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**Crackdown on NGOs and volunteers helping  
refugees and other migrants**

MIGRATION



**Synthetic Reports** are the final outcome of ReSOMA's activities related to one of the most pressing topics in the EU migration, asylum and integration debate. Bringing together findings and results of previous ReSOMA Discussion Briefs and Policy Options Briefs, they provide an overview of **key controversies, available evidence** and **proposed policy alternatives**. Drawing on ReSOMA's dialogue with policymakers, stakeholders and research, the Synthetic Reports point to **viable reform paths** in order to fill crucial policy gaps in line with realities on the ground, the rule of law and human rights. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG).

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# Crackdown on NGOs and volunteers helping refugees and other migrants\*

*This report synthesises previous ReSOMA briefs concerning the crackdown on NGOs and volunteers helping refugees and other migrants. Section 1 captures the main issues and controversies in the debate on the policing of humanitarianism and the potential impacts of EU and national anti-migrant smuggling policies on civil society actors. This section has drawn on academic research in this area, and in particular on CEPS expertise in this field. Section 2 provides an overview of the possible policy options to address this phenomenon taking stock of the ongoing policy debate on solutions and alternatives. Section 3 aims to identify and quantify criminal cases of individuals, volunteers and NGOs providing humanitarian assistance to migrants in the European Union. This monitoring exercise has been carried out by MPG through ReSOMA's collaborative and participatory process involving experts from NGOs, researchers and other stakeholders. Section 4 provides overall summary conclusions and recommendations to end the crackdown on NGOs and to prevent further policing of civil society. The final section proposes approaches to returning responsibility to EU actors, to be further explored by the ReSOMA platform, with a focus on good governance, human rights defenders, and the protection of humanitarian space inside the EU.*

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## SECTION 1

### POLITICAL AND LEGAL TRENDS LIMITING CIVIL SOCIETY SPACE<sup>1</sup>

#### 1. Introduction

The crackdown on NGOs assisting refugees and other migrants is a multi-faceted phenomenon characterised by the increased policing of civil society actors assisting refugees and other migrants (Carrera et al., 2018a; Carrera et al., 2018b; Carrera et al., 2019). 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 (Youngs and Echague, 2017; Szuleka, 2018; Carrera et al., 2018a; Carrera et al., 2018b).

Sometimes political and operational priorities to tackle migrant smuggling have also 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 et al., 2018a; Carrera et al., 2018b; Carrera et al., 2019). Civil society actors have filled the gaps left by EU agencies and national governments 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.

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

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<sup>1</sup> This section is extracted from the [Discussion Policy Brief 'Crackdown on NGOs and volunteers helping refugees and other migrants'](#), L. Vosyliūtė and C. Conte, July 2018

refugees, asylum seekers and undocumented migrants have reported increased criminalisation of their activities (Carrera et al., 2018a; Carrera et al., 2018b; 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 effects, leading to “shrinking civil society space” (Youngs and Echague, 2017).

## 2. Scoping the debate

### 2.1 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 et al., 2018; Szuleka, 2018; Fekete et al., 2017; PICUM, 2017; Heller and Pezzani, 2017; Gkliati, 2016; Carrera and Guild, 2016;).

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 re-framed civil society activities as a “pull factor” (Carrera et al., 2019). 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., 2018a; Carrera et al., 2018b).

### 2.2 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, ‘*délits 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., 2019; 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).

### 3. Key issues and controversies

#### 3.1 What is (not) criminal according to the Facilitators Package?

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).

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 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 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 Directive 2002/90 also 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 criminalisation 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 above-mentioned member states (Carrera et al., 2019). 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., 2019; UNODC, 2017).

### **3.2 Escalation from suspicion to disciplinary actions 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 et al., 2018b). 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.

### **3.3 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.

### **3.4 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.

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.

### **3.5 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., 2019).

#### **4. Potential impacts of policies adopted**

The ongoing criminalisation of solidarity may negatively affect the humanitarian work of NGOs and volunteers helping refugees and migrants. The political and legal trends limiting civil society space in the Member States also raise concerns with regard to the respect for fundamental freedoms, human rights and rule of law.

- **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 and transit of irregular migrants in the EU.

- **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. 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).

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

## SECTION 2

# POLICY OPTIONS ADDRESSING THE CRACKDOWN ON NGOS AND VOLUNTEERS<sup>2</sup>

### 1. Introduction

International and regional organisations, including human rights bodies and other standard setting institutions, European institutions and agencies, national policymakers, civil society, private businesses and other stakeholders have been putting forward various **policy alternatives** to prevent or discourage the criminalisation of solidarity with refugees and other migrants. Some of these proposals aim to reform the EU legal framework delineated by the Facilitators Package (Bozeat et al., 2016, Carrera et al., 2016) while others also suggest addressing the broader phenomenon of 'policing humanitarianism' (Carrera et al., 2019) and tackling the underlying reasons for migrant smuggling (Zangh, Sanchez and Achilli, 2018, Carrera et al., 2018a; Carrera et al., 2018b, Fekete, 2018).

### 2. Identifying and mapping key policy options

To address the ongoing criminalisation of solidarity various policy proposals have been put forward by diverse civil society actors, such as PICUM, Social Platform, ECRE, the Red Cross EU office, Amnesty International, Médecins sans Frontières (MSF), FEANTSA, CIVICUS, Human Rights Watch, Frontline Defenders, and many others. For example, the European Citizens' Initiative "We are welcoming Europe" has mobilised more than 170 civil society organisations calling for the decriminalisation of humanitarian assistance. Some suggestions have also come from international and regional human rights bodies or even from the European institutions and agencies (FRA, 2014; UNODC, 2017; FRA, 2018; European Parliament, 2018a; Council of Europe, Venice Commission 2018; Council of Europe, Commissioner for Human Rights, 2018; United Nations Human Rights Committee, 2018).

As summarised in earlier ReSOMA discussion briefs (Vosyliūtė and Conte 2018; Vosyliūtė and Joki, 2018; Wolffhardt, 2018), academia and think tanks have been increasingly interested in the issue of the criminalisation of migration and the criminalisation of solidarity (see for example, Fekete, 2009; Portes, Fernandez-Kelly and Light, 2012; Van der Leun and Bouter, 2015; Provera, 2015; Carrera et al., 2016; Gkliati, 2016; Fekete, Webber and Edmond-Pettit, 2017; Heller and Pezzani, 2017; Landry, 2017; Carrera, Allsopp and Vosyliūtė, 2018; Carrera et al., 2018a; Carrera et al., 2018b; Zangh, Sanchez and Achilli, 2018; Fekete, 2018; Carrera et al., 2019).

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<sup>2</sup> This section is extracted from the Policy Option Brief 'Crackdown on NGOs and volunteers helping refugees and other migrants', L. Vosyliūtė and C. Conte, March 2019

In this report we further develop four proposals that are not mutually exclusive and could be seen as complementary:

- legislative revision of the Facilitators Package that requires 'financial gain or other material benefit' to trigger investigation into the crime of facilitation of entry/transit and 'unjust enrichment' for a stay in the EU;
- legislative revision of Article 1 (2) of the Facilitation Directive to make the 'humanitarian exemption' clause mandatory;
- implementation of 'firewalls' between civil society and law enforcement;
- independent monitoring of implementation of the Facilitators Package including via a designated observatory on criminalisation of civil society.

## 2.1 The criterion of 'financial gain or other material benefit'

The UN Protocol against the Smuggling of Migrants by Land, Sea and Air sets an international standard in the area (UN General Assembly, 2000). Article 6 of the UN Protocol provides the international threshold to criminalise the behaviour as 'migrant smuggling' when it is done for profit motives. The element of financial gain in this context is the crucial indicator of criminal intent on the side of smugglers (UNODC, 2004; UNODC, 2017). The European Union Agency for Fundamental Rights (FRA) underlines that all EU Member States, except Ireland, have ratified the UN Protocol against the Smuggling of Migrants (FRA, 2018).

## 2.2 The exemption on grounds of humanitarian assistance

The United Nations Office on Drugs and Crime (UNDOC) clarifies that the Protocol against the Smuggling of Migrants does not require states to criminalise 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).

As the EU Facilitators Package does not contain a 'financial and material benefit requirement' various international and regional bodies (United Nations Human Rights Committee, 2018; UNODC, 2017; Council of Europe, Venice Commission, 2018; Council of Europe, Commissioner for Human Rights, 2018), EU institutions and agencies (European Union Agency for Fundamental Rights 2014 and 2018, European Parliament 2018a) have therefore also recommended the introduction of an obligatory provision under EU law that expressly exempts humanitarian assistance by civil society organisations or individuals from criminalisation.

This policy option is complementary to the first one and widely supported among civil society stakeholders (see for example, PICUM, 2017; Social Platform, 2016; Red Cross EU Office, 2017). It is also one of the calls of **the European Citizens' Initiative** "We are welcoming Europe, let us help!" that is supported by more than 170 civil society organisations, and also by a separate Civic Space Watch initiative. Various forms of mobilisation calling for humanitarian exemption have come about as a reaction to concrete prosecutions – for example, the **petition submitted to the European Parliament's Committee on Petitions** by Paula Schmid

Porras on behalf of PROEM-AID (Schmid Porras, 2017). This petition recommends revising Article 1(2) and specifying that Member States “shall not impose sanctions” on those who provide humanitarian assistance to undocumented migrants on non-profit grounds (see, for instance, Schmid Porras, 2017; Social Platform, 2016).

### 2.3 Implementing firewalls

Civil society actors and researchers also call on the EU institutions to develop **guidelines and funding schemes for implementing ‘firewalls’** between civil society and law enforcement which guarantees safe humanitarian assistance and access to justice (Carrera et al., 2018a; Carrera et al., 2018b; Vosyliūtė and Joki, 2018; Carrera et al., 2019). This policy option is supported among civil society and social partners, for example PICUM (2017), FEANTSA (2017), Social Platform (2016) and ETUC (2016).

The concept of ‘firewalls’ was first proposed with the aim of de-coupling the provision of public services, and fundamental rights mandates, from immigration law enforcement (Crépeau and Hastie, 2015). ‘Firewalls’ seek to prevent immigration enforcement authorities from accessing information concerning the immigration status of individuals who seek assistance (for example police or hospital, assistance) or services (shelters, NGOs) (Crépeau and Hastie, 2015).

### 2.4 The independent monitoring of implementation of the Facilitators Package

The evidence brought by civil society and researchers suggests the need for systematic and **independent monitoring** of the respect of the human rights of migrants, the protection of civil society free space and the enforcement of the Facilitators Package and/or broader immigration policies in compliance with fundamental rights.

