

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

# POLICY DEPARTMENT **C**

## CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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## Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants

LIBE





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

## **Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants**

### **Abstract**

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee. With renewed efforts to counter people smuggling in the context of an unprecedented influx of migrants and refugees into the EU, it assesses existing EU legislation in the area – the 2002 **Facilitators' Package** – and how it deals with those providing humanitarian assistance to irregular migrants. The study maps EU legislation against the international legal framework and explores the effects – both direct and indirect – of the law and policy practice in selected Member States. It finds significant inconsistencies, divergences and grey areas, such that humanitarian actors are often deterred from providing assistance. The study calls for a review of the legislative framework, greater legal certainty and improved data collection on the effects of the legislation.

**This study was commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the LIBE Committee**

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Special thanks to Mark Provera (Jesuit Refugee Service (JRS) and former Researcher at CEPS) for his input at the inception of this study, as well as to Prof. Cathryn Costello (Andrew W. Mellon Associate Professor of International Human Rights and Refugee Law, University of Oxford) and Torsten Moritz (Churches' Commission for Migrants in Europe – CCME) for their comments on a previous draft of the study.

Unless otherwise noted, all translations are by the authors.

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Original: EN

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European Parliament, manuscript completed in December 2015.  
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## LIST OF ABBREVIATIONS

<b>AMIF</b>	Asylum, Migration and Integration Fund
<b>AufenthG</b>	<i>Aufenthaltsgesetz</i> , Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory ('Residence Act', Germany)
<b>BPC</b>	Border Policing Command (UK)
<b>CESEDA</b>	Code of Entry and Stay of Aliens and of the Right of Asylum (France)
<b>CFSP</b>	Common Foreign and Security Policy
<b>CISA</b>	Convention implementing the Schengen Agreement
<b>CJEU</b>	Court of Justice of the European Union
<b>CNCDH</b>	National Advisory Committee on Human Rights (France)
<b>CSDP</b>	Common Security and Defence Policy
<b>DCPAF</b>	Central Directorate of the Border Police (France)
<b>ECID</b>	Identity Fraud and Documents Expertise Centre (Netherlands)
<b>ECSR</b>	European Committee on Social Rights
<b>EEA</b>	European Economic Area
<b>EEAS</b>	European Union External Action Service
<b>EMM</b>	Expertise Centre on Human Trafficking and People Smuggling (Netherlands)
<b>ESF</b>	European Social Fund
<b>EUNAVFOR</b>	European Union Naval Force
<b>FIDH</b>	International Federation for Human Rights
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>IATA</b>	International Air Transport Association
<b>INS</b>	Immigration Naturalisation Service (Netherlands)
<b>JHA</b>	Justice and Home Affairs
<b>KKB</b>	AG Kripo crime-fighting commission (Germany)
<b>MIG</b>	People Smuggling and Human Trafficking Information Group (Netherlands)
<b>MS</b>	Member State
<b>NCA</b>	National Crime Agency (UK)
<b>NGOs</b>	Non-governmental organisations
<b>OCRIEST</b>	Employment of Foreigners without Residence Permits (France)
<b>SAR</b>	International Convention on Maritime Search and Rescue

<b>SOLAS</b>	International Convention for the Safety of Life at Sea
<b>SZW</b>	Social Affairs and Employment (Netherlands)
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TUI</b>	Single Text on Immigration (Italy)
<b>UCOLTEM</b>	Operational Coordination of Measures to Combat the Trafficking and Exploitation of Migrants (France)
<b>UKHTC</b>	UK Human Trafficking Centre
<b>UNCTOC</b>	United Nations Convention against Transnational Organised Crime
<b>UNODC</b>	United Nations Office on Drugs and Crime



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## EXECUTIVE SUMMARY

The ongoing 'asylum crisis', with the tragic experiences and loss of lives among people trying to reach and cross the EU's external borders, has been the catalyst for renewed EU policy efforts to address the issue of irregular migration and people smuggling in the scope of the European Agenda on Migration.

The issue of facilitating the entry, transit and stay of irregular migrants has been politicised at the EU's internal borders and within Member States during the course of 2015. While migrants remain in transit in areas such as Calais, Ventimiglia and the Serbian-Croatian border, often seeking out the services of smugglers to cross into neighbouring states to reunite with family members or fulfil a personal migration goal, humanitarian actors seek to respond to their human rights and needs in an increasingly ambiguous, punitive and militarised environment. Within many EU Member States, the backdrop of austerity and cuts to public services has placed local authorities and civil society actors in a difficult position as they seek to respond to the basic needs of new and established migrants.

In the EU Action Plan against migrant smuggling (2015-2020) (COM(2015) 285), the Commission noted that it would ensure that appropriate criminal sanctions are in place while avoiding the risks of criminalising those who provide humanitarian assistance to migrants in distress. Accordingly, the Commission has at least implicitly acknowledged the inherent tension between assisting irregular migrants to enter, transit and remain in EU Member States and the real risks this poses to those who provide humanitarian assistance of being subject to criminal sanctions.

This tension between the criminalisation of people smuggling and those providing humanitarian assistance is a by-product of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (the Facilitation Directive) and the Council Framework Decision implementing it – collectively known as the 'Facilitators' Package'. The tension arises because the Facilitators' Package seeks to compel Member States to provide criminal sanctions for a broad range of behaviours that cover a continuum from people smuggling at one extreme to assistance at the other, but it does so with a high degree of legislative ambiguity and legal uncertainty.

The implementation of the Facilitators' Package has been said to face a number of key challenges. There is, however, a lack of on-the-ground information about the multilayered effects of the practical implementation of the Facilitation Directive on irregular migrants and those providing assistance to them. This study aims to address this gap by providing new knowledge on this issue, while also identifying areas for further research. It provides a comprehensive understanding of the implementation of the humanitarian exception provisions of the Facilitators' Package and their impact on irregular migrants, as well as the organisations and individuals assisting them in selected Member States.

The study finds a substantial 'implementation gap' between the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (referred to as the UN Smuggling Protocol) and the international and EU legal frameworks on people smuggling. Chiefly, the latter differs from the UN Protocol in three main ways: i) the extent of the inclusion and definition of an element of "financial gain" in the description of facilitation of irregular entry, transit and stay; ii) the inclusion of an exemption of punishment for those providing humanitarian assistance; and iii) the inclusion of specific safeguards for victims of smuggling. As a result of the discretionary powers granted to Member States in the

**implementation of the Facilitators' Package**, the study further finds variation in the way in which laws are implemented in the national legislation of selected Member States. This results in legal uncertainty and inconsistency, and impacts on the effectiveness of the legislation.

An analysis of available statistics coupled with an in-depth analysis of court cases in selected countries involving the criminalisation of facilitation and humanitarian assistance reveals that qualitative and quantitative data on the prosecution and conviction rates of those who have provided humanitarian assistance to irregular migrants is lacking at the national and EU level. We can therefore identify a significant knowledge gap regarding the practical use and effects of the criminalisation of entry, transit and residence. Domestic court cases in selected EU Member States offer anecdotal evidence that family members and those assisting refugees to enter have been criminalised. Meanwhile, domestic developments in Greece and Hungary suggest that these laws are being applied with renewed rigour but with minimal monitoring of the direct or indirect impact on humanitarian assistance. Irrespective of the actual number of convictions and prosecutions, the effects of the **Facilitators' Package extend beyond** formal prosecutions and the number of criminal convictions.

Drawing on primary evidence from an online survey, the study demonstrates that, in addition to direct and perceived effects, the Facilitation Directive has profound unintended consequences (or indirect effects) that have an impact not just on irregular migrants and those who assist them, but also on social trust and social cohesion for society as a whole. Some civil society organisations fear sanctions and experience intimidation in their work with irregular migrants, with a deterrent effect on their work. They similarly highlight the lack of EU funding to support the work of cities and civil society organisations providing humanitarian assistance to irregular migrants. Moreover, we find widespread confusion among civil society practitioners about how the Facilitation Directive is implemented in their Member State, which can lead to misinformation and **'erring on the side of caution', thereby compromising migrants' access to** vital services. This is especially true in the context of the current migration crisis, where everyday citizens are obliged to volunteer vital services in the absence of sufficient state provision. This confusion stems in part from a lack of coordination between local and national authorities regarding implementation of the Facilitation Directive.

In certain Member States, the implementation of the Facilitation Directive is perceived to contribute to the social exclusion of both irregular and regular migrants and to undermine social trust. Shipowners report that they feel poorly supported by Member States and are ill placed to help irregular migrants at sea.

In light of the above considerations, the study formulates the following policy recommendations to the European Parliament:

**Recommendation 1:** The current EU legal framework should be reformed to i) bring it into full compliance with international, regional and EU human rights standards, in particular those related to the protection of smuggled migrants; ii) provide for a mandatory exemption from criminalisation for **'humanitarian assistance' in cases of** entry, transit and residence; and iii) use the financial gain element and include standards on aggravating circumstances in light of the UN Smuggling Protocol. Clarity and legal certainty should be the key guiding principles of this legislative reform.

**Recommendation 2:** 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.

**Recommendation 3:** EU funding should be made available for cities and civil society organisations to address the human rights, destitution and humanitarian needs of irregular migrants.

**Recommendation 4:** Firewall protections should be enshrined for irregular migrants to allow them to report human rights abuses and access public services without fear that they will immediately be reported to immigration authorities.

## 1. INTRODUCTION

### 1.1. Context, research questions and objectives

The 2015 ‘refugee crisis’, and the increasing perils and deaths of people **intending to cross Europe’s borders**, have been a catalyst for concerted EU action towards the phenomenon of migration and the building of a common immigration policy. The EU has given special attention to policies aimed at addressing the irregular immigration, trafficking and smuggling of human beings. The European Commission’s **European Agenda on Migration**<sup>1</sup> identified as a key priority the “fight against smugglers and traffickers” and called for improving the current EU legal framework “to tackle migrant smuggling and those who profit from it”.

The current EU legal framework on ‘smuggling’ is mainly composed of the 2002 **Facilitators’ Package**, which comprises Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence (the ‘Facilitation Directive’),<sup>2</sup> and an accompanying Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (the ‘Framework Decision’).<sup>3</sup> The EU Action Plan against Migrant Smuggling (2015-2020) of May 2015 announced that the European Commission would make proposals in 2016 to improve these two legal instruments.

The Action Plan also stated that the Commission “will seek to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress”. By doing so the Commission acknowledged one of the key dilemmas inherent to criminalising those providing assistance to irregular migrants, in particular the existential risks that it raises for individuals and organisations (or both) providing humanitarian assistance and access to fundamental human rights to immigrants. These may include civil society organisations, local authorities, citizens and residents.

The **Facilitators’ Package** seeks to compel EU Member States to provide criminal sanctions for a broad set of behaviours, including the smuggling of people as well as the provision of assistance to irregular migrants in a framework characterised by legal ambiguity and uncertainty. Article 1.2 of the Facilitation Directive provides a non-binding option to EU Member States to apply an exception to the criminalisation of that facilitation when the latter is “humanitarian” in nature.<sup>4</sup> The implementation of the humanitarian assistance exception is therefore discretionary upon EU Member States’ authorities.

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<sup>1</sup> European Commission, European Agenda on Migration, COM(2015) 240 final, 13.5.2015, pp. 8 and 9.

<sup>2</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, pp. 17–18.

<sup>3</sup> Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002.

<sup>4</sup> Article 1.2 reads as follows: “2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.”

The nature and scope of 'what' humanitarian assistance actually involves is not defined by the Directive. Neither are the potential relationships between the facilitator and the irregular immigrant, which may often include family, affective or personal relationships. In addition, the Directive places special emphasis on Member States adopting criminal sanctions for facilitators of residence who act **"for financial gain"**,<sup>5</sup> which in turn puts at greater risk of prosecution and conviction service providers to irregular immigrants and other members of society such as landlords. These legal uncertainties are exacerbated by the omission in the **Facilitators' Package** of its relationship with relevant international and regional human rights instruments, which stipulate legal obligations for State Parties and often call for the provision of assistance to those in need, not least in critical situations such as destitution or persons in distress at sea.

The European Commission has more recently announced before the UK's House of Lords EU Select Committee Inquiry on the EU Action Plan against Migrant Smuggling that its review of the **Facilitators' Package** will pay special attention to **"the effectiveness, added value and value in general of this EU legislation"**, and that the Commission will, "if necessary, ...come forward with new legislative proposals sometime by mid-2016".<sup>6</sup> The Commission also stated that the goal was to bring the current EU legal framework into line with international instruments (in particular those existing at the UN level) and **"to strengthen criminal sanctions while clearly excluding organisations providing humanitarian assistance"**.<sup>7</sup> The Commission's evaluation of the EU facilitation legal framework is expected to be completed in mid-2016, when it is expected to publish the results, any new legislative proposals and impact assessments.

In light of the above, the following research questions can be raised: What is the actual scope, impact and direct/indirect effects of the criminalisation of facilitation of entry, transit and residence of irregular migrants and the use of **the "humanitarian assistance" exception** provided for in European law? Several studies have been or are currently being conducted as regards EU Member States' national transposition and implementation of the **Facilitators' Package**,<sup>8</sup> or more generally on policies and programmes focused on smuggling across the EU and in cooperation with third countries and the characteristics of the phenomenon.<sup>9</sup> Yet, a significant gap exists as regards the actual effects or repercussions that these laws have on those working at the front line of providing humanitarian assistance, public services and fundamental human rights to irregular migrants, in particular civil society organisations and cities.

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<sup>5</sup> Article 1.1.b of the Directive stipulates that "any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State [is] in breach of the laws of the State concerned on the residence of aliens".

<sup>6</sup> UK House of Lords European Union Committee, *Report on the EU Action Plan against Migrant Smuggling*, 4th Report of Session 2015–16, 27 May 2015, London: Stationary Office, 3 November 2015, paras. 100 and 101 (<http://www.publications.parliament.uk/pa/ld201516/ldselect/ldEUcom/46/46.pdf>).

<sup>7</sup> Ibid.

<sup>8</sup> European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of persons engaging with them*, FRA, Vienna, 2014; M. Provera, "The Criminalisation of Irregular Migration in the European Union", CEPS Papers on Liberty and Security in Europe, No. 80, CEPS, Brussels, 2015.

<sup>9</sup> See European Commission, "A Study on Smuggling of Migrants: Characteristics, Responses and Cooperation with Third Countries", Final Report, September 2015 ([http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/study\\_on\\_smuggling\\_of\\_migrants\\_final\\_report\\_master\\_091115\\_final.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/study_on_smuggling_of_migrants_final_report_master_091115_final.pdf)).



The overall objective of this study is to fill that gap by providing a comprehensive understanding of the implementation of the humanitarian exception provision envisaged **by the Facilitators' Package** and the impact that it has on individuals and organisations providing access to humanitarian assistance, public services and fundamental rights to irregular immigrants. The study has the following specific objectives:

- Map the existing international and EU legal frameworks on people smuggling and their implementation in national law of selected EU Member States and assess them against international and regional human rights instruments as well as the EU Charter of Fundamental Rights.
- Gather and present any existing data on the prosecution and conviction rates of those who have provided humanitarian assistance to irregular migrants and identify any knowledge gaps and methodological caveats in statistical knowledge gathering and collection.
- Identify and assess the material, direct and perceived effects of the Facilitation Directive on irregular migrants and on individuals and organisations providing humanitarian assistance to them. Also identify any unintended or indirect consequences of the implementation of the Facilitation Directive.
- Identify the experiences and practices adopted by civil society organisations, cities and shipowners when addressing the challenges posed by the implementation of the Facilitation Directive.
- Suggest policy recommendations to improve and amend the Facilitation Directive to the European Parliament.

## **1.2. Methodology**

To address the above-mentioned objectives, the study adopted an actor-centred, multidisciplinary methodology, which built upon the state of the art in this area and benefited from a wide range of legal, civil society and stakeholder sources. The research was conducted between the beginning of July 2015 and December 2015.

The methods used in this study have included a legal analysis of founding international conventions and treaties, and EU secondary legislation (most notably the Facilitation Directive and Framework Decision), which was combined with documentary analysis of key EU policy documents and studies. The study involved an analysis of national legislation implementing the Facilitation Directive in the following six EU Member States: France, Germany, Italy, Spain, the Netherlands and the UK. The legal analysis also included relevant domestic developments in Greece and Hungary. The statistical assessment of prosecution and conviction rates was based on publicly available information in domestic jurisdictions in the previously mentioned Member States, mainly statistics on criminal justice and immigration law enforcement. It additionally included an analysis of court cases involving the criminalisation of facilitation and humanitarian assistance in these same national jurisdictions.

A key innovation of the methodology deployed in the study was the implementation of an **actor-centred approach**, which allowed for a holistic understanding of the impact that the Facilitation Directive has on irregular migrants, service providers and civil society – that is, an understanding that extends beyond gathering statistics and assesses the material, perceived and unintended effects on stakeholders. This addresses one of the main challenges identified earlier – the current lack of empirical evidence on the effects of the Facilitators' Package on the ground, as well as first-hand knowledge about the practices and experiences of these actors.

This bottom-up approach enabled the harnessing of empirical input by a large number of civil society organisations and experts. When examining the accessibility of rights, protection and provision of basic services, the key actors in the field are civil society organisations and local authorities. Their role is crucial given their working knowledge, particularly about the effects on their members or constituents and irregular migrants and their observations on promising practices. To draw upon their valuable knowledge and expertise, the study set up a Civil Society and Practitioners Focus Group, composed of the Platform for International Cooperation on Undocumented Migrants (PICUM), Social Platform, Eurocities and the European Community Shipowners' Association. This group was coordinated by PICUM.

The study also benefited from a team of experts consisting of researchers with academic and scientific expertise on each of the issue areas, objectives and methods of the study, which made up the Research Group. A first version of the study and the preliminary findings were presented and discussed at a closed-door workshop at CEPS in Brussels on 16 November 2015. Participants and discussants included representatives from other EU umbrella civil society organisations, Brussels-based EU policy-makers and academics with outstanding expertise on the issues at stake in the research.

The Research Group and the Civil Society and Practitioners Group drew up four different electronic surveys/questionnaires (see Annex 3 of this study for the model survey form that was used) addressed respectively to civil society organisations, cities, EU Member States' ministries and shipowners. They aimed to gather information from grass-roots stakeholders to complement secondary legal and policy analysis. They contained a mix of yes/no, multiple-choice and open questions and were hosted on the online platform Survey Monkey. The civil society survey was made available in English, French and Spanish, whereas the surveys for local authorities, shipowners and Member States were available only in English.

As regards civil society organisations, a total of 69 complete or partially complete responses were received. These came from organisations operating in 17 different EU Member States (see Table 1). A further 68 responses were excluded from the dataset on the basis that they were either i) completed by respondents from non-EU Member States or ii) the respondent completed fewer than 5 of the survey's 37 questions. Five questions were deemed to be the threshold for a meaningful contribution to the study.

The results are unevenly distributed among the 17 represented Member States (Table 1) and in no way claim to be representative. Rather, the data give a snapshot of some of the perceived effects of the Facilitation Directive, as experienced by irregular migrants and those organisations supporting them across the represented Member States. The surveys provided a particularly useful tool to elicit case studies, some of which we draw upon in section 4 of this study.

**Table 1: Survey responses**

Member State	Number of Responses
Hungary	25
Spain	11
Belgium	9
UK	4
Portugal	3
France	2
Ireland	2
Netherlands	2
Cyprus	2
Germany	2
Austria	1
Malta	1
Italy	1
Denmark	1
Europe-wide	1
Greece	1
Slovenia	1
Croatia	1

Source: Authors.

The main anomalies in our results are the 25 responses from Hungary, 11 from Spain and 9 from Belgium. For the remaining 14 countries we received 1 to 4 responses each. This bias has been taken into account in our analysis, which focuses primarily on individual instances rather than attempting generalisations pertaining to individual Member States. We have nevertheless included the Member State when reporting incidences to open up space for discussion and, in those instances where it is possible, to provide space for meaningful comparison.

The anonymity of respondents has been preserved at all times. Where the information provided made it possible to identify the organisation, unless consent was obtained from the respondent in question, this information has not been reported in our results.

The bias in our sample in part reflects the bias in membership of one of the two Europe-wide civil society organisations to which the questionnaires were circulated. The deadline for the questionnaire was also extended twice, and through the two civil society

organisations we were able to target other civil society organisations from unrepresented Member States with direct emails.

As a consequence of this, we received a large number of responses from Hungary. With the exception of Hungary, the dearth of responses from Eastern European and EU 'border states' more generally can partly be explained by the scale of the migration crisis at the time when the surveys were distributed. Indeed, there is a correlation between the Member States with fewer responses and the Member States with the highest levels of new migrant arrivals. Some organisations were clear that they did not have time to complete the questionnaire, or that they had already been approached by other **organisations on similar issues and were experiencing survey or 'respondent' fatigue.**

All responses were submitted by representatives of civil society organisations whose work focus on – or includes – supporting irregular migrants. A clear bias in our sample is that organisations responding to the survey were i) likely to already be politically engaged to a certain degree on issues pertaining to the Facilitation Directive through their membership of one of the Europe-wide networks, both of which have previously run campaigns on the issue; and ii) as completion of the survey was voluntary, those respondents with a specific character profile – for example, more proactive and politically engaged – were more likely to complete it.

Respondent organisations varied as to whether they assisted migrants at the local, national or international level (Table 2), with many overlapping across the three. There was also a large variation in the nature of the services that organisations provided, with most providing at least two or three (Table 3). Many of the services provided corresponded to assisting irregular migrants to access fundamental rights and basic services, such as health care, shelter and sustenance.

**Table 2: Level of service provision**

Answer Choices	Responses
Local	33
Regional	22
National	36
Other (please specify)	8

Note: Total respondents – 67.

Source: Authors.

**Table 3: Type of service provision**

Answer Choices	Responses
Housing	6
Emergency shelter	21
Food	31
Health care	32

Legal assistance	40
Language assistance/translation	38
Providing public transport tickets	20
Arranging private transport	7
Arranging public transport	14
Giving a lift in a vehicle	7
Lending a vehicle	1
Emergency rescue	7
Counselling/advice	41
Education	13
Other - please specify	14

Note: Total respondents – 55.

Source: Authors.

A second questionnaire that replicated the format of the civil society survey was distributed to local authorities through a European network of cities. This survey was fully or partially completed by 11 European cities across nine EU Member States plus Norway (Table 4). Analysis was also enriched by information provided by a number of cities at a 2014 event, "City Responses to Irregular Migrants", which was co-organised by the Centre of Migration, Policy and Society (COMPAS) at the University of Oxford and the Ajuntament de Barcelona.

**Table 4: Cities responding**

Cities
Genoa (Italy)
Lisbon (Portugal)
Brno (Czech Republic)
Utrecht (Netherlands)
Nantes (France)
Rennes (France)
Athens (Greece)
Stockholm (Sweden)
Oslo (Norway)

Barcelona (Spain)

Ghent (Belgium)

Source: Authors.

We received eight substantial responses to our survey of shipowners, which was distributed to members of **the European Community Shipowners' Association**. The additional electronic survey focused on EU Member States' authorities. This was only responded to by two Member States under study.

## 2. EU AND INTERNATIONAL LEGAL FRAMEWORKS

### KEY FINDINGS

1. There is a substantial ‘implementation gap’ between the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (referred to as the UN Smuggling Protocol) and the EU *acquis* on irregular immigration.
2. Significant differences and inconsistencies exist between the UN Smuggling Protocol and the EU *acquis* on irregular immigration regarding three main aspects: 1) the extent of the inclusion and definition of an element of “financial gain” in the description of facilitation of irregular entry, transit and stay; 2) the inclusion of an exemption of punishment for those providing humanitarian assistance; and 3) the inclusion of specific safeguards for victims of smuggling.
3. The current EU *acquis* grants disproportionate discretionary powers to Member States in the implementation of the **Facilitators’ Package**. This causes issues of legal uncertainty and inconsistency in the implementation of EU legislation and impacts on their effectiveness.
4. There are major differences in the transposition of specific provisions of the **Facilitators’ Package** in the selected EU Member States under analysis. These mainly relate to the lack of specific mandatory provisions to ensure the fundamental rights of smuggled migrants and exemption from criminalisation of actors providing assistance to them for humanitarian purposes.

Since the Tampere European Council of 1999, one of the key elements of the EU’s common policy on migration and asylum has been the prevention of irregular migration, with a strong focus on the ‘fight against human smuggling’ as one of the key objectives for the EU Area of Freedom, Security and Justice.<sup>10</sup> Renewed commitments towards “addressing smuggling and trafficking in human beings more forcefully” can be found in the guidelines for the period 2015-2020 given by the European Council at its meeting held in Ypres on 26-27 June 2014.<sup>11</sup>

One of the earliest policy instruments in the EU’s toolbox to prevent irregular migration is the **Facilitators’ Package**, which, as noted earlier, comprises Directive 2002/90/EC<sup>12</sup> and its accompanying Council Framework Decision 2002/946/JHA.<sup>13</sup> **The Facilitators’ Package** – adopted three years after the 1999 Tampere Council that established the goal of progressively building a common migration policy in the EU – **aims to prevent irregular migration by compelling EU Member States to punish anyone who assists a person to irregularly enter, transit or stay in the territory of a Member State.**

This obligation follows the logic later on introduced in Article 79 of the Treaty on the Functioning of the European Union (TFEU), which includes preventing irregular migration

<sup>10</sup> European Council, Presidency Conclusions, Tampere European Council, 15-16 October, 1999, points 3 and 24.

<sup>11</sup> European Council, European Council Conclusions, 26-27 June 2014, EUCO 79/14, point 8.

<sup>12</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (the Facilitation Directive).

<sup>13</sup> Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (the Framework Decision). For a detailed analysis, see V. Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*, Springer Briefs in Law, 2015, London: Springer.

as one of the aims of an EU "common immigration policy".<sup>14</sup> It is equally important to reiterate that, in line with Article 67 TFEU, a common immigration policy must respect the rights, freedoms and principles reaffirmed in the Charter of Fundamental Rights of the European Union.<sup>15</sup>

This section provides an analysis of the international and EU legal frameworks with direct relevance for the EU **Facilitators' Package**. It assesses the Package's links and compliance with international and regional human rights standards.

The relationship between the EU **Facilitators' Package** and the UN Convention against Transnational Organised Crime (UNTOC) and its Smuggling Protocol are also analysed in order to ascertain differences, possible inconsistencies and shortcomings, not only in the implementation of the EU **Facilitators' Package**, but also in its conceptualisation and scope prior to its formal adoption in 2002.

## **2.1. The Facilitators' Package and the UN Convention against Transnational Organised Crime and its Smuggling Protocol: A comparative analysis**

The years between 2000 and 2004 saw the adoption and subsequent entry into force of several legislative instruments at both EU and international levels aimed at addressing the phenomenon of 'migrant smuggling'. As Textbox 1 illustrates, the concept of smuggling differs from that of human trafficking in important, yet often unclear, ways.

### **Textbox 1: Human trafficking and migrant smuggling Legal definitions**

Human trafficking and migrant smuggling are two distinct but sometimes overlapping criminal activities. In practice, it may be difficult to distinguish between a situation of trafficking and a situation of smuggling for a variety of reasons: smuggled migrants may become victims of trafficking; the same or similar routes can be used for trafficking and smuggling; and the conditions in which migrants are smuggled can be extremely poor, making it questionable whether smuggled migrants consented to them.

Still, there are four key differences between trafficking in persons and smuggling of migrants:

- 1) **Consent**. While victims of trafficking have not consented or their consent is rendered meaningless by the actions of the traffickers, smuggled migrants usually consent to being smuggled.
- 2) **Transnationality**. While smuggling involves irregular border crossing and entry into another country, trafficking does not necessarily involve the crossing of a border and the possible irregularity of the border crossing is irrelevant.
- 3) **Exploitation**. Where the relationship between traffickers and their victims involves ongoing exploitation of the victims to generate profit for the traffickers, smugglers and migrants engage in a transaction that usually ends after the border crossing.
- 4) **Profit**. Smuggling involves the generation of profit for irregular border crossing, while trafficking involves the acquisition of profit through the ongoing exploitation of victims.

Human trafficking is defined as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or

<sup>14</sup> European Union, Consolidated version of the Treaty on the functioning of the European Union, OJ C 83, 30.3.2010, p. 47.

<sup>15</sup> European Union, Charter of Fundamental Rights of the European Union, OJ C 83, 30.3.2010, p. 389.



benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>16</sup>

The smuggling of migrants is defined by the UN Smuggling Protocol as 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”.<sup>17</sup>

At the international level, on 15 November 2000 the UN General Assembly adopted the Smuggling Protocol,<sup>18</sup> supplementing the UN Convention against Transnational Organized Crime.<sup>19</sup> The UN Smuggling Protocol was opened up for signatories at the Signing Conference in Palermo in December 2000 and entered into force on 28 January 2004. It currently counts 116 State Parties and has been ratified by both the EU and, bilaterally, all EU Member States except Ireland.<sup>20</sup>

The three explicit objectives of the UN Smuggling Protocol are 1) combating the smuggling of migrants and 2) promoting international cooperation, while 3) protecting the rights of smuggled migrants.<sup>21</sup>

The UN Smuggling Protocol is the result of lengthy negotiations initiated by an Ad-hoc Committee established by the UN General Assembly in 1998 and tasked with the elaboration of the Convention and three protocols, of which the Smuggling Protocol is one.<sup>22</sup> A first joint draft of the UN Smuggling Protocol was presented by Austria and Italy at the first session of the Ad-hoc Committee in Vienna in January 1999. The Ad-hoc Committee convened at the United Nations in Vienna 11 times and the negotiations for the UN Smuggling Protocol were finalised in October 2000.<sup>23</sup>

Official records of the *travaux préparatoires* of the negotiations for the elaboration of the Convention and the Protocols indicate that “there was consensus that migrants were victims and should therefore not be criminalized”.<sup>24</sup> In this context, **Article 5 of the UN Smuggling Protocol explicitly prohibits the criminalisation of persons being the object of conduct of smuggling as defined in Article 6 of the Protocol**. A State Party therefore violates the UN Smuggling Protocol if an individual is criminalised for having been smuggled.

Both the EU *acquis* and the UN Smuggling Protocol place legislation concerning the smuggling of migrants within the framework of preventing irregular migration. Yet, the

<sup>16</sup> See Article 3(a), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons.

<sup>17</sup> See Article 3, UN Smuggling Protocol.

<sup>18</sup> United Nations, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000 (the UN ‘Smuggling Protocol’).

<sup>19</sup> United Nations, UN General Assembly, United Nations Convention against Transnational Organized Crime: Resolution, adopted by the General Assembly, 8 January 2001, A/RES/55/25.

<sup>20</sup> Status of ratifications as of 19 November 2015.

<sup>21</sup> See Article 2, UN Smuggling Protocol.

<sup>22</sup> The three protocols are United Nations, UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000; United Nations, UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000; and United Nations, UN General Assembly, Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime, 31 May 2001 (A/RES/55/255).

<sup>23</sup> The draft UN Smuggling Protocol was approved during the 11<sup>th</sup> session of the Ad Hoc Committee on 23 and 24 October 2000 (A/AC.254/38). See the UN Audiovisual Library of International Law, United Nations Convention against Transnational Organized Crimes (with protocols), New York, 15 November 2000, Procedural History (<http://legal.un.org/avl/ha/unctoc/unctoc.html>).

<sup>24</sup> See United Nations Office on Drugs and Crime (2006), Notes by the Secretariat, p. 483.

