

**10 June 2021**

## **Submission to the European Commission's consultation on a new migrant smuggling action plan**

### **Key points**

- The impact, legitimacy and effectiveness of the current action plan should be the subject of an in-depth public evaluation prior to the adoption of a new action plan
- An over-reliance on repressive measures is putting people at risk of increasing physical and mental harm and requires urgent reconsideration, along with an increased number of channels for legal migration and safe passage for those seeking refuge
- Any cooperation with third countries must be strictly conditional on respect for international human rights standards and meaningful judicial and democratic safeguards
- The numerous bodies that have been set up as part of the fight against migrant smuggling require meaningful forms of public, democratic accountability and oversight
- CSDP actors and operations must be subject to judicial accountability

### **Introduction**

Statewatch is a non-profit-making voluntary group founded in 1991 comprised of lawyers, academics, journalists, researchers and community activists. Our European network of contributors is drawn from 18 countries. We encourage the publication of investigative journalism and critical research in Europe in the fields of the state, justice and home affairs, civil liberties, accountability and openness.

We welcome the opportunity to contribute to this public consultation. However, we have chosen not to respond to the consultation questions directly (except where mandatory), as they are clearly geared towards legitimising a pre-determined set of actions, rather than generating a much-needed public debate about the root causes of migrant smuggling and the impact, legitimacy and effectiveness of EU action taken to prevent and punish it.

We also wish to note that the timeframe for this consultation makes it extremely unlikely that responses to it – in particular, responses that do not merely respond to the box-ticking exercise provided by the Commission – will be considered in any depth. Publication of a new action plan on migrant smuggling is foreseen by the end of June, just weeks after this consultation closes.

### **Evidence base**

It is concerning that the European Commission intends to prepare and publish a new action plan on migrant smuggling despite there being no thorough public evaluation of the actions

undertaken in line with the current plan. This makes it difficult to meaningfully assess claims made as to the effectiveness of the current plan, and therefore to judge what may be appropriate to include in its successor. Nevertheless, we wish to submit a number of observations that merit consideration in any attempt to combat migrant smuggling.

### **Over-reliance on repressive measures**

There is no way to fully eliminate the illicit crossing of national borders, although there are a number of approaches that can be taken to try to limit such acts. The approach adopted by the EU and its member states, which relies heavily on the adoption of new coercive measures (in particular through investigative and operation action against smuggling networks), may have some impact upon the number of people able to make use of smuggling services – although as noted above, with no public evaluation of the results or effectiveness of the EU’s actions, it is essentially impossible to determine if this has been the case over the last five years.

What is certain is that the ongoing ramping up of repressive measures means that migrants, smugglers and law enforcement officials themselves are exposed to increasing risks of physical and mental harm. This has been recognised by in-depth, expert studies of migrant smuggling networks,<sup>1</sup> in press coverage, and by EU justice and home affairs agencies alike. As a joint report by Europol, Frontex and the European Asylum Support Office noted (emphasis added):

*“Although some irregular migrants try to cross borders in the Western Balkan region on their own, **given the fact that they need to bypass reinforced borders several times and on some occasions need to move across difficult and unknown terrain, the demand for facilitation services in the Western Balkans region is high...***

*“Not only are irregular migrants increasingly transported in life threatening, dangerous and overcrowded conditions, migrant smugglers in the Western Balkan region regularly engage in aggressive, dangerous and reckless behaviour, **especially when they try to avoid apprehension.**”<sup>2</sup>*

Prevention is better than the cure, and the best way to prevent this downward spiral of repression, risk and harm would be to work constructively with national, regional and local authorities to find new means of legal migration for ‘economic migrants’ and safe passage for those seeking refuge. Nowhere is it acknowledged in the current action plan, the inception impact assessment that preceded this consultation, nor the introductory text to this consultation, that a large number of those making use of smuggling services are people with legitimate claims to international protection, who have to make use of those services due to an inability to make their journeys via regular channels. In this respect, an examination of the impact of carrier sanctions and a lack of humanitarian visas on access to international protection for those who need it is long overdue.