An initial study for the European Parliament’s LIBE committee has suggested better monitoring systems (Carrera et al., 2016: 11):

“Member States should be obliged to put in place **adequate systems** to monitor and independently evaluate the enforcement of the Facilitators Package, and allow for quantitative and qualitative assessment of its implementation when it comes to the number of prosecutions and convictions, as well as their effects.”

The study proposed that all EU Member States should therefore collect and record annually the following data: “the number of people arrested for facilitation, the number of judicial proceedings initiated; the number of convictions along with information about sentencing determination; and reasons for discontinuing a case/investigation” as well as the effects of such investigations (Carrera et al., 2016: 65).

## 2.5 How to ensure funding and protection of free space for civil society to assist refugees and other migrants?

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., 2018b). 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).

Starting with its Communication on the scope and structure of the 2021–27 MFF (European Commission, 2018b and 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).

Funding rules developed by several Member States for National Programmes of AMIF and also for other EU funds may give excessive discretionary powers on the side of national authorities on how these funds are used (Westerby, 2018a). The same report highlights how “political priorities can influence the content and scope of AMIF CfPs (Calls for Proposals)” (Westerby, 2018a: 9). For example: CFPs in the Czech Republic have tended to address government priorities related to security concerns; in Slovakia and Estonia the calls for proposals were highly “detailed and proscriptive” and were seen more as tenders by civil society organisations; in Bulgaria, due to the suspension of national integration policies there was “very slow overall implementation” of this priority area and therefore organisations working in this field could not count on AMIF funding (Westerby, 2018a: 29).

To overcome these pressures, research and stakeholders propose that where the rule of law is backsliding, the European Commission should firstly monitor the rule of law situation in EU Member States and stop EU funding to such governments, and secondly, instead, provide more direct funding possibilities for civil society.

## 2.6 Suspension of funding for governments violating the rule of law in the area of migration and asylum

Researchers warn that rule of law backsliding has the effect of shrinking space for NGOs and in particular those who assist refugees and migrants (Westerby, 2018a; Szuleka, 2018; Carrera et al., 2018a and 2018b). In some countries, NGOs experience increasing difficulties in promoting European values and are targeted by the governing majority and other fundamental democratic actors, such as the judiciary or independent media.

Recent studies on using EU funds in the area of migration and asylum (Šelih, Bond and Dolan, 2017; Szuleka, 2017; Westerby, 2018a and 2018b; Carrera et al., 2018a and 2018b) have therefore recommended **tying funding for governments to their respect of the rule of law** and the values embodied under Article 2 of the TEU such as human dignity, freedom, democracy, equality and respect for human rights. The broader rule of law debate proposes the establishment of **an EU Rule of Law Mechanism**, to be instead operated by an independent committee of experts, with inputs from international and regional human rights bodies, European agencies and civil society (Bárd et al., 2016).

Another proposal has suggested the establishment of a regular rule of law assessment in the Member States to be carried out by the EU's Fundamental Rights Agency, with input from the Council of Europe and civil society (Šelih, Bond and Dolan, 2017). In both cases, if the assessment shows breaches of the rule of law, the allocation of funds could be suspended until the state has put in place policy reforms in line with the values of the EU treaties (Bárd et al., 2016; Šelih, Bond and Dolan, 2017).

## 2.7 Direct financial support for NGOs and the monitoring of funding

Researchers have proposed that the European Union should provide more direct funding schemes for civil society in the area of migration and asylum across the EU (Szuleka, 2018; Westerby, 2018a; Carrera et al., 2019). For example, they have proposed a "**new financial mechanism** designed to provide financial support for civil society organisations working for human rights protection, rule of law and democracy" (Szuleka, 2018). The fund should not be dependent on national authorities and should cover those costs related to the activities undermined by the rule of law backsliding or political pressures such as monitoring, advocacy or strategic litigation. The European Parliament and Commission have been discussing the establishment of the European Values Fund and Strategic Litigation fund (European Commission, 2018a-j). Furthermore, via current and future AMIF National Programmes the EU "should empower civil society organisations to carry out their complementary role, including by allocating and distributing reasonable minimum percentages of programme funding to civil society organisations in the asylum and integration priority areas" (Westerby, 2018a).

### 3. Mapping the debate on solutions at EU level

#### 3.1 Revising the Facilitators Package, adopting guidelines and ensuring monitoring

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. 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., 2019). 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 empirical 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., 2019).

The complete revision of the Facilitators Package in the post-Lisbon framework, and not the mere rewording of it, is needed as "with the Treaty of Lisbon entering into force, and in particular, after its Protocol 36 on 'Transitional Provisions' (Title VII, Article 10), came to an end in December 2014, the Commission had new possibilities to inject 'more EU' within the former 'third pillar' legislation, meaning that new legislation in criminal matters would move beyond 'minimum approximation' towards 'more harmonisation'. (Carrera, Hernanz and Parkin, 2013, in Carrera et al., 2018:12).

In light of an increasing criminalisation of humanitarian actors, the **European Parliament** (2018a) adopted a resolution on 5 July 2018 to end the criminalisation and punishment of organisations and individuals who assist migrants in need. The European Parliament (2018a) expressed "concern at the unintended consequences of the Facilitators Package on citi-

zens providing humanitarian assistance to migrants and on the social cohesion of the receiving society as a whole". The resolution sets out that acts of humanitarian assistance should not be criminalised, as required by the international standards of the UN Protocol against the Smuggling of Migrants. It expressly emphasises that organisations and individuals who assist migrants play a crucial role in supporting national competent authorities and ensuring that humanitarian assistance is provided to migrants in need.

Nevertheless, the unit responsible within the **European Commission's** Directorate-General for Migration and Home Affairs continues to argue in line with its REFIT conclusions (European Commission, 2017) that there is not enough evidence to reform the Facilitation Package, or that reported cases are not sufficiently related to the transposition of the Facilitators Package, but are related to the wider political context and it is therefore argued that a change of the Directive would not prevent the criminalisation of civil society actors (European Parliament, Committee of Civil Liberties Justice and Home Affairs, 2018).

### 3.1.1 Adoption of guidelines

In addition, the legislative reform needed to come with accompanying practical guidance on what is (not) a crime on migrant smuggling in compliance with the EU Charter of Fundamental Rights and international law. Clear guidelines could also help to develop more rigorous monitoring and increasing financial and political accountability are also considered as necessary steps to tackle the criminalisation of solidarity (Carrera et al., 2018b).

**The European Parliament** (2018a) has urged the "Commission to **adopt guidelines** for Member States, which clarify those forms of facilitation that should not be criminalised, in order to ensure clarity and uniformity in the implementation of the current *acquis*, including Article 1(1)(b) and 1(2) of the Facilitation Directive", thus covering not only the facilitation of entry and transit (Article 1(1) (a) of the Directive) but also the facilitation of residence and stay; and the humanitarian exemption clause.

**The Commission** seems to be supportive of this policy option. For example, European Commission in response to the letter from Race International Institute, noted 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" (European Commission, 2018).

By contrast, the policy recommendation to put firewalls in place between civil society and law enforcement does not seem to find strong political support in **the European Commission** with the exception of Directorate-General for Regional and Urban Policy (DG REGIO) (2018). As mentioned in the Discussion Brief on "Social Inclusion of Undocumented Migrants" (Vosyliūtė and Joki, 2018), the **Council of Europe, European Commission against Racism and Intolerance** (ECRI) (2016) recommended European governments to implement firewalls between the service providers and immigration controls. The ECRI recommendations urge

governments to “ensure that no public or private bodies providing services in the fields of education, health care, housing, social security and assistance, labour protection and justice are under reporting duties for immigration control and enforcement purposes” (ECRI, 2016).

### 3.1.2 Independent monitoring of implementation of the Facilitators Package

The European Parliament has called for “**adequate systems to monitor** the enforcement and effective practical application of the Facilitators Package, by collecting and recording annually information about the number of people arrested for facilitation at the border and inland, the number of judicial proceedings initiated, the number of convictions, along with information on how sentences are determined, and reasons for discontinuing an investigation” (European Parliament, 2018a). This could set a blueprint on what kind of monitoring the European Commission should do, although it is different from the independent observatory that should be set up by academia and civil society.

In the closed-door meeting with academics and civil society stakeholders in May 2018, the European Commission proposed developing an inter-governmental **observatory of cases of criminalisation** within the infrastructure of the European Migration Network (EMN), where usually national Ministries of Interior or their selected agencies represent Member States.

### 3.2 Access to funding for NGOs assisting refugees and other migrants

The policy option to allocate minimum funding directly to CSOs has been explicitly supported by the European Parliament (2018b) and some MEPs have been active in following up a proposal to set up a strategic litigation fund (Youngs and Echague, 2017). However, the negotiation process for agreement on the new MFF was still ongoing at the time of writing this policy options brief.

### 3.3 Rule of Law Mechanism and funding conditionality

The policy option proposed linking and strengthening EU funds and the respect of rule of law is widely supported by the European Parliament (2018b) and the Commission (2018a; 2018b; 2018c).

In 2018, **the European Commission** (2018a) adopted the proposal for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. Moreover, the Commission's Reflection Paper on the Future of EU Finances, published on 28 June 2017, sets out that: “respect for the rule of law is important for European citizens, but also for business initiative, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union (European Commission, 2017b). There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget” (Halmai, 2018). The budget commissioner, Günther Öttinger, has also declared that EU funds could be dependent on the respect for the rule of law in the 2021-2027 EU budget ([Maurice, 2017](#)).

**The European Parliament** has stated in a resolution (2018b) that “recent developments in Hungary have led to a serious deterioration in the rule of law, democracy and fundamental rights, which is testing the EU’s ability to defend its founding values”. The resolution therefore called for: “the European Commission to strictly monitor the use of EU funds by the Hungarian Government”. In addition, on 17 January 2019, the European Parliament voted in favour of the Commission’s proposal to cut funds to EU countries that do not comply with the rule of law (Bayer, 2019).

## SECTION 3

### IDENTIFICATION AND MONITORING OF CASES<sup>3</sup>

#### 1. Introduction

This section reports **data and information concerning cases of** the so-called **criminalisation of solidarity**. Based on a monitoring exercise, this section relies on recent studies of the criminalisation of humanitarian assistance in Europe that examine cases of individuals prosecuted under anti-smuggling and immigration laws in the Member States (Open Democracy, 2019; Fekete et al., 2019; Carrera et al., 2018b; FRA, 2018).

This section begins the process of monitoring cases of criminalisation of solidarity in accordance with the main recommendations of the European Parliament (2018). The European Parliament released on 5 July 2018 a resolution calling on the European Commission to draft guidelines for Member States to prevent humanitarian assistance from being criminalised. More specifically, the guidelines requested to put in place a dedicated monitoring system on:

“the enforcement and effective practical application of the Facilitators Package, by collecting and recording annually information about the number of people arrested for facilitation at the border and inland, the number of judicial proceedings initiated, the number of convictions, along with information on how sentences are determined, and reasons for discontinuing an investigation”.