UN Smuggling Protocol gives specific focus to protecting the rights of migrants and of those providing them with assistance. It specifically requires the presence of an element of financial gain for the conduct to be defined as smuggling. This has not been entirely reflected in the EU legal framework concerning migrant smuggling.

In the EU, the smuggling of migrants has traditionally been included as part of the EU policy framework aimed at preventing irregular migration. Following the 1999 Tampere European Council, and participation of the European Community in the negotiations of the 2000 Palermo Convention and the UN Smuggling Protocol, the French Presidency presented to the Council on 28 July 2000 two legislative proposals aimed at addressing human smuggling.

These led to the adoption of the **Facilitators' Package** in 2002,<sup>25</sup> aimed at harmonising **Member States' legal provisions "in the area of combating illegal immigration in order to strengthen the penal framework to prevent and prosecute the facilitation of unauthorised entry, transit and residence"**.<sup>26</sup>

The **Facilitators' Package** criminalises "any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens".<sup>27</sup> It is thus aimed at **penalising the provision of assistance specifically to irregular migrants**, to be defined as third-country nationals who enter, transit or reside irregularly in the territory of a Member State.

When considering the personal scope of application of the **Facilitators' Package**, it is crucial to highlight the multiple reasons **why migrants could fall into irregularity while residing in the territory of a Member State**: refusal of an application for international protection or asylum; loss of a residence permit due to unemployment, exploitation or domestic violence; bureaucratic failures in processing residence or work permit applications, resulting in withdrawal or loss of status; as well as being born in the EU to parents who are undocumented.<sup>28</sup>

As the Framework Decision was adopted under the former EU third pillar in the Treaties (dealing with police and criminal justice cooperation), the enforcement powers of the European Commission and the Court of Justice of the European Union (CJEU) on EU **Member States' implementation were limited until December 2014**. According to Protocol 36 annexed to the Lisbon Treaty, the powers of the Commission and the CJEU were limited for a period of five years post the entry into force of the Lisbon Treaty on 1 December 2009. These limited powers of enforcement over criminal justice-related EU legal instruments may have been one of the key reasons why there is limited (quantitative and qualitative) data available on the implementation of the Package across the Member States (see also sections 3 and 4).

The Facilitation Directive aims at preventing irregular migration and countering human smuggling. It intends to render the implementation of the Framework Decision more

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<sup>25</sup> Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (the 'Framework Decision').

<sup>26</sup> European Commission, *Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence*, COM/2006/0770 final, Brussels, 6 December 2006, paras. 2.2 and 3.

<sup>27</sup> See Article 1(a) of the Facilitation Directive.

<sup>28</sup> For additional considerations on causes of irregularity, see UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants: Labour exploitation of migrants*, 3 April 2014 (A/HRC/26/35) para. 16 (<http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf>).

effective through “the precise definition”<sup>29</sup> of the offences that are the subject of the penalties provided for as part of the Framework Decision.<sup>30</sup>

According to the Facilitation Directive and its accompanying Framework Decision, **EU Member States are required to implement legislation introducing criminal sanctions against the facilitation of irregular entry, transit and residence.** Any person who aids, abets or in any other manner facilitates irregular migration shall be liable to be punished under criminal law.<sup>31</sup>

Penalties shall be constituted by effective, proportionate and dissuasive criminal sanctions,<sup>32</sup> and may be accompanied by other supplementary measures, such as confiscation of the means of transport, prohibition to practice the occupational activity in which the offence was committed or deportation of the offender. With regards to the latter, the European legislator has implicitly acknowledged that **people accused of human smuggling might be irregular migrants themselves.**<sup>33</sup>

The Facilitation Directive defines “facilitation” as two different types of behaviour:

- a) intentionally assisting “a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the **entry or transit** of aliens;”<sup>34</sup> (emphasis added) and
- b) assisting intentionally, “**for financial gain...a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens**”<sup>35</sup> (emphasis added).

The definition included in the Facilitation Directive deviates from the one previously provided by Article 27(1) of the Convention implementing the 1985 Schengen Agreement (CISA),<sup>36</sup> which required Contracting Parties to impose “appropriate penalties

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<sup>29</sup> See the Facilitation Directive, Preamble (3).

<sup>30</sup> A 2005 ruling by the CJEU, concerning environmental crimes, prompted the Commission to argue that the **Facilitators’ Package should be recast. The judgment clarified the distribution of powers between the Community and the Union as regards the provisions of criminal law.** In its judgment, the Court annulled the Council Framework Decision on the protection of the environment through criminal law because this instrument was adopted in breach of Community competences. The Court referred to Article 47 TEU to assert the **Community’s competences on issues relating to criminal law, and in particular stated that**

[a]s a general rule, neither criminal law nor the rules of criminal procedure fall within the **Community’s competence...However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.**

See European Court of Justice, Judgment of the Court (Grand Chamber) of 13 September 2005, Case C-176/03, *Commission of the European Communities v. Council of the European Union*.

For the European Commission’s interpretation of the implication of the Court’s judgment, see European Commission, Communication from the Commission to the European Parliament and the Council on the implications of the Court’s judgment of 13 September 2005 (Case C 176/03 *Commission v. Council*), COM/2005/0583 final, 23 November 2005, Annex. The European Parliament supported the Commission’s opinion concerning the need to recast a number of EU instruments in light of the Court’s judgment. However, it called for a review on a case-by-case basis, in order for the reasoning of the Court not to be extended to all fields falling within the scope of the first pillar. See European Parliament, Resolution on the consequences of the judgment of the Court of 13 September 2005 (C-176/03 *Commission v. Council*), (2006/2007(INI)), 14 June 2006.

<sup>31</sup> See Article 1 of the Facilitation Directive, which expressly provides that

each Member State shall adopt appropriate sanctions on any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens.

<sup>32</sup> See Article 1, Framework Decision.

<sup>33</sup> See Article 1(2), Framework Decision.

<sup>34</sup> See Article 1(1)(a), Facilitation Directive.

<sup>35</sup> See Article 1(1)(b), Facilitation Directive.

<sup>36</sup> European Union, Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French

on any person who, **for financial gain**, assists or tries to assist an alien **to enter or reside** within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens" (emphasis added).<sup>37</sup>

**This conceptualisation is not fully in line with the definition of 'smuggling' envisaged by the UN Smuggling Protocol**, which requires "a financial or other material benefit"<sup>38</sup> as a condition for the criminalisation of procuring irregular entry or residence. The reference to financial or other material benefit for the perpetrator within the UN Smuggling Protocol is intended to exclude "family members or support groups such as religious or non-governmental organisations" from punishment.<sup>39</sup>

Similar concerns regarding the personal scope of criminalisation have been expressed in other international jurisdictions, such as Canada. This was an issue at the heart of a decision issued on 27 November 2015 by the Supreme Court of Canada to clarify the scope of the provisions of the Immigration and Refugee Protection Act relating to migrant smuggling.<sup>40</sup> In its decision in *R. v. Appulonappa*,<sup>41</sup> the Court determined the unconstitutionality of provisions of the Immigration and Refugee Protection Act criminalising smuggling "insofar as [it] permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members".<sup>42</sup>

During negotiations on the EU Facilitators' Package, **the dissociation of the 'financial gain' element from the facilitation offence for the purposes of entry and transit raised concerns among civil society organisations** working on fundamental rights. They expressed concerns about being prosecuted for protecting and assisting third country nationals at the external borders and within the territory of the EU.<sup>43</sup>

After protracted negotiations<sup>44</sup> within the Council, prolonged due to parliamentary scrutiny reservations expressed by the delegations from Denmark, the Netherlands, Sweden and the UK, a clause was added in the Directive granting Member States the discretion not to impose sanctions if the aim of the behaviour is to provide humanitarian assistance to the person concerned – Article 1.2 of the Directive. Yet, **this provision does not cover humanitarian assistance enabling a third-country national to reside in EU territory.**

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Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement"), 19 June 1990.

<sup>37</sup> After their entry into force in 2004, the Facilitation Directive and Framework Decision replaced Article 27(1) of the Convention implementing the 1985 Schengen Agreement (CISA).

<sup>38</sup> See Article 6, UN Smuggling Protocol.

<sup>39</sup> United Nations Office on Drugs and Crimes, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 3 November 2000, p. 469 ('*Travaux Préparatoires*').

<sup>40</sup> See Canada: Immigration and Refugee Protection Act (IRPA) [Canada], SC 2001, c. 27, 1 November 2001.

<sup>41</sup> See Supreme Court of Canada, *R. v. Appulonappa*, 2015 SCC 59.

<sup>42</sup> *Ibid.*, para. 3.

<sup>43</sup> See for example, Platform for International Cooperation on Undocumented Migrants (PICUM), PICUM comments on the adoption of the framework decision on strengthening the penal framework to prevent the facilitation of unauthorized entry, transit and residence. (JHA-Council Meeting on 28 and 29 November 2002), PICUM, Brussels, December 2002 (<http://www.stranieriinitalia.it/briguoglio/immigrazione-e-asilo/2002/dicembre/oss-picum-decis-favoregg.html>). See also PICUM, *Book of Solidarity: Providing assistance to undocumented migrants*, Volumes I-III, PICUM, Brussels, 2003 (<http://picum.org/en/publications/reports/>). The publication highlights the manifold ways in which solidarity is extended to undocumented migrants in different geographical regions in Europe, exploring assistance to undocumented migrants and the rights of help providers against the background of a tendency to criminalise assistance to undocumented migrants, and its indirect consequences for undocumented migrants themselves.

<sup>44</sup> A political agreement, subject to parliamentary scrutiny reservations by the Danish, Swedish and British delegations, was reached as part of the 2350<sup>th</sup> Council JHA meeting on 28-29 May 2011. See the 2350<sup>th</sup> Council meeting JHA, 9118/08, Brussels, 28-29 May 2011.

The inclusion of a 'humanitarian clause' as part of Article 1.2 of the Directive had been the object of prolonged reservations of the Austrian delegation, calling for the deletion of that provision. The European Commission maintained reservations on the non-compulsory nature of the humanitarian clause.<sup>45</sup> Additionally, an optional exemption from criminalisation for family members, which was present in the original proposal, was deleted as a consequence of Council negotiations.<sup>46</sup>

**The Facilitation Directive does not provide a definition of the concept of 'humanitarian assistance', leaving considerable discretion to Member States** as to the definition of the extent, scope and personal application of conduct to be defined as 'humanitarian' in nature. For example, while the Facilitation Directive does not include specific provisions exempting family members assisting irregular migrants from being criminalised, some Member States have nonetheless included these kinds of exemptions. This contributes to increased legal uncertainty in the implementation of the humanitarian clause at national level across the EU (see section 4 for additional details). The Directive inaccurately assumes that instances of humanitarian assistance in terms of residence/stay can only occur in the absence of an element of financial gain. It does not contemplate instances of assistance by service providers and landlords requiring non-exploitative remuneration for their services.

Based on Article 1.1.b of the Facilitation Directive, Member States **may refrain from punishing facilitation of irregular stay**, if this is not done intentionally or for financial gain. Still, the Directive does not impose an obligation on Member States to refrain from punishing the facilitation of irregular stay when an element of intention or financial gain is absent.

Therefore, although not explicitly encouraging the punishment of people who provide emergency shelter, food and other basic necessities to migrants in an irregular situation (as long as this is not done for financial gain), the **Facilitation Directive does not explicitly discourage or prohibit them from punishing such people**. The Framework Decision does not include general safeguards aimed at mandatorily preventing the punishment of acts performed for humanitarian purposes, rescue at sea or in emergency situations. This also needs to be read in conjunction with the EU legal **framework on carriers' sanctions**, which is outlined in Textbox 2 below.

#### **Textbox 2: Carriers' sanctions and obligations to share data**

Measures aiming at countering migrant smuggling include specific additional obligations and sanctions for carriers providing transportation services to third country nationals seeking irregular entry or transit in the EU. A combination of increased penalties and obligations for commercial carriers, coupled with the absence of safeguards ensuring exemption from sanctions in the case of humanitarian assistance and remedies for migrants against carriers' **decisions to prevent boarding, enhances carriers' reluctance to provide transport services to passengers who appear not to have the necessary travel documentation.**

According to the UN Smuggling Protocol, commercial carriers may be held responsible

<sup>45</sup> Council of the European Union (2001), Brussels, 8632/01, 11 May 2001 (<http://register.consilium.europa.eu/doc/srv?!=EN&t=PDF&qc=true&sc=false&f=ST%208632%202001%20INI>). See also Council of the European Union, 6766/01, Brussels, 9 March 2001 (<http://data.consilium.europa.eu/doc/document/ST-6766-2001-INIT/en/pdf>).

<sup>46</sup> Ibid.

for ascertaining that all passengers are in possession of travel documents to enter the receiving state.<sup>47</sup> If the receiving state does not admit the passenger, international aviation law makes the carrier liable to cover the costs of the return and, if this is not possible within a **reasonable timeframe, any costs related to the passenger's stay**, including the provision of food and water.<sup>48</sup>

At the EU level, Council Directive 2004/82/EC on the obligation of carriers to communicate advanced passenger data states that carriers are obliged to share details of passengers with the authorities responsible for border checks at the port of arrival.<sup>49</sup> Carriers that have not transmitted data, or have transmitted incomplete or false data, are penalised.<sup>50</sup>

Article 26 of the CISA and Council Directive 2001/51/EC<sup>51</sup> regulate the duty of carriers to return non-admitted third country nationals at their own cost, providing for sanctions against those who transport undocumented migrants into the EU. As a result, carriers **check passengers' travel documents and visas at check-in**, refraining from carrying passengers who are not properly documented.

The Framework Decision provides for infringements committed for financial gain to be punishable by **custodial sentences with a maximum sentence of not less than eight years**, in cases where first, they are committed as part of activities carried out by a criminal organisation, understood as a structured association of more than two persons established over a period of time;<sup>52</sup> or second, where the lives of the victims have been endangered.<sup>53</sup> These two elements are also mentioned in the UN Smuggling Protocol. That notwithstanding, **the latter incorporates a further aggravating circumstance when smuggling entails inhuman or degrading treatment, including exploitation.**

The Framework Decision envisages some limited safeguards for migrants who are victims of smuggling. It refers to the need for anti-smuggling provisions to be applied without prejudice to the principle of non-refoulement, in compliance with the 1951 Refugee Convention and the Protocol Relating to the Status of Refugees (the 'New York Protocol') of 1967.<sup>54</sup>

In summary, and as synthesised in Table 5 below, there are important divergences between the UN Smuggling Protocol and the EU *acquis* on irregular immigration. These relate to the following three main aspects:

- the extent of the inclusion and definition of an element of **"financial gain"** in the description of facilitation of irregular entry, transit and stay;

<sup>47</sup> See Article 11(3), Council Directive 2004/82/EC.

<sup>48</sup> See United Nations (UN), International Civil Aviation Organisation (1944), Convention on International Civil Aviation, Annex 9, Chapter 5, "Inadmissible persons and deportees", with subsequent IATA agreements. See also Council Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in case of denied boarding and cancellation or long delays.

<sup>49</sup> Council of the European Union, Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, 29 April 2004.

<sup>50</sup> See Article 4, Council Directive 2004/82/EC.

<sup>51</sup> Council of the European Union, Council Directive 2001/51/EC of 28 June 2001 Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985, 9 August 2001, OJ L 187/45, 10 July 2001.

<sup>52</sup> See Joint Action 98/733/JHA adopted by the Council on the basis of Article K.3 of the TEU, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351, 29 December 1998, p. 1, Article 1. 9.

<sup>53</sup> See Article 1(3), Framework Decision.

<sup>54</sup> See Article 6, Framework Decision.

- the inclusion of an exemption of punishment for those providing “humanitarian assistance”; and
- the inclusion of specific safeguards for victims of smuggling.

**Table 5: Comparing the UN Smuggling Protocol with the EU Facilitators’ Package**

	UN Smuggling Protocol	EU Facilitators’ Package
Element of financial gain	Requires “a financial or other material benefit” as a condition for the criminalisation of procuring <b>irregular entry or residence</b> (Article 6, UN Smuggling Protocol)	Only for facilitation of <b>irregular stay</b> (Article 1, Facilitation Directive)
Humanitarian assistance	The reference to financial or other material benefit for the perpetrator within the UN Smuggling Protocol is <b>intended to exclude “family members or support groups such as religious or non-governmental organisations”</b> from punishment (Travaux Préparatoires, p. 469)	Member States <b>may decide</b> not to impose sanctions with regard to the facilitation of <b>irregular entry/transit</b> by applying national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned (Article 1.2, Facilitation Directive)
Safeguards for victims of smuggling	Explicit prohibition of the criminalisation of migrants being the object of conduct of smuggling as defined in Article 6 of the Protocol (Article 5, UN Smuggling Protocol)	Anti-smuggling provisions are to be applied without prejudice to the principle of non-refoulement, in compliance with the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees (Article 6, Framework Decision)

Source: Authors’ elaboration.

## 2.2. Implementation of the Facilitators’ Package at national level

This section provides an overview of the state of play regarding the implementation of the **EU Facilitators’ Package** in the following six EU Member States: France, Germany, Italy, the Netherlands, Spain and the UK. It additionally includes relevant information on Hungary and Greece owing to their relevance in the 2015 ‘refugee crisis’.<sup>55</sup> The analysis pays particular attention to

- 1) the choice of introducing an exemption from prosecution in cases of facilitation of entry and transit and in cases of facilitation of stay for purposes of “humanitarian assistance”;

<sup>55</sup> This section is based on the findings provided in Annex 2 of this study as well as additional desk research on other publicly available information and studies. See also European Union Agency for Fundamental Rights (FRA), “Criminalisation of migrants in an irregular situation and of persons engaging with them”, FRA, 2014 and also M. Provera, “The Criminalisation of Irregular Migration in the European Union”, CEPS Papers on Liberty and Security in Europe, No. 80, CEPS, Brussels, February 2015.

- 2) **the need for an element of "financial gain or profit" for the conduct of facilitating** irregular entry, transit or stay to be punishable; and
- 3) the type and scope of sanctions imposed on those facilitating irregular entry, transit or stay.

Concerning facilitation of irregular entry, an analysis of the implementation of the **Facilitators' Package** in the six Member States under assessment shows that all of them punish the facilitation of irregular entry. This is also the case in Hungary and Greece. Only legislation in Germany requires an element of financial gain or profit for it to be a punishable offence. As underlined in the previous section, while the UN Smuggling Protocol **requires the punishment of facilitation only if done for profit, the Facilitators' Package** does not expressly introduce this obligation in the case of facilitation of irregular entry.

The safeguard introduced in Article 1.2 of the Facilitation Directive, allowing Member States not to impose sanctions where irregular entry and transit are facilitated for humanitarian purposes, has been introduced only in Spain<sup>56</sup> and Greece.<sup>57</sup>

In the UK this exclusion is only related to cases where entry is facilitated by a person acting pro bono on behalf of an organisation that seeks to assist asylum seekers.<sup>58</sup> It relates to **'arrival' rather than** to residence and only applies to a person acting on behalf of an organisation that aims to assist asylum seekers, and does not charge for its services. The exemption does not cover the general offence of assisting unlawful immigration.

While **facilitation of irregular stay** is punishable in all selected Member States, inconsistencies among national laws can be identified in relation to both the definition of the specific conduct to be criminalised and the requirement of an **element of profit or financial gain** for facilitation of irregular stay to be punished. Legislation in France,<sup>59</sup> Greece<sup>60</sup> and the UK<sup>61</sup> do not require profit or gain for the conduct to be punished. In contrast, Germany,<sup>62</sup> Hungary,<sup>63</sup> Italy,<sup>64</sup> the Netherlands<sup>65</sup> and Spain<sup>66</sup> do require an element of profit for the facilitation of irregular stay to be punishable in their national laws.

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<sup>56</sup> Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE-A-2000-544 [Organic Law 4/2000, of 11 January, on rights and freedoms of foreigners in Spain and their social integration]. See Article 54(3) listing "very serious infringements": "That established in preceding articles notwithstanding, it shall not be considered an infringement to transport into Spanish territory a foreign national who, having presented without delay a request for asylum, has had this admitted for processing."

<sup>57</sup> See the Immigration Act, Article 88(6).

<sup>58</sup> See the UK Immigration Act 1971. Section 25A(3)(1) does not apply to anything done by a person acting on behalf of an organisation that — a) aims at assisting asylum-seekers, and b) does not charge for its services.

<sup>59</sup> Ordonnance n° 2004-1248 relative à la partie législative du code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA), JORF n°0274 du 25 novembre 2004 p. 19924 texte n° 12 [Ordinance no. 2004-1248 relating to the legislative section of the code on the entry and stay of foreigners and on the right of asylum, of 25 November 2004]. Article L622-1 provides that "[s]ubject to the exemptions provided for in Article L. 622-4, any person who directly or indirectly assists or attempts to assist the entry, movement or residence of an irregular non-national in France is punished".

<sup>60</sup> See the Immigration Act, Article 87.

<sup>61</sup> See the Immigration Act 1971, Section 25.

<sup>62</sup> See the Residence Act, Section 96.

<sup>63</sup> See the Hungarian Criminal Code, Section 354.

<sup>64</sup> Legge 15 luglio 2009, n. 94, "*Disposizioni in materia di sicurezza pubblica*", Gazzetta Ufficiale n. 170 del 24 luglio 2009, Supplemento ordinario n. 128, Articolo 12 [Law of the 15 July 2009, no. 94, "Provisions relating to public security", Official Journal no. 170 of 24 July 2009, Ordinary supplement no. 128, Article 12].

<sup>65</sup> See the Criminal Code, Article 197A.

<sup>66</sup> See Ley Orgánica 4/2000, Article 54.



Legislation in France,<sup>67</sup> Germany, Italy,<sup>68</sup> and the Netherlands explicitly includes provisions concerning exemption from punishment in cases of facilitation of irregular stay for humanitarian purposes. In particular, national law in Germany exempts from **punishment those who conduct "specific professional or honorary duties"**.<sup>69</sup> France has introduced exemptions from punishment for humanitarian assistance provided to family members and for the provision of legal advice.<sup>70</sup>

Moreover, people **providing accommodation to migrants in an irregular situation also risk punishment** in all the selected Member States.<sup>71</sup> This is with the exception of France,<sup>72</sup> where punishing is explicitly excluded for those who accommodate a close relative. A similar context exists in Italy, where landlords are punished for renting accommodation to undocumented migrants only if they take "unfair advantage" of their vulnerable situation.<sup>73</sup>

In terms of the **type of punishment** imposed on those facilitating irregular entry, transit or stay, the nature and range of sanctions vary greatly across the selected Member States, with maximum custodial sentences ranging from one year in the case of Spain to 10 years in the case of Greece and 14 years in the UK (see Annex 2 of this study). In countries such as Italy, the penalty is lower for the facilitation of entry/transit than the facilitation of stay. In others, such as the Netherlands, the sanction is the same.

Sanctions are generally not limited to the facilitation of irregular entry, transit and stay in the territory of the country itself: the facilitation of entry, transit and stay in another Member State is also sanctioned in Hungary (except for entry), Italy (except for stay), Spain and the UK. Moreover, in Germany, the entry into, transit and stay in Schengen countries is also punished, and in the Netherlands the entry into, transit and stay in any country that is a party to the UN Smuggling Protocol is also sanctioned.<sup>74</sup>

Differences in the transposition of specific provisions of the Facilitators' Package at national level, further illustrated in section 4 of the study, highlight **disproportionate discretionary powers accorded to Member States in the implementation of the Directive and Framework Decision**.

### 2.3. The Facilitators' Package through a human rights lens

The human rights challenges connected to the criminalisation of irregular migration, including facilitation or irregular entry, transit and stay, have been highlighted by **several international and regional human rights bodies**. These include the Council of Europe Commissioner for Human Rights<sup>75</sup> and the UN Special Rapporteur on the

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<sup>67</sup> See Article L. 622-4, CESEDA.

<sup>68</sup> See Article 12, Legislative Decree 94/2009.

<sup>69</sup> This is stated as part of a general administrative provision, "Allgemeine Verwaltungsvorschrift", to the Residence Act, issued by the Federal Ministry of the Interior and amended in 2009. According to the administrative provision, those who act within the scope of their specific professional or honorary duties shall not be punished under section 96 of the Residence Act. See Bundesrat (27.07.2009): Drucksache 669/09, S. 531, Vor. 95.1.4. ([www.bundesrat.de/cln\\_090/SharedDocs/Drucksachen/2009/0601-700/669-09.template?ld=raw\\_property=publicationFile.pdf/669-09.pdf](http://www.bundesrat.de/cln_090/SharedDocs/Drucksachen/2009/0601-700/669-09.template?ld=raw_property=publicationFile.pdf/669-09.pdf)).

<sup>70</sup> See Article L. 622-4, CESEDA.

<sup>71</sup> Punishment for facilitation of irregular stay of those providing accommodation to undocumented migrants is not specifically excluded in the legislation of France, Germany, Hungary, the Netherlands, Spain or the UK (see respective national laws cited above). In Greece, specific legislative provisions explicitly punish this conduct (see Immigration Act, Article 87).

<sup>72</sup> See Article L. 622-4, CESEDA.

<sup>73</sup> See Article 12(5bis), Legislative Decree 94/2009.

<sup>74</sup> Ibid.

<sup>75</sup> See Council of Europe Commissioner for Human Rights, "Criminalisation of migration in Europe: Human rights implications", Issue Paper, Strasbourg, 4 February 2010. See also Council of Europe Commissioner for Human Rights, "Human Rights in Europe: time to honour our pledges, Viewpoints by Thomas Hammarberg,

human rights of migrants.<sup>76</sup> At the EU level, the FRA has highlighted a number of fundamental rights challenges connected with legislation criminalising conducts related to irregular migration.<sup>77</sup>

Regardless of their immigration status, **smuggled migrants and migrants in an irregular situation are bearers of inalienable human rights arising from international, regional and national law**. These rights derive from key international treaties.<sup>78</sup> Additionally, specific provisions relating to the standards of treatment of refugees are provided in the 1951 Convention relating to the Status of Refugees<sup>79</sup> and its 1967 New York Protocol.<sup>80</sup>

**The EU Facilitators' Package contains some limited safeguards for migrant victims of smuggling**. The EU Council Framework Decision refers to the need for anti-smuggling provisions to be applied without prejudice to the principle of non-refoulement, in compliance with the 1951 Refugee Convention and its 1967 New York Protocol.<sup>81</sup>

As studied above, the Facilitation Directive also contains a provision granting Member States the discretion not to impose sanctions for the facilitation of irregular entry and transit where the conduct is aimed at providing "humanitarian assistance" to the person concerned.<sup>82</sup> Yet, **the provision only partially serves the purpose of ensuring protection for actions carried out with the aim of providing humanitarian assistance to migrants in an irregular situation**. The exception is not mandatory and does not cover humanitarian assistance enabling a third-country national to stay in the territory of the EU.

The focus of EU legislation concerning the smuggling of migrants seems to be mainly on preventing irregular migration. The guiding rationale of the UN Smuggling Protocol supplementing the UN Convention against Transnational Organized Crime differs by compelling State Parties to ensure that human rights and refugee law are not

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Commissioner for Human Rights", Ch. "29 September 2008", Strasbourg, 2009, p. 91. See also J. Parkin, "The Criminalisation of Migration in Europe: A State of the Art of the Academic Literature and Research", CEPS Papers in Liberty and Security in Europe, No. 61, CEPS, Brussels, October 2013.

<sup>76</sup> United Nations Human Rights Council, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, F. Crépeau, Special Rapporteur on the human rights of migrants, A/HRC/23/46, Geneva, 24 April 2013.

<sup>77</sup> European Union Agency for Fundamental Rights, "Fundamental rights of migrants in an irregular situation in the European Union", FRA, Vienna, 2011; European Union Agency for Fundamental Rights, "Fundamental rights at Europe's southern sea borders", FRA, Vienna, 2013; European Union Agency for Fundamental Rights, "Criminalisation of migrants in an irregular situation and of persons engaging with them", FRA, Vienna, 2014.

<sup>78</sup> All of the human rights treaties cited, as well as the Universal Declaration of Human Rights, contain rights that, in line with the respective non-discrimination clauses included in the treaties, are applicable to migrants irrespective of their residence status. For a detailed analysis outlining how provisions included in these international treaties recognise rights to all migrants, irrespective of their residence status, see Platform for International Cooperation on Undocumented Migrants (PICUM), "Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework", PICUM, Brussels, March 2007, p. 11. See also UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171; UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol. 993, p. 3; UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, Vol. 660, p. 195; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, Vol. 1249, p. 13; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, Vol. 1465, p. 85; UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3; UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158.

<sup>79</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, Vol. 189, p. 137.

<sup>80</sup> UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, Vol. 606, p. 267.

<sup>81</sup> See Article 6, Framework Decision.

<sup>82</sup> See Article 1.2, Facilitation Directive.

compromised in any way by the implementation of anti-smuggling measures and by including clearer references and obligations related to **the protection of migrants' fundamental rights**.<sup>83</sup>

A comparative analysis of the human rights obligations included as part of the EU Facilitators' Package and of human rights and mandatory protection provisions in the UN Smuggling Protocol illustrates **the existence of an implementation gap in the current EU *acquis* on the smuggling of migrants in terms of human rights protection and safeguards**.

In line with the international human rights framework, EU legal and policy instruments against the smuggling of migrants must not jeopardise the human rights of victims of smuggling, irrespective of their administrative status. The UN Smuggling Protocol, read in connection with the international human rights framework, requires specific protection needs to be addressed by State Parties **to safeguard migrants' fundamental rights in the context of smuggling**.

Detailed operational measures recommending specific actions to be taken by Member States for the implementation of the UN Smuggling Protocol and for the safeguards for smuggled migrants contained therein are provided by the United Nations Office on Drugs and Crime (UNODC) Framework for Action. It **"aims to support origin, transit and destination countries to identify gaps in their own action plans, strategies, policies and legislative and institutional frameworks with respect to migrant smuggling, and put in place appropriate measures to fill them"**.<sup>84</sup>

The UN Smuggling Protocol contains mandatory protection provisions covering

- a) protection and assistance of smuggled migrants, including humanitarian assistance, protection and assistance at sea, and protection against violence;
- b) the right to life and right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; and
- c) protection of smuggled migrants who are victims or witnesses of crime.

How, then, are these provisions framed in the UN Protocol and how are they reflected in the Facilitators' Package?

#### **a) Protection and assistance of smuggled migrants, including humanitarian assistance, protection and assistance at sea, and protection against violence**

In its Article 16.3, the UN Smuggling Protocol lays down specific obligations for State Parties to take **all appropriate measures with a view to offering assistance to those whose life or safety is endangered by reason of having been smuggled**.<sup>85</sup> Basic assistance includes ensuring food<sup>86</sup> and medical and health assistance to smuggled

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<sup>83</sup> Several specific provisions in the Smuggling Protocol explicitly refer to the rights of smuggled migrants: Preamble, Articles 2, 4, 14(1), 14(2)(e), 16 and 19(1).

<sup>84</sup> United Nations Office on Drugs and Crime (UNODC), International Framework for Action to Implement the Smuggling of Migrants Protocol, New York, 2011, para. 22. For an overview of measures to be taken by Member States to ensure protection of smuggled migrants in line with the UN Smuggling Protocol, see Table 2 of the Framework for Action: Protection (and assistance), paras. 104-159. See also United Nations Office on Drugs and Crime UNODC, Toolkit to Combat Smuggling of Migrants, New York, 2010.

