: 11; see also Allsopp 2017; Provera 2015).

Reports indicate the increase of anxiety and even post-traumatic stress disorders among the volunteers who went to help during the peak of the humanitarian crisis (Piere and Breniere 2018).

The living conditions and rights of refugees and other migrants, in particular the right to human dignity among undocumented migrants, is likely to deteriorate as civil society actors are not safe in delivering their mandated services.

This hostile environment towards NGOs engaged in SAR has generated an operational gap in SAR, leading to a nine-fold increase in death rates in the central Mediterranean. In 2015, 4 people were reported dead or missing out of 1,000 trying to cross the sea; by March 2018, 37 lives were lost per 1,000 sea crossings (Vosyliūtė 2018).



### Economic and fiscal dynamics

NGOs are experiencing a lack of public trust and a decrease in voluntary contributions by citizens, which may undermine their effective involvement in operations in the Mediterranean and, more broadly, their capacity to promote human rights and fundamental European values (Pech and Scheppele 2017).

The civil society actors working under public contracts have been silenced or avoid expressing their criticism because they fear losing public funding or access to their clients.

The upholding of human dignity of undocumented migrants is left to the 'own risks' of NGOs. Only some countries allow the use of funds from the AMIF, ESF or FEAD (Fund for European Aid to the Most Deprived) for undocumented migrants.



### The EU as an international actor

The normative power of the EU, especially its international role in protecting human rights and civic society space, may be



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compromised by the current trend of criminalising NGOs within its member states.

The EU's pressure on strengthening border controls, particularly along the central Mediterranean route and in the Aegean, is exacerbating the peace-building and state-building processes in war-torn countries like Libya, and supporting those regimes and militias that act outside the rule of law and threaten peace and stability in the long run (Lenhe 2018).



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# ReSOMA

RESEARCH SOCIAL  
PLATFORM ON MIGRATION  
AND ASYLUM

## ReSOMA - Research Social Platform on Migration and Asylum

is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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