The identification and monitoring of cases is a first step towards the implementation of the policy option proposing a better monitoring framework of the EU Facilitators Package. NGOs (PICUM, 2017) and researchers (Vosyliūtė and Conte, 2019; Carrera et al., 2018; Carrera et al., 2016) have also been recommending the creation of **an independent observatory** to systematically monitor the respect of the fundamental rights of migrants and EU citizens that would be linked to the proposed EU Rule of Law Mechanism (Bárd et al., 2016).

#### 2. Methodology

Unlike previous reports, the present work only focuses **on formal investigations and prosecutions** carried out by national judicial authorities under anti-smuggling laws. The identification and monitoring of cases is strictly based on grounds falling under the **material scope of the Facilitation Directive** (facilitation of entry and transit, residence and stay). The legal terminology of “facilitating” the entrance of third-country citizens is however highly vague and its interpretation is left up to national judges who might extend the scope of application to

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<sup>3</sup> This section was written by Carmine Conte (MPG) in May 2019

a wide degree (Carrera et al., 2019; Carrera et al., 2018a; Carrera et al., 2018b). For instance, in the case of the ERCI volunteers Sarah Mardini and Sean Binder who were criminalised in Greece for providing humanitarian assistance to migrants, the gathering and transferring of information regarding refugee boats was considered as facilitating human smuggling.

Other forms of policing civil society including suspicion, disciplining, harassment and intimidation are beyond the scope of this monitoring exercise, although it is recognised that they are “unintended consequences of the Facilitators Package” (Carrera et al., 2018). This report also excludes other judicial cases based on terrorism-related offences or defamation as they are not related to the direct provision of humanitarian assistance to migrants and the material scope of the Facilitation Directive.

The scope of this section is therefore to take into account criminal prosecutions based on grounds of facilitating the entry, transit and residence of migrants in the Member States that affect EU citizens, third-country nationals and NGOs, regardless of the final outcome of the proceedings. By doing so, it seeks to systematise and update the existing research on the topic and provide **an initial overview** of those investigations and formal prosecutions since the adoption of the Facilitation Directive. This overview also considers some criminal proceedings based on ‘multiple grounds’. This category aims to include cases based on those grounds not included under the Facilitation Directive, such as money laundering, membership of a criminal organisation and sabotage, which have been sometimes made by judicial authorities against volunteers and individuals trying to assist migrants. Only when these grounds overlap with accusations based on the facilitation entry/transit or stay/residence, the relevant case has been validated for this data collection.

To this end, this exercise collected cases of formal prosecution and investigations on the following grounds:

- i. Crimes based on facilitation of entry and transit;**
- ii. Crimes based on facilitation of stay and residence;**
- iii. Crimes on multiple grounds** (e.g.: facilitation of entry and membership of a criminal organisation)

The case monitoring has been carried out through ReSOMA’s **collaborative and participatory process** involving several experts from NGOs, researchers and stakeholders. A ReSOMA transnational thematic feedback meeting brought together most expert stakeholders and researchers on criminalisation to review the policy options proposed to address issue, and to reflect on their feasibility and adaptability (cf. Section 2, Vosyliūtė and Conte, 2019). For instance, **lawyers** of NGOs and volunteers criminalised in Belgium, Italy and Greece have been in contact to better assess and validate cases of criminalisation of solidarity: Markella Papadouli (Europe Litigation Coordinator of the AIRE Centre), Alexis Deswaef (lawyer of Anouk Van Gestel, Belgian journalist prosecuted for hosting migrants), Paula Schmid Porras (lawyer who submitted a petition to PETI on behalf of PROEM-AID and Spanish firefighters),

Zacharias Kesses and Haris Petsikos (lawyers of two volunteers criminalised in Greece, Sean Binder and Sarah Mardini), Nicola Canestrini and Alessandro Gamberini (lawyers of IU-VENTA's crew members). **NGOs** including Are You Syrious?(AYS), Borderline Europe, Médecins Sans Frontières (MSF), Solidarity at Sea IUVENTA, Social Platform and PICUM also collaborated in the process of collecting and examining these cases, along with the main **researchers** (Sergio Carrera, CEPS/EUI - Lina Vosyliūtė, CEPS) and **academics** (Dr Jennifer Allsopp, SOAS University of London).

In addition, cases have been collected through the inputs of the national stakeholders working to promote **the European Citizens' Initiative** (ECI) "We are a welcoming Europe – let us help" and the experts who responded to **the ReSOMA survey** on the effects of anti-smuggling policy on civil society actors in Europe. The ECI mobilised more than 200 civil society organisations in Europe calling for ending criminalisation of humanitarian assistance and engaged citizens across Europe to reclaim the right to help migrants and refugees. The ReSOMA survey addressed 111 experts (higher education workers, social and legal professionals) on migration and the crackdown on migration-support NGOs who are part of the ReSOMA database.

Building on these findings, further **desk research** and **media monitoring** contributed to complete the identification and classification of the cases collected. In particular, this exercise was based on the case monitoring already carried out by Open Democracy (Nabert et al., 2019), the Institute of Race Relations (Fekete et al., 2019; Fekete et al., 2017) and the update 2018 study of CEPS on the Facilitation Directive requested by the PETI committee (Carrera et al., 2018b).

**Open Democracy** published an article which "compiles a list of more than 250 people across 14 countries who have been arrested, charged or investigated under a range of laws over the last five years for supporting migrants" (Nabert et al., 2019). The dataset captures not only the most shocking cases of criminalisation, but also many insidious cases of intimidation and harassment on many other grounds. To give a few examples, cases of individuals investigated for disrupting migrant deportations and documenting or challenging abuse against migrants have been included in Open Democracy's analysis. These types of cases fall beyond the scope of this monitoring exercise and therefore have not been counted. Only cases related to the facilitation of entry or stay of migrants have been considered and validated for the purpose of this section.

The **Institute of Race Relations (IRR)** published a comprehensive report which focuses on the shrinking of space for humanitarian activism at Europe's borders (Fekete et al., 2017). The report includes 26 case studies, involving 45 individuals prosecuted under anti-smuggling and/or immigration laws since September 2015. Most of the cases collected by the IRR have been validated and included in this section as falling under the scope of this monitoring exercise, except for case studies identified outside the EU 28 Member States. In the update study on 'crimes of solidarity', IRR looked at 17 cases involving 99 people who have been investigated and/or prosecuted in 2018 and the first three months of 2019 (Fekete et al.,

2019). It is worth noting that new offences have been added to the charge sheet, such as endangering maritime and airport security (Fekete et al., 2019). These crimes have not been considered relevant for the purpose of this monitoring exercise because they fall beyond the material scope of the Facilitation Directive. By contrast, when these cases overlap with the grounds of “facilitating the entry/transit or stay/residence”, they have been included in our analysis. For instance, the case of Sean Binder and Sarah Mardini who have been accused not only of smuggling, but also of espionage, forgery and membership of a criminal organisation, has been included in our monitoring exercise.

This section also builds on the cases of persecution examined by the **CEPS** study “Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update” (Carrera et al., 2018b). It takes stock of and analyses the latest developments since 2016 (Carrera et al., 2016). To do so, the concept of ‘policing humanitarianism’ is used “to describe not only cases of formal prosecution and sentencing in criminal justice procedures, but also wider dynamics of suspicion, intimidation, harassment and disciplinary actions in five selected Member States – Belgium, France, Greece, Hungary and Italy” (Carrera et al., 2018). Our monitoring exercise is instead limited to cases of formal prosecutions and take into account only investigations and prosecution based on the grounds of the Facilitation Directive.

To sum up, the collection of cases is based on:

- I. **the reports of EU agencies, researchers and NGOs (Open Democracy, 2019; Fekete et al., 2019; Carrera et al., 2018b; FRA, 2018; Fekete et al., 2017);**
- II. **media and journal articles;**
- III. **the ReSOMA survey on the effects of anti-smuggling policy on civil society actors in Europe (36 respondents);**
- IV. **the ReSOMA transnational feedback meetings;**
- V. **the national stakeholders’ inputs of the European Citizens’ Initiative (ECI) “We are a welcoming Europe – let us help!”;**

This wide variety of sources collected a significant number of cases of criminalisation of solidarity in **EU Member States**. The section mainly focuses on the findings referring to the **period 2015-April 2019** when most of cases have been identified. This collection of cases includes **NGOs, volunteers** and **individuals** who have been formally criminalised for helping and assisting migrants. The broad category of ‘individuals’ aims to consider not only volunteers and humanitarian actors, but also ordinary citizens seeking to reunite with their family members or facilitating migrants to cross the border without gaining financial benefit of unjust enrichment.

The main findings regarding the formal cases of prosecution against NGOs’ volunteers and individuals collected so far will now be presented.

### 3. Preliminary main findings on prosecutions

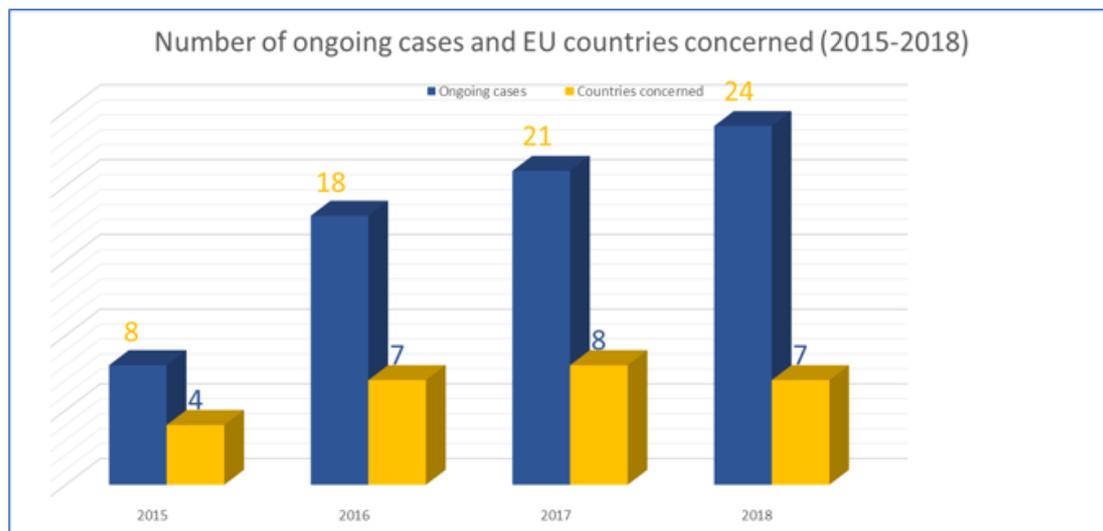
The cases identified in this section represent a wide scale of different experiences and challenges with regard to the divergent implementation of anti-smuggling policies that can be found in the Union. Cases emerged in at least **11 countries: Belgium, Croatia, Denmark, France, Germany, Greece, Italy, the Netherlands, Spain, Sweden and the United Kingdom**. These countries are at the forefront of migration flows, although in different ways. It may be said that Croatia, Greece, Italy and Spain more recently developed into destinations for people seeking international protection and represent the external borders of Europe. Belgium, Denmark, France, Germany, the Netherlands, Sweden and the UK are instead countries of final destination which have often adopted restrictive policies in terms of internal border managements. This monitoring exercise revealed a **lack of data** on cases of criminalisation of solidarity in Eastern European countries and the need of further research in this area.