<sup>85</sup> United Nations Office on Drugs and Crime, "Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime", New York, 2008, p. 24.

<sup>86</sup> The human right to food is protected by Article 11 of the International Covenant on Economic, Social and Cultural Rights. General Comment No. 12 (1999) on the right to adequate food of the Committee on Economic, Social and Cultural rights offers guidance on the practical fulfilment of this right. Provision of adequate food implies "the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture" (para. 8). See Official Records of the Economic and Social Council, 2000, Supplement No. 2 and corrigendum (E/2000/22 and Corr.1), Annex V.

migrants,<sup>87</sup> and it applies to both undocumented migrants at the border and to those residing irregularly in the territory of the State Party.<sup>88</sup> Article 16.4 of the Protocol compels State Parties to mainstream throughout their protection and assistance measures those that address the special needs of women and children.

In relation to assistance and protection of smuggled migrants at sea, the obligation to preserve life at sea<sup>89</sup> is reflected in the language used in Article 8(5) of the Smuggling Protocol. This provision calls upon State Parties to take no additional measures without the express authorisation of the flag State,<sup>90</sup> **"except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements"**.<sup>91</sup> These legal standards are of particular relevance to current EU-level operations at sea, such as Operation Sophia outlined in Textbox 3.

### **Textbox 3: Operation Sophia, EU military operation in the Southern Central Mediterranean (EUNAVFOR MED) and UN Resolution 2240 (2015)**

Tasked with the role of **"contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean"**,<sup>92</sup> EUNAVFOR MED Operation Sophia was launched on 22 June 2015. It followed approval by the European Council, on 18 May 2015, of the Crisis Management Concept for a military CSDP operation to disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean.<sup>93</sup>

The military Operation Sophia aims at the identification, capturing and disposal of vessels as well as enabling assets used or suspected of being used by migrant smugglers or traffickers. The operation is structured around three separate, sequential phases, to **1) "support the detection and monitoring of migration networks through information gathering and patrolling on the high seas"; 2) "conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking"; and 3) "take all necessary measures against a vessel and related assets,**

<sup>87</sup> The Committee on Economic, Social and Cultural Rights, in General Comment No. 14 (2000) on the right to the highest attainable standard of health, has highlighted that "[s]tates are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventative, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy". See Economic and Social Council (2001), Official Records, 2001, Supplement No. 2 (E/2001/22), annex IV, para 34.

<sup>88</sup> See Legislative Guides, p. 365: Article 16(3) "does establish a new obligation in that it requires States parties to provide basic assistance to migrants and illegal residents in cases where their lives or safety have been endangered by reason of an offence established in accordance with the Protocol".

<sup>89</sup> See for example United Nations Convention on the Law of the Sea, Article 98. See also the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue, chs. 2.1.10 and 1.3.2.

<sup>90</sup> A 'flag state' is the state under whose laws the vessel is registered or licensed. See United Nations, UN General Assembly, Convention on the Law of the Sea, 10 December 1982, Article 91.

<sup>91</sup> The UN General Assembly has given more prominence to issues concerning treatment of people rescued at sea in recent years. In its resolution 64/71, adopted on 4 December 2009, the General Assembly recognised that some transnational organised criminal activities threaten legitimate uses of oceans and endanger the lives of people at sea and encouraged strengthened cooperation in response.

<sup>92</sup> Article 1, Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), O J L 122/31, 19 May 2015.

<sup>93</sup> Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), O J L 122/31, 19 May 2015. For more information on Operation Sophia (EUNAVFOR MED), see European Union External Action Services (EEAS), Fact Sheet: European Union Naval Force – Mediterranean Operation Sophia, Update: November 2015 ([http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet\\_eunavfor\\_med\\_en.pdf](http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf)).

including through disposing of them or rendering them inoperable, which are suspected **of being used for human smuggling or trafficking, in the territory of that State**".<sup>94</sup>

With Resolution 2240 (2015) of 9 October 2015,<sup>95</sup> the UN Security Council decided to authorise EU Member States for a period of one year to inspect vessels on the high seas **off the coast of Libya, in case of the presence of "reasonable grounds" to suspect the vessels were being used for migrant smuggling or human trafficking from Libya**. The Resolution was adopted with 14 votes in favour and one abstention by Venezuela. Acting under Chapter VII of the Charter of the United Nations, the UN Security Council further decided to authorise EU Member States to seize vessels that were confirmed as being used for migrant smuggling or human trafficking from Libya. The UN Resolution authorises EU Member States, acting nationally or through regional organisations, to use all measures in confronting migrant smugglers or human trafficking in full compliance with international human rights law.

Finally, in its Article 16.2, the UN Smuggling Protocol requires State Parties to **"take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them by migrant smugglers"**. Measures aimed at protecting smuggled migrants from violence should address not only violations that might occur during the smuggling process, but also in the country of destination, when migrants are residing irregularly in the territory of the State or when they are in administrative detention or facing deportation. In this context, specific measures must be introduced to protect smuggled migrant women against violence, as stressed in Article 16.4 of the UN Smuggling Protocol.

#### **b) The right to life and right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment**

**The fundamental right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment**, enshrined respectively in Articles 6.1 and 7 of the International Covenant on Civil and Political Rights, are explicitly provided for in Article 16.1 of the UN Smuggling Protocol.

Effective guarantee of the right to life and of the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment implies not only action in situations where smuggled migrants are in danger. It also entails positive actions to be proactively carried out by the **State to ensure smuggled migrants' positive enjoyment of these rights**. An example of positive action in this respect to protect these fundamental rights would include offering food and medical care to smuggled migrants.

The absolute right to life and right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, entail a negative obligation on the State to refrain from acts that would jeopardise the enjoyment of these rights. This would include, for instance, the obligation not to forcibly return undocumented migrants where there is a chance that their lives or safety would be under threat or that they would be subject to torture, cruel, inhuman or degrading treatment or punishment.<sup>96</sup>

<sup>94</sup> Article 2.2, Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122/31, 19 May 2015.

<sup>95</sup> UN Security Council, Resolution 2240 (2015), Adopted by the Security Council at its 7531<sup>st</sup> meeting on 9 October 2015, S/RES/2240 (2015).

<sup>96</sup> Specific safeguards relating to the procedures for forcibly returning undocumented migrants are included in the EU *acquis* as part of the EU Return Directive – see Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L 348/98-348/107, 16.12.2008. For a recent and detailed interpretation of the EU Return Directive, containing common guidelines, best practices and

### c) Protection of smuggled migrants who are victims or witnesses of crime

The UN Smuggling Protocol stipulates **that migrants shall not become liable to criminal prosecution under the Protocol for the fact of having been smuggled**.<sup>97</sup>

This provision offers guarantees encouraging such persons to testify and provide evidence against their smugglers in related proceedings in the receiving State.

Smuggled migrants are often vulnerable to becoming victims or witnesses of crimes in the context of smuggling. They might, for example, become victims of violence, assault or sexual violence, or may fall victim to human trafficking.

#### **Textbox 4: Temporary residence permits for trafficked and smuggled people in EU legislation**

At EU level, trafficking in human beings is dealt with by Directive 2011/36/EU,<sup>98</sup> which has replaced Council Framework Decision 2002/629/JHA.<sup>99</sup> The 2011 Anti-Trafficking Directive establishes detailed safeguards for the protection of victims of human trafficking, contrary to EU legislation countering smuggling, which lacks a specific focus on the protection of smuggled migrants compared with the previous anti-trafficking Framework Decision of 2002.<sup>100</sup> Yet, some common provisions apply to victims of both these crimes. For instance, Directive 2004/81/EC entitles victims of both trafficking and smuggling to a residence permit. Whilst granting a residence permit to victims of human trafficking who cooperate with the authorities is compulsory, it is discretionary for the victims of smuggling.<sup>101</sup> Specific safeguards are also included as part of Directive 2009/52/EC on sanctions and measures against employers of irregular migrants, which applies to cases of both trafficking and smuggling.<sup>102</sup>

**The obligation to provide assistance and protection to smuggled migrants is enshrined within the UN Smuggling Protocol**, according to which State Parties shall afford migrants appropriate protection against violence and provide appropriate

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recommendations for Member States to ensure implementation of the EU Return Directive, see the European Commission Recommendation of 1 October 2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, Brussels, 1 October 2015, **C(2015) 6250 final and Annex: "Return Handbook"** ([http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return\\_handbook\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf)).

<sup>97</sup> Article 5, UN Smuggling Protocol.

<sup>98</sup> European Union, Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 5 April 2011, (the 'Anti-Trafficking Directive').

<sup>99</sup> European Council, Council Framework Decision 2002/629/JHA on combating trafficking in human beings, 19 July 2002.

<sup>100</sup> See, in particular, Article 1 and Articles 11-16 of the Anti-Trafficking Directive.

<sup>101</sup> European Council, Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, 29 April 2004. See Article 3, according to which **"Member States shall apply this Directive to the third-country nationals who are, or have been victims of offences related to the trafficking in human beings". Note that the same Directive "may apply...to the third-country nationals who have been the subject of an action to facilitate illegal immigration". See also** Communication from the Commission to the Council and the European Parliament on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (SWD(2014) 318 final), 17 October 2014. In its Communication, the European Commission highlights that only ten Member States have made use of the opportunity to grant access to a residence permit for victims of smuggling: Austria, Belgium, Czech Republic, Estonia, Greece, Luxembourg, Malta, Portugal, Romania and Sweden. The Commission further notes that in Belgium, only persons subject to **'serious types of smuggling'** are included, whereas in Greece the smuggling must be conducted by a criminal organisation for smuggled migrants to have access to a residence permit.

<sup>102</sup> European Union, Directive 2009/52/EC of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, 18 June 2009.

assistance to migrants whose lives or safety are endangered.<sup>103</sup> Still, **enhanced efforts are needed to provide support and ensure access to justice for undocumented migrants** who, during or after the process of smuggling, have become victims or witnesses of crime.

Smuggled migrants who have been victims of any crime should be able to safely report to the relevant authorities and have their claims investigated and prosecuted. Where national laws do not ensure safe access to police reporting and justice to all victims of crime irrespective of their residence status, smuggled migrants may become increasingly vulnerable to crime with relative impunity for perpetrators, thus becoming 'zero-risk' victims. Where criminal laws and procedures do not already cover all persons, irrespective of residence status, **States may need to broaden the application of existing criminal law offences, particularly those relating to violent crimes, to ensure that they are available to protect smuggled migrants.**

In relation to ensuring protection for smuggled migrants who are witnesses of crime, Article 24 of the Organized Crime Convention provides that State Parties should take appropriate measures to protect them in criminal proceedings dealing with smuggling cases.

## 2.4. The implementation and extended scope of application of fundamental rights safeguards

Although not specifically recalled in the EU Facilitators' Package, **the EU *acquis* does recognise, through various instruments of EU legislation,<sup>104</sup> mandatory protection provisions** enshrined in the UN Smuggling Protocol. These include protection against violence, protection for victims and witnesses of crime, and protection of the right to life and not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Through its recent jurisprudence, the CJEU has contributed to clarifying that **the personal scope of application of specific safeguards included in EU legislation does extend to the protection of undocumented migrants.**<sup>105</sup> In its judgment on *Tümer* of 5 November 2014 (Case C-311/13),<sup>106</sup> the CJEU ruled in favour of the

<sup>103</sup> Article 16(2) and 16(3), UN Smuggling Protocol.

<sup>104</sup> For example, through safeguards included in the EU Anti-Trafficking Directive or in the EU Victims' Directive.

<sup>105</sup> Extensive jurisprudence has been developed by the CJEU, particularly in relation to access to rights and a residence permit to undocumented migrants, and protection against forced removal or access to fundamental rights pending forced removal. For example, in the case of *Zambrano v. Office National de l'Emploi (ONEM)*, the Court ruled that Article 20 of the TFEU prevents a Member State from denying an undocumented parent of an EU citizen the right to work and reside in the country of the child's citizenship. See C-34/09, *Ruiz Zambrano v. Office National de l'Emploi (ONEM)*, [2011] ECR I-0000, judgment of 8 March 2011, para. 45. Concerning the scope of protection available under EU law to third-country nationals suffering from serious illness whose removal would amount to inhuman or degrading treatment, the CJEU found, in the case of *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida*, that the removal of a person suffering a serious illness to a country where appropriate treatment was not available could in exceptional circumstances be contrary to the EU Charter of Fundamental Rights, and, in such circumstances, their removal had to be suspended pursuant to Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. Thus, the Court ruled that Directive 2008/115/EC requires the provision of emergency health care and essential treatment of illness to be made available to such persons during the period in which the Member State is required to postpone their removal. See Case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida*, Judgment of the Court (Grand Chamber) of 18 December 2014. Finally, the scope of application of safeguards included in the EU Return Directive (Directive 2008/115/EC) has been clarified by the CJEU through several judgments. See for example, *Kadzoev* (C-357/09), *El Dridi* (C-61/11), *Achughbabian* (C-329/11), *Sagor* (C-430/11), *Arslan* (C-534/11), *Filev & Osmani* (C-297/12), *Bero & Bouzalmate* (C-473/13 & C-514/13), *Pham* (C-474/13), *G. & R.* (C-383/13), *Z. Zh.* (C-554/13), *Mahdi* (C-146/14), *Skerdjan Celaj* (C-290/14).

<sup>106</sup> Case C-311/13, *O. Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Judgment of the Court (Fifth Chamber) of 5 November 2014.

application to undocumented migrant workers of the protections established by the EU Directive on insolvency of employers.

The case concerned the application of Mr Tümer, a Turkish national with no leave to remain in the Netherlands, to access his right to back pay as his employer became insolvent. Prior to the decision of the Court of Justice, according to Dutch legislation, undocumented migrants **could not be considered 'employees'** for the purpose of the national application of EU law. The Court ruled that denying undocumented workers access to back pay when their employer becomes insolvent is **"contrary to the social objectives of the directive"** and thus clarified that Member States could not refuse to apply the safeguards established within the Directive to undocumented migrants.

A similar reasoning has been followed by the European Committee on Social Rights (ECSR) when assessing the personal scope of application of the rights enshrined within the European Social Charter. Although in principle the rights in the Charter are granted only to lawfully residing residents, the decisions of the ECSR have confirmed **the expanded personal scope of these provisions irrespective of residence or administrative status**. In particular, the ECSR has issued key decisions on the social rights of undocumented children and found that certain rights are so intrinsically linked to human dignity that it would be contrary to the Charter to deny these rights on the basis of residence status.<sup>107</sup>

Moreover, recently adopted EU legislation explicitly clarifies the extended personal scope of application, by asserting that the fundamental rights safeguards included apply irrespective of residence status. This is for example the case of the recently adopted EU **Victims' Directive** (see Textbox 5), which establishes that the rights and protections of the Directive apply to all victims of crimes committed in the EU, irrespective of the **victim's residence status**.<sup>108</sup>

#### **Textbox 5: The EU Victims Directive**

The EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/ EU),<sup>109</sup> adopted on 25 October 2012, is a step towards ensuring protection and access to justice for all victims of crime, irrespective of residence status.<sup>110</sup> **The rights and protections of the Victims' Directive apply to all victims of crimes committed in the EU, irrespective of the victim's residence status,**<sup>111</sup> and to criminal proceedings taking place in any Member State within the Union,<sup>112</sup> with the exception of Denmark, to which the Directive does not apply.<sup>113</sup> This includes crimes

<sup>107</sup> See *International Federation of Human Rights (FIDH) v. France* (decision on the merits), Complaint No. 14/2003, Council of Europe: European Committee of Social Rights, 8 September 2004. When determining the object and purpose of the Charter, the ECSR takes account of the fact that the latter is a living human rights instrument dedicated to the values of dignity, autonomy, equality and solidarity, and closely complements the European Convention on Human Rights. The ECSR concluded from this analysis that the Charter must be interpreted so as to "give life and meaning to fundamental social rights", and that limits on rights must therefore be read restrictively. See the Decision on the merits, paragraph 31, which states that "[h]uman dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and health care is a prerequisite for the preservation of human dignity".

<sup>108</sup> Article 1, Victims' Directive.

<sup>109</sup> Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, L 315/57 (the 'Victims' Directive').

<sup>110</sup> For a detailed analysis concerning the application of the safeguards included in the EU Victims' Directive to all victims of crime irrespective of residence status, see Platform for International Cooperation on Undocumented Migrants (PICUM), "Guide to the EU Victims' Directive: Advancing Access to Protection, Services and Justice for Undocumented Migrants", PICUM, Brussels, November 2015.

<sup>111</sup> Article 1, Victims' Directive.

<sup>112</sup> Recital 13, Victims' Directive.

<sup>113</sup> Recital 71, Victims' Directive.



that occur at EU borders or in detention, as well as criminal proceedings in the EU for crimes that occurred outside EU territory (also known as extraterritorial offences), where national law provides for this.

By obliging Member States to ensure certain basic rights to all victims of crime, the Directive prioritises **individuals' dignity and safety above their administrative status**. It therefore holds the potential to become a significant legislative tool at the EU level to ensure their access to protection and support, and to address impunity for crimes against undocumented migrants.

The Directive requires that all victims of crime be treated with respect, be offered support services, have access to protection, and be given the opportunity to participate in the criminal proceedings linked to their case. The Directive includes several provisions specifically addressing victims of gender-based violence, and underscores the importance of taking into account the best interests of child victims. The Directive also tackles a number of practical barriers to access that are relevant to undocumented victims of crime and requires that officials in regular contact with victims receive appropriate training on how to adequately address their needs.

The lack of specific mandatory provisions to ensure the fundamental rights of smuggled migrants and of actors providing assistance to them for humanitarian purposes as part of **the EU Facilitators' Package**, however, has given rise to a high degree of inconsistency in the implementation of fundamental rights safeguards by Member States and has fuelled legal uncertainty in this policy area.

### 3. PROSECUTION AND CONVICTION RATES FOR INDIVIDUALS AND ORGANISATIONS ACTING FOR HUMANITARIAN REASONS

#### KEY FINDINGS

1. Qualitative and quantitative knowledge of the implementation of the Facilitation Directive and the use of the humanitarian exception are by and large lacking at national and EU level.
2. The few existing sources of information and statistical data do not offer an accurate and comparable picture of the practical use and effects of the criminalisation of entry, transit and residence.
3. Domestic court cases in selected EU Member States, however, offer anecdotal evidence that criminalisation has covered family members and those assisting refugees to enter.
4. Irrespective of the actual number of convictions and prosecutions, the effects of the **Facilitators' Package** extend beyond formal prosecutions and the number of criminal convictions.

This section provides a synthesised overview of statistical data on prosecution and conviction rates for individuals assisting irregular migrants to enter, transit or reside in the EU Member States under examination. It also summarises the main methodological challenges and 'data gaps' characterising existing quantitative knowledge of this phenomenon in six selected EU Member States under analysis in this study: Germany, the UK, Italy, the Netherlands, Spain and France.

**Statistics on the practical operability of the Facilitation Directive at the national level are largely lacking and most of the time are not publicly available.** This makes any cross-country comparative examination a challenging enterprise. The few existing, publicly available statistical data at the national level do not provide an accurate picture of the use of the criminalisation of entry, transit and residence in the countries under assessment. This is particularly the case in respect of the use of the humanitarian assistance exception.

There are different collection methods and analysis practices concerning law enforcement data, prosecution information and other kinds of data across the Member States under analysis. They also present their own specificities regarding data gaps and methodological deficits. **Nor is there EU-level statistical collection of prosecution and conviction rates** of organisations or individuals facilitating entry, movement or stay of undocumented immigrants, or for those acting for humanitarian purposes (e.g. Eurostat). On the basis of the research outlined in Annex 1 of this study, the following picture emerges when it comes to data from police and law enforcement (section 3.1), prosecution and criminal courts (section 3.2) and knowledge gaps and methodology caveats (section 3.3).

#### 3.1. Police and law enforcement data

The most detailed statistical picture of prosecution and conviction rates exists in **Germany. It is the only Member State under examination offering specific statistics on persons arrested on suspicion of facilitation of irregular migrants.**

A total of 11,195 persons were arrested between 2009 and 2013 in Germany.<sup>114</sup> Moreover, in 2013 alone, 229 cases (288 suspects) related to the smuggling of human beings and a total of 6,232 offences against the Residence Act were reported.

In Italy, information provided by the government clarifies that the number of persons **apprehended for 'facilitation-related' offences** were as follows: 1,978 (2011), 1,655 (2012) and 1,499 (2013). During the last five years, 3,185 were apprehended for facilitating immigrants in the Netherlands, and 1,083 were suspected of facilitating irregular immigration (See Annex 1 of this study).

The UK crime statistics do not offer a detailed breakdown on types of offences. No specific data related to crimes in the scope of facilitation are available. In Spain, 836 and 746 suspected facilitators were arrested respectively in 2012 and 2013.<sup>115</sup> The responses provided by the Spanish authorities to the survey drawn up in the context of this study have confirmed that no further data exists concerning prosecution and conviction of facilitators. In France, data on arrests are not publicly available.

### 3.2. Prosecution rates and information from criminal courts

In Germany, 3,883 cases on smuggling were handled by the public prosecutor's office of the District Court and as part of investigations under the public prosecutor during 2013. There were 3,903 cases on the facilitation of irregular immigration and other crimes related to the Residency Act that same year. Table 6 provides an overview of the number of individuals judged and convicted in 2013, which included more than 6,700 convicted for irregular entry, more than 620 for the smuggling of foreigners and 30 for smuggling aggravated by death, commercial and gang smuggling. Annex 1 provides several practical examples of German cases before national courts involving facilitation, including the one outlined in Court Case 1 below (Textbox 6).

**Table 6: Total persons judged and convicted in Germany, 2013**

Offences	Total Judged	Total Convicted
Irregular entry (section 95 Residency Act)	7,937	6,765
Smuggling of foreigners (section 96)	693	622
Smuggling aggravated by death, commercial and gang smuggling (section 97)	32	30

Source: Annex 1 of this study.

<sup>114</sup> European Commission, "Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU: national institutional frameworks, policies and other knowledge-based evidence", Brussels, 2014.

<sup>115</sup> Ibid.

**Textbox 6: Court Case 1 (Germany)**

A Moldovan national organised the irregular entry of his fiancé into German territory. He bought a false visa from a person who asked him to take another woman along with them as well. The middle-aged woman died while attempting to cross the Polish-German border. The man was not found guilty of smuggling under section 96 of the Residence Act because he had not acted for gain. He was found guilty and convicted for facilitating irregular entry under section 27 of the Criminal Code.<sup>116</sup>

In the UK, there are publicly available statistics providing a picture of the number of persons proceeded against and found guilty at Crown Courts for generally assisting undocumented migrants (see Table 7 and Annex 1 for a full overview).<sup>117</sup> Domestic case law in the UK, such as that described in Court Case 2 below (Textbox 7), indicates that **criminalisation has covered family members and those assisting refugees to enter**. A study of case law in the UK related to facilitation in Aliverti (2013) has shown that 25% of the defendants charged are alleged to be family members of the person involved.<sup>118</sup>

**Textbox 7: Court Case 2 (R v. Alps, UK)**

The UK Court of Appeal ruled against an applicant charged and convicted for assisting irregular immigration. He had passed off a passport as belonging to his nephew. The nephew then applied for international protection in the UK but was considered to be an irregular entrant within the scope of section 25 of the Immigration Act, as he had used **someone else's** passport.<sup>119</sup>

As regards the number of persons proceeded against and found guilty for more generally assisting irregular immigration in the UK, the criminal justice statistics provided by the government are shown in Table 7 below.

**Table 7: Number of persons proceeded against and found guilty at the magistrates' and Crown Courts for assisting unlawful immigration in the UK, 2005-2014**

Year	Proceeded against in magistrates' courts	Found guilty in magistrates' courts	For trial at Crown Court	Found guilty at Crown Court
2005	109	26	165	126
2006	82	13	129	101
2007	66	11	81	55
2008	106	9	97	75

<sup>116</sup> Bundesgerichtshof, Decision 4<sup>th</sup> December 2007 Az 5 StR 324/07 (only in German) (<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2007-12&Seite=9&nr=42345&pos=285&anz=323> or <https://openjur.de/u/76546.html>).

<sup>117</sup> See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/427922/detention-q1-2015-tabs.ods](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427922/detention-q1-2015-tabs.ods).

<sup>118</sup> A. Aliverti, *Crimes of Mobility: Criminal Law and the Regulation of Migration*, Routledge: Abingdon, 2013.

<sup>119</sup> See [2001] All ER (D) 29 (Feb); on the criminalisation of those assisting bona fide asylum seekers, refer to *Sternaj and Sternaj v. the Crown Prosecution Service* [2011] EWHC 1094 (Admin). For more information see also Aliverti (2013).

<b>2009</b>	244	27	192	148
<b>2010</b>	280	27	203	172
<b>2011</b>	438	41	275	220
<b>2012</b>	344	38	245	176
<b>2013</b>	375	21	265	209
<b>2014</b>	377	7	311	239

Source: Annex 1 of this study.

Based on the response by the French authorities to the questionnaire/survey drawn up for this study, the number of convictions of individuals for assisting undocumented migrants is shown in Table 8.

**Table 8: Number of convictions in France, 2009-2014**

<b>Year</b>	<b>Number of Convictions</b>
2009	1,149
2010	1,184
2011	1,023
2012	1,278
2013	1,470
2014	1,834

Source: Authors.

In Italy, there are no data available concerning the prosecution and conviction of persons charged with the facilitation of irregular immigration, or any information concerning immigration-related offences during the last three years. In the Netherlands, there is a similar gap and public information does not exist. In answering the questionnaire/survey, Spain reported that there are no available data on the number of prosecutions and convictions.

### **3.3. Data gaps and methodological issues**

**The following crosscutting methodological caveats can be identified across the EU Member States studied:**

- First, existing data (quantitative and qualitative) sources are scarce, fragmented and largely non-existent. When collected, they are not made publicly available as they relate to criminal and civil actions and charges, and the number of prosecutions.
- Second, information on the use of the humanitarian assistance exemption and the enforcement of penalties is also lacking in all EU Member States under analysis.
- Third, **the data or relevant categories of 'immigration-related' offences are not broken down or disaggregated into specific categories of offences.** These are often grouped into a sole type.
- Fourth, any relevant information on the two last reporting years is often not available.

It is therefore not possible to gain an accurate picture or draw general conclusions about the workability of the **Facilitators' Package** and the use of the humanitarian assistance

exception. As highlighted in section 3.2 above, Annex 1 of this study has identified some anecdotal evidence of court cases where individuals and organisations acting for altruistic purposes when assisting others have been prosecuted and convicted. These cases are complemented by the findings of the civil society survey assessed in the next section.

That notwithstanding, it is important to underline that irrespective of the actual number of convictions and prosecutions, **the effects of the Facilitators' Package may well extend beyond formal prosecutions and criminal convictions**, and may also entail other material and perceived effects as well as wider unintended consequences, which we analyse in the next section.

## 4. EFFECTS OF THE FACILITATION DIRECTIVE AS IMPLEMENTED IN MEMBER STATES

### KEY FINDINGS

1. Some civil society organisations fear sanctions and experience intimidation in their work with irregular migrants, with a deterrent effect on their work. Those assisting irregular migrants perceive a significant margin of manoeuvre and degree of arbitrariness in the way the Facilitation Directive is implemented in their Member State.
2. There is widespread confusion among civil society practitioners around how the Facilitation Directive is implemented in their Member State, which can lead to misinformation and ‘erring on the side of caution’, thereby compromising migrants’ access to vital services. This is especially true in the context of the current migration crisis, where everyday citizens are obliged to volunteer vital services in the absence of sufficient state provision.
3. This confusion stems in part from a lack of coordination between local and national authorities regarding implementation of the Facilitation Directive. This lack of coordination impinges on the key role played by civil society organisations and cities in ensuring irregular migrants’ access to humanitarian assistance and basic services.
4. In certain Member States, the implementation of the Facilitation Directive is perceived to contribute to the social exclusion of both irregular and regular migrants. Many individuals, organisations and city authorities assisting irregular migrants see the Facilitation Directive as part of a raft of measures that undermine social trust and social cohesion. Shipowners feel poorly supported by Member States in undertaking legal and moral obligations to help irregular migrants at sea and often ill-placed to meet these obligations.
5. There is scant EU funding to support the work of cities and civil society organisations providing humanitarian assistance to irregular migrants. This lack of funding is experienced as an existential threat for civil society organisations and, at the city level, has the effect of compromising irregular migrants’ access to vital services.

This section provides an analysis of the effects of the Facilitation Directive in the eight EU Member States examined in this study and in others. It draws on the 69 substantive responses to a survey of civil society organisations (representing 17 Member States), 13 responses to a second survey of Member State cities (representing 11 Member States) and 8 responses to a survey of shipowners. A series of case studies and promising practices are also drawn from the surveys.

The section starts by addressing the material and indirect effects of the criminalisation of facilitation of undocumented migrants and those assisting them (section 4.1). The section continues by studying the ‘unintended consequences’ of the implementation of the Facilitation Directive for irregular migrants and those who assist them as well as for refugees and regular migrants, citizens and society as a whole (section 4.2).

## 4.1. Material and perceived effects on irregular migrants and those assisting them

### Sanction, harassment and intimidation

Data from the surveys suggests that in some Member States, such as France, Spain and Belgium, the fear of sanction for assisting the irregular entry, transit or stay of an irregular migrant on the basis of the Facilitation Directive has decreased, in part because of reformed national legislation informed by civil society activism. Yet in other Member States, **civil society organisations fear sanction for their work supporting irregular migrants.**

This is especially the case in states at the common EU external border facing large influxes, such as Hungary. Previous studies have demonstrated that fear of sanction can have a deterrent effect, contributing to what Basaran (2015) calls, in the context of **humanitarian rescue at sea, a "collective indifference"**.<sup>120</sup> While there is no evidence of indifference in our survey of shipowners, there is widespread concern that Member States are failing to adequately support shipowners. This lack of support has the effect of putting the lives of crew members and migrants at risk, and of harming relations of social trust between shipowners and Member States (see 4.2.2 below).

Just a handful of respondents to the civil society survey reported direct experience of proceedings, prosecution or sanction for their work supporting irregular migrants. Criminal acts included fundraising for the medical bill of a migrant domestic worker without licence, protesting, and misuse of public funds.

Only half of respondents report that staff or volunteers (or both) clearly understand which services they **can provide to irregular migrants 'in keeping with the law'**, and seven out of nine fear that their work could put them in conflict with the law.

Around a quarter of civil society respondents knew of charges brought against humanitarian actors for facilitation outside of their organisation. These included charges being brought for the following acts: a solidarity kitchen in the Netherlands providing **'undeclared work' to irregular migrants; universities in the UK having their sponsorship licences** (required to admit international students to their courses) suspended for not having sufficiently rigorous procedures in place to monitor students who might fall in breach of their conditions of residence; someone bringing a refugee family they knew from Italy to the Netherlands convicted for smuggling; someone in Spain taking an irregular migrant in their vehicle; and someone in Hungary hosting irregular migrants.

#### Textbox 8: Case Study 1, Spain Arrested at the border

In March 2015, a photojournalist whose work has been featured in *Al Jazeera* and *El Mundo* was arrested on the charge of transporting a number of irregular migrants in her car into Spain's North African territory Melilla. She denied the charges, claiming that she simply gave them directions to a refugee centre and then photographed them leaving. She had her possessions confiscated and was incarcerated for 12 hours. Although later released without charge, she argued that her arrest and subsequent treatment in itself constituted a **form of 'persecution'**.

