



Viewpoint

Hindering humanitarianism: European Commission will not ensure protection for those aiding *sans-papiers*

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A new European Commission evaluation of EU laws on migrant smuggling concludes there is a need to improve the situation around "the perceived risk of criminalisation of humanitarian assistance" to "irregular" migrants. The Commission argues that the answer to the problem is "effective implementation of the existing legal framework" – but it is the laws currently in place, which let Member States decide whether or not to punish humanitarian assistance, that permits the existence of a very real risk of criminalisation in the majority of EU Member States.

Evaluating the ‘Facilitators Package’

On 31 March the European Commission published a substantial evaluation of two laws that are known together as the “Facilitators Package”, which were agreed in 2002 and provide the legal backbone to EU and Member State efforts against migrant smuggling. [1]

Numerous action plans, strategies and policy measures have been introduced to complement the laws in the years since they were passed – most recently the May 2015 EU Action Plan on migrant smuggling, which promised that in 2016 there would be:

“[P]roposals to improve the existing EU legal framework to tackle migrant smuggling... while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress.” [2]

[1] European Commission, ‘REFIT evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package’, SWD(2017) 117 final, 22 March 2017, <http://statewatch.org/news/2017/apr/eu-com-facilitation-directive-evaluation-swd-117-final.pdf>; see also the summary of the evaluation: European Commission, ‘Executive summary of the REFIT evaluation’, SWD(2017) 120 final, <http://statewatch.org/news/2017/apr/eu-com-facilitation-directive-evaluation-exec-summary.pdf>

[2] European Commission, ‘European Action Plan against migrant smuggling (2015-2020)’, COM(2015) 285 final, 27 May 2015, <http://statewatch.org/news/2015/may/eu-com-action-plan-against-migrant-smuggling-com-285-15.pdf>

With the evaluation of the Facilitators Package, the Commission has made clear its intention to do no such thing.

The Member States: free to criminalise solidarity

One of the two laws that makes up the Facilitators Package is a Directive, Article 1 of which says that all Member States must adopt appropriate sanctions against:

“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.” [3]

However, it also says that Member States may decide not to impose sanctions where such acts – that is, assisting migrants and refugees without the correct papers to enter, travel through or reside within a Member State – aim “to provide humanitarian assistance to the person concerned.”

Currently only seven Member States - Belgium, Greece, Spain, Finland, Italy, Malta, UK [4] - "specifically include in national law an exemption from punishment for facilitation of unauthorised entry and/or transit intended to provide some form of humanitarian assistance," according to the Commission's evaluation report. [5]

Thus, the vast majority of Member States do not have specific laws preventing the punishment of people who provide humanitarian assistance to “irregular” migrants.

Law in action

[3] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:328:0017:0018:EN:PDF>; and the accompanying: 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, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002F0946>

[4] Update, May 2017: after publication, it was pointed out to us by Frances Webber of the *Institute of Race Relations* that the Commission is wrong on this point. In the evaluation document, footnote 66 states that “UK's relevant provision provides for an exemption from punishment when the person is acting on behalf of an organisation which aims to assist asylum-seekers and does not charge for its services.”

This is not the case: UK law only includes exemption from punishment in the case of facilitation of *authorised* entry – not *unauthorised* entry, as the Commission says. Section 25 of the 1971 Immigration Act criminalises the facilitation of illegal entry, transit and residence and there is no exception for humanitarian organisations. Section 25A (a subsequent amendment) criminalises bringing an asylum seeker to the UK for gain.

This offence doesn't involve smuggling or illegal entry - it was created in 1996 as a response to a case in which a man gave his wife's passport (with a substituted photograph) to a woman trying to leave Sri Lanka, so she could get on the flight. When she arrived in the UK they told the immigration officer the passport was not hers and she claimed asylum. He was acquitted of facilitating illegal entry as she hadn't entered the UK using the passport, she had just arrived (see *R v. Naillie*; *R v. Kanesarajah*, <http://www.refworld.org/docid/3ae6b6cf14.html>)

So the Commission has confused or elided the two offences, and wrongly attributed the exemption to the smuggling/ facilitating illegal entry offence.

[5] In 2014 the EU's Fundamental Rights Agency produced a useful overview of laws implementing the Facilitation Directive in Member States. See: 'EU Member States' legislation on irregular entry and stay, as well as facilitation of irregular entry and stay', <http://statewatch.org/news/2016/jan/eu-fra-2014-criminalisation-of-migrants-annex.pdf>

Cases in which people are investigated, charged, prosecuted or in some way punished by the authorities for humanitarian efforts come to light internationally fairly frequently:

- in Greece, lifeguards have been charged with human smuggling after taking part in maritime rescue operations; [6]
- in Italy, fishermen and NGO workers have been put on trial after intervening to save peoples' lives at sea, while individuals offering meals to individuals blocked at the Italian-French border in Ventimiglia have been served with fines, orders banning them from the area (*fogli di via*), and the possibility of prison sentences (for "providing food to the migrants without authorisation"); [7]
- in France, a whole host of different laws are deployed against those who offer help to *sans-papiers*.