The fundamental finding of this section is that **cases** involving individuals, volunteers and NGOs helping migrants seem to have **greatly increased** since the 'refugee crisis' in 2015, despite the lower numbers of arrivals of migrants in the EU in the last years. Most experts and stakeholders consulted through the ReSOMA platform also confirmed that criminalisation of humanitarian assistance escalated in the Member States since 2015.

Moreover, the results of this monitoring exercise demonstrate that **cases at national level are linked to the divergent implementation of EU law**, as a result of the lack of a binding 'humanitarian exemption' and a 'financial gain' requirement to trigger the crime of facilitating the entry of migrants under the Facilitation Directive. The first ReSOMA Discussion Policy Brief shows that the criminal prosecution of individuals and NGOs providing humanitarian assistance to migrants is mainly related to the implementation and interpretation of the Facilitation Directive at national level (cf. Section 1, Vosyliūtė and Conte, 2018). Criminal cases have therefore the effect of discouraging individuals and NGOs from pursuing their mission and assisting migrants (Carrera et al., 2018).

- **When did criminalisation of solidarity happen?**

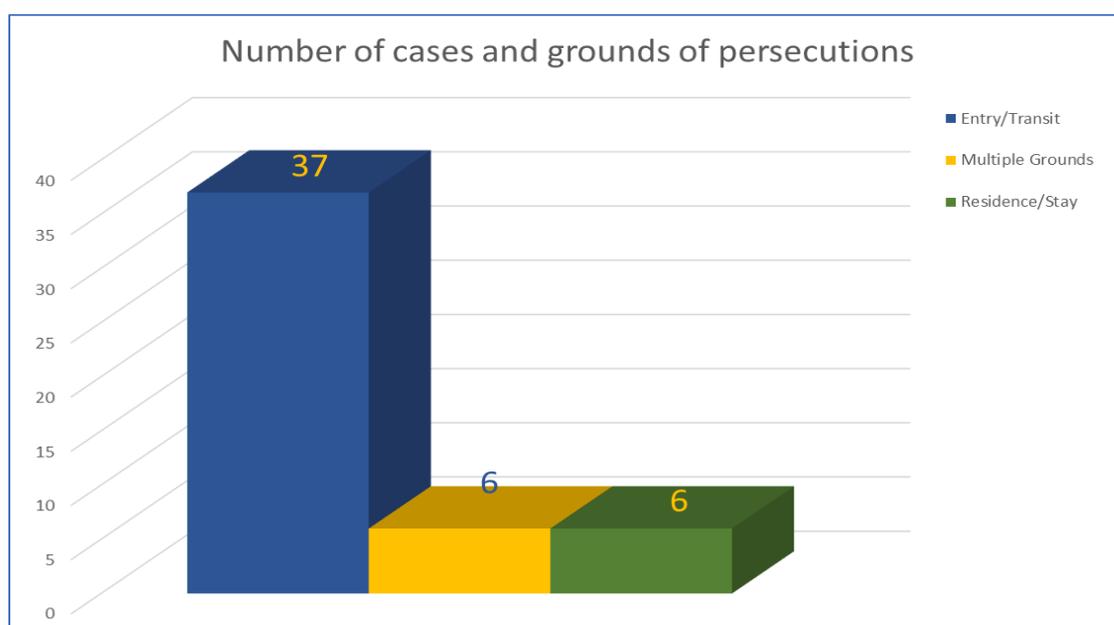
The number of cases exponentially increased after **2015** when only 8 cases were taking place. The peak of cases has been recorded in **2018** with a total of 24 cases involving 104 individuals in seven Member States, while in the first quarter of 2019 there are still 15 cases ongoing with 79 individuals and volunteers involved in six countries. By contrast, in **2016** and **2017**, 39 different cases with 96 individuals have been registered. The average duration of the cases of criminalisation of solidarity is **2** years in the Member States.



- **How many cases?**

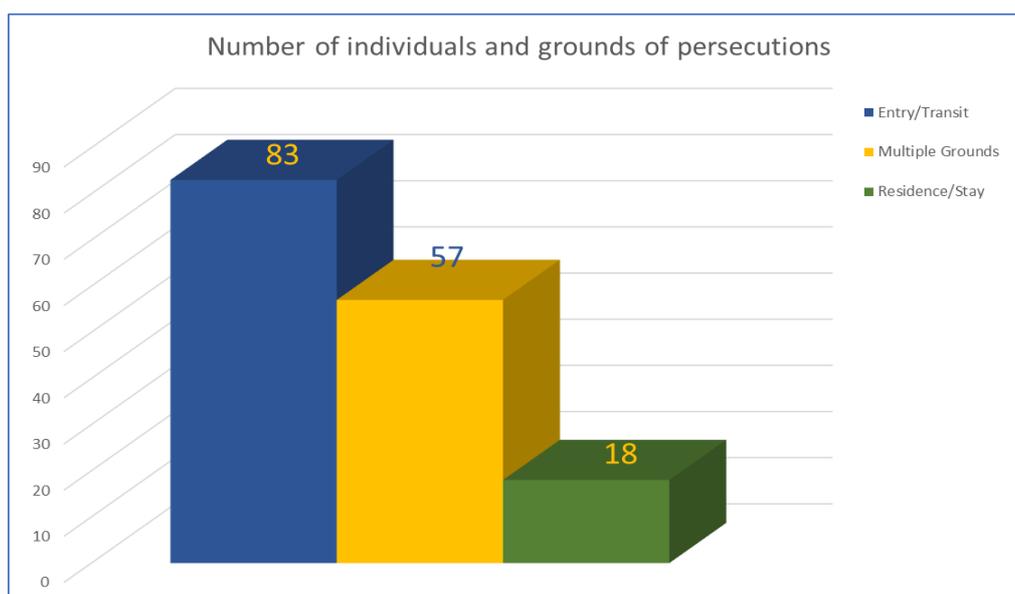
This research has identified at least **49 cases of investigation and criminal prosecution** in 11 Member States: Belgium, Croatia, Denmark, France, Germany, Greece, Italy, the Netherlands, Spain, Sweden and the UK. The identification and monitoring exercise finds that:

- I. **37 cases** are based **on the facilitation of entry or transit of migrants;**
- II. **6 cases on the facilitation of residence or stay;**
- III. **6 cases are based on multiple grounds**, in 5 cases, the charges on human smuggling are aggravated by the simultaneous accusation on other grounds such as money laundering, membership of a criminal organisation, sabotage or improper use of documentation. In 1 case, the accusations are based on both the facilitation of entry and residence of migrants.



## How many individuals?

This monitoring exercise finds that at least **158 of individuals** between 2015 and 2019 have been investigated or formally prosecuted on grounds of smuggling and other grounds not included under the Facilitation Directive, such as money laundering, membership of a criminal organisation and sabotage. Out of this group, **83** individuals are exclusively investigated or prosecuted on grounds of facilitating the entry or transit of migrants, while **18** persons for facilitating the stay or residence. **57** persons are prosecuted simultaneously on both the grounds of the facilitation of entry and stay of migrants and other grounds including membership of a criminal organisation, sabotage or waste management contracts.



- **How many NGOs have been involved?**

This initial case monitoring has identified at least **16 NGOs and associations** which have been affected by the formal criminalisation or investigation of their volunteers: Association nationale d'assistance aux frontières pour les étrangers (Anafé), Are you Syrious (AYS), Calais Action, Calais Solidarité, Jugend Rettet, Habitat et Citoyenneté, Open Arms, Médecins Sans Frontières (MSF), Mediterraenea Saving Humans, Plateforme pour le Service Citoyen,

PROEM-AID, Team Humanity, Emergency Response Centre International's (ERCI), Roya Citoyenne, Sea Watch, Walking and Borders NGO.

The majority of NGOs' members has been accused in France, Greece and Italy, contributing to a general climate of mistrust and suspicion towards civil society. Most of the NGOs performing SAR were forced to stop their humanitarian activities and still cannot guarantee a permanent presence at the sea (Carrera et al., 2018). For instance, in May 2017, the rescue ship IUVENTA was withdrawn from the SAR zone by the Coast Guard Maritime Rescue Coordination Centre (MRCC) in Rome despite an urgent need for intervention while multiple migrant boats were in distress. Notwithstanding a counter investigation and two appeals submitted against the seizure of the vessel, the IUVENTA remains impounded in the port of Trapani as confirmed by the Italy's Supreme Court in April 2018.

- **Where happened and on which grounds? Trends in each country**

In **Belgium**, 4 individuals have been criminalised for hosting migrants at their home with the formal accusation of human smuggling and membership of a criminal international organisation (Carrera et al., 2018). The Court finally acquitted the defendants accepting the defence that they acted out of humanitarian reasons. This judgment has been recently appealed. This case also involved 8 other migrants who were accused of being part of a criminal organisation for assisting others in organising their travel. One defendant was ordered to be arrested and others seven people, who are undocumented migrants, were given suspended sentences of between 12 and 42 months.

In **Croatia**, 1 volunteer of the NGO "Are You Syrious" was convicted for committing a misdemeanour act defined by Article 43 of the Foreigners Act that prohibits providing assistance to a third-country national (Fekete et al., 2019; Open Democracy, 2019; Carrera et al., 2018). The charges stated that he has helped third-country nationals in illegally crossing the Croatian-Serbian border. In early September 2018, the volunteer was sentenced for "unconscious negligence" when helping the family to cross the border illegally. The amendments to the Foreigners Act adopted at the beginning of 2017 state that only humanitarian organisations should not be sanctioned because of helping migrants. However, other organisations and individuals/volunteers still risk being prosecuted and convicted.

In **Denmark**, 4 cases involving 9 individuals took place as a response to the increasing flows of asylum seekers who moved across Denmark to Sweden. Three cases are based on the grounds of facilitating the entry of migrants, while the other one is related to facilitation of illegal residence. Most of the charges are under section 59(8) of the Danish Alien Act, which criminalises 'assisting an alien with travelling into or through the country or ... with an unlawful stay in the country'. Three individuals were charged with facilitating illegal transit, convicted and fined (Fekete et al., 2017). By contrast, the other two cases involving 5 persons were dismissed because of the lack of evidences.