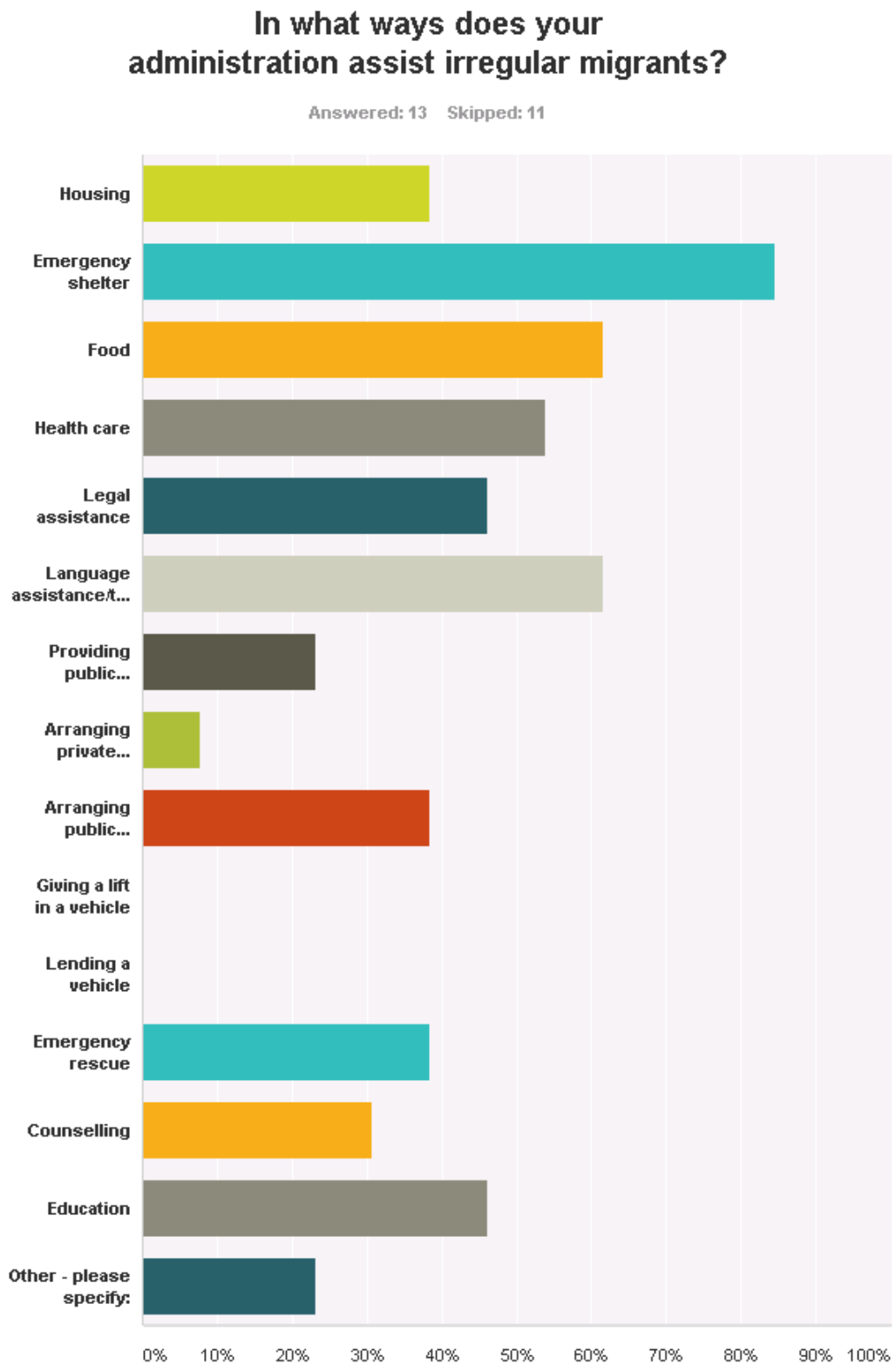
<sup>120</sup> See T. Basaran, "The saved and the drowned: Governing indifference in the name of security", *Security Dialogue*, Vol. 6, No. 3, 2015.



A fifth of respondents reported that their organisation or a member of **their organisation has feared sanction for their work assisting an irregular migrant** – both for work related to the transit of migrants and for supporting them during their stay in a Member State. Among these were respondents from Spain, the UK, Cyprus, Germany, Denmark, Austria and Hungary. Some civil society organisations reported that this fear and confusion vis-à-vis the legislation influences their willingness and ability to provide humanitarian assistance.

Of the 57 civil society organisations surveyed, 56 reported that they understand the assistance that they provide irregular migrants to be humanitarian in nature. Most of those who provided a definition of this referred to **services that help migrants to access their fundamental rights (including to health care, shelter, hygiene and legal assistance) and to live with dignity** as fellow human beings.

**Figure 1: Cities' responses to Q18 of the survey – Assistance to irregular migrants**



Answer Choices	Responses
Housing	38.46%
Emergency shelter	84.62%
Food	61.54%
Health care	53.85%
Legal Assistance	46.15%
Language Assistance/Translation	61.54%
Providing public transport tickets	23.08%
Arranging private transport	7.69%
Arranging public transport	38.46%
Giving a lift in a vehicle	0.00%
Lending a vehicle	0.00%
Emergency rescue	38.46%
Counselling	30.77%
Education	46.15%
Other – please specify	23.08%

Source: Authors.

**The shipowners who responded to the survey similarly see their interaction with irregular migrants as humanitarian in nature** – saving lives at sea is both a legal and moral requirement, albeit one that they feel poorly placed to provide (see 4.2.2 below). As one respondent articulated, “shipowners and crewmembers feel it as their humanitarian duty to help ships in distress and people in need of help at sea. Furthermore seafarers have the obligation pursuant to SOLAS (International Convention for the Safety of Life at Sea, 1974) to actually help in such circumstances.”

Intimidation and harassment were more widely reported, but again this varied according to the Member State. Among the 49 respondents to a question on this topic in the civil society survey, 12 reported that they “feel that we work in a climate of intimidation from the authorities”. Some reported that while they feel supported in their work at a local level, the national level discourse serves to deter or intimidate them. Intimidation can take multiple forms, including inaction on the part of the authorities. One civil society organisation experiences the state’s unwillingness to protect them from right-wing groups as a form of intimidation.

#### **Textbox 9: Case Study 2, Central and Eastern Europe Intimidation as a form of deterrence**

In Central and Eastern Europe, respondents report that their experience of supporting irregular migrants over the summer has been less one of sanction than one of intimidation and a lack of cooperation from the authorities. One civil society organisation reports that “policemen often do not let us do our work”. They report that at a train station in Slovenia the police did not let volunteers call the paramedic from an ambulance to assist someone, even though it was there at the station.

In Hungary, meanwhile, it is reported that when civil society organisations called the police from a railway station to report smugglers who wanted to persuade refugees to go with them for much more money than it would cost to go on trains safely, they said that they knew the smugglers and were not in any position to act. In Hungary, refugees were frequently dispersed from squares and relocated, with the consequence that it was hard for them to access food-distribution points provided by humanitarian actors.

The fact that much of the humanitarian assistance provided to irregular migrants is 'invisible' (see 4.2.3 below) means that advocacy is also a risky terrain for some civil society organisations. A fifth of civil society respondents report that they feel that **their ability to engage in advocacy work is compromised as a consequence of the climate of criminalisation of which the Facilitation Directive is part**, including in Cyprus, Spain, Hungary and the UK. One Spanish organisation has been subject to administrative sanction as a result of protests calling for fundamental rights for all.

#### **Textbox 10: Case Study 3, The UK Self censoring for fear of sanction**

UK respondents report concerns regarding the freedom of advocacy work among civil society organisations that also provide services. As one reports, "we have received advice that our work may not be considered humanitarian (and therefore charitable under UK charity law), because we assist those who do not currently have the legal right to remain in the UK (even though our assistance is about establishing this legal right). This has also been mentioned in relation to our information on [the] successful overturning of convictions for refugees who have used false passports to flee (allowable under the Refugee Convention)." This climate of intimidation has led to the possible self-censoring of their work and messaging, they conclude, owing to fears about funding (see 4.2.3 below).

### **Margins of manoeuvre and lack of coordinated working**

Civil society organisations across almost all Member States experience a **disproportionate margin of manoeuvre in the implementation of the Facilitation Directive**, on the part of national government, local authorities, third parties and law enforcers.

Just under half of 46 respondents to one question in the civil society survey reported that their Member State enforces duties **to report on third parties only** "some of the time", while nine responded "rarely". Along with flexibility in government enforcement, respondents reported great variation in whether third parties – such as landlords or schools – adhered to their obligations to report or not, again, the most common response being "some of the time".

Some respondents report that any ambiguity surrounding the **Facilitation Directive's** implementation can actually be of benefit – meaning that **they are in reality left to their own devices to get on with work recognised as important by local authorities**. One respondent sums up the relationship between service providers and the authorities as one of "tacit acknowledgment". They report that, although they have **the right**, "it is very unusual for police or immigration officials to enter food services...or medical services...where irregular migrants attend". While this margin of manoeuvre means that **authorities often apply a 'common sense' approach to humanitarian actors**, using their discretion not to pursue them, national authorities could foster greater coordination and transparency in this area by clarifying the exemption of humanitarian acts from sanction in domestic law.

### Textbox 11: Promising Practice 1, Utrecht Using the law to bridge the local and the national

Legal action led by the city of Utrecht demonstrates how cities can use legal strategies to force the state to provide clearer instructions and resources to local authorities for the upholding of **irregular migrants' fundamental rights**. The City of Utrecht decided to provide shelters to irregular migrants when the situation of homeless people squatting just outside the city became unacceptable. Municipal authorities decided to provide a response to this situation both for the need for public order and security but also for humanitarian reasons. After the decision of local authorities to provide shelters to irregular foreign nationals, Utrecht was criticised for challenging national legislation and policy on this issue.

Local authorities replied to this criticism by arguing that, if they did not provide shelters to everyone the municipality would breach international obligations, such as Articles 3 and 8 of the European Convention on Human Rights, as well as the EU Return Directive, particularly Article 3, Preamble 12 and Article 9.2. A first complaint against the Dutch State – because of an action of the City of Utrecht – was filed by Defence for Children International and resulted in the European Committee of Social Rights stating that shelter must be provided to undocumented migrants. A second complaint was lodged as well before the European Committee of Social Rights by the Conference of European Churches. The final decision on this case is yet to be reached.

### **Sometimes cities themselves use their discretion to support irregular migrants (such as through emergency housing) in breach of national regulations.**

While, in national law, public operators in Italy (with the exception of health care workers) are obliged to report irregular migrants to the police, for example, there is evidence that, at the city and regional levels, social workers and the police adopt a more pragmatic approach when applying this to particularly vulnerable groups, such as irregular elderly people, pregnant women and unaccompanied minors. In making it explicit that humanitarian assistance is excluded from sanction, national law could foster greater transparency in this area, recognising that in some cases anonymity is a necessary condition to preserve the fundamental rights of especially vulnerable migrants.

Survey responses provided evidence of **cities using the law to empower their work with irregular migrants and overcome the restrictions from national government**; new regulations delineate their pragmatic approach, thus bringing it out of the shadows. In Milan, for example, **the city's administration amended legislation to make it explicit that irregular children were not required to show parents' residence permits to access nursery schools.**

### Textbox 12: Promising Practice 2, City to city coordination across the EU

One city respondent is hopeful that a new working group of cities in Europe will serve to highlight local realities and influence policies at the European level from the bottom up. Comments included the "need to start to acknowledge the reality of undocumented migrants". "They exist, they live among us". The fact that many will be regularised is a challenge faced by cities across Member States. **"It's time to start making real policies and not to hide."**

For other respondents, the high degree of discretion employed by authorities and third parties – such as schools and medical professionals – in implementing the Facilitation Directive leads to **a lack of clarity around the law, which can hamper efforts to secure migrants' access to fundamental rights**. On the question of enforcement, one respondent to the civil society survey from the UK commented that “many institutions report going *beyond* what is in fact their legal duty, compromising their duty of care to e.g. minors (schools, social workers, etc.), breaching confidentiality and data protection laws (hospitals, GPs) and often risking discrimination (landlords asking for evidence of immigration status from non-white prospective tenants, or those with a non-British accent)”.

Another respondent similarly notes that “schools often report to us that they feel **pressured to report irregular students (and are told to do so by the Home Office)**”; meanwhile, their legal duty to pass on information to the Home Office is unclear. It is reported by another respondent that guidance on charging for health care for irregular **migrants in the UK** “encourages” hospitals to inform the Home Office of unpaid debts – those with debts over £1,000 can be sanctioned by the refusal of further visas. Such discretion appears to undermine the principle of clarity of law.

In the absence of clarity and oversight, **both humanitarian workers and migrants may find themselves at the mercy of a single official's discretion** vis-à-vis the implementation of the Facilitation Directive. One respondent reports that the decision of a labour inspector to report irregular migrants following a workplace check can come down to an individual whim. Similarly, respondents from the UK, Belgium, Cyprus and the Netherlands suggest that landlord checks on immigration status, though a legal requirement, are largely discretionary. In Cyprus, a respondent reports that while “medical professionals are not *obliged* to report undocumented migrants, they often do”. They claim that this is even more usual in regards to administrative staff in public hospitals. For this reason, they report, some migrants, and especially undocumented migrants, avoid visiting public hospitals at all.

In some cases, **the law grants irregular migrants anonymity in accessing services with the aim of protecting them. This is commonly referred to as a 'firewall'**.<sup>121</sup> In the Netherlands, it is reported that in Amsterdam a firewall is working effectively – irregular migrants can report crimes to the Amsterdam police without fear of being arrested because of their irregular status.

**The ambiguity and ambivalence surrounding implementation means that irregular migrants' access to essential services is often governed by luck rather than fairness and justice.**

### **Lack of information about rights and exclusion from vital services**

Poor understanding of the scope of the Facilitation Directive by statutory service providers, third parties and migrants themselves is a frequent occurrence reported by civil society. When unsure, some service providers will err on the side of caution for fear of penalty (see 4.1.1 above). As one civil society organisation in the Netherlands reports, “for service providers who don't exactly know what the law says, the practice is, keep away from irregular migrants (schools, GPs, youth workers, etc.)”.

**Lack of information can therefore lead to the exclusion and marginalisation of irregular migrants from services to which they have the right**, including

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<sup>121</sup> See e.g. F. Crépeau and B. Hastie, “The Case for ‘Firewall’ Protections for Irregular Migrants”, *European Journal of Migration and Law*, Vol. 17, Nos. 2-3, 2015, pp. 157-183.

vulnerable groups such as children seeking to access school and pregnant women in need of hospital care.

Survey responses suggest that often **the exclusion of irregular migrants from services to which they are entitled, including school and health care, comes down to a simple lack of information**. Several respondents, including in the UK and Belgium, raise concerns **over irregular migrants' access to labour rights, since many are unsure of their rights and protections**. It is also reported that some pregnant women are too scared to go to hospital for fear of being reported to the authorities. In Spain, it is reported that mothers may avoid accessing certain services for fear that their children will be taken from them. In some Member States this fear is well founded. A UK respondent reports cases where hospital patients have indeed been referred to immigration authorities from the hospital.

Just two of the 59 respondents to the civil society survey pointed out that they are obliged to report irregular migrants, although a sixth of respondents were unsure of whether they had such an obligation. Confusion was even greater in **the respondents' understanding of other third parties' obligations to report the presence of irregular migrants, and their perception as to whether the third parties complied with these obligations** (Table 9). The results from the civil society survey demonstrate a **poor understanding of the law among humanitarian actors across the EU**. In several instances, respondents from the same country gave different answers.

**Table 9: Civil society responses: Are duties to report the presence of irregular migrants imposed on third parties in your Member State in the following contexts (even if not enforced)?**

Third Party	Yes	No	Don't know
Medical professionals	11	35	17
Schools	9	34	19
Higher education institutions	8	29	25
Local authorities	26	16	21
Landlords	9	29	25
Total respondents	63		

Source: Authors.

An especially high level of confusion was reported among the 25 Hungarian respondents. This may reflect the fact that many civil society organisations have sprung up informally in Hungary over the 2015 summer to respond to the 'refugee crisis' and these might include volunteers who are not fully trained or qualified on these matters. These volunteers are frequently the first and only humanitarian ports of call for refugees arriving in Europe.

While **civil society organisations** play an important role in providing humanitarian support to irregular migrants and should be supported in this function (see 4.2.3 below), they **cannot substitute for the state's humanitarian obligations**. Several respondents demonstrated that they were coordinating effectively with the state to provide crucial services, for example through being contracted to provide assistance on

behalf of the state. As one French city survey comments, ultimately "it is up to the state to take care of every person in distress".

### **Textbox 13: Case Study 4, Cyprus The law is not enough; there is a need for information**

In Cyprus, one respondent reports that some irregular migrant children are not enrolled in school because there is no public information that they have the right. They explain, "[s]chools used to ask for a resident permit to register children, but we complained against this and the Ministry of Education gave directions not to ask for a resident permit. It is very seldom now, but we still receive complaints by migrants for being asked for a resident permit to enrol their children in school. What remains problematic is the fact that most migrants are not informed of this policy and many undocumented migrants still avoid enrolling their children [in] school, as they are afraid. Moreover, the directions by the Minister of Education refer to children, who are [at] an age [when] schooling is compulsory (up to 16). Schools still ask for a resident permit from migrant children aged [over] 16."

**Shipowners report some uncertainty about their legal obligations and risk of sanction in relation to certain encounters with irregular migrants.** These include what would happen in the case of death or injury among rescued parties and also with regard to stowaways. One respondent fears that much confusion comes from inconsistency in receiving states: "There are two situations there. On the one hand the refugees, that everyone is kind to welcome in European ports, and on the other hand, the stowaways, who, despite their few number, are very difficult to disembark and the source of many administrative and financial and operational troubles."

One respondent specifically laments **the lack of a description in the Facilitation Directive to provide for (and exclude from sanction) humanitarian acts at sea.** Another respondent explains that a further grey area concerns "confusion over what is meant by the nearest 'safe port' in the SAR convention. Will a North African port be considered a safe port or can a master breach the UN Refugee Convention when bringing a migrant/refugee back to the country **they claim to be fleeing from?**" Another reports, "[i]n our view it should be made clear that shipowners and crew members...helping ships in distress and people at sea, especially migrants, as a fulfilment of their duties under SOLAS and SAR, will not face any form of sanction, investigation or prosecution pursuant to the [Facilitation] Directive (and/or the national legislation implementing the Directive)".

## **4.2. Unintended consequences of how the Facilitation Directive is implemented**

The first part of this section has demonstrated that through a range of material and indirect effects, the implementation of the Facilitation Directive can have a significant bearing on the ability of service providers to provide assistance to irregular migrants, and for irregular migrants to access that assistance. Yet, civil society groups and cities surveyed for this study have reported that the implementation of **the Facilitation Directive also has unintended consequences (or indirect effects) that impact not just irregular migrants and those who assist them, but citizens and society as a whole, including migrants with regular status.** This section explores the



unintended (indirect) consequences of how the Facilitation Directive is implemented in various Member States.

## Social exclusion

The marginalisation of irregular migrants in society is a multifaceted issue, but one that most respondents link to the individuals' exclusion from mainstream and public services, and consequent dependency on piecemeal humanitarian aid. We have seen above that this humanitarian aid regime operates across Member States in a climate of insecurity and confusion, in particular as it relates to the somewhat ambiguous conditions of the Facilitation Directive.

Given their limited financial resources (see 4.2.3 below), **civil society organisations often struggle to provide for the needs of irregular migrants in a comprehensive way**. Housing was raised by respondents across Member States as an area where irregular migrants are routinely excluded. One respondent, a healthcare specialist, reports that, after treating the wounds of an irregular migrant, he then saw the same person sleeping outside in an unhygienic environment.

**Measures to prevent third parties from housing irregular migrants** under the conditions of the Facilitation Directive, as in the landlord checks that have been introduced in the UK, **may serve to aggravate homelessness among irregular migrants**, while also leading landlords to vet or discriminate against potential residents by nationality or skin colour. **As one respondent comments**, “[i]mmigration sanctions impact on much wider groups than irregular migrants and have serious implications for regular migrants and even ethnic minority citizens who can be construed as being immigrants. This shows up in forms of discrimination against these groups.”

Education is raised by one civil society organisation as another area where exclusion is a risk faced by irregular migrants (see Case Study 4 in Textbox 13 above). This is partially fuelled by confusion on the part of educators over their obligations to report undocumented students. In the UK, higher education institutions have to check the compliance of international students with the immigration conditions imposed on them and report to the Home Office if they are believed to have fallen in breach. Such regulations can lead to discriminatory practices on the part of individual staff members and entire institutions.

Several respondents cite as an unintended consequence of criminalising assistance what one Spanish respondent refers to as **the deterioration of the social perception of migrants in general and a rise in unfounded fear**. Multiple respondents refer to the same phenomenon as a ‘decrease in social cohesion’. A Spanish organisation reports an explicit fear of racism directed towards migrants as an indirect consequence of criminalisation measures. Meanwhile, several respondents point out that criminalisation can affect irregular migrants' ability to be included in society and their chances of regularising their status at a later stage.

More than one respondent across different Member States lamented having to exclude irregular migrants from services when the explicit aim of the services is to help them to regularise their status or seek protection (40 out of 55 civil society respondents provide some form of legal assistance to irregular migrants). A civil society representative pointed out that the “same migrants that are being welcomed across Europe's train stations today may be those we seek to exclude tomorrow” – in other words, not all of those who seek refugee protection will be granted it and Member States need to plan for how to provide for their needs. A significant proportion of those who fall into irregularity

are de facto not returnable or 'non-removable' (as applies at present to thousands of Eritreans who have been refused asylum in EU Member States).

**A preoccupation expressed by city representatives is how to avoid social exclusion, maintain social cohesion and cater for the needs of these populations,** which will grow ever more significant as a consequence of the current 'refugee crisis'.

Respondents report stigma and fear in relation to the general climate of criminalisation and enforcement of which the Facilitation Directive forms part. While 33 out of 49 respondents said that irregular migrants feel comfortable accessing their services, a minority (9) reported evidence of fear and stigma. This is especially so concerning access to health care and the provision of other fundamental rights to particularly vulnerable groups. One respondent from Belgium reports that it is the most marginalised groups who are at specific risk of stigma and fear. These include children, trafficking victims and sex workers, to whom they provide much needed psychological and health support. A respondent from the Netherlands lays out the associated risks of difficulties in accessing assistance caused by criminalisation: "they will stay in isolation, vulnerable to exploitation".

**Civil society's preoccupation that social exclusion is an indirect consequence of the lack of a clear humanitarian exception in the Facilitation Directive is echoed by cities.** One city reports that, once irregular migrants go underground, they cannot be seen or reached any longer by the local authorities and diseases will flourish, as well as human trafficking and all kinds of abuse. They continue, "we fear beggars in the streets and people sleeping under bridges or starting wood camps, etc.". Another Spanish city comments that "we believe in avoiding segregation as soon as possible. Our experience is that the undocumented today will be the future documented". They lament, however, that they have to fund this accessibility with their own economic resources (see 4.2.3 below) because of a lack of coordinated work between the city and national government.

## Social trust and social cohesion

A second indirect effect of the implementation of the Facilitation Directive, reported by cities and civil society alike, concerns **the negative influence on perceptions of other migrant groups and the broader effects on social cohesion in the wider community.** One respondent comments that, in addition to the risks for migrants, it is "an invasion of our liberty as citizens" (own translation). Respondents from Spain and the UK raise concerns that citizens are increasingly being required to become immigration officers, something that is perceived as intimidation and as a breach of the social trust that is at the heart of the social contract. This concern relates to arguments raised elsewhere in relation to a 'citizen's right to assist' those in need of humanitarian aid as a key function of democracy.<sup>122</sup> There is also some evidence in our surveys of concern over professional ethics: professionals, such as doctors or teachers, feel that their professional duties to include irregular migrants, through healing or teaching, are in conflict with the legal requirement to exclude them.

Social trust and social cohesion also relate to establishing relationships of trust between service providers, institutions and irregular migrants. Previous studies have shown that **a degree of trust is important for compliance on the part of irregular migrants**

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<sup>122</sup> See e.g. J. Allsopp, "Contesting Fraternité: Vulnerable Migrants and the Politics of Protection in Contemporary France", Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2012.

**and those who assist them.**<sup>123</sup> In the Netherlands, it is reported that local authorities' obligation to report irregular migrants when they make use of the new special night shelters has prevented irregular migrants from making use of these night shelters.

Cities take a range of measures to support the work of civil society organisations and, in **so doing, to facilitate irregular migrants' access to assistance.**<sup>124</sup> Indeed, the cities survey revealed several examples of **cities and civil society networks collaborating well together to promote social trust** (see Promising Practice 3 in Textbox 14, below). A city respondent from the Netherlands points out the importance of fostering trust between cities and civil society organisations delivering services. "We finance these organisations and meet with them on a regular basis", they explain. "The local authorities monitor the irregular community closely. This is only possible because the local authorities did not create distrust."

At the civil society level, organisations foster trust through working together and sharing best practice through networks or regional bodies. At the same time, only two-fifths of civil society respondents claimed to feel recognised by the authorities as providing an important service.

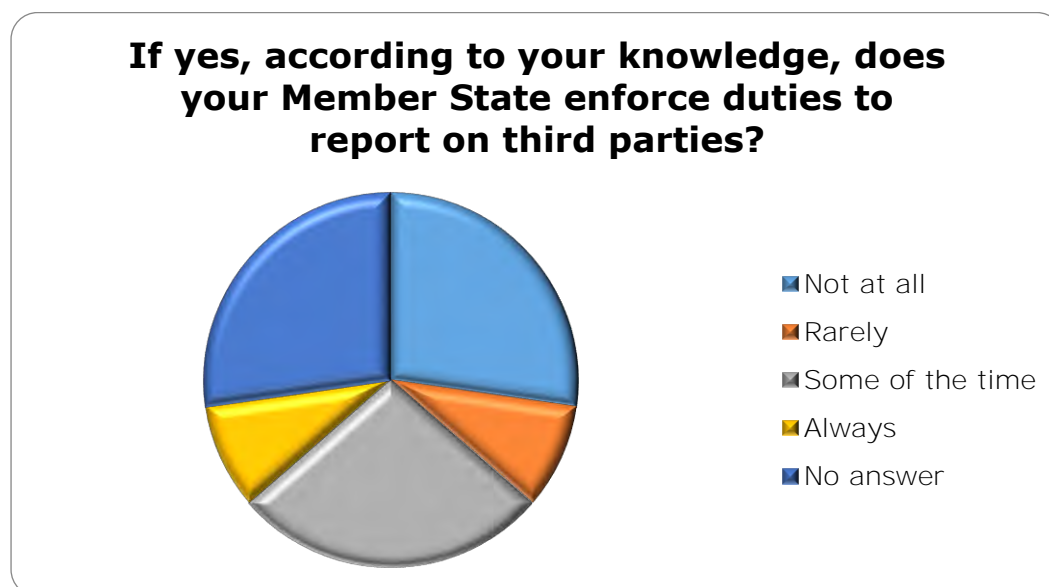
#### **Textbox 14: Promising Practice 3, Italian cities establishing social trust**

One Italian administration explains that when it decided to increase the number of places provided to homeless people, it also decided to stop asking those who required shelter to show a valid residence permit. This was done in order to foster trust among undocumented homeless people, who feared the possibility of being reported to the police. Local politicians had to go to the accommodation centres to inform them of this change in order to foster trust in the service. This action had widespread media coverage and a significant impact on public opinion.

**Certain cities' willingness to turn a blind eye to breaches** of the Facilitation Directive by humanitarian actors, and their reluctance to exclude irregular migrants from certain services, or to report them, is explained by multiple respondents as a **pragmatic choice as well as a moral choice** (see also Figure 2). One Spanish city respondent views implementation of the Facilitation Directive as "humanitarian but also practical and utilitarian, from an economic and social cohesion point of view. We cannot afford thousands of people living in segregation, it would be a threat for social cohesion." A Belgian **respondent echoes that "[p]eople live in the local community, we're all people. If we ignore the ones who have not (yet) the required documents, we steer them in the direction of abusers."**

<sup>123</sup> See e.g. A. Ellermann, "Street-level democracy: how immigration bureaucrats manage public opposition", *West European Politics*, Vol. 29, No. 2, 2006, pp. 293-309.

<sup>124</sup> See S. Carrera and J. Parkin, "Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union", Study for the Committee of the Regions, CEPS, Brussels, 2011; and S. Carrera and M. Merlino, "Undocumented Immigrants and Rights in the EU: Addressing the gap between social science research and policymaking in the Stockholm Programme?", CEPS Liberty and Security in Europe Papers, CEPS, Brussels, December 2009; and S. Carrera and M. Merlino, "Assessing EU Policy on Irregular Immigration, under the Stockholm Programme", CEPS Liberty and Security in Europe Series, CEPS, Brussels, 2010. See also D. Gebhardt, "Irregular Migration and the Role of Local and Regional Authorities," in S. Carrera and M. Merlino (eds), "Assessing EU Policy on Irregular Immigration under the Stockholm Programme", CEPS Liberty and Security in Europe Series, CEPS, Brussels, 2010, pp. 15-17.

**Figure 2: Cities' responses to Q4 of the survey – The duty to report irregular migrants<sup>125</sup>**

Source: Authors.

One area where there appears to a low level of trust is at sea. Shipowners report feeling poorly supported in the search and rescue operations that they are obliged to undertake in the Mediterranean. One respondent comments, “[s]hipowners (through the organisations who represent them) have stressed on several occasions that it is unacceptable that the international community is relying on merchant ships and their crews to undertake large-scale rescues. Single ships have had to rescue as many as 500 people at a time, creating serious risks to the health and welfare of seafarers.” Another respondent reports that, over a two-year period, their company has carried out more than 40 search and rescue operations in the Mediterranean, rescuing more than 3,000 migrants.

### Existential threat to civil society organisations

One of the most widely documented indirect effects of the implementation of the Facilitation Directive on civil society revealed in the surveys concerns **the existential threat fuelled primarily by insecurity of funding for humanitarian work with irregular migrants**. The existential threat experienced by civil society organisations in particular leads to a consequent breach in social trust (see 4.2.2 above).

There are scant resources available to fund human rights work with irregular migrants at the local, national or EU level. There is concern that little is being done through EU funding in order to secure humanitarian assistance to **irregular migrants within Europe’s borders**.

It is important to note that EU funding is channelled through Member States and therefore is used in line with their national policies and practices. Our survey data reveals that, across Member States, **many cities and civil society organisations are required to exclude irregular migrants from their services because of funding constraints** (a third of civil society respondents), including from the Asylum, Migration

<sup>125</sup> Q4 poses the question, “If yes, according to your knowledge, does your Member State enforce duties to report on third parties? (For example, does your Member State conduct any investigations, prosecutions, impose fines or conduct audits to ensure third parties report the presence of irregular migrants?)”

and Integration Fund (AMIF)<sup>126</sup> and the European Social Fund (ESF).<sup>127</sup> This causes them to experience ethical dilemmas in the context of increasingly mixed migration flows where migrants with a range of needs – refugees and economic migrants – may arrive side by side. In this context, some report feeling obliged to adopt the role of ‘border guards’ (see 4.2.2). It is also a problem for organisations working with mixed-status families, in which only certain family members have regular status.