In January a new French campaign, *Delinquant Solidaires*, published a manifesto supported by dozens of trade unions and campaign groups denouncing the fact "that populations targeted by xenophobic practices and policies are stopped from having support." [8] Alongside their manifesto, the organisation listed some of the "solidarity offences" used by the authorities:

- laws against obstructing the movement of an aircraft (against individuals on aeroplanes protesting against violent deportations);
- rules on health and safety (to prevent the provision of accommodation); and
- urban planning regulations (to enforce the destruction of migrants' shelters).

In Paris, volunteers have been threatened with fines for offering meals to people who are living in the street with nothing. [9]

There have also been suggestions from politicians and officials that NGOs conducting lifesaving search and rescue (SAR) operations on the high seas or in Libya territorial waters

[6] Anealla Safdar, 'NGOs decry charges against volunteers in Greece', *Al Jazeera*, 16 January 2016, <http://www.aljazeera.com/news/2016/01/ngos-decry-arrests-volunteer-lifeguards-greece-160116193522648.html>;

[7] 'Italy: Criminalising solidarity - Cap Anamur trial underway', *Statewatch News Online*, April 2007, <http://database.statewatch.org/article.asp?aid=27766>; 'Italy/Tunisia: Fishermen on trial for rescuing migrants', *Statewatch News Online*, September 2007, <http://database.statewatch.org/article.asp?aid=28114>; Ilaria Sessana, 'L'Europa contro la solidarietà. Se aiutare i migranti diventa reato', *Altreconomia*, 2 January 2017, <https://altreconomia.it/leuropa-la-solidarieta-aiutare-migranti-diventa-reato/>; 'Ventimiglia: Tre volontari denunciati per aver dato da mangiare ai migranti', *Osservatorio Repressione*, 24 March 2017, <http://www.osservatoriorepressione.info/ventimiglia-tre-volontari-arrestati-aver-dato-mangiare-ai-migranti/>

[8] 'Migration: collective manifesto marks start of new campaign against the "solidarity offence" as government maintains border controls until July', *Statewatch News Online*, 16 January 2016, <http://www.statewatch.org/news/2017/jan/fr-solidarity-offence.htm>; This is not a new issue in France. See, for example, a 2009 report on the solidarity offence was produced by FIDH: 'France: The observatory for the protection of human rights defenders has published a research report on the obstacles faced by defenders of the rights of migrants in France', *Statewatch News Online*, June 2009, <http://database.statewatch.org/article.asp?aid=28881>

[9] Frances Grahl, 'At the crossroads: homeless and undocumented people in Paris since the Calais evictions', *OpenDemocracy*, 20 March 2017, <https://www.opendemocracy.net/mediterranean-journeys-in-hope/frances-grahl/at-crossroads-homeless-and-undocumented-people-in-paris>. An overview of the situation was provided in a May 2016 article: Mark Wilding, 'European Governments Are Arresting Refugee Crisis Volunteers', *Vice*, 3 May 2016, https://www.vice.com/en_us/article/refugee-crisis-volunteers-prosecution-lesbos-kos-idomeni

are indirectly encouraging, if not actively supporting, human smugglers. [10] NGOs involved in search and rescue operations have demanded that “unsubstantiated accusations of unlawful conduct by SAR NGOs ceases immediately without the presentation of substantiated evidence.” [11]

Popular proposals

The widespread support for the demands made by *Delinquant Solidaires* was reflected in the 2,245 responses to a public consultation set up by the Commission that was used to inform the evaluation of the Facilitators Package.

92% of the respondents were individuals and upon being asked whether the EU should “make it obligatory not to sanction facilitation for humanitarian reasons” the majority of them, along with organisations, academics, businesses and international organisations – said yes.

The Commission recognises that “the wide majority” of respondents were “strongly in favour of a modification of the existing definition of the offence,” noting that:

“The majority of respondents mentioned... the need to uphold human rights and core European values, as well as need for clarity and the adverse effects of fears of criminalization felt by civil society organisations or service providers engaging with irregular migrants, which deter them from providing services or assistance.”

Yet despite this the Commission will do nothing to change the existing provisions, because:

“At this point in time, the information collected does not allow to draw an accurate picture pointing to actual and repeated prosecution and conviction of individuals or organisations facilitating irregular border crossings for reasons of humanitarian assistance across EU Member States.”