In **France**, 31 individuals have been investigated or prosecuted on grounds of facilitating the entry, transit and residence of migrants. Among these, several convictions have been eventually issued. For instance, an English volunteer, despite the smuggling charges against

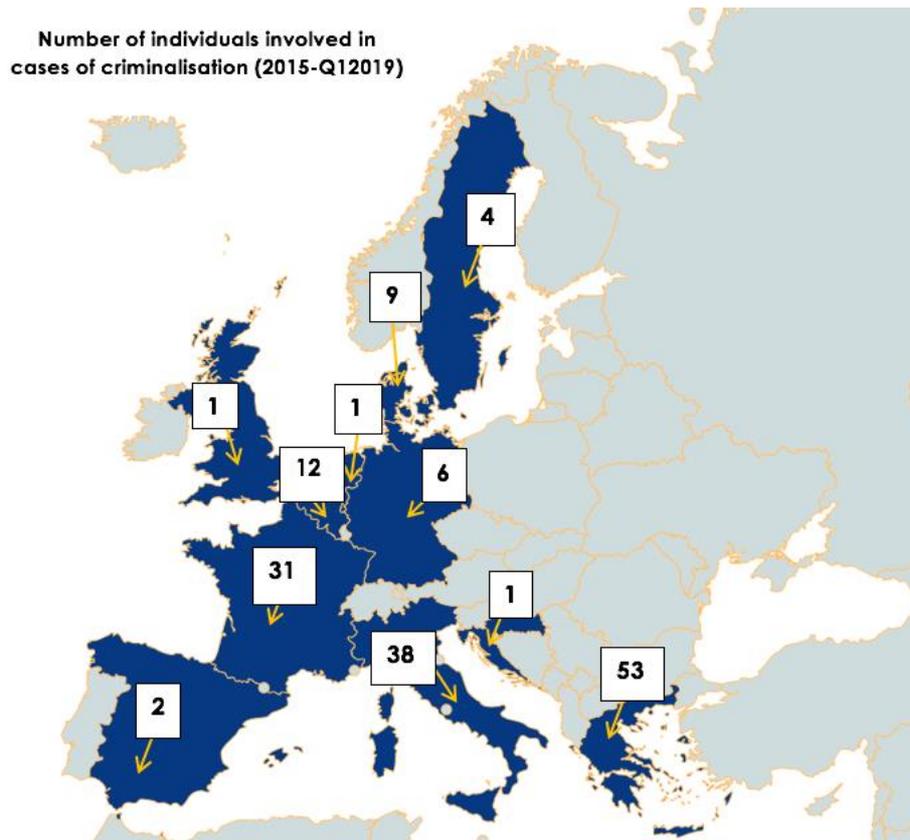
him were dropped, was sentenced for the less grievous crime of endangerment and received a suspended fine. In one case related to the conviction of an individual for smuggling migrants across the Franco-Italian border, the Constitutional Council ruled “the principle of fraternity confers the freedom to help others, for humanitarian purposes, regardless of the legality of their presence on national territory”. The Court referred to the assistance to the transit of an irregularly migrant motivated by humanitarian purpose (ECRE, 2018). However, in December 2018, 7 people have been finally convicted for facilitating the entry into France of refugees during a demonstration in the spring (Fekete et al., 2019). 5 persons were sentenced to 6 months, 1 person was sentenced to 12 months of imprisonment, 1 person to 12 months of imprisonment. On March 13, 2019, 7 volunteers of the association ‘Roya Citoyenne’ were taken into custody and accused of facilitating the entry and stay of people in an irregular situation into France (Open Democracy, 2019).

In **Germany**, 6 individuals have been prosecuted for facilitating the illegal entry of migrants. 5 pastors in Rhineland-Palatinate hosting refugees from Sudan were searched and charged for aiding and abetting illegal residence (Open Democracy, 2019). A German MP has been accused of facilitating the illegal entry of a migrant, but the charge was dropped due to a lack of evidence (Fekete et al., 2017).

In **Greece**, 53 people have been criminalised for helping migrants. In March 2017, a German pensioner has been convicted to a prison sentence of 3,5 years for migrant smuggling (FRA, 2018). A French citizen was arrested in August 2015 while trying to smuggle out his Syrian family in Greece. He was sentenced to seven years in prison by the court of first instance and he has now been acquitted by the Greek Tribunal of Patras in March 2019. 2 young volunteers are still under investigation on grounds of human smuggling, money laundering and sabotage. They were accused of joining the NGO Emergency Response Centre International (ERCI), described as a criminal organisation with a perpetual action group of more than three persons, with internal and hierarchical structure, acting with intent of facilitating entry of refugees flows from Turkey to the Northeast Aegean Islands (Lesvos and Samos) with illegal methods and procedures. ERCI was accused of money laundering because, despite its non-profit status, it accepted donations of physical objects and payments by private individuals or other collective bodies. In addition, they were accused of not disclosing information regarding the departures of the refugees to the relevant Greek authorities (sabotage). This investigation started in 2018 and involves a total of 37 individuals. In April 2019, the prosecutor decided to press extra charges including fraud.

In **Italy**, 38 individuals and NGO volunteers have been investigated or prosecuted on grounds of abetting illegal migration or colluding with smugglers. To give a few examples, the mayor of Riace has been charged by the preliminary investigative judge with aiding and abetting clandestine immigration and illegal acts in relation to waste management contract. Four ongoing investigations involve several members of NGOs, such as Mediterranean, MSF, Jugend Rettet and Open Arms. However, in May 2019, the prosecutor of Catania requested the dismissal of the case involving Open Arms for accusations related to abetting illegal immigration. In two other cases involving a French volunteer and the crew members

of the boat Golfo Azzuro (NGO Proactiva Open Arms), the humanitarian exception has been expressly recognised by Italian courts to acquit the defendants.



In the **Netherlands**, 1 individual and 1 NGO have now been sued for wrongful death, incitement and facilitation of entry of migrants (Article 197a Penal Code). The National Public Prosecutor's Office announced that the case was 'being processed'.

In **Spain**, 1 individual has been accused of abetting illegal migration by the National Police's Central Squad of Illegal Immigration Networks and False Documents.

In 2017 the prosecutor of the Audiencia Nacional closed the case because of lack of evidences, but the files were sent to the Moroccan judicial authorities. In 2019, the charges have been dropped in Morocco (Fekete et al., 2019). In addition, a freelance photographer was arrested and accused of smuggling immigrants across the border from Morocco into Melilla, but immediately released.

In **Sweden**, 4 individuals have been charged for facilitating the entry of migrants. A journalist and two other Sveriges Television (SVT) employees were arrested and charged with facilitating illegal entry after helping a 15-year-old Syrian from Greece to Sweden in spring 2014 (Fekete et al., 2017).

In the **UK**, 1 volunteer of a migrant support group was arrested and convicted for smuggling an Albanian woman and her two sons to the UK. This person was charged with attempting to facilitate illegal immigration. The Court gave a 14-month suspended sentence despite the humanitarian motive (Fekete et al., 2017).

- **How many convictions?**

This initial case monitoring has already identified **17 cases** leading to the **conviction of 30 citizens** acting on humanitarian or family reunification purposes in **6 Member States** on grounds of migrant smuggling before a court of first or second instance. It is worth noting that most of the convictions have been handed down in **France** with the involvement of at least 19 people including **human rights defenders, volunteers and ordinary citizens**.

- 1) In **Croatia**, a volunteer of Are You Serious (AYS) was charged for providing humanitarian assistance to a third-country national and helping him in illegally crossing the Croatian-Serbian border (Carrera et al., 2018).
- 2) In **Denmark**, 3 private citizens who acted for humanitarian reasons and helped asylum seekers to cross the border have been sentenced on grounds of human smuggling (Fekete et al., 2017).
- 3) In **France**, a citizen was arrested and sentenced to seven years in prison for smuggling out his Syrian family in Greece.
- 4) In France, an academic acting on humanitarian purposes, was handed a prison sentence for aiding Eritrean migrants to enter into Italy from France.
- 5) A French farmer was convicted in 2017 and given a suspended fine for assisting entry of migrants across the Italian/French border. He acted on humanitarian grounds and provided migrants with food, shelter and protection.
- 6) In 2017, a former English soldier volunteering at Calais, initially accused of human smuggling, was found guilty of endangering a child in France. He hid a four-year-old Afghan child in his van to reunite him with their relatives in the UK. His conduct was motivated by humanitarian purposes.
- 7) In 2018, the so-called Briançon seven, human rights defenders, were sentenced on grounds of assisting the entry into the territory of a person in an irregular situation (Carrera et al., 2018). They participated in a demonstration and crossed the Italian/French border with illegal migrants. They acted on humanitarian grounds.
- 8) A volunteer member of 'Anafé', the "Association nationale d'assistance aux frontières pour les étrangers", has been sentenced by the Aix-en-Provence Court of Appeal to a fine of 3,000 euros for "helping the entry of a foreigner into France" (Open Democracy, 2019).
- 9) A 19-year-old French citizen was convicted in October 2017 and given a three-month suspended prison sentence. In 2019, the Aix-en-Provence Court of Appeal reduced the sentence to two months (Open Democracy, 2019).
- 10) 4 members of the 'Roya Citoyenne' collective were condemned to a fine of 800 euro for the offences of entry and residence person in an irregular situation. They helped six young migrants find shelter in the winter (Open Democracy, 2019).
- 11) An Italian woman was sentenced by the Court of Appeal of Aix-En-Provence to six months in prison for helping eight migrants to cross the border from Ventimiglia to Menton (Open Democracy, 2019).
- 12) A British volunteer of 'Calais Action' and 'Calais Solidarité' was sentenced by the Rouen Court of Appeal to one year in prison, including nine months suspended, for trying to smuggle a Syrian teenager into England (Open Democracy, 2019).

- 13) A 72-year-old woman, activist of the association 'Habitat', was sentenced on December 2015 to 1500 euros fine by the court of Grasse for facilitating the stay and circulation of two Eritreans in an irregular situation.
- 14) In **Greece**, on November 2016, a Spanish unionist, received by a court in Athens a suspended sentence of 17 months' imprisonment. She tried for humanitarian reasons to help a 17-year-old Kurdish refugee leave Greece.
- 15) In **Sweden**, 3 individuals working for the SVT were found guilty of facilitating illegal entry of a 15-year-old Syrian from Greece to Sweden in 2014 (Fekete et al., 2017). They received suspended sentences despite the court accepted that the motive was humanitarian. In December 2018, the Supreme Court reduced the sentence from two months' imprisonment to one month.
- 16) A person was convicted in 2016 on grounds of facilitating illegal entry of a family with two children from Denmark to Sweden. This person was motivated by humanitarian reasons (Fekete et al., 2017).
- 17) In the **UK**, a volunteer trying to smuggle an Albanian woman and her two sons to the UK was charged with attempting to facilitate illegal immigration. The volunteer was convicted in March 2017, although the judge accepted that she acted for humanitarian reasons (Fekete et al., 2017).