In this context, some organisations have stopped providing services to irregular migrants altogether; others continue to aid them in precarious circumstances. Around a third of the civil society organisations surveyed report that they breach the conditions attached to their funding in order to provide irregular migrants with access to vital services. In doing so they run the risks of having their funding stopped or facing other sanctions (see Case Study 5 in Textbox 15 below). Those that do not have such constraints on their funding rely on ad hoc internal funding and volunteer labour in order to support irregular migrants.

Because of funding constraints, **much civil society support to irregular migrants is ‘invisible’, unreported or unmonitored**. Most Hungarian organisations that responded to our survey provide vital services, including food and emergency shelter, yet rely entirely on volunteers for time and resources.

#### **Textbox 15: Case Study 5, Cyprus Precarious funding and the existential threat**

The case of a civil society organisation in Cyprus shows the risky nature of the strategy of diverting funds to support irregular migrants. The organisation in question had around €60,000 of EU and national funding for the implementation of two projects deducted at the order of the head of a government department. The refusal of the said government **service to pay this money was annulled after the Ombudsman found the organisations’** claim to be totally justifiable. The ordeal, according to the civil society organisation, was a waste of valuable time and resources.

The implications of this ‘invisible assistance’ are many, although they primarily relate to **problems of resourcing and transparency**. It follows that, as this work is unpaid and largely un-resourced it is unsustainable – organisations report significant time, asset and resource pressures. They have to ‘self-fund’, often from private sources, which is time-consuming and unreliable. As one respondent reports, the fact that they have to exclude irregular migrants from their funding “limits the type of activities that can be done with **migrant communities**”. They also report that “services have to be hidden”, which “could affect people knowing about them”. In several Member States, respondents regretted that, because of a lack of funding, **some irregular migrants have had to pay for vital services including shelter, health care and legal aid**.

The vital nature of some of these ‘invisible’ services to irregular migrants, such as health care, shelter and food (Table 10), renders their precariousness particularly disconcerting. Among the irregular migrants with whom respondents work, they list various particularly vulnerable groups, including pregnant women, sex workers, unaccompanied minors, babies and victims of human trafficking.

<sup>126</sup> See <https://ec.europa.eu/sfc/en/2014/fund/amif>.

<sup>127</sup> See <http://ec.europa.eu/esf/home.jsp?langId=en>.

**Table 10: General climate in which civil society respondents work with irregular migrants**

Answer Choices	Responses
We feel that we are recognised by the authorities as providing an important service	20
We feel that we work in a climate of intimidation from the authorities	12
Our staff and/or volunteers clearly understand which services they can provide to irregular migrants in keeping with the law	26
We worry that our work could put us in conflict with the law	7
We feel that irregular migrants are comfortable in accessing our services	33
Some irregular migrants feel stigmatised in accessing our services	9
It would assist our organisation in its day to day operations if the humanitarian work was more explicitly excluded from sanction	15
Our ability to engage in advocacy work to advance the rights of irregular migrants has been affected by the criminalisation of assistance	8

Note: Total respondents: 49.

Source: Authors.

**Civil society organisations play a key role in coordinating with cities to ensure irregular migrants' access to their fundamental rights.** Over half of civil society organisations surveyed report that migrants feel comfortable accessing their services. Moreover, civil society organisations play an especially important role in an emergency. Civil society organisations may be the first to bring assistance to irregular migrants, and act as the link between the state and what is happening on the ground – to inform the state on what is needed, and, potentially, to lobby in order to get assistance. Nevertheless, it is important to note that, without proper resourcing, such groups may also function without reliable information and in a way that may end up undermining their humanitarian role.

One French respondent concludes that in this context, "recognition of our work with irregular migrants would be of huge benefit" (own translation). **More clarity on the exclusion of humanitarian aid from sanction could help to increase statutory and non-statutory funders' willingness to fund this work**, thus bringing it out of the shadows and rendering it more sustainable for organisations to help irregular migrants access their fundamental rights. Among the respondents, 15 out of 49 (many from Hungary) agreed that recognition of their work with irregular migrants and explicit exemption from sanction of their work would be of huge benefit to the daily running of their services.

## 5. CONCLUSIONS AND POLICY RECOMMENDATIONS

### 5.1. Conclusions

This study has examined the scope and challenges characterising the implementation of **the EU Facilitators' Package in a selection of EU Member States from a practitioner-based and bottom-up approach**. It has assessed the direct, perceived and unintended consequences of the criminalisation of the facilitation on actors playing a crucial role in humanitarian assistance and service provision to irregular immigrants.

The study has analysed the set of international and EU legal frameworks with direct relevance for **the EU Facilitators' Package**, and has revealed important differences, inconsistencies and gaps. When comparing the EU **Facilitators' Package** with relevant UN legal instruments, i.e. the UN Smuggling Protocol, we have identified key distinctive components of the UN framework:

- first, the importance given to the human rights of, and the prohibition of criminalisation of, the person who is the subject of smuggling;
- second, the special protection of the rights and safety of migrants and those providing humanitarian assistance to them;
- third, the requirement of the presence of an element of financial gain in these two contexts (entry and transit).

The current EU legal framework, however, **embodied by the EU Facilitators' Package** and comprising the Directive and Framework Decision, presents its own specificities and features, some of which differ and are distant from the UN legal standards enshrined in the Smuggling Protocol and other relevant, international human rights instruments.

**The Facilitators' Package calls upon EU Member States to criminalise the facilitation of entry, transit and (distinctively) residence in their territory.** The target group of this '**criminalisation**' extends to any person or organisation assisting undocumented migrants in entering, transiting or residing in their territories. This may include the migrants themselves and their families, as well as organisations and actors providing humanitarian assistance, basic social services and fundamental human rights.

**The definition provided in current European legislation of 'facilitation' differs from the one enshrined in UN standards. The Directive expressly refers to the element of 'financial gain' only when it comes to the facilitation of residence. By doing so, and in a departure from the UN standards, it does not exclude from punishment the facilitation of entry and transit by persons presenting family/personal links or by civil society organisations.**

Importantly, Article 1.2 of the Facilitation Directive provides the option for EU Member States to apply in their domestic legal system an exception to criminalisation in cases **where the person or the organisation provide 'humanitarian assistance' in cases of entry and transit**. Yet this exemption does not cover humanitarian assistance in cases of residence. Nor does the Directive provide any specific conceptual guidance regarding what this actually means in practice. Member States may refrain from punishing the facilitation of irregular stay, if this is not done intentionally or for financial gain. Moreover, the Directive does not have standards on aggravating circumstances when smuggling entails inhuman or degrading treatment, including exploitation.

The analysis provided in this study has thus revealed the existence of a wide margin of appreciation in the **hands of EU Member States and an 'implementation gap' in the current EU *acquis* on smuggling migrants in terms of human rights protection and safeguards.** This is particularly so in respect of the protection and assistance of

smuggled migrants, the right to life, to human dignity and not to be subjected to inhuman or degrading treatment and torture, and the protection of victims or witnesses of the smuggling crime.

The study has also offered an in-depth analysis of the implementation of the Facilitators' Directive, and particularly the humanitarian assistance clause, in a selected group of EU Member States. The assessment reveals a rather heterogeneous and inconsistent picture. This is particularly so in respect of the implementation of the option to exempt facilitation for humanitarian reasons, the need to have financial gain/profit and the type/scope of the sanctions or punishment provided for.

The sanctions envisaged by the Package have been domestically transposed in both civil and criminal legislation. When it comes to the facilitation of entry, Article 1.2 has been implemented only by Spain and Greece. The UK has only done so as regards cases where entry is facilitated by a person acting pro bono on behalf of an organisation that aims to assist asylum seekers and only covering the offence of helping asylum seekers to arrive in the country. In relation to the facilitation of stay, France, Germany, Italy and the Netherlands have included exemptions for humanitarian assistance, although such an exemption is not explicitly provided for in the Facilitation Directive. With the exception of France, in all Member States under examination people providing accommodation to migrants in an irregular situation also risk punishment. The maximum custodial sentences vary from one year (in Spain) to 10 years (in Greece) or 14 years (in the UK).

The study has found important variations concerning the material scope of the specific punishable conduct as well as the offences and sanctions envisaged in cases of 'facilitation'. All these elements lead to important challenges from the perspective of general principles of legal certainty, fundamental rights and the effectiveness of European law.

Still, existing EU legislation does offer some scattered standards of protection for smuggled migrants. This is especially the case regarding the EU Anti-Trafficking and the EU Victims' Directives, which confer some degree of protection irrespective of the administrative status (documented or not) of the person involved. Moreover, the CJEU has recently clarified that the personal scope of EU law cannot be circumscribed to the legality of residence of a potential beneficiary of EU standards and rights when this would undermine the objectives of an EU legal act (Case *Tümer* C-311/13).

That notwithstanding, the lack of express and specific provisions in the Directive entail far-reaching inconsistencies with UN legal standards and have led to major inconsistencies and lack of clarity as regards fundamental rights obligations, which require assistance to smuggled irregular immigrants. Moreover, the Facilitators' Package does not exclude the possibility of prosecuting and convicting people and organisations providing emergency shelter, food and other basic necessities and services to migrants in an irregular situation, nor family members or persons who have affective or private relationships with the undocumented person.

This has been confirmed when examining statistical and qualitative information on courts' decisions related to prosecutions and convictions of individuals in the context of facilitation. An assessment of available information in the selected EU Member States under analysis shows that there are important methodological gaps and shortcomings regarding statistical data. In a majority of the Member States under examination, the data do not exist or are not publicly available. There is no centralised collection system for this sort of statistical information at the EU level. This makes it difficult to provide a succinct and detailed picture of the impact of the Facilitators' Package based on the



number of prosecutions and convictions, or the use of the humanitarian exception. Nonetheless, this study has provided anecdotal evidence on court proceedings and decisions showing that individuals facilitating entry, transit or residence citing family, personal and other altruistic reasons, or those assisting refugees to enter, have been punished or criminalised (or both).

The study has shown that, irrespective of quantitative evidence (actual numbers of convictions and prosecutions), the most far-reaching effects of the **Facilitators' Package** may well extend beyond formal prosecutions and criminal convictions. These mainly relate to the direct, perceived and unintended consequences characterising the **implementation of the Facilitators' Package for those** providing on-the-ground humanitarian assistance and services or other organisations and individuals in society.

When it comes to the direct and perceived effects of the criminalisation of facilitation on migrants and those assisting them, the study has shown that civil society organisations fear sanctions for their work supporting irregular migrants. The fear of sanctions can have a profound deterrent effect on individuals and organisations. While few respondents to the survey for the purposes of this study reported experiences with actual prosecutions and criminal convictions as a result of their work with undocumented migrants, a majority reported fears about work related to the transit of migrants and about support for them during their stay in a Member State. Intimidation and harassment by national authorities was also widely reported by the respondents.

As the study has revealed, civil society organisations underline that a direct impact of **the Facilitators' Package is the way in which it affects their ability to engage in advocacy work**, which is compromised as a consequence of the climate surrounding the criminalisation of facilitation of entry, transit and residence. A key finding from the survey is that the latter concerns are further exacerbated by a high degree of discretion or disproportionate margin of manoeuvre afforded to EU Member State authorities in the daily implementation and enforcement **of the Facilitators' Package. Great variations** across the Member States have been identified as to whether authorities or other third parties adhere to their obligations to report. Sometimes the exclusion of undocumented immigrants from services and rights to which they are entitled comes from a lack of information among relevant actors.

**When it comes to the concept of 'humanitarian assistance', the respondents highlighted** that this mainly relates to services that assist migrants to access their fundamental rights (health care, shelter, hygiene and legal assistance) and to live with human dignity. Sometimes cities themselves use their discretion to support irregular migrants in breach of national regulations demanding criminalisation and exclusion, depending on the administrative status of the person involved.

Shipowners report feeling poorly supported and ill-equipped to carry out the search and rescue operations that they are obliged to conduct in the Mediterranean. This lack of support has the effect of putting the lives of crew members and migrants at risk and of harming social trust between shipowners and Member States. Single ships have had to rescue as many as 500 people at a time, creating serious risks to the health and welfare of seafarers. Another respondent reported that, over a two-year period, his/her company had undertaken more than 40 search and rescue operations in the Mediterranean, rescuing more than 3,000 migrants.

**The Facilitators' Package also has indirect or unintended repercussions not just for irregular migrants and those assisting them, but also for citizens and the social cohesion of the receiving society as a whole.** Our research shows that criminalisation of assistance feeds a general climate of fear and insecurity about irregular immigration. The main

concerns of practitioners continue to be how to deliver their assistance tasks and responsibilities without being penalised, and how to avoid social exclusion, maintain social cohesion and cater for the needs of all these populations. Criminalisation also jeopardises the **'citizen's right to assist' those in need of humanitarian aid as a key function of democracy**. It additionally damages trust-based relations in society.

This study has demonstrated that one of the most widely documented indirect effects of **the implementation of the Facilitators' Package concerns the existential threat fuelled** primarily by the insecurity of funding for civil society organisations for humanitarian work with irregular migrants. EU funding offers limited scope for providing humanitarian assistance to irregular migrants. Cities and NGOs are often obliged to exclude irregular migrants from their services because of funding constraints, which lead to far-reaching resourcing and transparency challenges and undermine their humanitarian roles. In light of the above, the following recommendations are put forward.

## **5.2. Policy recommendations**

### **RECOMMENDATION 1: Reform the current EU legal framework: Clarity, legal certainty and effectiveness.**

The European Commission should present a legislative reform of the current EU **Facilitators' Package at the earliest possible** opportunity. The reformed **Facilitators' Package** should have the following aims:

- first, to bring it into full compliance with international, regional and EU human rights standards, in particular those related to the protection of smuggled migrants;
- second, to make mandatory upon EU Member States the exemption of humanitarian assistance from criminalisation in cases of entry, transit and residence. The humanitarian exemption should not be made a defence, but a bar to prosecutions, to ensure that no investigation is opened and no prosecution is pursued against private individuals and civil society organisations assisting migrants for humanitarian reasons. This will be an additional safeguard to prevent unwarranted criminalisation;
- third, to ensure that criminalisation is primarily justified by protection of the life, physical integrity and dignity of migrants. The rationale for criminalisation should be the prevention of harm to those assisted, and not general deterrence; and
- fourth, to introduce the financial gain element to all forms of facilitation (with particular consideration given to the specific circumstances of each individual case) and include standards on aggravating circumstances in light of the UN Smuggling Protocol. In addition, the financial gain element should be qualified to **encompass only 'unjust enrichment' or 'unjust profit', in order to exclude bona fide shopkeepers, landlords and businesses.**

Clarity and legal certainty should be the key guiding principles of this legislative reform. The new European legislation should make clearer those forms of facilitation that should not be criminalised by Member States. Clarity of parameters will ensure greater consistency in the criminal regulation of facilitation across EU Member States and will limit unwarranted criminalisation. This is imperative, since legal uncertainty undermines EU law.

Making the humanitarian exception to assisting irregular migrants both mandatory and clearer would make the day-to-day work of city services, civil society organisations and

other practitioners easier. Making clear that work seeking to advance and deliver the fundamental human rights of irregular migrants is exempted from sanction at the EU level could go some way towards reducing the stigma and climate of fear around this work, and help to open more national and local funding resources for this vital assistance.

The EU should take more action to avoid relying on merchant ships and their crews to undertake large-scale rescue operations for which they are insufficiently equipped. Furthermore, it should be made explicitly clear that shipowners and crew members helping irregular migrants at sea will not face any form of sanction, investigation or prosecution pursuant to the Facilitation Directive (or the national legislation implementing European law).

### **RECOMMENDATION 2: Monitor the enforcement of the Facilitators' Package.**

Member States should be obliged to put in place adequate systems to monitor the **enforcement and effective practical application of the Facilitators' Package**, and allow for quantitative and qualitative assessment of its implementation regarding the number of prosecutions and convictions. They should collect and record annually at least the following information: 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 about sentencing determination; and reasons for discontinuing a case/investigation. This should also include gathering data on the level/nature of protective measures accorded to undocumented migrant victims of smuggling.

This information should be made periodically accessible to the EU bodies and to the general public through Eurostat. To complement statistics on criminal justice and immigration enforcement, there should be an independent assessment of the qualitative aspects of the investigations and cases involving people charged with facilitation offences – including the operation of any exemptions from liability and punishment based on humanitarian considerations.

### **RECOMMENDATION 3: Make available EU funding for cities and civil society organisations to address the human rights, destitution and humanitarian needs of irregular migrants.**

Funding should also be made available to protect the safety and dignity of irregular migrants. EU funding regulations should be amended accordingly in parallel with the **amendment of the Facilitators' Package**. The following aspects should be considered:

- Make EU funding available for all disadvantaged groups and people in need, for such activities (beyond labour market measures) as emergency assistance for shelter and food, and education for the children of undocumented migrants.
- Make more funding at the EU level available for humanitarian work with irregular migrants in the context of increasingly mixed migration flows, and revise the current funding guidelines to stop making it a condition of certain funds to distinguish between regular and irregular migrants.
- **Ensure that national governments' relevant** ministries apply the so-called '**Partnership Principle**', including a monitoring committee when preparing and implementing the funding programmes.<sup>128</sup>

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<sup>128</sup> See Social Platform, "Making EU migration & integration funding easier", 9 November 2015 (<http://www.socialplatform.org/blog/making-eu-migration-integration-funding-easier>).

- In a context where local budgets, including those of cities, are under pressure due to cuts, the EU should take the specific role and experiences of cities into consideration when drawing up funding guidelines and allocating grants.

**RECOMMENDATION 4: Enshrine firewall protections for irregular migrants to report human rights abuses.**

The EU should address ongoing problems of irregular migrants' access to justice in the context of their enduring vulnerability to exploitation. Irregular migrants should be enabled to report human rights abuses or crimes against them, and should feel comfortable and secure when doing so. Expulsion procedures against undocumented victims should be suspended until the resolution of criminal procedures and until any application for residence has been determined. A firewall between public service provision on the one hand and justice and immigration enforcement on the other should be erected, in law and in practice, in line with the guidelines provided by the Fundamental Rights Agency of the European Union (FRA) in relation to the detection and apprehension of irregular migrants.

The sharing of personal data between service providers and immigration authorities should be prohibited, including in the context of access to justice and redress. Access to primary and secondary health care without fear of prosecution should be ensured in States where irregular stay is considered a crime. The firewall should not only ensure that immigration enforcement does not take priority over access to fundamental rights, such as access to health care, but also over access to other fundamental social rights (e.g. access to education for children and access to housing). Service providers should not be obliged to act as immigration or border guard officials. It should also be clarified that irregularly present migrants who are working should be entitled to protection under EU labour standards, as clarified by the CJEU (Case *Tümer* C-311/13).

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# ANNEX I - ENFORCEMENT ASPECTS: CONVICTION AND PROSECUTION STATISTICS

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## 1. INTRODUCTION

This Annex examines statistical data on prosecution and conviction rates for facilitation-related offences, and identifies methodological obstacles to the collection of this information in six Member States. All the Member States studied criminalise the facilitation of entry and/or residence of irregular immigration with some variation among them on the scope of the so-called **'humanitarian exemption' to criminal liability**. These countries are Germany, the UK, Italy, the Netherlands, Spain and France. Some of these Member States have civil or administrative penalties in addition to criminal sanctions. Some Member States conceive the exemption more narrowly (for example, the UK), while others provide for a more generous, wider exemption (for example, Italy).<sup>129</sup>

Statistical data on the operation of the Facilitation Directive<sup>130</sup> in domestic jurisdictions is largely not publicly available and difficult to find. When available, information could be found in statistics on criminal justice or immigration law enforcement. Most of the countries observed for this study collect and compound data on the number of individuals proceeded against for assisting or facilitating irregular migrants to enter, transit across or reside in the Member State territory.

Yet, meaningful cross-country comparisons are hard to draw because of the variable definition of offences and of the criteria to compile this data in different jurisdictions, and the time period for which this information is available. Statistical data concerning people apprehended, prosecuted and convicted for facilitation-related charges is not available in the statistical office of the EU (Eurostat).

None of the Member States studied provide quantitative information as to whether the individual arrested for or charged with a facilitation-related offence has benefited from the operation of the humanitarian exemption. In the absence of this information, it is difficult to assess the operation of this aspect of the law on facilitation in practice, **particularly the extent to which 'humanitarian smugglers' are being criminalised through domestic laws enacted on the basis of EU legislation**.

Another aspect relates to the utility of this data in measuring the impact of the Facilitation Directive. The available law enforcement data do not lend themselves to any conclusion in relation to the deterrent impact of the Facilitation Directive. Nor is it possible to confidently conclude from such data that the said Directive has allowed unwarranted criminalisation.

This Annex looks at each of the Member States selected in terms of the data found on the prosecution and conviction figures for facilitation-related offences. It draws on official statistical data for each of the countries reviewed (both published and not publically available), reports by civil society organisations and academic literature.

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<sup>129</sup> For a review of national legislation of various Member States in light of the Facilitation Directive, see M. Provera, "The Criminalisation of Irregular Migration in the European Union" **CEPS Papers on Liberty and Security in Europe**", CEPS Liberty and Security Paper No. 80, CEPS, Brussels, February 2015.

<sup>130</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328/17, 5.12.2002.

It describes the enforcement data found, and draws on other available sources – including reported case law – to complement enforcement data, particularly in relation to the operation of the humanitarian exemption. Appeal court decisions and cases are by no means representative of patterns of decision-making and/or cases dealt with under a given national jurisdiction. They are, however, authoritative interpretations of the law and provide valuable information about the scope of the humanitarian exemption in domestic jurisdictions and the characteristics of the cases that reach the courts.

## 2. MEMBER STATE ANALYSIS

### 2.1. Germany

#### a. Law enforcement data

The German government collects and publishes data on the enforcement of the following sections of the Residence Act.<sup>131</sup>

##### i. Police data

Between 2009 and 2013, the Federal Police arrested a total of 11,195 persons (Germans and non-Germans) on suspicion of facilitation of irregular migrants. The majority of these suspects came from Turkey, Vietnam, China, the Russian Federation, Serbia, Afghanistan, Iraq and Syria. The report sent by Germany to the European Commission noted that “[o]nly in very few isolated cases were these suspects members of an organised criminal group”.<sup>132</sup>

Statistical data on police arrests is published in the *Report about the current situation of crimes of smuggling of human beings*.<sup>133</sup> In 2013, the police started 3,415 cases, with 2,846 suspects – of which 229 cases with 288 suspects were for smuggling of foreigners into the federal territory and for smuggling for gain and as organised gangs.

In the *Report on Migration* published by the Federal German Police, data on apprehensions at German borders between 1990 and 2013 show peaks of apprehension at certain points, particularly from the mid- to late 1990s. Since 2010, there has been a steady but sustained increase in the number of apprehended smugglers (*aufgegriffene Schleuser*) and the apprehended smuggled persons (*aufgegriffene Geschleuste*) (Figure A1.1).<sup>134</sup>

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<sup>131</sup> Particular thanks are due to Susanne Knickmeier, from the Max Planck Institute for Foreign and International Criminal Law, who helped to retrieve this data.

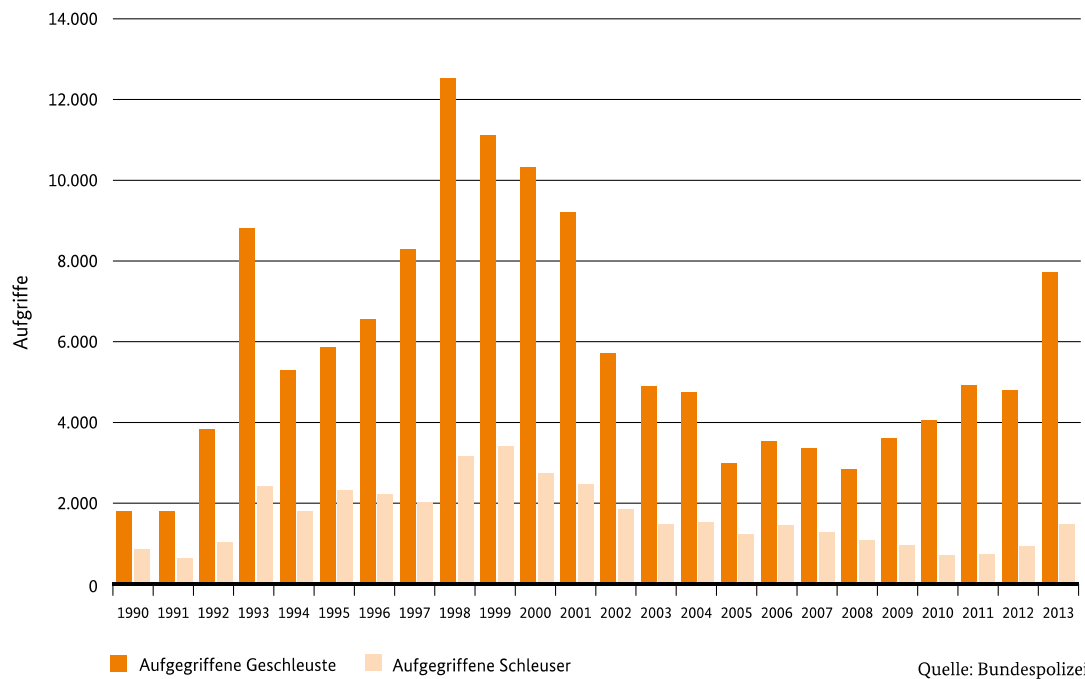
<sup>132</sup> European Commission, “Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU: national institutional frameworks, policies and other knowledge-based evidence”, 2014, p. 22 ([http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/trafficking/605\\_emn\\_ahq\\_national\\_institutional\\_framework\\_on\\_smuggling\\_2014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/trafficking/605_emn_ahq_national_institutional_framework_on_smuggling_2014_en.pdf)).

<sup>133</sup> Bundeskriminalamt, *Bundeslagebild Schleusungskriminalität 2013*, p. 5. ([www.bka.de/nr\\_193314/DE/Publikationen/JahresberichteUndLagebilder/Schleusungskriminalitaet/schleusungskriminalitaet\\_node.html?\\_nnn=true](http://www.bka.de/nr_193314/DE/Publikationen/JahresberichteUndLagebilder/Schleusungskriminalitaet/schleusungskriminalitaet_node.html?_nnn=true)). This is the latest data available.

<sup>134</sup> Migrationsbericht des Bundesamtes für Migration und Flüchtlinge im Auftrag der Bundesregierung Migrationsbericht 2013, p. 139 ([http://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Migrationsberichte/migrationsbericht-2013.pdf?\\_\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Migrationsberichte/migrationsbericht-2013.pdf?__blob=publicationFile)).



**Figure A1.1 Human smugglers and smuggled individuals apprehended at the German borders between 1990 and 2013**



Source: Migrationsbericht des Bundesamtes für Migration und Flüchtlinge im Auftrag der Bundesregierung Migrationsbericht 2013, p. 139 ([http://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Migrationsberichte/migrationsbericht-2013.pdf?\\_\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Migrationsberichte/migrationsbericht-2013.pdf?__blob=publicationFile)).

The following table (Table A1.1) contains information on arrests for various offences under the Foreigners Act/Residence Act (not disaggregated by offence type) between 2003 and 2013.

**Table A1.1 Number of persons apprehended and charged for offences against the Foreigners Act/the Residence Act, and percentage of non-German suspects, Germany, 2003-2013**

Offence	Year	Offences (total)	Detection rate in % <sup>135</sup>	Number of suspects (total)	Number of Non Germans suspects	%
Further Offences against Foreigners Act	2003	31,496	99.1	31,218	27,901	89.4
Further Offences against Foreigners Act	2004	20,245	98.4	20,036	18,135	90.5
Further Offences against Residence Act	2005	18,399	97.9	12,665	12,014	94.9
Further Offences against Residence Act	2006	17,602	98.9	12,642	12,181	96.4
Further Offences against Residence Act	2007	13,060	98.3	9,494	9,157	96.5
Further Offences against Residence Act	2008	18,399	98.9	7,305	7,087	97.0
Further Offences against Residence Act	2009	8,110	99.6	5,480	5,347	97.6
Further Offences against Residence Act	2010	7,319	99.7	4,941	4,825	97.7
Further Offences against Residence Act	2011	7,293	99.6	5,220	5,116	98.0
Further Offences against Residence Act	2012	7,397	99.7	5,058	4,954	97.9
Further Offences against Residence Act	2013	6,232	99.6	4,512	4,423	98.0

Source: Compiled by Susanne Knickmeier (Max Planck Institute, Germany) based on data from German Police statistics (Bundeskriminalamt, *Polizeiliche Kriminalstatistik*, years 2003 to 2013).

<sup>135</sup> The detection rate refers to the proportion of police-recorded crime in which the suspect has been identified.

## ii. Prosecution data

Data about cases that reach the prosecutor's office is published in the *Prosecution Services Report*. This report contains information about the activities of prosecutors within a year and on the cases that are completed during that calendar year, even if they had started before. There are two different ways to complete a case: by closing off proceedings without pursuing a prosecution or by initiating a prosecution.

In 2013, 3,883 cases on smuggling human beings in Germany were dealt with and completed by the prosecutor at the District Court and as part of public prosecution investigations. A total of 124,600 cases were dealt with in relation to other offences in the Residence Act.<sup>136</sup>

## iii. Criminal court data

The report on criminal courts contains information about the activities of criminal courts within a year. In relation to the completed proceedings before the district courts (*Amtsgericht*), in 2013 there were 3,903 cases for facilitation of irregular immigration and other crimes in the Residence Act and related legislation, of which 400 related to smuggling of foreigners, and 3,503 related to other offences under the Residence Act, the Asylum Procedures Act and the Freedom of Movement Act/EU.<sup>137</sup>

In relation to completed proceedings before the district court in first instance, there were 26 cases for facilitation of irregular immigration and crimes under the above legislation. At second instance (appeal), there were 243 cases. Data on the district courts are not disaggregated by offence type. All crimes in the Residence Act are grouped together.<sup>138</sup>

As to the individuals judged and sentenced in 2013 for offences under the Residence Act, the figures are outlined below.<sup>139</sup>

- Offences under section 95 (includes irregular entry): 7,937 (total judged), 6,765 (total convicted)
- Offences under section 96 (smuggling of foreigners): 693 (total judged), 622 (total convicted)
- Offences under section 97 (smuggling aggravated by death, commercial and gang smuggling), 32 (total judged), 30 (total convicted).

Of those convicted under criminal law proceedings, the breakdown below relates to the type of sanction imposed.<sup>140</sup>

- Offences under section 95: 6,707 (total of individuals convicted), 359 (of which punished with prison sentence), 6,348 (of which punished with fine)
- Offences under section 96: 618 (total of individuals convicted), 245 (of which punished with prison sentence), 373 (of which punished with fine)
- Offences under section 97: 28 (total of individuals convicted), 24 (of which punished with prison sentence), 4 (of which punished with fine).

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<sup>136</sup> Destatis, *Statistisches Bundesamt, Rechtspflege Staatsanwaltschaften*, Fachserie 10 Reihe 2.6, p. 22 ([https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften2100260137004.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften2100260137004.pdf?__blob=publicationFile)).

<sup>137</sup> Destatis, *Statistisches Bundesamt. Rechtspflege Strafgerichte*. Fachserie 10 Reihe 2.3, p. 18 ([https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Strafgerichte2100230137004.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Strafgerichte2100230137004.pdf?__blob=publicationFile)).