The Commission therefore suggests that:

“The effective implementation of the existing legal framework and a reinforced exchange of knowledge and good practice between prosecutors, law enforcement and civil society could contribute to improving the current situation and avoid criminalisation of genuine humanitarian assistance.”

This includes:

“[E]nhancing the effectiveness of the legislation on the spot, offsetting the risk of unintended consequences, and in particular the risk that no assistance is provided to those in need, in breach of the EU Charter of Fundamental Rights, the non-refoulement principle and other international human rights commitments.”

Wait and see is not enough

While few would dispute the benefits of “a reinforced exchange of knowledge and good practice” in order to “avoid criminalisation of genuine humanitarian assistance,” ensuring “the

[10] ‘Common statement from the SAR NGOs operating in the Mediterranean’, 31 March 2017, <http://statewatch.org/news/2017/apr/statement-SAR-NGOs-med.pdf>

[11] Patrick Wintour, NGO rescues off Libya encourage traffickers, says EU borders chief, *The Guardian*, 27 February 2017, <https://www.theguardian.com/world/2017/feb/27/ngo-rescues-off-libya-encourage-traffickers-eu-borders-chief>

effective implementation of the existing legal framework” will do nothing to stop national authorities using the law against individuals or organisations engaging in such efforts.

It is made clear in the evaluation that there are “statistics gaps” and a “lack of robust, comprehensive and comparable public data” on the effects of the Facilitators Package in general, and more comprehensive collection of data on the criminalisation of humanitarianism would certainly be welcome – there are presumably many more cases, beyond those cited above, that never receive widespread public attention.

It would be quite simple for the Commission to recommend that Eurojust, the EU’s judicial cooperation agency, to begin collecting and publishing data on cases across the EU – but the evaluation does not even contain a proposal as simple as this.

The Council, for its part, has previously recommended that Eurojust’s “thematic group on migrant smuggling” examine “the scope of the humanitarian exception” across different EU Member States – but in the framework of “identifying and analysing the obstacles regarding prosecution and judicial cooperation” in relation to migrant smuggling. [12] This would seem to suggest that the “humanitarian exception” is seen more as a hindrance to law enforcement than anything else.

In a climate marked by increasing xenophobia and hostility to migrants and minorities – amongst politicians, from “movements” such as PEGIDA, and in wider society – the Commission’s refusal to act is effectively a sign to states across the EU that they are free to harass, impede and even prosecute individuals attempting to help some of the most vulnerable people in European society.

Of course, prosecutions may not succeed – but this could be assured were laws in place that explicitly prevented the criminalisation of humanitarian assistance. As a December 2015 study for the European Parliament found, there are:

"[S]ignificant inconsistencies, divergences and grey areas, such that humanitarian actors are often deterred from providing assistance. The study calls for a review of the legislative framework, greater legal certainty and improved data collection on the effects of the legislation." [13]

The Commission’s evaluation ultimately concludes that:

"[A]t this point in time the Facilitators Package should be maintained in its present form, while the Commission further pursues the implementation of the Action Plan against migrant smuggling... The need for possible legislative amendments to the Facilitators Package could be re-evaluated, once the implementation of the Action Plan has reached greater maturity."

When exactly this will be is not stated.

Doing more, doing better, or doing nothing?

At a November 2014 conference, the Commissioner for Home Affairs and Migration, Dimitris Avramopoulos, said that the “universal values of human dignity, freedom, equality and

[12] ‘Justice and Home Affairs Council adopts Conclusions on "migrant smuggling" and facilitating "illegal entry & transit"', *Statewatch News Online*, 10 March 2016,

<http://statewatch.org/news/2016/mar/eu-refugee-crisis-humanitarian-assistance.htm>

[13] European Parliament, ‘Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants’, December 2015,

<http://statewatch.org/news/2016/jan/ep-study-humanitarian-assistance.pdf>

solidarity” are “the guiding line of our mission in Migration, Home Affairs and Citizenship.” He closed his speech by stating his conviction “that we will be able to do even more and better in the future.” [14]

Recent recommendations on return policy – which propose reducing human rights protections to an absolute minimum in the name of increasing the number of deportations, including by detaining more children – would suggest that while the EU might be doing more, it certainly isn’t doing better when it comes to “human dignity, freedom, equality and solidarity”.

Perhaps Avramopoulos and his department could take a step in the right direction by standing with both irregular migrants and the tens of thousands of people across the EU who give their time, energy and money to try to offer them some kind of dignity, by making it “obligatory not to sanction facilitation for humanitarian reasons.”

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[14] Dimitris Avramopoulos, 'Fundamental Rights: the Pillar for EU Migration Policy', 10 November 2014, http://europa.eu/rapid/press-release_SPEECH-14-1601_en.htm