## Key findings

### Have cases of criminalisation solidarity been increasing since the 2015?

- ✓ Yes, this data collection confirms that since the emergence of the "refugee crisis", there has been an **escalation of judicial prosecutions and investigations** against individuals on grounds related to the Facilitation Directive in the Member States, especially in France, Italy and Greece.
- ✓ The **increase in the number of cases has continued despite the nearly 90% decrease of irregular arrivals** in the EU in 2018.
- ✓ Target of criminalisation are mostly **volunteers, human rights defenders, crew members of boats involved in search and rescue operations**, but also **ordinary citizens, family members, journalists, mayors and religious leaders**.

### Are these cases related to the legal gaps identified under the Facilitation Directive?

- ✓ Yes, the wide majority of investigation and formal prosecution is related to the facilitation of **entry** or **transit** of migrants in the Member States, while a few cases are related to the facilitation of stay or residence and other grounds.
- ✓ The citizens or volunteers involved in these cases primarily acted on **humanitarian grounds or without the intent to gain a financial profit**. As broadly discussed in the ReSOMA briefs, EU law recognises to Member States a wide margin of appreciation to decide what is the base crime of migrant smuggling (Carrera et al., 2018; Vosyliūtė and Conte, 2018). Against this background, it may be argued that the gaps concerning the EU legal framework contribute to facilitate the development of this phenomenon.

## SECTION 4

### CONCLUSIONS AND RECOMMENDATIONS<sup>4</sup>

#### **Crackdown on NGO's assisting refugees and other migrants: lessons learned and policy recommendations**

The initial ReSOMA Discussion Brief on the Crackdown on NGOs assisting refugees and other migrants has elaborated on the existing research substantiating the trends and controversies of increasing policing and criminalisation of civil society actors that are assisting refugees and asylum seekers at the EU's borders and in the spaces of transit and/or residence (Vosyliūtė and Conte, 2018; see Section 1 of this report for the summary of findings).

The subsequent Policy Options Brief has further mapped the debate at the European level and evaluated the policy alternatives against the evidence provided by academia, civil society, European institutions and agencies, international and regional human rights bodies and standard setting institutions (Vosyliūtė and Conte 2019, see Section 2 of this report for the summary findings). The Policy Options Brief was enriched with insights from the ReSOMA Transnational feedback meeting (ReSOMA, 2018), and Task Force (ReSOMA, 2019). On the basis of this analysis the following key policy options were analysed:

1. Revision of the Facilitators Package introducing 'financial or other material benefit' requirement so as to narrow the definition of the crime of migrant smuggling;
2. Mandatory exemption of humanitarian actors from prosecution in the Facilitators Package and related guidelines;
3. Better separation of law enforcement and civil society mandates by introducing the principle of 'firewalls';
4. Improving monitoring of implementation of the Facilitators Package including by establishing an independent observatory, that could be linked with the proposed Rule of Law Mechanism;
5. Strengthening civil society across the EU via dedicated EU funding, with particular measures in those countries experiencing rule of law backsliding, as foreseen in the European Values Mechanism.

One of the policy options for better monitoring has been further explored by carrying out a quantitative overview of increasing criminal prosecutions of humanitarian actors (Conte, 2019, see Section 3 for the full version of this paper). The dedicated quantitative overview indicates that number of civil society employees and volunteers being subjected to criminal prosecutions has increased tenfold – from 10 accused persons in 2015 to 104 persons in 2018.

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<sup>4</sup> This section was written by Lina Vosyliūtė (CEPS) in May 2019

As of May 2019, 79 volunteers had already been accused or prosecuted for migrant smuggling, and the numbers are likely to increase further. This constant increase in the number of prosecutions of civil society actors occurred during a period when detections of irregular migrants decreased almost four times from 2.2 million in 2015 to 0.6 million in 2017 (Eurostat [migr\_eipre ], 2019), as a significant share of them were recognised as people in need of international or subsidiary protection, while others, though not satisfying the criteria for protection, cannot be returned in line with principle of *non-refoulement*.

This section summarises the lessons learned during the first year of the ReSOMA project on the crackdown on NGOs. Subsequently, it puts forward policy approaches to be explored further in order to return responsibility to EU level institutions and agencies. In addition to the general obligation to promote fundamental rights, the brief calls for a deeper analysis of EU citizens' right to good governance, on EU responsibilities for human rights defenders and on the protection of humanitarian space inside the EU. Finally, the section suggests policy recommendations to be followed up by EU and national policymakers, EU and national law enforcement agencies, international organisations, civil society and other stakeholders.

## Lessons learned from academic research

Academia has framed the issue as 'policing humanitarianism', 'criminalisation of solidarity', 'shrinking civil society spaces', 'blaming the rescuers' and finally 'humanitarian smuggling', as they have focused on distinctive aspects of the phenomenon to which we broadly refer in the ReSOMA project as the 'crackdown on NGOs (and individuals) that are assisting refugees and other migrants'. An increasing number of academics are focusing on these issues and providing a complementary narrative, which helps to understand the complexity of the phenomenon better. Such complementary narratives are hinting at a wide range of underlying mechanisms that can be and should be tackled to prevent the crackdown on NGOs.

'**Policing humanitarianism**' (Carrera et al., 2019; Carrera et al., 2018a; Carrera et al., 2018b; Carrera et al., 2017; Carrera et al., 2016) has provided an insight into broader modes of policing, starting from suspicion and escalating via intimidation and harassment, through disciplinary actions to fully fledged criminal prosecutions on the grounds of migrant smuggling. This helps to explain how criminal justice tools and in particular, preventive policing methods are misused to track and infringe upon free civil society space. The EU Facilitators Package, that is framed as both a criminal justice and migration management tool has therefore not resolved these tensions, but simply left a broad margin of appreciation to Member States. This legislative act and national implementation has been subsequently weaponised against civil society actors that assist refugees and other migrants.

The 'policing humanitarianism' approach helps to analyse roles and responsibilities with, as a starting point, both European and national 'political masters' – European and national agencies that coordinate coast guards, border guards, police officers, prosecutors and independent judges. This approach explores potential avenues for improving **democratic accountability and oversight institutions** and calls for analysis of the **right of EU citizens to good administration** as well as a clear separation of criminal justice, migration management and

civil society mandates, not only reactively – when criminalisation happens, but also proactively, when signs of ‘policing’ start to become visible. This approach argues, that once civil society actors are criminalised, it is often too late to reverse a process that leads to mistrust in civil society, in criminal justice systems and a broader polarisation of societies.

‘**Criminalisation of solidarity**’ or ‘**Délits de solidarité**’ (Allsopp, 2012; Ryngbeck, 2015; Allsopp, 2017; Fekete, 2009; Fekete et al., 2017; Fekete, 2018; Fekete et al., 2019) links the attacks against NGOs with structural racism against migrants and the broader phenomenon of ‘criminalisation of migration’ (Provera, 2015). The authors pay attention to racist and xenophobic rhetoric and attitudes promoted by high level politicians and state agencies. Subsequent creation of the ‘hostile environment’ as a political communication method to keep the migrants out by denying their human rights and thus in turn, punishing those who attempt to act ‘in solidarity’. Civil society, and also local authorities and private business are discouraged from providing very basic services, starting from shelter and food and ending with those who attempt to uphold the right to life – search and rescue or anti-deportation activists. Such analysis calls for the protection of **human rights defenders** and basing long-term solutions on EU legal principles, such as non-discrimination and equality. It also highlights the need to assess how concepts of ‘nationalism’ and ‘borders’ are handled in political communication.

Another narrative is that of ‘**shrinking civil society space**’, in particular in the context of the rule of law backsliding, such as the situations in Hungary and Poland and beyond (Szuleka, 2018; Youngs and Echague, 2017). This approach helps to understand how critical civil society is being silenced through funding, access to clients, and/or openly attacked by high level politicians. Civil society actors are labelled as ‘enemies of the state’ for challenging human rights violations perpetrated by national authorities against refugees and migrants. Such pressures and attacks aim to limit more generally the critical civil society role in safeguarding the rule of law and democratic institutions that are acting in line with fundamental rights. This approach hints at the need to resolve the Copenhagen Dilemma, the EU’s and international organisations’ capabilities to monitor and interfere in a timely manner when there are signs of rule of law backsliding and to uphold civil society spaces (Bárd et al., 2016; Bárd and Carrera, 2017).

‘**Blaming the rescuers**’ or ‘blame-shifting’ to SAR NGOs has analysed the very particular case of civil society saving lives at sea, which has been re-framed as ‘pull factor’, as a ‘migrant taxi’, as conniving with the migrant smuggling business model and even as ‘migrant smugglers’ (Heller and Pezzani, 2017; Gkliati, 2016; Vosyliūtė, 2018; Carrera, 2018a).

Research on ‘**humanitarian smuggling**’ (Landry, 2016; Landry, 2017) and critical analysis of ‘migrant smuggling’ (Sanchez and Achilli, 2019; Reitano et al., 2018; Zhang et al., 2018; Micallef, 2017; Carrera and Guild, 2016) have revealed more complex and nuanced aspects of migrant smuggling, taking into consideration the personal and socio-economic situations of those labelled as smugglers. This narrative challenges the oversimplified narrative of ‘ruthless smugglers’ that need to be thwarted at any cost. The analysis brought forward cases where family members have facilitated irregular entries of their children, spouses, as well as

where friends and other individuals were acting out of compassion. This approach requires a thorough rethinking of what is (not) criminal in the 'area of migrant smuggling' and suggests that limited law enforcement resources could be more focussed on issues of high criminality through accepting that grey areas should be excluded.

### **Lessons learned from stakeholder responses**

European citizens have mobilised in showing solidarity with those who are accused of a similar kind of solidarity with refugees and other migrants. They have used their right to petition (Schmid Porras, 2017) and the European Citizens Initiative – “We are Welcoming Europe” calling on EU legislators to resolve the legal uncertainty in the current EU Facilitators Package. Petitioner, Paula Schmid Porras, who was also a lawyer for the PROEM-AID volunteers, has been calling for the mandatory exemption of humanitarian actors from criminalisation, which is currently under a ‘may’ clause and is optional for Member States (Schmid Porras, 2017). The European Citizens Initiative “We are Welcoming Europe” – that brought together more than 170 civil society organisations around its three calls for action – stated that “no one should be prosecuted or fined for offering humanitarian help or shelter”. While the ECI has been closed, the Petition remains open before the European Parliament’s Petitions Committee (European Parliament, 2018d). Moreover, the European Parliament has called on the European Commission to clarify the Facilitators Package and to prevent further criminalisation of humanitarian actors (European Parliament, 2018a). The LIBE Committee attempted to follow up on this call on several occasions, but did not receive any reassuring answers from the Commission (European Parliament, 2018c).