<sup>138</sup> Ibid, p. 56.

<sup>139</sup> Destatis, *Statistisches Bundesamt. Rechtspflege Strafverfolgung*. Fachserie 10 Reihe 3, pp. 50-51 ([https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafverfolgung2100300137004.pdf;jsessionid=B35945C6D36524C22E9D29AAA0EC4E8D.cae4?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafverfolgung2100300137004.pdf;jsessionid=B35945C6D36524C22E9D29AAA0EC4E8D.cae4?__blob=publicationFile)).

<sup>140</sup> Ibid, pp. 116-117.

## b. Other sources of data

German jurisprudence has interpreted the extension of the criminalisation of assistance to irregular migrants in various decisions. Particularly, in relation to the application of Article 31 of the Refugee Convention, which prohibits the imposition of penalties on account of the irregular entry or presence of refugees in certain conditions, German jurisprudence ruled that this prohibition amounts to an exclusion from punishment (BGH: Decision 26/02/2015– 4 StR 178/14<sup>141</sup> and 4 StR 233/14).<sup>142</sup> Hence, while refugees cannot be punished for their irregular entry or stay, those who assist them may be criminally liable. However, an opinion held by the minority of the Federal Court of Justice argued that Article 31 should be considered a justification (justifying emergency) (cf. El-Ghazi and Fischer-Elcano, p. 389).<sup>143</sup> If Article 31-I of the Refugee Convention is considered a justification, an unlawful act (required by section 27 Criminal Code) has not occurred and the aider cannot be held liable.

There are several cases reported in newspapers or on websites referring to people driving refugees with their private cars from Hungary, Austria or Italy to Germany. In two cases reported in a newspaper article,<sup>144</sup> the suspects were charged with smuggling and the invocation of humanitarian motives was rejected because they were found to benefit financially from their actions. In the first case, a 46 year-old Pakistani man was accused of smuggling 26 people from Hungary to Germany. He argued that he thought giving people a lift in his car was a normal behaviour and was not criminalised. Apparently, the people assisted offered him €200. The Traunstein District Court in Germany imposed an 18-month prison sentence without parole. In the second case, also decided by the Traunstein District Court, a 47-year-old Romanian was asked by a number of refugees to help them to buy train tickets from Vienna to Munich. They gave him money for single tickets, he bought group tickets, which were cheaper, and took the difference of €270. The judge said that he had not acted for humanitarian reasons. He was convicted and sentenced to prison for 11 months (without parole).

In another case recently decided by the Federal Court,<sup>145</sup> the appellant was charged with the facilitation of a group of Syrian citizens who entered Greece irregularly. Yet, they did not file an asylum claim there because they meant to do so in Germany, where their relatives live. The appellant assisted them to travel to Germany by organising forged papers, tickets and accommodation. He also got money from the people assisted or their relatives. Although it was not possible to determine the exact amount, the High Court of Essen established that he lost money. The Federal Court ruled that the appellant acted out of financial and humanitarian motives and that both motives should be reflected in sentencing.

In a similar case,<sup>146</sup> the High Court of Osnabrück found that the accused acted for humanitarian reasons, the proceedings were discontinued and the accused were given suspended sentences. In this case, four Tamil citizens were accused of assisting relatives, friends and former neighbours to **escape Sri Lanka's civil war in August 2009**.

<sup>141</sup> See <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2015-2&nr=70643&pos=5&anz=246>.

<sup>142</sup> See <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2015-2&Sort=3&nr=70644&pos=7&anz=246>.

<sup>143</sup> M. El-Ghazi and A. Fischer-Lescano, Rechtfertigung bei Einreisedelikten – zugleich Besprechung von OLG Bamberg, Urteil vom 24.09.2014 – 3 Ss 59/13, in *Strafverteidiger* 2015: 386-392 (389).

<sup>144</sup> P. Winterer, "Gerichte an der Grenze kommen kaum noch nach mit Prozessen gegen Schleuser", *Bayerische Staatszeitung* vom 9 November 2015.

<sup>145</sup> Bundesgerichtshof, Decision 26<sup>th</sup> February 2015, Az: 4 StR 233/14 (<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=5192c472d282e52403bc7eea549df234&nr=70644&pos=0&anz=1>).

<sup>146</sup> Reported in A. Nagler, 'Lob der Schleuser – Teil I' in *Anwaltsnachrichten Ausländer- und Asylrecht*, 2014, pp. 13-14.

They received money from them to organise forged papers, flights, transportation and pay for bribes to corrupt officials. The Court found that the accused acted for humanitarian reasons, but not to earn money.

The last case<sup>147</sup> involves a 26-year-old Moldovan man who organised the irregular entry of his fiancé into Germany. He bought a false visa from a man who also demanded that he take a 48-year-old woman with them. The defendant accepted. The middle-aged woman collapsed and died during the treacherous crossing of the Polish-German border. The defendant was not found guilty of smuggling under section 96 of the Residence Act because he had not acted for gain, but was found guilty and convicted for aiding irregular entry under section 27 of the Criminal Code. The Federal Court confirmed the decision of the High Court.

### c. Main data gaps:

- The last criminal justice data available are for 2013. Data for 2014 will be published after January 2016.
- Some of the data sources are not disaggregated by offence type (e.g. appeal court data).

## 2.2. The United Kingdom

### a. Enforcement data

#### i. Police data

Crime statistics contain data on the crimes recorded by the police. This source of data does not provide a breakdown of offences. Instead, **information on 'immigration offences' is aggregated and does not** give specific information on the number of crimes involving facilitation-related offences recorded by the police. This information is also not recent, since it is only available until 2012.

**Table A1.2 Police-recorded immigration offences, UK, 2003-15**

Offences	Apr 02 to Mar 03	Apr 03 to Mar 04	Apr 04 to Mar 05	Apr 05 to Mar 06	Apr 06 to Mar 07	Apr 07 to Mar 08	Apr 08 to Mar 09	Apr 09 to Mar 10	Apr 10 to Mar 11	Apr 11 to Mar 12
<b>Immigration offences</b>	433	451	550	935	792	661	573	411	445	344

Source: Based on data published in Home Office, "Crime in England & Wales", year ending March 2015, Table 4A (<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/year-ending-march-2015/rft-02.xls>).

#### ii. Court data

Annual immigration statistics compound data on the number of prosecutions and convictions for facilitation offences and irregular employment. The latest published statistics contain data from 2005 until 2014.

<sup>147</sup> Bundesgerichtshof, Decision 4<sup>th</sup> December 2007 Az 5 StR 324/07 (<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2007-12&Seite=9&nr=42345&pos=285&anz=323>) or (<https://openjur.de/u/76546.html>).

**Table A1.3(a) Number of persons proceeded against and found guilty at the magistrates' and Crown Courts for assisting unlawful immigration, UK, 2005-2014**

Year	Proceeded against in magistrates' courts	Found guilty in magistrates' courts	For trial at Crown Court	Found guilty at Crown Court
2005	109	26	165	126
2006	82	13	129	101
2007	66	11	81	55
2008	106	9	97	75
2009	244	27	192	148
2010	280	27	203	172
2011	438	41	275	220
2012	344	38	245	176
2013	375	21	265	209
2014	377	7	311	239

Source: Home Office, *Immigration Statistics*, Home Office, London, 2015 (Table pr. 01) ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/427922/detention-q1-2015-tabs.ods](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427922/detention-q1-2015-tabs.ods)).

**Table A1.3(b) Number of persons proceeded against and found guilty at the magistrates' and Crown Courts for helping an asylum seeker to enter the UK, 2005-2014**

Year	Proceeded against in magistrates' courts	Found guilty in magistrates' courts	For trial at Crown Court	Found guilty at Crown Court
2005	18	2	6	5
2006	21	1	1	1
2007	11	1	5	1
2008	17	1	5	4
2009	4	1	5	4
2010	2	0	1	1
2011	3	0	2	2
2012	0	0	0	0
2013	1	0	3	2
2014	1	0	0	0

Source: Home Office, *Immigration Statistics*, Home Office, London, 2015 (Table pr. 01) ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/427922/detention-q1-2015-tabs.ods](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427922/detention-q1-2015-tabs.ods)).

**Table A1.3(c) Number of persons proceeded against and found guilty at the magistrates' and Crown Courts for assisting entry to the UK in breach of a deportation or exclusion order, 2005-2014**

Year	Proceeded against in magistrates' courts	Found guilty in magistrates' courts	For trial at Crown Court	Found guilty at Crown Court
2005	5	1	2	1
2006	6	2	1	1
2007	3	1	2	2
2008	2	0	2	1
2009	1	0	2	1
2010	0	0	2	2
2011	0	0	2	2
2012	1	0	0	0
2013	0	0	0	0
2014	0	0	0	0

Source: Home Office, *Immigration Statistics*, Home Office, London, 2015 (Table pr.01) ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/427922/detention-q1-2015-tabs.ods](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427922/detention-q1-2015-tabs.ods)).

**Table A1.3(d) Number of persons proceeded against and found guilty at the magistrates' and Crown Courts for employing a person subject to immigration controls (old law), UK, 2005-2014**

Year	Proceeded against in magistrates' courts	Found guilty in magistrates' courts	For trial at Crown Court	Found guilty at Crown Court
2005	23	13	0	0
2006	10	6	1	1
2007	38	25	0	0
2008	66	34	8	5
2009	32	21	15	10
2010	5	3	0	0
2011	2	2	0	0
2012	0	0	1	1
2013	3	1	1	0
2014	0	0	0	0

Source: Home Office, *Immigration Statistics*, Home Office, London, 2015 (Table pr.01) ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/427922/detention-q1-2015-tabs.ods](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427922/detention-q1-2015-tabs.ods)).

**Table A1.3(e) Number of persons proceeded against and found guilty at the magistrates' and Crown Courts for employing a person subject to immigration controls (new law), UK, 2006-2014**

Year	Proceeded against in magistrates' courts	Found guilty in magistrates' courts	For trial at Crown Court	Found guilty at Crown Court
2006	....	....	....	....
2007	1	0	0	0
2008	2	2	1	0
2009	10	3	2	2
2010	9	3	3	2
2011	4	2	4	3
2012	7	3	1	1
2013	6	2	2	1
2014	6	0	5	4

Source: Home Office, *Immigration Statistics*, Home Office, London, 2015 (Table pr.01 ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/427922/detention-q1-2015-tabs.ods](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427922/detention-q1-2015-tabs.ods))).

Sentencing data for people convicted for assisting entry of irregular immigrants is below, in Table A1.4.<sup>148</sup>

<sup>148</sup> See Criminal Justice Statistics: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/428937/outcomes-by-offence-tables.xlsx](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428937/outcomes-by-offence-tables.xlsx).



**Table A1.3 Number of cautions issued, number of persons proceeded against and type of sanctions imposed on people convicted for assisting irregular immigration, UK, 2004-2014**

Assisting entry of irregular immigrant	Year of Appearance											Change in most recent year
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	
<b>Cautions Issued</b>	29	26	19	11	37	38	32	63	23	36	30	-17%
<b>Total Proceeded Against</b>	357	823	748	521	536	578	501	593	478	506	467	-8%
<b>Total Found Guilty</b>	346	793	752	495	494	475	398	447	348	334	333	0%
<b>Total Sentenced</b>	419	808	854	556	495	471	379	447	341	334	334	-
<b>Custody</b>	363	754	788	489	402	379	306	351	269	279	246	-12%
<b>Suspended Sentence</b>	19	10	22	18	33	46	33	78	55	47	80	70%
<b>Community Sentence</b>	14	17	12	17	13	17	19	4	10	4	3	-25%
<b>Fine</b>	9	11	17	26	37	22	8	4	3	2	2	-
<b>Absolute Discharge</b>	1	2	2	-	1	-	1	-	-	-	-	-
<b>Conditional Discharge</b>	12	14	10	3	8	5	11	9	1	1	1	-
<b>Compensation</b>	-	-	-	-	-	-	-	-	-	-	1	-
<b>Otherwise Dealt With</b>	1	-	3	3	1	2	1	1	3	1	1	-
<b>Average Custodial Sentence Length (months)</b>	13.4	9.6	7.1	6.2	8.5	11.7	15	14.4	14.8	18.1	18.8	0.7
<b>Average Fine (£)</b>	340	793	1,142	745	3,232	1,405	1,637	*	*	*	*	*

Source: Ministry of Justice, *Criminal Justice Statistics*, Ministry of Justice, London, 2015 (Table 8.1) ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/428937/outcomes-by-offence-tables.xlsx](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428937/outcomes-by-offence-tables.xlsx)).

In terms of the enforcement of civil sanctions, the data available is summarised in Table A1.5, below.

**Table A1.4 Data on civil penalties issued on employers by number of penalties and amount levied and collected, UK, 2008-2013**

	2008 (from 29 Feb to Dec)	2009	2010	2011	2012	2013
<b>Average civil penalty (£)</b>	9,652	10,073	9,246	_____	_____	_____
<b>Largest civil penalty (£)</b>	95,000	165,000	61,250	_____	_____	_____
<b>Number of civil penalties issued</b>	1,168	2,271	1,223 (until 30 Jun 2010)	1,426	1,215	1,625
<b>Total penalties levied (£)</b>	11,280,000	22,860,000	18,900,000	12,315,000	10,777,500	12,616,750
<b>Total penalties collected (£)</b>	845,000	3,241,000	6,480,000	6,730,000	6,460,000	9,100,000

Sources: Compiled by the author based on data from parliamentarians' questions and written answers by government officials (*Hansard*, House of Commons, 7 March 2011, Column 873W; and 1 March 2012, Column 462W; and *Hansard*, House of Lords, 8 March 2010, Written Answers WA 18) and government responses to Freedom of Information requests (available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284751/FOI\\_30057\\_Civil\\_Penalties.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284751/FOI_30057_Civil_Penalties.pdf)).

There is no other publicly available data on the enforcement of civil sanctions.

### **b. Other sources of data**

The existing case law suggests that the offence of assisting unlawful immigration is being used against family members and against people assisting refugees to enter the country. Evidence that the assistance was provided for gain or the person assisted is not a family member is considered an aggravating factor.<sup>149</sup> As retired immigration law barrister Frances Webber puts it, “[t]he UK authorities’ attitude to humanitarian smuggling is clear: whether or not financial gain is involved, the courts have consistently held that smugglers must go to prison, and the motive is relevant only to the length of the sentence”.<sup>150</sup>

In the case of *R v. Alps*,<sup>151</sup> the Court of Appeal ruled that the applicant, Mr Alps, was rightly charged and convicted for the offence of assisting irregular immigration since he passed off a passport as belonging to his nephew. His nephew subsequently claimed asylum in the UK, but as he had **used someone else’s passport, he was deemed an irregular entrant** for the purpose of section 25 of the 1971 Immigration Act. In *Sternaj and Sternaj v. the Crown Prosecution Service*,<sup>152</sup> the Court of Appeal established that a person charged with assisting is not exempted from liability if the person assisted is a bona fide asylum seeker. In that case, the applicants – Mr Mondi and Mr Edmir – were charged and convicted of **assisting Mr Edmir’s two-year-old son** to enter the UK by furnishing him with a false passport.

This line of jurisprudence has been severely criticised by human rights practitioners and organisations because it risks undermining the protection of refugees and bona fide asylum seekers against criminalisation, as laid down in Article 31 of the Refugee Convention. While the above provision does not prohibit the criminalisation of those who assist refugees, the imposition of criminal sanctions on them can have adverse effects on the ability of people fleeing persecution to seek protection.

In an earlier review of court files in English criminal courts conducted by the author,<sup>153</sup> 25% of the defendants charged with assisting irregular immigration were alleged to relate to a person assisted as a member of the same family. In one of these cases, the defendant was charged with facilitating the entry of his wife and his two children. He had unsuccessfully applied for family reunification visas on their behalf. He was found not guilty of that offence. Of 58 cases involving a person charged and convicted for assisting facilitation, in 14 of them the person facilitated subsequently claimed asylum in the UK. In half of these cases (7), the person assisted was also a relative of the defendant. In one such case, the defendants – a mother and her son – were charged with assisting the **entry of the other sibling, who used his brother’s passport to secure entry to the UK** and claimed asylum upon arrival. Her mother pleaded guilty to the charge of assisting irregular immigration and was convicted with an eight-week prison sentence; her son was found not guilty. In another case, two friends assisted the entry to the UK of the sister of one of them. She was subsequently granted refugee status. Both defendants were convicted and sentenced to 15 and 9 months in prison, respectively.

### **c. Data gaps**

- There is no information on police/border force arrests for facilitation-related charges. Data on recorded crimes by the police is not disaggregated by offence type. Rather, all immigration offences are grouped together as a

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<sup>149</sup> *R v. Van Binh Le; R v. Stark* [1999] 1 Cr. App. R. (S.) 422 [at 3].

<sup>150</sup> F. Webber, *Border wars and asylum crimes*, Statewatch, London, 2008 (<http://www.statewatch.org/analyses/border-wars-and-asylum-crimes.pdf>).

<sup>151</sup> See [2001] All ER (D) 29 (Feb).

<sup>152</sup> See [2011] EWHC 1094 (Admin).

<sup>153</sup> A. Aliverti, *Crimes of Mobility: Criminal Law and the Regulation of Immigration*, Abingdon: Routledge, 2013.

single category. Moreover, this information is not available for the years 2013 and 2014.

- There is no systematic information publicly available about the enforcement of civil sanctions.

## 2.3. Italy

### a. Enforcement data

#### i. Police data

According to the data provided by the Italian government to the European Commission, the number of people apprehended by the police on facilitation charges is given in Table A1.6.

**Table A1.5 Number of persons apprehended for facilitation-related offences, Italy, 2010-14**

Year	Arrested	Not arrested	Total
2010	704	2,329	3,033
2011	479	1,499	1,978
2012	389	1,266	1,655
2013	402	1,097	1,499
2014 (until September)	629	869	1,498

Source: European Commission, "Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU: national institutional frameworks, policies and other knowledge-based evidence", Brussels, 2014, p. 37.<sup>154</sup>

#### ii. Court data

There are no publicly available statistics about the prosecution and conviction of people charged with facilitation of irregular immigration. Criminal justice statistics compile information on adults who have been charged and dealt with by the criminal courts for violations to the immigration laws from 2006 to 2012. There is no disaggregation based on types of offences.

**Table A1.6 Number of persons charged and dealt with for immigration offences before the courts (per 100,000 inhabitants), Italy, 2006-2012**

	2006	2007	2008	2009	2010	2011	2012
<b>Violations of immigration laws</b>	70	54.4	53.5	47.2	45	15.4	12.7

Source: Istat Statistics (2014) (*noi-italia.istat.it/fileadmin/user\_upload/allegati/S09I04T05p0\_2014.ods*).

In relation to convictions, Table A1.8 shows percentage variation year on year of the number of people convicted of violations of immigration laws.

<sup>154</sup> See [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/trafficking/605\\_emn\\_aHQ\\_national\\_institutional\\_framework\\_on\\_smuggling\\_2014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/trafficking/605_emn_aHQ_national_institutional_framework_on_smuggling_2014_en.pdf).

**Table A1.7 Persons convicted for immigration offences (per 100,000 inhabitants), Italy, 2003-2012**

Offences	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Violations of immigration laws	7	13.9	18.3	19.5	27.6	31.9	36.8	33.1	25.7	20	11.2

Source: Istat Statistics ([http://noi-italia.istat.it/index.php?id=7&user\\_100ind\\_pi1\[id\\_pagina\]=64&cHash=f4b9117dc0fbafdb7de9de78f1dbe22c](http://noi-italia.istat.it/index.php?id=7&user_100ind_pi1[id_pagina]=64&cHash=f4b9117dc0fbafdb7de9de78f1dbe22c)).

Below is a breakdown of data on people convicted for immigration-related offences from 2000 to 2011, by age and gender (Table A1.9) and a breakdown of immigration conviction data by jurisdiction in 2012 (Table A1.10).

**Table A1.8 Adults convicted for immigration offences by age and gender, Italy, 2000-2011**

Sex		Male									Female									Total									
Age at time crime committed	Type of crime	Year	up to 15 yrs old	16 17 yrs old	18 24 yrs old	25 34 yrs old	35 44 yrs old	45 54 yrs old	55 64 yrs old	over 65 yrs old	total	up to 15 yrs old	16 17 yrs old	18 24 yrs old	25 34 yrs old	35 44 yrs old	45 54 yrs old	55 64 yrs old	over 65 yrs old	total	up to 15 yrs old	16 17 yrs old	18 24 yrs old	25 34 yrs old	35 44 yrs old	45 54 yrs old	55 64 yrs old	over 65 yrs old	total
			<b>Migration</b>	2000	3	6	1527	1639	559	159	43	3	3939	1	1	405	228	72	35	10	0	752	4	7	1932	1867	631	194	53
	2001	3	15	2463	2789	1035	359	117	6	6787	3	2	945	640	180	66	23	1	1860	6	17	3408	3429	1215	425	140	7	8647	
	2002	4	8	1150	1619	661	293	112	15	3862	6	3	368	271	95	37	10	7	797	10	11	1518	1890	756	330	122	22	4659	
	2003	7	37	2135	2950	1274	472	163	29	7067	1	14	896	584	221	84	30	12	1842	8	51	3031	3534	1495	556	193	41	8909	
	2004	1	6	2826	3826	1667	640	197	39	9202	1	7	1229	840	253	110	36	8	2484	2	13	4055	4666	1920	750	233	47	11686	
	2005	3	6	2827	4148	1920	719	289	56	9968	4	0	1220	819	258	103	43	18	2465	7	6	4047	4967	2178	822	332	74	12433	
	2006	1	1	4105	5963	2649	917	289	60	13985	1	4	1585	1167	413	202	55	19	3446	2	5	5690	7130	3062	1119	344	79	17431	
	2007	6	12	5058	7278	3159	1107	365	111	17096	0	1	1341	1044	457	267	68	28	3206	6	13	6399	8322	3616	1374	433	139	20302	
	2008	2	15	5747	9026	3676	1189	375	109	20139	0	0	1278	1100	502	212	74	19	3185	2	15	7025	10126	4178	1401	449	128	23324	
	2009	3	2	5188	8664	3474	1146	356	98	18931	0	0	1084	911	465	210	52	22	2744	3	2	6272	9575	3939	1356	408	120	21675	
	2010	3	5	3884	7016	3153	1015	278	99	15453	2	0	531	657	412	161	70	18	1851	5	5	4415	7673	3565	1176	348	117	17304	
	2011	4	5	2983	5774	2363	923	282	67	12401	1	1	324	467	312	155	52	9	1321	5	6	3307	6241	2675	1078	334	76	13722	

Source: Istat Statistics (<http://dati.istat.it/Index.aspx?QueryId=15326>).

**Table A1.9 Convictions by jurisdiction, Italy, 2012**

<b>Jurisdiction of the court</b>	<b>Immigration crimes convictions</b>
<b>Torino</b>	812
<b>Milano</b>	2,444
<b>Brescia</b>	1,056
<b>Trento</b>	103
<b>Bolzano/Bozen (sez.)</b>	117
<b>Venezia</b>	1,012
<b>Genova</b>	598
<b>Bologna</b>	1,877
<b>Firenze</b>	1,129
<b>Perugia</b>	315
<b>Ancona</b>	386
<b>Roma</b>	1,464
<b>L'Aquila</b>	268
<b>Campobasso</b>	20
<b>Napoli</b>	608
<b>Salerno</b>	110
<b>Bari</b>	249
<b>Lecce</b>	132
<b>Taranto (sez.)</b>	26
<b>Potenza</b>	46
<b>Catanzaro</b>	158
<b>Reggio di Calabria</b>	115
<b>Palermo</b>	241
<b>Messina</b>	62
<b>Caltanissetta</b>	44
<b>Catania</b>	181
<b>Cagliari</b>	35
<b>Sassari (sez.)</b>	72
<b>All districts</b>	14,111

Source: Istat Statistics (<http://dati.istat.it/Index.aspx?QueryId=15328>).

#### **b. Other sources of data**

According to the prevailing Italian doctrine, Article 12, para. 5 of the Single Text on Immigration (**Testo Unico sull'Immigrazione, TUI**) exempts from liability those who facilitate the residence of an irregular migrant if the facilitation is not done for profit and purely for humanitarian motives, and especially if the person assisted is in need and

destitute.<sup>155</sup> Where assistance is provided to persons who had entered the country legally but whose leave to remain has subsequently expired, those providing assistance are liable only if in so doing they procure an unjust profit. This last qualification includes those who take pecuniary advantage from the irregular status of the person assisted, such as the employer who hires an irregular migrant to cut costs. According to Enrico Lanza, the exemption in para. 5 is narrower than the humanitarian exemption in para. 2 of Article 12. The latter exempts from liability those who, in pursuing humanitarian assistance, facilitate the entry into the country of an irregular migrant in need.<sup>156</sup>

**c. Data gaps:**

- There are no data disaggregated by specific immigration offences, including facilitation-related offences.
- There are no data on the number of prosecutions of immigration-related offences.
- The data are not recent. There is no court information for 2013 and 2014.
- There are no data available on the invocation of the humanitarian exemption or on the enforcement of civil penalties.

**1. The Netherlands**

**a. Enforcement data**

According to the response submitted to the European Commission by the Dutch government,<sup>157</sup> in the last five years (2009-2014), a total of 3,185 people were apprehended as facilitated immigrants at the border, of which 1,235 came by air, 1,803 by land and 147 by sea. In the same period, the Dutch authorities apprehended 1,083 people at the border who were suspected of facilitating irregular immigration, 266 of them came by air, 747 by land and 70 by sea. This information relates to apprehensions at border points conducted by the border police (the Royal Marechaussee), and does not include apprehensions conducted inland.

Court data on prosecutions and convictions for facilitation of irregular immigration was not submitted to the European Commission. This information is not publicly available. Apparently, however, prosecution data on offences under section 197a of the Criminal Code are collected by the Dutch Ministry of Security and Justice. Yet, due to restrictions on access to this data – mainly, confidentiality and security of personal data – this information could not be retrieved within the timeframe for drafting this Annex.

In contrast, information on trafficking on human beings is available on the website of the Dutch Central Bureau for the Statistics.

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<sup>155</sup> P. Zaccaria, 'Il delitto di favoreggiamento dell'immigrazione clandestina alla luce della L.189/02', *Altalex*, 3 February 2004 (<http://www.altalex.com/documents/news/2010/07/23/il-delitto-di-favoreggiamento-dell-immigrazione-clandestina-alla-luce-della-l-189-02>).

<sup>156</sup> E. Lanza, 'La repressione penale della immigrazione clandestina', 2001, *Diritto & Diritti* (no date) (<http://www.diritto.it/articoli/penale/lanza.html>).

<sup>157</sup> European Commission, "Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU: national institutional frameworks, policies and other knowledge-based evidence", 2014, p. 58 ([http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/trafficking/605\\_emn\\_ahq\\_national\\_institutional\\_framework\\_on\\_smuggling\\_2014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/trafficking/605_emn_ahq_national_institutional_framework_on_smuggling_2014_en.pdf)).



**Table A1.10 Registered crimes and suspects of trafficking in human beings, the Netherlands, 2012-2014**

	Registered crimes	Registered suspects	Total men	Total women	Adult suspects total
2012	770	545	445	95	530
2013	580	410	340	65	405
2014	605	500	405	90	485

Source: Central Bureau for Statistics, "Human trafficking" (<http://statline.cbs.nl/Statweb/publication/?VW=T&DM=SLNL&PA=83032NED&D1=0.5-8&D2=56&D3=0&D4=7-9&HD=151001-1427&HDR=G2,G1,T&STB=G3>).

**Table A1.11 Sanctions imposed on people convicted for trafficking in human beings, the Netherlands, 2009-2013**

	2009	2010	2011	2012	2013
Total sanctions	50	85	80	115	205
of which imprisonment	25	50	55	60	105

Source: Central Bureau for Statistics, "Crimes, imposed measures and sanctions: human trafficking" (<http://statline.cbs.nl/Statweb/publication/?VW=T&DM=SLNL&PA=81538NED&D1=0-26&D2=52&D3=0&D4=0&D5=15-19&HD=151001-1441&HDR=G1,G2,G3,G4&STB=T>).

### b. Other sources of data

Cases involving people charged with facilitation-related offences who had invoked humanitarian motives are not systematically compiled. Unreported cases are not easily accessible through Internet search engines on general case law. Civil society organisations are reluctant to provide details of cases owing to data protection considerations.

In one of the reported cases before the Court of Alkmaar,<sup>158</sup> the defendants – husband and wife – were charged with assisting a number of Ukrainian citizens to obtain irregular residence in the Netherlands by providing them with accommodation and employment, and arranging transportation to their workplaces. In their defence, it was argued that the defendants did not know that the persons assisted were irregularly in the country – they thought they were Polish citizens. Furthermore, 'bad intentions' or a situation of exploitation against the people assisted were not proven. They did not demand high payments for accommodation and they were 'warm-hearted people' who accommodated the migrants in their own cottage. It was argued that section 197a of the Criminal Code was meant to criminalise the exploitation of foreigners.

The court ruled that the defendant had reasons to suspect that the people assisted were irregularly in the country. It also established that they provided rented accommodation and hence the element of profit required by section 197a was fulfilled, even though there was no exploitation of the people assisted. The court further established that this section is not limited to the prevention of exploitation of foreigners, but also aims at protecting immigration policy and labour market interests. Therefore, it concluded that they were

<sup>158</sup> Court of Alkmaar, judgement of 5<sup>th</sup> March 2008. Reference number: 14/810231-07.

liable under such provisions. They were given a prison sentence of 74 days and a community order.

### c. Data gaps

- There are no data publicly available on the prosecution of individuals suspected of facilitation of irregular immigration, or on convictions for the same offence.
- There are no data on the operation of the humanitarian exemption for the offence of facilitating residence or on the enforcement of civil penalties.

## 2.4. France

### a. Enforcement data

Based on the response by the French authorities to the questionnaire developed for the purposes of this study (Q19), the data on prosecutions for facilitation of irregular migrants and related offences is shown in Table A1.13.

**Table A1.12 Number of prosecutions for facilitation of irregular migrants and related offences, France, 2009-2014**

Year	Number of prosecutions
2009	1,149
2010	1,184
2011	1,023
2012	1,278
2013	1,470
2014	1,834

### b. Other sources

The Commission Nationale Consultative des Droits de l'Homme (the National Advisory Committee on Human Rights, CNCDH) has produced a report<sup>159</sup> outlining a number of police and criminal proceedings against people who have provided selfless assistance to irregular immigrants to enter or stay in France. It found that some conduct, which may be covered by the 'humanitarian exemption', is being criminalised, as courts are reluctant to apply the exemption. The CNCDH concluded that, owing to the vagueness and ambiguity of the current law, 'mere acts of solidarity' are still being punished, or at least trigger the opening of investigations by the police and the initiation of public prosecutions. Although all the cases reported are prior to the reform of 2012, they are useful for understanding the operation of domestic law and the problems arising from the interpretation of the exemption based on humanitarian motives.

Of particular concern are cases involving family members. In three out of the 18 cases reviewed, the person assisted was a relative of the defendant charged with facilitation of entry, transit or stay. In a case before the Bastia Court of Appeal, MM was charged and convicted for assisting the unauthorised residence of his son, who was irregularly in the

<sup>159</sup> See CNCDH, *Note sur les cas d'application du délit d'aide à l'entrée, à la circulation et au séjour irréguliers*, 11 January 2011, pp. 1-18 (<http://veillejuridiquedelafapil.20minutes-blogs.fr/media/00/02/542816678.pdf>). See also FIDH/OMCT, *Délit de solidarité: Stigmatisation, répression et intimidation des défenseurs des droits des migrants*, 2009 (<http://combatsdroitshomme.blog.lemonde.fr/2009/06/15/delit-de-solidarite-stigmatisation-repression-et-intimidation-des-defenseurs-des-droits-des-migrants-rapport-fidh-omct-juin-2009/>).

country with his daughter and at risk of being deported to Morocco. He harboured them in his home for three months. The Court of Appeal confirmed his conviction, stating that he was not covered by the immunity provided by Article 622-4 of the Code on the Entry and Stay of Foreigners and the Right of Asylum (*Code de l'entrée et du séjour et du droit d'asile*, CESEDA), yet MM was cleared of all charges because his behaviour was dictated solely by generosity.<sup>160</sup> The Supreme Court rejected the appeal against the decision of the Court of Appeal. MM appealed to the European Court of Human Rights.

Of the 18 facilitation cases, eight involved people who are co-habiting or about to be married, or at least maintaining a stable emotional relationship. In one of these cases, C was charged with providing material assistance to two individuals (T and M) who were residing in France irregularly. T had claimed political asylum and was granted refugee status. The Correctional Court of Boulogne sur Mer held that the defendant was openly co-habiting with T, and ruled a 'partial release' (*relaxe partielle*) in favour of C. The prosecution appealed the decision. The Court of Appeal revoked the decision by the court of first instance declaring C guilty of the crime of facilitation, because it concluded that they were not openly cohabitating. Yet, it exempted her from punishment.<sup>161</sup>

The Commission quotes cases in which private individuals and charities have been investigated and/or charged with facilitation offences for assisting foreigners with irregular status. Ms A, a volunteer at the Salam Association, was arrested by the border police near Calais while she was carrying in her car two injured undocumented migrants to take them to hospital. She was wearing a jacket with the logo of her organisation. She was then released and not charged with any offence.<sup>162</sup> Ms B, a social worker at Solidarité Femmes, was asked for information by the border police on an Algerian woman who was undocumented and had been in contact with the organisation. Ms B refused to disclose information. She was summoned to attend the office of the border police and was interviewed. She refused to answer any questions. She was placed in custody and was released the same day. The prosecution closed the case without further action.<sup>163</sup> Ms P was placed in police custody in Coquelles, suspected of being involved in assisting irregular residence on behalf of an organised gang. Ms P is a volunteer working for a charity in Calais organising the donations of food and clothes for migrants. She was released without charge after ten hours in custody.<sup>164</sup>

The CNCDH points out that, even if police investigations do not lead to a formal charge or a conviction, they can have other punitive effects, such as social and economic stigmatisation, adverse effects on family members, and psychological consequences on those subject to criminal proceedings. To avoid the unwarranted criminalisation of 'humanitarian smugglers', the CNCDH proposed the inversion of the rule established in French law: instead of providing certain exemptions to criminalisation based on family relationships and/or humanitarian motives, the general principle should be no criminalisation and the exception criminalisation of facilitation when it is done for financial gain.

### c. Data gaps

- There are no data on the number of prosecutions against people charged with facilitation of irregular immigration.
- There are no data on the number of convicted facilitators.

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<sup>160</sup> Bastia Appeal Court, 11 April 2007, quoted on p. 13.

<sup>161</sup> Douai Appeal Court, 14 November 2006, quoted on p. 14.

<sup>162</sup> Quoted on p. 7.

<sup>163</sup> Quoted on p. 8.

<sup>164</sup> Quoted on p. 8.

- There are no statistical data on the invocation of the humanitarian exemption or on the enforcement of civil penalties.

## 2.5. Spain

### a. Enforcement data

The only data publicly available relate to the arrest of suspected facilitators for 2012 and 2013 – respectively 836 and 746.<sup>165</sup> According to the response by the government to the request for information by CEPS, there are no data available on the number of prosecutions and convictions of facilitators. Further requests were sent to the Spanish Statistical Office, and to the Permanent Observatory on Immigration at the Secretary of State for Immigration and Emigration, Ministry of Labour and Social Security. There were no replies to those requests.

### b. Other sources

Martínez Escamilla (2009)<sup>166</sup> refers to a number of judicial decisions in which Article 318(bis) of the Criminal Code was enforced against individuals who had provided selfless assistance to foreigners in need. The Court of Cádiz, through its judgment of 9 December 2003, handed down a three-year prison sentence to a police officer who had **attempted to assist the entry into the country of his girlfriend's brother**. The Court of Malaga gave a sentence of two years to individuals who hid a young Moroccan man in their car in order to facilitate his entry (judgment of 13 July 2004). On 24 February 2005, the same court sentenced a Moroccan man who tried to secure entry for his **nephew by lending him his son's passport**. He was punished with a prison sentence of three years and a day.

### c. Data gaps

- There is no information publicly available about the number of people proceeded against and convicted for facilitation of irregular immigration.
- There are no data on the invocation of the humanitarian exemption or on the enforcement of civil or administrative sanctions for offences under immigration law.

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<sup>165</sup> European Commission, "Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU: national institutional frameworks, policies and other knowledge-based evidence", 2014, p. 89 ([http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/trafficking/605\\_emn\\_ahg\\_national\\_institutional\\_framework\\_on\\_smuggling\\_2014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/trafficking/605_emn_ahg_national_institutional_framework_on_smuggling_2014_en.pdf)).

<sup>166</sup> M. Martínez Escamilla, "Inmigración, Derechos Humanos y Política Criminal: ¿Hasta dónde estamos dispuestos a llegar?" *InDret. Revista para el Análisis del Derecho*, 3, 2009, p. 9.

### 3. CONCLUSIONS

This examination of legal provisions and their enforcement in practice reveals a number of methodological and substantive issues concerning the regulation and practical implementation of the Facilitation Directive at the domestic level.

In terms of methodological issues, while some of the Member States studied collect data on the number of individuals apprehended, prosecuted and convicted for facilitation-related offences, some of them do not make this information publicly available. Others, like Italy, do not provide a breakdown of immigration offences by offence type. There are also discrepancies in terms of the years for which the information is available. As a result, meaningful comparisons across jurisdictions are difficult to draw. There are also language barriers for accessing data. Statistical data of such a level of specificity, when available at all, is rarely translated into English.

Above all, quantitative, statistical data are unlikely to shed light on the types of cases that end up being criminalised at the national level. Since crime and immigration statistics rarely disaggregate data according to specific parameters – for example, whether defendants and victims are relatives or whether proof of humanitarian assistance was produced during proceedings – and since this information is rarely systematically collected, general statistical datasets are unfit to provide details on the **operation of the 'humanitarian exemption' at the national level.**

On the other hand, it is misleading to regard a criminal conviction as the only index of punitiveness. Being arrested, interrogated, detained and prosecuted for a crime can have punitive effects on those subject to state intervention, even where those interventions do not eventually result in a conviction and the imposition of a sanction. Criminal and immigration statistics are unlikely to provide details on the context of the offence and the specific reasons for the discontinuation of proceedings, including the application of any exemption to liability. Thus, the fact that a number of facilitation prosecutions do not lead to criminal convictions can be read as a product of the effective scrutiny of the judicial system. Alternatively, it can be interpreted as an outcome of the incapacity of the criminal justice system to filter out unmeritorious cases at the early stages.

Unfortunately, a systematic analysis of police investigations and court proceedings has not been carried out to date in the countries reviewed – not even an examination of appeal cases. In order to gather this information, we must rely on anecdotal evidence on police and court proceedings produced in each country. Alternatively, what would be needed is research in situ in each of the countries under study. This would require researchers working in each country to conduct searches on criminal justice archives and databases. This is a comparatively larger project and outside the remit of this study.

As we currently stand, there is scarce and patchy evidence – both qualitative and quantitative – on the impact of the Facilitation Directive in the criminalisation of humanitarian smugglers and civil society organisations. Without comprehensive and robust evidence on the impact of the Facilitation Directive in domestic jurisdictions, it is difficult to assess the practical effectiveness of the EU law. Without this evidence, the current process of revision of the Facilitators' Package risks being poorly informed.

In terms of the substantive issues, some of the cases reported in this study – particularly in the UK, Germany, France, the Netherlands and Spain – provide evidence of the use of facilitation-related offences against altruistic individuals assisting others, including family members, members of humanitarian organisations and private individuals acting out of compassion. Given the limited scope and sample size on which these studies are based, it is difficult to draw general conclusions on the operation of the exemption from them.

Yet, these cases are indicative of the wide scope for criminalisation allowed by domestic legal regimes, and potential deficiencies in the Facilitation Directive to prevent such expansion.

Thus, if the Facilitation Directive is to mandate the criminalisation of certain forms of facilitation of entry, transit and residence, those forms of facilitation should be sufficiently specified in order to minimise the scope for expansive interpretation at the domestic level. In addition, it should be made clear that not-for-profit, humanitarian facilitation of entry, transit and/or residence is not to be subject to criminal or administrative liability. Overall, in considering prospective offences for criminalisation, the European Parliament should examine closely the interest to be protected by the facilitation offence in light of general principles of criminal law, particularly the principle of maximum certainty and the harm principle. The main interest protected by the offence should be the life, security and physical integrity of the person assisted. As such, obvious candidates for criminalisation are acts that cause serious injuries, endanger life or result in the death of another person, as well as acts committed by organised criminal groups.

A major concern should be the effects of criminalisation processes for both immigrants and those who help them, in terms of increasing the risks of border crossings and the demand for facilitators. Criminal regulation should be used as a last resort, reserved for the most serious cases of facilitation and assistance.

## ANNEX 2

### IMPLEMENTATION BY EU MEMBER STATES

#### Ms Mirja Gutheil and Ms Aurélie Heetman (Optimity Advisors, London)

This Annex provides a synthesis of the main findings resulting from the survey and the desk research, covering the following issues related to implementation of the Facilitation Directive in the eight selected Member States:

1. Institutional arrangements (Q2 and 6);
2. Legal transposition (Q3, 4, 5 and 7);
3. Sanctions (Q8);
4. Exceptions (Q9, 10, 11 and 12);
5. Obligation to report (Q13 and 14);
6. Rationale, effects & changes (Q15, 16 and 17); and
7. Statistical questions (Q18 to 25).

#### 1. INSTITUTIONAL ARRANGEMENTS (Q2 AND 6)

This subsection presents findings for the following survey questions:

**Q2:** To what extent and how is your organisation involved in the implementation of the Facilitation Directive?

**Q6:** Please name the relevant administrative practices that support the enforcement of the Facilitation Directive in national law.

The survey responses for France and Spain have been supplemented with the information included in the publicly available ad-hoc query.<sup>167</sup> The responses for the remaining countries are solely based on this source. As the ad-hoc query did not include information on Greece and Hungary, no information is presented on these countries.

**Table A2.1 Relevant administrative practices that support the enforcement of the Facilitation Directive in national law (Q6)**

MS	Administrative bodies/actors involved in addressing migrant smuggling	Source
FR	<ul style="list-style-type: none"> <li>• <b>Ministry of Interior:</b> In particular the French Office for the Suppression of Unauthorised Immigration and the Employment of Foreigners without Residence Permits (OCRIEST) and the French Unit for the Operational Coordination of Measures to Combat the Trafficking and Exploitation of Migrants (UCOLTEM) within the Central Directorate of the French Border Police</li> </ul>	<ul style="list-style-type: none"> <li>• Survey response</li> <li>• Ad-hoc query</li> </ul>

<sup>167</sup> European Commission and EMN Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU ([http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/trafficking/605\\_emn\\_aHQ\\_national\\_institutional\\_framework\\_on\\_smuggling\\_2014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/trafficking/605_emn_aHQ_national_institutional_framework_on_smuggling_2014_en.pdf)).

	(DCPAF)	
DE	<ul style="list-style-type: none"> <li>• <b>Task force II</b> (Internal Security) of the Standing Conference of Interior Ministers;</li> <li>• <b>Working group</b> comprising the heads of the Land offices of criminal investigation and the Federal Criminal Police Office (AG Kripo);</li> <li>• <b>AG Kripo crime-fighting commission</b> (KKB)</li> </ul>	<ul style="list-style-type: none"> <li>• Ad-hoc query</li> </ul>
EL	No information available.	N/A
HU	No information available.	N/A
IT	<ul style="list-style-type: none"> <li>• <b>Ministry of the Interior</b>, through the Department for Civil Liberties and Immigration and the Department of Public Security (Police Force), in the area of prevention;</li> <li>• <b>Ministry of Foreign Affairs and International Cooperation</b> in the area of prevention;</li> <li>• <b>Law enforcement</b>: Navy, Air Force, Carabinieri, Guardia di Finanza, Port Authorities, personnel of the Military Corps of the Italian Red Cross and the Ministry of the Interior (State Police) in the areas of humanitarian assistance and safety and security at sea;</li> <li>• The <b>regions, provinces and municipalities</b>, with the involvement of the third sector (<b>associations and NGOs</b>), in the areas of humanitarian assistance and safety and security at sea</li> </ul>	<ul style="list-style-type: none"> <li>• Ad-hoc query</li> </ul>
NL	<ul style="list-style-type: none"> <li>• The <b>Ministry of Security and Justice</b>, DG Migration and DG Law Enforcement and DG Police; at a national level, the Ministry is responsible for all matters concerning human smuggling. It cooperates with the Ministry of Defence, the Ministry of Foreign Affairs, the Ministry of Labour and Social Affairs;</li> </ul> <p><i>Operational level:</i></p> <ul style="list-style-type: none"> <li>• <b>Royal Netherlands Marechaussee</b> (border police) is responsible for border investigations;</li> <li>• <b>Immigration and Naturalisation Service</b>: their focus in interviews within the migration process is on travel routes, patterns, organised crime elements, facilitators, etc. They also train airline staff to recognise smuggling and document fraud. The People Smuggling and Human Trafficking Information Group of the Immigration Naturalisation Service (MIG/INS) is a special unit of the INS which centrally records information with regard to migration crime;</li> <li>• <b>National Police</b> is responsible for internal investigations;</li> <li>• <b>Public Prosecution Service</b>;</li> <li>• <b>Expertise Centre on Human Trafficking and People Smuggling (EMM)</b>. The EMM is the centre where information,</li> </ul>	<ul style="list-style-type: none"> <li>• Ad-hoc query</li> </ul>



	<p>knowledge and expertise on human trafficking and smuggling is collected, processed and enriched. The EMM distributes this information to facilitate police investigations. The EMM is a collaborative venture between the Dutch National Crime Squad (part of the Netherlands Police Agency), the Royal Marechaussee, the Immigration and Naturalisation Service (INS), the Social Affairs and Employment (SZW) Inspectorate and the Aliens Police. All of these organisations second members of staff to the EMM. The EMM enables them to share information and to cooperate;</p> <ul style="list-style-type: none"> <li>● <b>Identity Fraud and Documents Expertise Centre (ECID)</b></li> </ul>	
ES	<ul style="list-style-type: none"> <li>● <b>Ministry of Interior</b> from the law enforcement side, responsibilities include border control, immigration control inside the territory and criminal investigations;</li> <li>● <b>Other ministries:</b> the Ministry of Employment and Social Security, and the Ministry of Foreign Affairs;</li> <li>● Coordination takes place in the inter-institutional task force <b>Comisión Interministerial de Extranjería.</b></li> </ul>	<ul style="list-style-type: none"> <li>● Survey response</li> <li>● Ad-hoc query</li> </ul>
UK	<ul style="list-style-type: none"> <li>● The <b>Home Office</b> is the ministry with overarching responsibility for both crime and immigration policy in the UK. It is the main actor involved in the development of policies addressing migrant smuggling;</li> <li>● <b>National Crime Agency (NCA)</b> (established 2013); Immigration crime, including people smuggling, is recognised as one of the strategic threats facing the UK by the NCA in its Strategic Assessment of Serious and Organised Crime (NCA, 2014); <ul style="list-style-type: none"> <li>○ The <b>Border Policing Command (BPC)</b> of the NCA leads work against serious and organised crime at the border including organised immigration crime and human trafficking;</li> <li>○ The <b>UK Human Trafficking Centre (UKHTC)</b> in the NCA is also involved in combating people smuggling. The <b>UKHTC's partners include police forces, the Home Office</b> and other government departments, the UK Border Force, the Gangmasters Licensing Authority, international agencies, NGOs and many charitable and voluntary expert groups.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>● Ad-hoc query</li> <li>● Desk research</li> </ul>

Source: Authors.

### a. **Legal transposition (Q3, 4, 5 and 7)**

This subsection presents findings for the following survey questions:

**Q3:** How/to what extent has the Facilitation Directive been implemented in national law in your country to date?

**Q4:** Are there any parts of the Directive that have not been implemented yet? If yes, what are the reasons?

**Q5:** Are the obligations of the Facilitation Directive implemented in criminal or civil law in your country, or both?

**Q7:** Does the national legislation in your country currently distinguish between smuggling and trafficking?

Table A2.2 provides an overview of the national laws implementing the Facilitation Directive. This is based on the survey responses for questions 3 to 5 for Spain and France, and desk research<sup>168</sup> for the remaining six selected Member States. It is important to note that, due to a lack of responses, answers to the second part of Q4 were not available.

**Table A2.2 Legal basis (Q3, 4 and 5)**

MS	Criminal Law	Civil Law/ Immigration Law	Provision(s) not implemented
FR	Criminal Code (includes general principles of criminal law which apply to CESEDA) <sup>169</sup>	Article L.6222-1 and L.622-4 of the Code for Entry and Residence of Foreign Persons and the Right of Asylum (CESEDA) <sup>170</sup>	Article 1(2) not transposed
DE	German Criminal Code <sup>171</sup> (general principles of criminal law applicable to the AufenthG, including provisions on aiding and abetting)	Section 95 to 97 Federal Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (AufenthG) <sup>172</sup>	Article 1(2) not transposed
EL	Criminal Code 1951 <sup>173</sup> (including provisions on aiding and abetting)	Article 29 and 30 Law 4251/2014, Immigration and Social Integration Code <sup>174</sup>	N/A
HU	Article 353 and 354 of the Act C of 2012 on the Criminal Code (contains the <b>criminal offence of 'Illegal Immigrant Smuggling' and of 'Facilitation of Unauthorised Residence'</b> )	Act CLXXX of 2012 on the Cooperation with the Member States of the European Union in Criminal Matters	Article 1(2) not transposed

<sup>168</sup> This included a legal review of the national law of the selected Member States.

<sup>169</sup> Code pénal Version consolidée au 7 novembre 2015.

<sup>170</sup> Survey response Q 3, loi n° 2003-1119 du 26 novembre 2003 du code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA).

<sup>171</sup> German Criminal Code in the version promulgated on 13 November 1998 (*Federal Law Gazette* I, p. 3322) last amended by Article 5 of the Act of 10 October 2013.

<sup>172</sup> Federal Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet), Residence Act - in the version as promulgated on 25 February 2008 (*Federal Law Gazette* I, p. 162) last amended by Article 3 of the Act of 6 September 2013 (*Federal Law Gazette* I, p. 3556).

<sup>173</sup> 2012. évi C. törvény a Büntető Törvénykönyvről (Btk).

<sup>174</sup> Law 4251/2014, Code of Migration and Social Integration and other provisions, GG A' 80/14-2014 1 April 2014 ([http://www.enterprisegreece.gov.gr/files/Pdf/2015/residence\\_permits\\_july\\_2015/N4251-2014\\_EN.pdf](http://www.enterprisegreece.gov.gr/files/Pdf/2015/residence_permits_july_2015/N4251-2014_EN.pdf)).

IT	Criminal Code <sup>175</sup> (provisions on aiding and abetting, and general provisions on sanctioning)	Article 12 Legislative Decree 25 July 1998, n. 286 - Single Act of the provisions governing immigration and the status of foreigners <sup>176</sup> (TUI)	N/A
NL	Article 197a(1) and (3)-(6) of the Criminal Code <sup>177</sup> (criminalises the smuggling of migrants)		Article 1(2) not transposed
ES	Article 20 and 318(bis) of the Criminal Code <sup>178</sup> (criminalises the smuggling of migrants)	Article 53 and 54 Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration <sup>179</sup> (includes additional administrative offences)	N/A
UK	<b>England, Wales and Northern Ireland:</b> Serious Crimes Act 2007, Criminal Attempts Act 1981, the Common Law. <b>Scotland:</b> Criminal Procedure (Scotland) Act 1975, the Scots law	Section 25 of The Immigration Act 1971 <sup>180</sup> (sanctions the smuggling of migrants)	Article 1(2) not transposed

Source: Authors.

As can be seen in the table above, the obligations of the Facilitation Directive are implemented in criminal law as well as civil law provisions in the selected Member States. What differs is that, in some countries, the offence of smuggling of migrants is defined in criminal law (Hungary, the Netherlands and Spain). In others, the offence is included in immigration law (France, Germany, Greece, Italy and the UK). Five out of the eight selected Member States did not implement Article 1(2) of the Facilitation Directive (humanitarian exception) into national law. This issue is further discussed in section 2.4.

With regard to Q7, in 2006 the European Commission's implementation report<sup>181</sup> stated that the criminal laws of some Member States, including Spain and the Netherlands, did not make a clear distinction between human trafficking and migrant smuggling. Yet the current section 197a of the Dutch Criminal Code only applies to cases of migrant smuggling; trafficking in human beings is dealt with in Article 273f of the Criminal Code. With regard to Spain, Article 318(bis) was

<sup>175</sup> Royal Decree n. 1398 of 19 October 1930 – Criminal Code.

<sup>176</sup> Decreto Legislativo 25 luglio 1998, n. 286 – Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero.

<sup>177</sup> Wetboek van Strafrecht.

<sup>178</sup> Criminal Code as amended by Organic Law 1/2015.

<sup>179</sup> Organic Law 4/2000, of 11 January 2000, on the rights and freedoms of foreigners in Spain and their social integration, as amended by Organic Law 14/2003 of 20 November 2003.

<sup>180</sup> See Immigration 1971, 28 October 1971.

<sup>181</sup> European Commission, Report based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, COM(2006) 770 final, Brussels, 6 December 2006.

amended in 2010 to separate the crime of human trafficking from migrant smuggling.<sup>182</sup>

## b. Sanctions (Q8)

This subsection presents findings for the following survey question:

**Q8:** (a) What sanctions are currently foreseen in your country for the facilitation of irregular entry, transit and stay? (b) Are these sanctions limited to the facilitation of irregular entry, transit and stay in the territory of your own country, or are facilitation of entry, transit and stay in other Member States also punished?

The sanctions currently provided for in the national legislation of the eight assessed Member States are given in Table A2.3 below. This is based on the survey responses for Spain and France, and desk research<sup>183</sup> for the remaining six selected Member States.

**Table A2.3 Implementation of sanctions (Q8a)**

MS	Sanction for the smuggling of migrants (SOM)	Sanctions for smuggling of migrants in aggravating circumstances	Source
FR	Up to 5 years + €30,000	Up to 10 years + €750,000 if committed by organised criminal gangs	Article L. 622-1 CESEDA Article L. 622-5 CESEDA
DE	Up to 5 years or a fine	If the facilitation caused danger to the life/safety of the migrant; If committed by a criminal organisation (gang)	Section 96(1) and (4) AufenthG
EL	<b>Entry/transit:</b> Up to 10 years' imprisonment and a fine of at least €20,000  <b>Stay:</b> At least 1 year's imprisonment and a fine of	<b>Entry/transit:</b> If for financial gain, professionally, habitually, as a repeat offence, if committed by a public officer, a tourist, a shipping company or a travel agent, or if two or more act in concert: at least 10 years' imprisonment and a fine of €30,000-60,000 for every transported person; if committed by a criminal organisation  <b>Stay:</b> if for financial gain, at least 2 years' imprisonment and a fine of at	Article 29 and 30 Law 4251/2014

<sup>182</sup> Organic Law No. 5/2010 of June 22, 2010 amending the Criminal Code, also called Organic Law No. 10/1995, 23 November 1995.

<sup>183</sup> This included a legal review of the national law of the selected Member States, and the findings were validated by the Annex to the 2014 FRA report on criminalisation of migrants: *EU Member States' legislation on irregular entry and stay, as well as facilitation of irregular entry and stay*, FRA, p. 26 ([https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-annex\\_en.pdf](https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-annex_en.pdf)).

	at least €5,000	least €10,000	
HU	<b>Entry/transit:</b> Up to 3 years <b>Stay:</b> Up to 2 years	<b>Entry/transit:</b> If for financial gain or involving several migrants: 1 to 5 years	Article 353 and Article 354 Criminal Code
IT	<b>Transit/entry:</b> 1 to 5 years and a fine of €15,000 for each person smuggled  <b>Stay:</b> 1 to 4 years and a fine of €15,000 for each person whose illegal residence on the Italian territory has been facilitated  <b>Sell/rent accommodation:</b> from 6 months to 3 years	<b>5 to 15 years and a fine of €15,000</b> for every person (paragraphs 3 to 3.4 of Article 12 of the TUI): <ul style="list-style-type: none"> <li>• 5 or more migrants;</li> <li>• Danger to life/safety of the migrant;</li> <li>• Inhuman/degrading treatment;</li> <li>• Committed by 3+ persons together or by using international shipping services or counterfeit or altered documents or otherwise unlawfully obtained;</li> <li>• Possession of weapons or explosive materials;</li> <li>• Increased if two or more of the above;</li> <li>• An increase of one-third to half + fine of €250,000 per person in certain circumstances (Article 12(3 ter) TUI)</li> </ul>	Article 12 TUI
NL	<b>Entry/transit/stay:</b> 4 years or a "fifth category" fine (maximum of €81,000)  <b>Attempts to commit/complicity:</b> maximum sanctions	Those offences committed in the execution of any duty or profession; that are made customary practice; by acting in association; where such acts lead to <ul style="list-style-type: none"> <li>• grievous bodily harm = maximum 6 years</li> <li>• grave danger = maximum 8 years</li> </ul>	Article 197A Criminal Code

	lowered by a third	<ul style="list-style-type: none"> <li>result in death = maximum 12 years</li> </ul> or with a fifth category fine <b>(maximum of €81,000)</b> <p>Participation in a criminal organisation is punished under Article 140(1) of the Criminal Code with a custodial sentence of at most 6 years.</p>	
ES	<b>Entry/transit/stay:</b> Up to 1 year <sup>184</sup>	Only relates to facilitation of entry: <ul style="list-style-type: none"> <li>If the facts were committed for profit, the penalty shall be imposed in its upper half (i.e. 6 months to 1 year);</li> <li>If carried out by an organisation – 8 years;</li> <li>If it endangered the lives of people involved in the infringement, or created the danger of serious injury – 8 years;</li> <li>If carried out abusing a situation of superiority – 8 years</li> </ul>	Article 318(bis)(1)–(3) Criminal Code
UK	<b>Crown Court:</b> up to 14 years, a fine or both  <b>Magistrates Court:</b> up to 6 months, a fine not exceeding the statutory maximum or both.	No aggravating circumstances provided for	Section 25 Immigration Act 1971

Source: Authors.

As can be seen in the table above, **the variety of sanctions for the facilitation of entry seems to be quite large, with maximum custodial sentences ranging from 1 year (Spain) to 14 years (UK)**. In some countries the penalty is lower for assisting entry/transit than stay (e.g. Italy), while in other countries the sanction is the same (e.g. the Netherlands and Spain).

The aggravating circumstances mentioned in the national law of selected Member States vary too: namely, if the facilitation caused danger to the life/safety of the migrant (Germany,<sup>185</sup> Italy, the Netherlands and Spain), if it involves several migrants (Hungary and Italy), if the offence was committed by two or more in concert (Greece and Italy), if carried out for financial gain

<sup>184</sup> The new Spanish Criminal Code entered into force in July 2015. Before that sanctions for facilitation of entry ranged from 4 to 8 years' imprisonment and from €10,000 to €100,000 in fines for the facilitation of stay as per Article 318 (bis)(1) Criminal Code.

<sup>185</sup> Germany explicitly requires the element of financial gain with regard to the aggravating circumstance of endangering the life of the person concerned.

(Greece, Hungary and Spain), if committed by a criminal organisation (Germany, Greece, France, the Netherlands and Spain),<sup>186</sup> and if committed habitually (Greece and the Netherlands). The elements of committing the offence as part of a criminal organisation and endangering the life of the migrant correspond to the aggravating factors mentioned in Article 1(3) of the Council Framework Decision 2002/946/JHA when also committed "for financial gain".

**These sanctions are generally not limited to the facilitation of irregular entry, transit and stay in the territory of that country.** As can be seen in Table A2.4, facilitation of entry, transit and stay in another Member State is also sanctioned in Hungary (only for stay), Italy (only for entry), Spain and the UK. Moreover, in Hungary the facilitation of entry or stay in European Economic Area (EEA) countries is also punished, while in France the facilitation of entry or stay in Schengen countries is sanctioned. In the Netherlands, the facilitation of entry, transit and stay in any country that is a party to the UN Protocol against Migrant Smuggling is sanctioned.

**Table A2.4 Do sanctions in national law apply only to the Member State or more broadly? (Q8b)**

MS	Only in own MS?
FR	Also any country that is part of the Schengen Area
DE	No provision for entry/transit or stay in other MS
EL	No provision for entry/transit or stay in other MS
HU	No provision for entry/transit in other MS; for stay – also other EU MS, or parties to EEA <sup>187</sup>
IT	Also other MS for transit/entry; <sup>188</sup> only Italy for stay
NL	Also any other State Party to the UN Protocol against Migrant Smuggling for entry, transit and stay <sup>189</sup>
ES	Also other MS for entry/transit
UK	Also in other MS for entry/transit and stay "has effect in a member state" Section 25(2) of the 1971 Act

Source: Authors.

**Table A2.5 Extension of sanctions beyond the Member State for facilitation of entry, transit or stay**

	Facilitation of entry/transit	Facilitation of stay
Only sanctioned if committed in own	DE, EL, HU	DE, EL, IT

<sup>186</sup> Germany and Greece explicitly require the element of financial gain when the acts are committed within a criminal organisation.

<sup>187</sup> Art. 354 Criminal Code Hungary

<sup>188</sup> Article 12(1) of the TUI also punishes assistance to illegal entry in another country (a Member State of the EU or a third-country), where the person concerned is neither a national, nor a holder of a permanent residence permit in such country.

<sup>189</sup> Article 197a(2) of the Penal Code

Member State		
Sanctioned if committed in the Schengen Area	FR	FR
Sanctioned if committed in an EU Member State	ES, UK, IT	ES, UK
Sanctioned if committed in a party to the European Economic Area (EEA)		HU
Sanctioned if committed in a State Party to the UN Protocol against Migrant Smuggling	NL	NL

Source: Authors

### c. Exceptions (Q9, 10, 11 and 12)

This subsection presents findings for the following survey questions:

- **Q9:** Are there any derogations/exceptions included in national law for assisting irregular entry, transit and stay of third-country nationals?
- **Q10:** Has your country implemented the “humanitarian assistance” exception (not to impose sanctions) for assisting irregular entry/transit (Article 1(2))?
- **Q11:** How has your country implemented the “financial gain” element (Article 1(b)) for assisting third-country nationals with irregular stay? What was the rationale for this? **How is “financial gain” defined?**
- **Q12:** Does the national legislation in your country include exceptions in case of existing relationships between the facilitator and the facilitated (i.e. close personal relationships, family members)?