The EU’s Fundamental Rights Agency also raised concerns regarding the legal certainty and potential effects of this legislation (FRA, 2014; FRA, 2018). Similarly, UNODC (2017), recommended clarifying the basis for criminal intent, namely by stipulating material or other financial benefit. PICUM (2017), Social Platform (2016), Red Cross (2017) and others have expressed their concerns over the worsening situation of civil society actors defending human rights or providing humanitarian assistance. And many independent monitoring efforts have been launched by various civil society organisations: CIVICUS (2016), Civic Space Watch, PICUM’s website of testimonies (PICUM, 2017), International Race Relations Calendar Against Racism, and, most recently, the monitoring started by Open Democracy (2019). These complementary efforts have shown that the trend of criminalisation is on the increase and deserves serious legal, policy and operational responses. In addition, civil society, independent researchers, journalists and relevant agencies need to rely on EU funding in order to ensure the longevity of such monitoring efforts. The outcomes of such monitoring need to feed into a more robust overview having ‘teeth’ on how fundamental rights are protected within the EU via the proposed EU Rule of Law Mechanism (Bárd et al., 2016, Bárd and Carrera, 2017; Carrera et al., 2018b).

## Which approaches need to be explored further at EU level?

The lessons learned from academic research as well as civil society mobilisations and the contributions of international organisations illustrate the complexity of the phenomenon of 'crackdown on NGOs'. There are multiple underlying reasons behind it, stemming from national political agendas as well as from European political and operational priorities. Although, there is no single 'silver bullet' to resolve the 'crackdown on NGOs' at the EU level, EU institutions and agencies have to assume their responsibilities for impacts on fundamental rights in the areas of their competence. Legal, political, and operational approaches in the area of 'migrant smuggling' as well as the way the EU Facilitators Package is being interpreted and applied have been led by EU institutions and agencies.

The vagueness and legal uncertainty stemming from the EU Facilitators Package was one of the tools that enabled misguided prosecutions of civil society across the EU. A quantitative overview provides the evidence that from 2015 until May 2019, there were at least 49 cases where 158 individuals were accused on the grounds of facilitation of entry and/or stay (Conte, 2019). Saving lives and upholding human dignity by providing food, shelter, and access to justice, at the borders or zones of transit were slowly relabelled as facilitation of entry or/and stay (Carrera et al., 2018 a; Carrera et al., 2018 b; Carrera et al., 2019).

While in all these areas the EU is acting on the basis of the principle of subsidiarity in the implementation and monitoring of Directives, operational care often falls within and between the competence of EU institutions and national actors. Such an 'in between' situation often leads to 'shifting the responsibility' for inconvenient issues to national or local level, including for EU citizens' rights, human rights defenders and humanitarian actors filling in the gaps in protection.

ReSOMA research brings up three key areas where the EU should resume responsibility and adopt measures to keep civil society space free from interference during anti-migrant smuggling operations, and within the wider context of asylum, migration management and border controls:

- First, legal certainty on what is (not) a crime of migrant smuggling should be enshrined in the EU citizens' right to good administration – therefore the EU should not only change the legislation and provide accompanying guidelines, but also ensure rigorous monitoring of Member State inaction. This could be further supported by inputs from independent monitoring mechanisms;
- Second, the EU should step up responsibility to protect human rights defenders acting within the Member States, in particular when they are challenging EU or Member State policies and operations on the grounds of fundamental rights non-compliance;
- Third, the EU should recognise that humanitarian gaps emerge when it or its Member States are "overwhelmed, unable or unwilling to act" in meeting the basic needs of refugees and other migrants. Therefore, despite political priorities, humanitarian actors should be free from interference or risk of prosecution in filling in such gaps, until the EU and national authorities build the capability and/or find the political will to save lives and uphold human dignity.

The big picture requires EU institutions to step up to their responsibility for defending fundamental rights and the rule of law and ensuring transparent and democratic accountability for its policies and operations in tackling irregular migration, in light of the EU citizen's right to good governance and the obligation to respect, protect and promote human rights defenders, and to uphold humanitarian principles of neutrality and impartiality.

Moreover, EU funding should be used to strengthen critical and 'watchdog' civil society actors, in particular in the context of rule of law backsliding. At the same time, EU funding should not be channelled to governments and political parties that are acting in contravention of EU founding values.

The EU institutions should find the strength to rise above the forces of populism and right wing extremism, and to agree on a holistic and long-term strategy on migration. Such a long-term strategy should be based on the Tampere principles of fairness, solidarity, responsibility sharing and loyal cooperation, that are needed to address deficiencies within the Common European Asylum System and the remaining gaps and barriers in the area of legal migration in light of implementing the Global Compact on Migration and Global Compact on Refugees.

### **Detailed recommendations to EU level policy makers:**

On basis of the lessons learned and also on the basis of recommendations from various stakeholders the following policy options were analysed:

#### **Facilitators Package:**

1. Revisions needed:
  - Introduction of a 'financial or other material benefit' requirement for facilitation of entry and transit and 'unjust enrichment' for the facilitation of stay so as to narrow the definition of what is a crime of migrant smuggling in these situations. This change would bring EU legislation in line with UN standards in the area of migrant smuggling.
  - A mandatory exemption of humanitarian actors from prosecution under the Facilitators Package so as to clarify that the work of civil society in saving lives and providing other basic services upholding human dignity and other fundamental rights should never be criminalised.
  - Family members, friends and individual citizens acting out of compassion without any profit or unjust enrichment should also be exempted from criminalisation.
  - The Facilitators Package (Directive and old type of Framework Decision) needs to be translated into a single legislative act as in the case of human trafficking Directive and it should explicitly include fundamental rights clauses, including the protection of human rights defenders and the right of civil society and EU citizens to assist refugees and other migrants.
2. The legislative change needs to be accompanied by guidelines for the EU and national level judiciaries and prosecutors as well as law enforcement personnel, border and coast guards on how to respect, protect and promote the rights of human rights

- defenders, humanitarian actors, and individuals acting out of compassion. It should also provide guidance for law enforcement and judicial actors on how to approach and assess such cases on the basis of 'harm' and 'public interest' principles, as well as how to assess 'financial or other material benefit' and 'unjust enrichment'.
3. Better separation of law enforcement and civil society mandates by introducing the principle of 'firewalls'. This means that civil society actors should not be asked to gather and share personal and other data regarding the status of their clients when assisting refugees and other migrants. The mandate of various humanitarian actors also should not be instrumentalised in criminal investigations as it is against the principles of impartiality and neutrality.
  4. The European Commission should improve monitoring of implementation of a revised Facilitators Package including through the Commission's own policy guidance and operational tools.
  5. The Commission's own monitoring of this area and the FRA overview should be coupled with that of an independent observatory consisting of civil society and academia. Such an independent observatory could not only provide a statistical overview but also offer robust academic analysis of the phenomenon in different countries.
  6. Various improved monitoring efforts, and in particular this independent observatory, should be linked with the proposed, broader EU Rule of Law Mechanism, that still needs to be set up following calls from the Parliament to the EU Commission, in light of developments in Hungary, Poland and other Member States. Strengthening the oversight of EU Rule of Law, democratic institutions and fundamental rights via an independent and mandatory Rule of Law Mechanism is essential for ensuring civil society space, human rights defenders and humanitarian actors remain free from interference,.
  7. Strengthening independent civil society across the EU with the help of EU funding. Dedicated EU Rights and Values Programme should be aimed at strengthening the mandate of civil society in upholding fundamental rights in the area of migration and asylum. A dedicated litigation fund should make protection of human rights defenders and humanitarian actors a strategic priority. The EU should channel direct funding to civil society in the countries with rule of law backsliding, as foreseen in the European Values Mechanism.
  8. The European Commission should start infringement procedures against Member States that are not correctly transposing the revised Facilitators Package or end up criminalising humanitarian actors. This should also be considered as a strong indicator of a worsening situation regarding EU founding values in the Member State concerned.
  9. When there are strong signs that Member States are undertaking 'misguided prosecutions' against humanitarian actors, human rights defenders or other civil society actors for their acts of compassion and solidarity, the European Parliament should launch a parliamentary inquiry to investigate such claims on a political level and to halt such prosecutions.

10. The EU needs to ensure coherence between external and internal action and apply the tools produced for third countries internally. For example, the text of “Ensuring Protection - EU Guidelines on Human Rights Defenders” should be updated in line with the UN, CoE, OSCE standards and guidelines and made applicable to the protection of human rights within the EU.
11. The European Commission needs to appoint a High Level Special Representative for the status of Human Rights Defenders within Member States and acting upon the outcomes of the proposed EU Rule of Law Mechanism as well as submissions from independent dedicated monitoring bodies.
12. An EU High Level Consensus on Humanitarian Aid needs to be applied within the EU so as to keep the operational space for humanitarian actors free from interference.
13. The EU needs to address the remaining gaps in the humanitarian protection of refugees and other migrants on the high seas by replacing the Mare Nostrum operation with an EU proactive search and rescue mission.
14. The EU and its Member States need to address the underlying reasons for migrant smuggling, namely the lack of channels for orderly, safe and legal migration and also refugees and asylum seekers while respecting the basic rights of refugees and other migrants who arrived via spontaneous and irregular arrivals. The Global Compact on Migration and Global Compact on Refugees provides a new impetus for the EU to create a holistic and long-term migration and asylum policy.
15. EU agencies, and in particular Frontex, are increasingly becoming operational in investigating crimes of migrant smuggling and conducting border control surveillance. However, in the absence of a holistic approach on asylum and migration, gaps in humanitarian protection have emerged and civil society is upholding rights of refugees and other migrants. EU agencies therefore need to explicitly commit to respecting, protecting and promoting the right to defend human rights. For this purpose, the role of the Fundamental Rights Officer at Frontex needs to be strengthened as well as the mandate of the Frontex Civil Society Consultative forum. Similar accountability mechanisms need to be thought through in case Europol becomes more operational on the ground.
16. When EU agencies and/or national authorities and administrations misuse EU policies, tools, funding and operational measures to instigate suspicion, harassment, intimidation of civil society actors, the EU officials directly responsible must take measures to denounce such actions and to prevent the stigmatisation and marginalisation of human rights defenders, humanitarian and other civil society actors.
17. The EU and its agencies must respect, protect and promote fundamental rights in their respective areas of work. Fundamental rights must not be side-lined as a concern of DG Justice or the EU's Agency for Fundamental Rights, but mainstreamed and promoted across the different DGs and their agencies active in the area of Justice and Home Affairs.
18. When the EU institutions fail to provide good administration in this area, the European Ombudsperson should be given the competence to oversee such instances of maladministration at the EU institutions and agencies.