The exceptions currently foreseen in the national legislation of the eight assessed Member States are provided in the tables of the sections below. This is based on the survey responses for Spain and France, and desk research<sup>190</sup> for the remaining six selected Member States. It is important to note that due to a lack of responses, answers to the second part of Q11 were not available.

#### i. Exceptions to sanctioning assistance for entry and transit

**Table A2.6 Implementation of exceptions on sanctioning assistance for entry and transit (Q9, 10 and 12)**

Member State	Humanitarian assistance exception (Article 1(2) Directive)?	Other exceptions to sanctioning facilitation of entry/transit in national law (incl. relationships)?
FR	No, Article 1(2) not implemented in national law	No

<sup>190</sup> This included a legal review of the national law of the selected Member States, and the findings were validated by the Annex to the 2014 FRA report on criminalisation of migrants: *EU Member States' legislation on irregular entry and stay, as well as facilitation of irregular entry and stay*, FRA, p. 26 ([https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-annex\\_en.pdf](https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-annex_en.pdf)).



DE	No, Article 1(2) not implemented in national law	Those who act within the scope of their specific professional duties shall not be sanctioned for facilitation of entry ( <b>"Allgemeine Verwaltungsvorschrift"</b> to the Residence Act, issued by the Federal Ministry of the Interior (amended in 2009)). <sup>191</sup>
EL	Yes, Article 30(6) Law 4251/2014 states: <b>"The above sanctions shall not be imposed in case of rescue of persons at sea as well as of the transportation of persons in need of international protection according to the international law of the sea."</b>	No evidence found.
HU	No, Article 1(2) is not implemented in national law.	No evidence found.
IT	Yes, Article 12(2) TUI states: <b>"Without prejudice to the provisions of Article 54 of the Criminal Code, the activities of rescue and humanitarian assistance provided in Italy towards foreigners in need, however present in the territory of the State, do not constitute a crime."</b>	No evidence found.
NL	No, Article 1(2) is not implemented in national law.	No evidence found.
ES	Yes, since mid-2015 (when the new Criminal Code was adopted), but humanitarian assistance is <b>undefined: "The facts are not punishable if the objective pursued by the actor was to provide humanitarian assistance to the person concerned."</b>	No, but <b>"would normally be covered by humanitarian reasons"</b> .
UK	No, Article 1(2) is not implemented in national law.	Those who act on behalf of an organisation that aims to assist asylum seekers, and does not charge for its services, are not sanctioned (Section 25A of the Immigration Act 1971). <sup>192</sup>

Source: Authors.

<sup>191</sup> See "Annex", *EU Member States' legislation on irregular entry and stay, as well as facilitation of irregular entry and stay*, FRA, p. 11 ([https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-annex\\_en.pdf](https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-annex_en.pdf)).

<sup>192</sup> Ibid.

As can be seen in the table above, the exception laid down in Article 1(2) of the Facilitation Directive to sanctioning those assisting migrants to enter or transit is only implemented in the national law of three out of the eight selected Member States (i.e. Greece, Italy and Spain). No further evidence was found of other exceptions to sanctioning those assisting migrants to enter or transit in the national law of the selected Member States. **Thus the national law in France, Germany, Hungary, the Netherlands and the UK does not prohibit the sanctioning of those providing humanitarian assistance in terms of entry/transit.** In Germany and the UK, however, those working for an organisation providing humanitarian assistance, such as NGOs, are protected from sanctioning.

## ii. Exceptions to sanctioning assistance for stay/residence

**Table A2.7 Implementation of exceptions on sanctioning assistance for stay (Q9, 11, 12)**

Member State	Requirement of financial gain for irregular stay (Article 1(1)(b) Directive)	Other exceptions to sanctioning facilitation of entry/transit in national law (incl. relationships)?
FR	No	<p>Yes, Article L. 622-4 of the CESEDA:</p> <p>Without prejudice to Article L. 621-2, L. 623-1, L. 623-2 and L. 623-3, assistance for illegal residence of an alien shall not be subject to criminal proceeding when it is committed by</p> <ol style="list-style-type: none"> <li>1. Descendants or relatives in the ascending line of the alien, their spouse, the brother and sisters of the alien or their spouse;</li> <li>2. The spouse of the alien, the person known to be in a marital situation with him/her, or descendants or relatives in ascending line, brothers and sisters of the spouse of the alien or of the person known to be living in a marital situation with him/her;</li> <li>3. Any legal or natural person, where the alleged act has been performed without any direct or indirect payment and has consisted of the provision of legal advice, food, housing services or medical care aimed at ensuring dignified and decent living conditions for the alien or any other assistance aiming at preserving his/her dignity and natural integrity.</li> </ol> <p>The exceptions set out in points 1 and 2 do not apply if the alien having received assistance for irregular residence, lives in</p>

		a situation of polygamy or where this alien is the spouse of a person living in a situation of polygamy residing in France with the first spouse.
DE	No, but Section 96(1) AufenthaltG sanctions with more stringent penalties anyone who aids or abets another person to reside in Germany illegally and receives a pecuniary advantage or the promise of a pecuniary advantage in return.	No
EL	Yes, Articles 29(5) and (6), and 30 of Law 4251/2014 state: <b>"If the above person acted for financial gain or professionally or habitually or where the crime is committed by two (2) or more persons acting in concert, a sanction of...shall be imposed."</b>	No
HU	Yes, Article 354 Criminal Code states: <b>"Any person who provides aid for financial gain to a foreign national to reside unlawfully in the territory."</b>	No
IT	Yes, Article 12(5) TUI states: <b>"anyone who, for the purpose of gaining an unfair advantage from the condition of illegality of the foreigner, or as part of the activities punishable under this Article"</b> ;  Article 12(5-bis) TUI notes: <b>"whoever, for a pecuniary interest, in order to draw undue profit"</b> .	No
NL	Yes, Article 197a(1) and (2) of the Criminal Code state: <b>"Any person who for financial gain"</b> .	No
ES	Yes, the "aim of financial gain", defined in jurisprudence  Article 318(bis)(2) Criminal Code is <b>"for profit"</b> .  Article 54(1)(b) Law 4/2000 states: "for financial gain individually or as member of an organisation".	No, but existing relationships between the facilitator and the facilitated (i.e. close personal relationships, family members) <b>"would normally be covered by humanitarian reasons"</b> .

UK	No	No
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Source: Authors.

As can be seen in the table above, the 'exception' to sanctioning those providing assistance to migrants in terms of stay, by way of requiring an element of 'financial gain', as laid down in Article 1(1)(b) of the Facilitation Directive, is implemented in the national law of five out of the eight selected Member States (i.e. Greece, Hungary, Italy, the Netherlands and Spain). Germany, however, sanctions those receiving a financial benefit more severely. Moreover, French law does include an exception for close relationships, such as family members and partners, and the Spanish stakeholder stated in the online questionnaire that close relations "would normally be covered by humanitarian reasons". In addition, in France an exception also exists for any person providing assistance without financial gain, if the assistance is aimed at ensuring dignified and decent living conditions for the alien or any other assistance aimed at preserving his/her dignity and natural integrity.<sup>193</sup>

No further evidence was found of other exceptions to sanctioning those assisting migrants to enter or transit in the national law of the selected Member States.

**Thus, the national law in Germany and the UK does not prohibit the sanctioning of those providing humanitarian assistance (i.e. not for financial gain) in terms of stay. In France, it is not prohibited either for those who are not a family member or partner of the smuggled migrants and are not providing assistance that is aimed at preserving the migrant's dignity and natural integrity.**

Moreover, in all selected Member States, national law does not prohibit sanctioning those renting accommodation to smuggled migrants (i.e. for financial gain).<sup>194</sup> For example in Italy, on the basis of Article 12(5-bis) of the TUI, anyone who sells or rents accommodation to a foreigner who is illegally staying in Italy is subject to criminal liability if they are taking "unfair advantage".<sup>195</sup> Similarly, in the UK, the Immigration Act 2014 obliges landlords of private rental accommodation to conduct checks to establish that new tenants have the right to rent in the UK, and those renting to irregular migrants are liable for civil penalties.<sup>196</sup>

#### **d. Obligation to Report (Q13 and 14)**

This subsection presents findings for the following survey questions:

**Q13:** Are there any legal obligations on organisations or individuals (i.e. for state employees or those receiving state funding) to report irregular migrants to immigration authorities?

<sup>193</sup> Article L. 622-4 CESEDA.

<sup>194</sup> See "Annex", *EU Member States' legislation on irregular entry and stay, as well as facilitation of irregular entry and stay*, FRA, 2014 ([https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-annex\\_en.pdf](https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-annex_en.pdf)).

<sup>195</sup> *Ibid.*, p. 15.

<sup>196</sup> See "Factsheet: Tackling illegal immigration in privately rented accommodation", Home Office, London, August 2014.

**Q14:** Do (civil/administrative or criminal) sanctions for non-reporting irregular migrants exist?

Table A2.8 outlines whether obligations to report exist in the selected Member States and if so, what criminal sanctions on non-reporting are included in national law. This is based on the survey responses for Spain and France, and desk research<sup>197</sup> for the remaining six selected Member States.

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<sup>197</sup> This mainly includes information from the 2011 FRA report: *Fundamental rights of migrants in an irregular situation in the European Union*, 2011 ([http://fra.europa.eu/sites/default/files/fra\\_uploads/1827-FRA\\_2011\\_Migrants\\_in\\_an\\_irregular\\_situation\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf)).

**Table A2.8 Summary of legal obligations to report irregular migrants and subsequent sanctions, if any (Q13 and 14)**

Member State	Legal obligations on organisations or individuals to report	Sanctions, if any, for non reporting irregular migrants
FR	No	Not applicable
DE	Yes, schools, nurseries and educational facilities are exempted from the obligation to report, but some public institutions are obliged by federal law to report migrants to the immigration authorities as soon as staff learn about the irregularity of their situation. <sup>198</sup> For example, Section 96 of the German Residence Act ( <i>Aufenthaltsgesetz</i> ) requires Social Welfare Officers to report undocumented migrants to the immigration authorities, except in an emergency, despite the law entitling undocumented migrants to some non-emergency services. <sup>199</sup>	Imprisonment up to five years or a fine, although criminal penalties rarely apply <sup>200</sup>
EL	In Greece irregular border crossings and irregular stay are crimes and Article 37(2) and 40 of the Greek Code of Criminal Procedure require public authorities and private citizens to report crimes. <sup>201</sup>	No information available
HU	No information available	No information available
IT	In Italy irregular border crossings and irregular stay are crimes and Article 361 of the Italian Criminal Code requires every authority, public officer or civil servant who, while executing his/her profession, is confronted with a crime or an offence, to report this to the public prosecutor. <sup>202</sup> However, health and education authorities are prohibited from reporting migrants who are in	No information available

<sup>198</sup> FRA, *Fundamental rights of migrants in an irregular situation in the European Union*, FRA, 2011, p. 44.

<sup>199</sup> J. Parkin, "The Criminalisation of Migration in Europe: A State-of-the-art of the academic literature and research", CEPS Paper in Liberty and Security in Europe, CEPS, Brussels, 2013, p. 8 (<http://www.ceps.eu/system/files/Criminalisation%20of%20Migration%20in%20Europe%20J%20Parkin%20FIDUCIA%20final.pdf>).

<sup>200</sup> Ibid., p. 8.

<sup>201</sup> FRA, *Fundamental rights of migrants in an irregular situation in the European Union*, 2011, p. 42, see footnote 162.

<sup>202</sup> Ibid., p. 42.

	an irregular situation to the police. <sup>203</sup>	
NL	Yes, under <i>Vreemdelingenbesluit</i> (Aliens Decree) 2000, Article 4(40), anyone who shelters irregular migrants is obliged to inform the authorities. <sup>204</sup> However, health and education authorities are prohibited from reporting migrants who are in an irregular situation to the police. <sup>205</sup>	Yes, if this obligation is not fulfilled, a fine of €3,350 or 6 months' imprisonment, although this is rarely implemented. <sup>206</sup>
ES	No	Not applicable
UK	No, although under the new Immigration Act 2014, landlords can make a report to the Home Office if checks indicate that the person they are renting to no longer has the right to rent. <sup>207</sup>	Not applicable

Source: Authors.

As can be seen in the table, in four selected Member States (i.e. Germany, Greece, Italy and the Netherlands) some form of legal obligation exists for organisations or individuals to report irregular migrants to immigration authorities.

#### e. Rationale, Effects & Changes (Q15, 16 and 17)

This subsection presents findings for the following survey questions:

**Q15:** Overall, what was the rationale for your country to implement the Facilitation Directive in the way it has been done?

**Q16:** In your opinion, what, if any, overall effects have been generated through the implementation of the Facilitation Directive in your country? Please provide examples.

**Q17:** To what extent has the Facilitation Directive led to changes to the facilitation of unauthorised entry, transit and residence in your country?

Table A2.9 shows which Member States already had provisions in place sanctioning the smuggling of migrants (namely France, Germany, Hungary, Italy, the Netherlands, Spain and the UK), as well as the legislation adopted to further transpose the Facilitation Directive.

<sup>203</sup> Ibid., p. 44.

<sup>204</sup> Ibid., p. 62.

<sup>205</sup> Ibid., p. 44.

<sup>206</sup> Ibid., p. 62.

<sup>207</sup> See the Code of practice on illegal immigrants and private rented accommodation, Home Office, 11 December 2015.

**Table A2.9 Legislation in place before and after adoption of the Facilitation Directive**

MS	Law in place prior to adoption of the Facilitation Directive (2002)	Law adopted to transpose the Facilitation Directive
FR	Ordinance No 45-2658 of 2 November 1945 relating to the conditions of entry and stay of aliens in France: already included a sanction for the smuggling of migrants	Law 2003-1119 amended Ordinance No 45-2658 & Ordinance No 2004-1248 of 25 November, creating the Code of Entry and Stay of Aliens and of the Right of Asylum (CESEDA)
DE	Foreigner Act 1990: <sup>208</sup> already included a sanction for the smuggling of migrants	<p>The Immigration Act 2005<sup>209</sup> introduced the Federal Residence Act (AufenthG<sup>210</sup>) that replaced the formerly applicable Foreigner Act.</p> <p>In 2007, the Federal Act on the Transposition of EU Directives on Issues of Residence and Asylum<sup>211</sup> amended Articles 95 and 96 AufenthG.</p> <p>In 2011, another Act<sup>212</sup> amended the AufenthG to subject offences of smuggling of human beings to the jurisdiction of German law enforcement bodies when committed on the territory of the Schengen states.</p> <p>In 2013, another Act<sup>213</sup> amended the AufenthG.</p>
EL	N/A	Law 3386/2005, Entry, residence and social inclusion of third-country nationals in the Greek territory, which was amended by Law 3536/2007 and replaced by Law 4251/2014 on 1 June 2014.
HU	Act CXXI of 2001 on the Amendment of Act IV of 1978 on the Criminal Code: its Article 218 already included a criminal offence for "Illegal	Act C of 2012 on the Criminal Code replaced Act CXXI of 2001

<sup>208</sup> Foreigner Act of 9 July 1990, *Federal Law Gazette* I, p. 1354.

<sup>209</sup> Federal Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners of 30 July 2004 (*Federal Law Gazette* I, p. 1950).

<sup>210</sup> Federal Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet), Residence Act - in the version as promulgated on 25 February 2008 (*Federal Law Gazette* I, p. 162) last amended by Article 3 of the Act of 6 September 2013 (*Federal Law Gazette* I, p. 3556).

<sup>211</sup> Federal Act on the Transposition of EU Directives on Issues of Residence and Asylum of 19 August 2007 (*Federal Law Gazette* I, p. 1970).

<sup>212</sup> Federal Act on the Transposition of EU Directives on Issues of Residence and the Adaptation of National Provisions to the EU Visa codex of 22 November 2011 (*Federal Law Gazette* I, p. 2258).

<sup>213</sup> Federal Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory - Residence Act - in the version as promulgated on 25 February 2008 (*Federal Law Gazette* I, p. 162) last amended by Article 3 of the Act of 6 September 2013 (*Federal Law Gazette* I, p. 3556).



	<b>Migrant Smuggling” and Article 214A for “Aiding Illegal Residence”</b>	
IT	Italian law (Criminal Code 1930 and Legislative Decree 25 July 1998 (TUI) already included provisions criminalising the smuggling of migrants	None
NL	Article 197a Criminal Code already included a criminal offence for the smuggling of migrants	645 Act of 9 December 2004 to execute the international legislation in combating human smuggling and human trafficking (9 December 2004) amended the Criminal Code and Foreigners Act 2000
ES	Criminal Code: Article 318(bis) already included a criminal offence for the smuggling of migrants, however sanctioned in same offence as trafficking of human beings	In 2010, a new Article 177(bis) CC was introduced inserting a specific criminal offence for human trafficking.  In March 2015 the Organic Law 1/2015 was adopted, which amended the Criminal Code further, including lower penalties <sup>214</sup> for facilitation of entry/transit and stay) and a humanitarian assistance exception.
UK	Immigration Act 1971: already included the offence of <b>“assisting unlawful immigration” in section 25</b> <sup>215</sup>	The Immigration Act 1971 amended by the National Immigration and Asylum Act 2002 and the Asylum and Immigration Act 2004. The National Immigration and Asylum Act 2002 widened and extended the old section 25 to cover any act facilitating a breach of immigration law by a non-EU citizen (including a breach of another Member State's immigration law) and acts covered by the old offence of “harbouring”. <sup>216</sup>

Source: Authors.

Table A2.10 provides a summary of the stakeholder perspectives on the rationale of countries' decisions to implement the Facilitation Directive and the overall effects that have been generated. Answers were not available for Germany, Greece, Hungary, Italy, the Netherlands or the UK.

<sup>214</sup> Before that sanctions ranged from 4 to 8 years' imprisonment for the facilitation of entry and fines of between €10,000 and €100,000 for the facilitation of stay as per Article 318(bis)(1) Criminal Code.

<sup>215</sup> See the website of the Crown Prosecution Service, “Human Trafficking, Smuggling and Slavery: Offences of People Smuggling” ([http://www.cps.gov.uk/legal/h\\_to\\_k/human\\_trafficking\\_and\\_smuggling/](http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/)).

<sup>216</sup> Ibid.

**Table A2.10 Summary of answers to Q15 and 16 – Rationale for decisions implementing the Facilitation Directive and effects of those decisions**

<b>Member State</b>	<b>Rationale (Q15)</b>	<b>Overall effects (Q16)</b>	<b>Changes (Q17)</b>
FR	<p>French legislation on the smuggling of migrants<sup>217</sup> existed before the Facilitation Directive was adopted. The text of this piece of legislation has been revised several times with regard to the level of sanctions, in order to include more severe penalties in aggravating circumstances, such as cases where the offender is part of an organised group and to specify the scope of exceptions (family members, etc.).</p> <p>The transposition of the Facilitation Directive has mainly been aimed at creating the offence, of facilitation of entry into the territory of a State Party to the UN Smuggling Protocol and to include more severe penalties for aggravating circumstances.</p>	<p>The French penal system on the suppression of unauthorised entry and residence is old and is widely pre-existing to European texts of 2002 (i.e. the <b>Facilitators' Package</b>).</p> <p>Section 21 of the Ordinance of 2 November 1945, effective since 2002, provides that <b>"any person who, while she was in France, by direct or indirect assistance, facilitates or attempts to facilitate the entry, movement or residence of a foreigner in France shall be punished one to five years imprisonment and a fine of 200,000 F [€30,000]"</b>.</p>	
ES	<p><b>"The implementation has evolved through different amendments of the Penal Code, responding to issues found in practice. The last one concerned the inclusion of humanitarian reasons."</b></p>	<p><b>"Facilitation was already punished before. Trafficking and facilitation [were] separated in the Penal Code afterwards, and sanctions have been adapted more accurately to each of them. No negative effects have been noticed."</b></p>	<p><b>"Impossible to know. Changes in facilitation are much more dependent on other circumstances (political situation in countries of origin, cooperation of neighbouring countries in border control, etc.)"</b></p>

Source: Authors.

<sup>217</sup> Décret-loi du 2 mai 1938, amended Ordinance No 45-2658 of 2 November 1945 relating to the conditions of entry and stay of aliens in France, which criminalises the facilitation of entry, transit or stay of irregular migrants.

As becomes clear from the responses outlined above, the implementation of the Facilitation Directive reportedly had an effect on

- including humanitarian exceptions (France & Spain);
- distinguishing the offence of migrant smuggling and human trafficking (Spain); and
- including more severe penalties for aggravating circumstances (France).

## **ANNEX 3**

### **QUESTIONNAIRE/ELECTRONIC SURVEY MODEL**

The questionnaires were addressed respectively to civil society organisations, cities, EU Member States' ministries and shipowners.

<h2><b>Section 1: Context</b></h2>
------------------------------------

**Q.1. In which country/countries does your organisation operate?**

**Q.2. At what level does your organisation operate?**

- (a) Local
- (b) Regional
- (c) National
- (d) Other (please specify)

**Q.3. In what context does your organisation normally provide assistance to irregular migrants?**

- (a) In the community
- (b) In detention centres (for example, pending removal, identification or at first arrival in your Member State)
- (c) In reception centres (for example, for asylum seekers where the reception centre is 'open')
- (d) At the point of first arrival in the EU
- (e) At sea
- (f) Other (please specify):

## Section 2: Reporting Obligations - General

**Q.4. Are duties to report the presence of irregular migrants imposed on third parties in your Member State in the following contexts (even if not enforced):**

- (a) Medical professionals Y / N / Don't know
- (b) Schools Y / N / Don't know
- (c) Higher education institutions Y / N / Don't know
- (d) Local authorities Y / N / Don't know
- (e) Landlords Y / N / Don't know

Please provide any details and/or examples here:

**Q.5. If you answered yes at all to question 4, according to your knowledge, does your Member State enforce duties to report on third parties? (For example, does your Member State conduct any investigations, prosecutions, impose fines or conduct audits to ensure third parties report the presence of irregular migrants?)**

- (a) Always
- (b) Most of the time
- (c) Some of the time
- (d) Rarely
- (e) Not at all

Please provide any details and/or examples here:

**Q.6. According to your knowledge, do third parties that are under a duty to report the presence of irregular migrants respect their duty to report?**

- (a) Always
- (b) Most of the time

- (c) Some of the time
- (d) Rarely
- (e) Not at all

Please provide any details and/or examples here:

**Q.7. In the course of your organisation's contact with irregular migrants, is your organisation under a duty to report the presence of irregular migrants?**

- (a) Yes
- (b) No
- (c) Unsure

Please provide any details and/or examples here:

**Q.8. Has the duty to report affected the assistance your organisation has been able to provide to irregular migrants? (Please note all information provided will remain confidential)**

- (a) Yes
- (b) No

Please provide any details and/or examples here:

**Q.9. Has the duty to report affected the assistance your organisation has been willing to provide to irregular migrants?**

- (a) Yes
- (b) No

**Q.10. If you answered yes to question 9, has this been because of:** (Please note all information provided will remain confidential)

- (a) Fear of prosecution

- (b) Fear of fine or penalty
- (c) Fear of a financial measure (e.g. auditing, removal of funding)
- (d) Confusion about whether your organisation has a duty to report irregular migrants
- (e) Other (please specify):

Please provide any details and/or examples here:

**Q.11. Has the duty to report placed any member of your organisation in conflict with professional ethical standards (such as rules, obligations or codes of conduct)? (Please note all information provided will remain confidential)**

- (a) Yes
- (b) No

Please provide any details and/or examples here:

## Section 3: Reporting Obligations – EU/National Funding Programmes

**Q.12. If you receive funding from EU and/or national sources, are you under any obligation to exclude irregular migrants from the provision of your assistance?**

- (a) Yes
- (b) No

If yes, please provide further details:

**Q.13. If you receive funding from EU and/or national sources, are you under any duty to report irregular migrants to state authorities?**

- (a) Yes
- (b) No

If yes, please provide further details:

**Q.14. If you have answered yes to either questions 12 or 13, has your ability to provide assistance to irregular migrants been affected? (Please note all information provided will remain confidential)**

- (a) Yes
- (b) No

If yes, please provide any details and/or examples here:

**Q.15. If you have answered yes to either questions 12 or 13, has your willingness to provide assistance to irregular migrants been affected?**

- (a) Yes
- (b) No



**Q.16. If yes, has this been because of: (Please note all information provided will remain confidential)**

- (a) Fear of investigation, proceedings or prosecution
- (b) Fear of fine or penalty
- (c) Fear of a financial measure (e.g. auditing, cessation of funding, repayment of funding)
- (d) Confusion about whether your organisation has a duty to report irregular migrants
- (e) Other – please specify

Please provide any details and/or examples here:

**Q.17. If you have answered yes to questions 12 or 13, has the obligation to report or exclude irregular migrants placed any member of your organisation in conflict with professional ethical standards (such as rules, obligations or codes of conduct)? (Please note that all information provided will remain confidential)**

- (a) Yes
- (b) No

Please provide any details and/or examples here:

## **Section 4: Assisting irregular migrants whilst they are in a Member State**

### ***4.1 How your organisation assists irregular migrants***

#### **Q.18. In what ways does your organisation assist irregular migrants?**

- (a) Housing
- (b) Emergency shelter
- (c) Food
- (d) Health care
- (e) Legal assistance
- (f) Language assistance/translation
- (g) Providing public transport tickets
- (h) Arranging private transport
- (i) Arranging public transport
- (j) Giving a lift in a vehicle
- (k) Lending a vehicle
- (h) Emergency rescue
- (i) Counselling
- (j) Education
- (k) Other – please specify:

Please add further information, if possible:

**Q.19. Do you consider the assistance your organisation gives to irregular migrants to be humanitarian in nature (for example, do you consider your work to be human rights-based work, work which enables irregular migrants to access their fundamental and human rights or work which helps irregular migrants to live with dignity)?**

- (a) Yes
- (b) No

Why is this?

**Q.20. Does your organisation receive any remuneration in exchange for providing that assistance?**

- (a) Yes
- (b) No

**Q.21. If yes, where does the remuneration come from?**

(If more than one answer is chosen, please indicate in percentage terms the source of remuneration)

- (a) Directly from the irregular migrant him/herself at the time that assistance is given
- (b) Directly from the irregular migrant him/herself at some other time
- (c) From national government funding
- (d) From EU funding
- (e) If other (for example, private funding), please specify:

Please provide any details and/or examples here:

#### ***4.2 Proceedings, prosecutions or sanctions – in general***

**Q.22. Has your organisation or a member of your organisation ever been subject to proceedings, prosecution or sanction in relation to your organisation's work in general?**

- a) In this question, we wish to know about any action taken by the state against your organisation or a member of it but not for the specific act(s) of assisting irregular migrants. Please note all information provided will remain confidential.
- b) The proceedings or prosecution may be under civil or criminal law initiated by the state and need not have resulted in a final finding or conviction. Proceedings may include an audit or investigation.
- c) A sanction may include a fine, penalty, warning, conviction or sentence resulting from criminal or civil law. It may also include an audit or the removal of funding.

(a) Yes

(b) No

If yes, please give further details:

#### ***4.3 Sanctions – for assisting irregular migrants***

**Q.23. Has your organisation or a member of your organisation ever been subject to a sanction in relation to assisting an irregular migrant whilst he or she is in your Member State?**

(A sanction may include a fine, penalty, warning, conviction or sentence resulting from criminal or civil law. It may also include an audit or the removal of funding).

(a) Yes

(b) No – go to Q.27

If yes, please give further details:

**Q.24. If you answered yes to question 23, did this place any member of your organisation in conflict with professional ethical standards (such as rules, obligations or codes of conduct)?**

(a) Yes

(b) No

**Q.25. If you answered yes to question 23, did your organisation or the member of your organisation provide any justification to exempt either or both of them from sanction?**

- (a) Yes
- (b) No

**Q.26. If 'yes' was the justification accepted?**

- (a) Yes
- (b) No

Please give further details:

***4.4 Proceedings and prosecutions– for assisting irregular migrants***

**Q.27. Has your organisation or a member of your organisation ever been subject to proceedings or prosecution in relation to assisting an irregular migrant whilst he or she is in your Member State?**

(The proceedings or prosecution may be under civil or criminal law initiated by the state and need not have resulted in a final finding or conviction. Proceedings may include an audit or investigation).

- (a) Yes
- (b) No – please go to Q.30

If yes, please give further details:

**Q.28. If you answered yes to question 27, did your organisation or the member of your organisation provide any justification to exempt either or both of them from continuing proceedings or prosecution?**

- (a) Yes
- (b) No

**Q.29. If 'yes' was the justification accepted?**

- (a) Yes
- (b) No

If yes, please give further details:

***4.5 Any fears held about sanctions, proceedings or prosecutions for assisting irregular migrants***

**Q.30. According to your knowledge, has your organisation or a member of your organisation ever feared sanction for assisting an irregular migrant whilst he/she is in your Member State?**

(A sanction may include a fine, penalty, warning, conviction or sentence resulting from criminal or civil law. It may also include an audit or the removal of funding.)

(a) Yes

(b) No

If yes, please give further details:

**Q.31. According to your knowledge, has your organisation or a member of your organisation ever feared prosecution for assisting an irregular migrant whilst he/she is in your Member State?**

(The proceedings or prosecution may be under civil or criminal law initiated by the state and need not have resulted in a final finding or conviction. Proceedings may include an audit or investigation.)

(a) Yes

(b) No

If yes, please give further details:

**Q.32. If you answered yes to question 30 or 31, did this fear result in your organisation modifying its actions in any way or affect the assistance given by your organisation or a member of your organisation to irregular migrants in your Member State?**

(a) Yes

(b) No

If yes, please give further details:

**Q.33. If you answered yes to question 30 or 31, has this placed any member of your organisation in conflict with professional ethical standards (such as rules, obligations or codes of conduct)? (All information provided will be strictly confidential)**

(a) Yes

(b) No

If yes, please give further details:

***4.6 Any examples or cases of sanctions, proceedings or prosecutions outside your organisation***

**Q.34. Are you aware of any examples or cases outside your organisation where a person or organisation has been sanctioned, prosecuted or subject to proceedings or investigation for providing assistance to irregular migrants? (Please note your answer will be confidential).**

(a) Yes

(b) No

Please give details including the relationship of the person to the irregular migrant

## Section 5: Climate in which you work

**Q.35. Please tick the statements which correspond to the general climate in which you work with irregular migrants:**

- We feel that we are recognised by the authorities as providing an important service
- We feel that we work in a climate of intimidation from the authorities
- Our staff and/or volunteers clearly understand which services they can provide to irregular migrants in keeping with the law
- We worry that our work could put us in conflict with the law
- We feel that irregular migrants are comfortable in accessing our services
- Some irregular migrants feel stigmatised in accessing our services
- It would assist our organisation in its day to day operations if humanitarian work was more explicitly excluded from sanction
- Our ability to engage in advocacy work to advance the rights of irregular migrants has been affected by the criminalisation of assistance

Please provide any details and/or examples here:

**Q.36. What do you consider to be some of the indirect consequences of sanctioning assistance to irregular migrants?** (Please provide specific examples, if possible)



**Q.37. Can you provide any examples from your national context of measures by civil society/local and regional authorities:**

- (a) to address the criminalisation or exclusion of assistance given to irregular migrants?
- (b) to facilitate access by irregular migrants to their human rights and basic services?





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ISBN 978-92-823-8581-4 (paper)  
ISBN 978-92-823-8580-7 (pdf)

doi: 10.2861/655571 (paper)  
doi: 10.2861/588 (pdf)