19. The European Court of Auditors should be given responsibility over EU institutions and operations for financial accountability and whether EU money are spent efficiently and effectively – in line with overarching EU legal principles, fundamental rights and specific objectives, notably whether EU anti-smuggling measures and operations are reducing migrant smuggling.
20. Finally, the European Court of Justice should be able to make judgments on the legality, necessity and proportionality of legal, policy and operational measures that infringe fundamental rights.

## EXPLANATORY NOTE ON THE APPROACHES TO BE FURTHERED AT THE EU LEVEL<sup>5</sup>

### Crackdown on NGOs assisting refugees and other migrants from the perspective of the Right to Good Administration, Obligation to Protect Human Rights and to Respect Humanitarian Assistance

- **The EU citizen's rights approach: EU legislators are accountable for the legal uncertainty in the EU Facilitators Package in light of the right to good administration**

As yet unexplored is the "**Right to good administration**", one of the key rights of EU citizens vis-à-vis EU institutions, as enshrined in the Article 41 of the Fundamental Rights Charter. It obliges EU institutions to act and legislate within the remit of law and foresees remedies for any wrongdoings. This right to good administration also includes (Article 41 para. 2): "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken". Potentially, this would also include the right of civil society that is negatively affected by the Facilitation Directive and related migration laws to be heard and their account to be taken seriously. Moreover, the right to good administration also contains remedies, namely that (Article 42, para. 3) "Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties". The Commission's REFIT of the Facilitators Package and subsequent exchanges with the European Parliament has disregarded the acute need to revise the legislation and to monitor its implementation despite a considerable amount of readily available evidence that the Facilitators Package is enabling criminalisation of civil society actors (Bozeat et al., 2014; Carrera et al., 2016; Carrera and Guild, 2016) and further evidence submitted to the Commission, or readily available (Fekete et al., 2017; Carrera et al., 2018bb; FRA, 2018; Fekete et al., 2019; Carrera et al., 2019).

**Inter-Institutional Agreement on Better Law-Making** between the Council, Commission and Parliament (2016, Article 2) contains the commitment to observe general principles of Union law, such as democratic legitimacy, subsidiarity and proportionality, and legal certainty in their law-making processes. Moreover, when it comes to EU legislation, the European Parliament, Council of the European Union and European Commission have agreed on the high quality required of law making (2016, Article 3):

"Union legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement."

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<sup>5</sup> This section was written by Lina Vosyliūtė (CEPS)

The right to good administration is further operationalised within the **EU Better Regulation Guidelines**. These guidelines oblige the Commission to follow various procedural steps in the law making, such as commissioning impact assessments, evaluations to consider any negative individual, societal and economic impacts of EU legislation and to improve EU-level legislation. It should be stressed that from the perspective of EU law, efficiency entails compliance with EU fundamental rights standards. The Better Regulation Guidelines, thus recommends the Commission conduct various types of impact assessments, evaluations, RE-FITs, to double check that legislation does remain effective and efficient.

- **Human rights defenders approach: EU institutions should respect, and create protection mechanisms for, human rights defenders within the EU and ensure a safe and enabling environment conducive to upholding fundamental rights**

In 2018, human rights defenders within the EU were listed for the first time among the European Parliament's Sakharov Prize nominees. They were 11 civil society organisations that conducted Search and Rescue in the Central Mediterranean and the Aegean (European Parliament, 2018f). This was an unprecedented message that people upholding EU fundamental rights values may be at risk of politically motivated persecutions not only in third countries, but also in Member States, when they are disregarding EU legal principles.

Regional and international organisations, such as the Council of Europe, Commissioner for Human Rights (2018), UN Special Rapporteur on the situation of Human Rights Defenders and other UN experts (i.e. UN OHCHR, 2019) on human rights have raised a number of concerns about the worsening general human rights situation within the EU with human rights defenders being at risk of judicial and fiscal harassment and even physical attacks. FRA (2018) also raised concerns about the situation of civil society within the EU, referring to international documents protecting human rights defenders.

However, issues of 'human rights defenders' at the EU level have so far been perceived as concerning only countries outside of the EU, and thus placed under EU's European External Action Service. The EU has appointed a Special Representative for Human Rights, developed a number of tools such as the Specialised Human Rights Guidelines, including "Ensuring Protection - EU Guidelines on Human Rights Defenders" (EEAS, 2008), Human Rights and Democracy Country Strategies, Human Rights Dialogues to engage with third countries, and a special funding tool – the European Instrument for Democracy and Human Rights (EEAS, 2018).

The Council of Europe and OSCE have also developed a number of tools. The 1998 Declaration on human rights defenders is readily applicable to Member States and the EU institutions. The OSCE Guidelines on the Protection of Human Rights Defenders (OSCE ODIHR, 2014) proposes a threefold approach: firstly, states must respect human rights defenders and refrain from actions that interfere with their work; secondly, states must protect human rights defenders from interferences by third parties, and thirdly, that states have the obliga-

tion to promote human rights and create a conducive “legal, administrative and institutional framework” for work in the area of human rights (OSCE, 2014, para. 10). For example, the OSCE guidelines insists explicitly that: “Any legal provisions that directly or indirectly lead to the criminalisation of activities that are protected under international standards should be immediately amended or repealed” (OSCE, 2014, para. 24). Particular attention is paid to “legal provisions with vague and ambiguous definitions, which lend themselves to broad interpretation and are or could be abused to prosecute human rights defenders for their work” (OSCE, 2014, para. 25). Moreover, the guidelines stress that “laws, administrative procedures and regulations must not be used to intimidate, persecute and retaliate” against human rights defenders (OSCE, 2014, para. 26). And if it were to occur, states and international bodies should address the impunity and provide effective remedies – judicial independence is a prerequisite, as well as the “existence of independent and effective mechanisms to investigate complaints against the police and other state officials” (OSCE, 2014, para. 13). As EU institutions and agencies are increasingly becoming operational in spaces where civil society is upholding the rights of refugees and other migrants, such an approach should be followed not only in overseeing Member States but also the actions of the EU level institutions and agencies themselves.

From the perspective of human rights defenders, once a criminal prosecution starts or other disciplinary sanctions are enacted, it is already too late and a lot of damage has been done to the defenders, their organisations and the individuals whose rights they are trying to uphold. As research on the policing of humanitarianism shows, the very climate of suspicion and intimidation has a chilling effect and has discouraged or prevented some civil society actors from operating, while others continue to face legal battles and are undergoing fears regarding their future (Carrera et al., 2019; Carrera et al., 2018a; Carrera et al., 2018b). Therefore, EU institutions and agencies, just like states and their institutions are under obligation when stigmatisation and marginalisation is occurring to, for example, “take proactive steps to counter smear campaigns and the stigmatisation of human rights defenders” (OSCE, 2014, para. 37), and more generally to “combat advocacy of hatred and other forms of intolerance (OSCE, 2014, para. 38).

In the area of migration and asylum, and in particular in combatting irregular migration, fundamental rights protections and a number of safeguards have been eroded (Carrera, 2019; Vosyliūtė and Joki, 2018). A number of instances indicate the side-lining instead of mainstreaming of responsibilities for the protection of fundamental rights. And this very situation of fundamental rights is the main reason behind the action of human rights defenders. The “full enjoyment of other rights and freedoms is instrumental to establishing the right to defend human rights” and therefore the EU “should put in place practical measures aimed at creating safe and conducive environments that enable and empower human rights defenders to pursue their activities freely and without undue limitations” (OSCE, 2014 para. 41). Among such concrete measures, the lack of a ‘principle of firewalls’ should be highlighted, as civil society and other basic service providers are frequently requested to share the personal data of their clients, to disclose migrants in an irregular situation and/or to otherwise fear for sanctions when upholding human dignity of migrants in irregular situation (Carrera, 2019; Vosyliūtė and Joki, 2018).

- **Gaps in addressing humanitarian needs should be filled by the EU and its Member States in cooperation with civil society, but when such gaps remain unaddressed civil society should be respected and protected in providing humanitarian aid and assistance**

Local and other European citizens were the first responders to the 'European Humanitarian Refugee Crisis' in 2015 – they filled in the gap in basic services for upholding human dignity. However, the approach to volunteers and NGOs has shifted in the countries at the EU's external borders, as well as in those of transit and residence. Suspicion, intimidation, and disciplinary actions against civil society organisations assisting refugees and other migrants have escalated and led to their criminalisation on the grounds of migrant smuggling in 11 Member States – Belgium, Croatia, Denmark, France, Germany, Greece, Hungary, Italy, Malta, Sweden, Spain, the Netherlands, and the UK (Carrera et al., 2019; Carrera et al., 2018b; Conte, 2019).

These prosecutions took place despite the obligations under International Maritime Law, and also despite the fact that some Member States have opted into the humanitarian exemption clauses in the Facilitators Package. The Commission in its REFIT and subsequent exchanges at the European Parliament continued to argue that humanitarian assistance is subject to national interpretation (Carrera et al., 2018b).

However, a High Level European Consensus on humanitarian aid should provide a definition that 'humanitarian aid' is 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" (Council and the Member States, 2008). However, while this approach is applied outside the EU, there is no understanding as yet that humanitarian crises can also occur inside the Union and that humanitarian actors will be obliged to act despite the reactions of their respective governments.

Therefore, there is a need to bring internal and external coherence in the EU's action on what is considered '**humanitarian aid**' at the EU level in order to protect such actors from criminalisation within the EU.

Another requirement is to address the underlying disincentives for Member States stemming from the 'first entry rule'. Thus, a thorough **reform of the Common European Asylum System**, based on fairness, loyal cooperation and solidarity, needs to be accomplished. This would further allow for setting up a **European Search and Rescue mission** and sharing disembarked migrants among all Member States (see also ReSOMA Policy Options Brief on Disembarkations – Cortinovis, 2019).

The critical research on migrant smuggling shows how the very 'migrant smuggling' industry is linked to the EU's policies – carriers' sanctions, Facilitators Package, hefty visa requirements. The very absence of safe, legal and orderly alternatives often leaves migrant smugglers as the only way to escape conflicts and to exercise the right to asylum, join family

members or leave poverty and find a job. Finally, it shows how in some cases EU measures aimed at incentivising anti-migrant smuggling in third countries of origin and transit have led to more consolidated and increasingly criminal networks that have been displacing small scale actors and various amateurs, such as bus drivers, ship owners, community-based smugglers. For example in Libya, the phenomenon shifted from migrant smuggling towards human trafficking (Reitano et al., 2018).

This angle of analysis requires a broader outlook and critical evaluation of EU migration and asylum policies. It also provides an opportunity to reflect on safe, legal and orderly alternatives for both refugees and other migrants as reflected within the Global Compact on Migration and Global Compact on Refugees.

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### **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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