---

<sup>1</sup> Peter Tinti & Tuesday Reitano, *Migrant, Refugee, Smuggler, Saviour*, Hurst Publishing, September 2016, <https://www.hurstpublishers.com/book/migrant-refugee-smuggler-saviour/>

<sup>2</sup> Europol, Frontex and EASO, *Illegal immigration along Western Balkan Route and neighbouring countries, July 2018-June 2019*, January 2020, <https://www.statewatch.org/media/documents/news/2020/feb/eu-europol-frontex-easo-wb-smuggling-report.pdf>

Ultimately, the ongoing pursuit of further repressive measures can only lead to a game of 'whack-a-mole', in which people are put at increasing levels of physical and mental harm. An urgent rethinking is required before the situation deteriorates any further.

### **Cooperation with third countries**

Enhanced cooperation with third countries is being pursued as a means for cracking down on migrant smuggling. This brings with it serious risks for fundamental rights and democratic standards which do not appear to have been taken into account.

In particular, proposed priority states for enhanced cooperation do not rank highly when it comes to their democratic credentials.<sup>3</sup> The EU prides itself on being a bastion of liberal democracy and humanist values, yet it is clear that many of its member states have neither the ability to, nor interest in, upholding those values in the fight against migrant smuggling and irregular cross-border movements – as demonstrated by the Greek state's ongoing involvement in violent pushbacks, the CJEU judgment against Hungary's asylum system and ongoing brutality by the Croatian authorities against migrants. If member states of the EU are unable or unwilling to halt these acts and undertake their activities in accordance with human rights law, what is to be expected when EU funds and political backing are used to empower authoritarian leaders in North Africa and further afield?

Any cooperation with third countries must be strictly conditional on respect for international human rights standards and meaningful judicial and democratic safeguards.

### **Democratic accountability**

As the introduction to this consultation notes, the activities launched on the back of the current action plan on migrant smuggling have led to the expansion of a variety of new bodies, institutions and activities – for example EMPACT, the Information Clearing House and the Internet Referral Unit. Others go unmentioned: for example, the Crime Information Cell or the Joint Operational Office in Vienna.

What these new bodies have in common is the generalised lack of a clear legal basis or any methods for meaningful democratic oversight and accountability. In particular, those bodies operated by Europol, or in which it is involved, are not foreseen by the agency's current legal basis. Their legitimacy is highly-questionable, regardless of whether or not they have been successful in their tasks – on which point we would like to highlight, again, the lack of any public evaluation of their work.

The continuation of the work of these bodies requires meaningful forms of public, democratic accountability and oversight. The pursuit of repressive law enforcement measures through bodies that do not have any such oversight measures is a recipe for malpractice and impunity.

---

<sup>3</sup> A recent Council document highlights Tunisia, Morocco, Libya, Somalia, Nigeria, Sudan, Bosnia and Herzegovina, Turkey, Afghanistan and Iraq as priority countries. See: 'Tracking the Pact: Council documents on coordination of externalisation, "partnerships" and Afghanistan', *Statewatch*, 4 June 2021; and 'Tracking the Pact: Reinforced cooperation against migrant smuggling with Balkan and African "partners"', *Statewatch*, 15 October 2020, <https://www.statewatch.org/news/2021/june/eu-tracking-the-pact-council-documents-on-coordination-of-externalisation-partnerships-and-afghanistan/>; <https://www.statewatch.org/news/2020/october/eu-tracking-the-pact-reinforced-cooperation-against-migrant-smuggling-with-balkan-and-african-partners/>

## Use of military operations

The Commission's Communication on the Pact on Migration and Asylum says that "Common Security and Defence Policy operations and missions will continue making an important contribution" to efforts against migrant smuggling.

The resort to military means to try to deal with what should (where necessary and proportionate) be the responsibility of civilian law enforcement agencies is a concerning development. Military forces may have the ability to undertake particular tasks (although we note, again, that there is no public evaluation of how these military operations have contributed to the fight against migrant smuggling), but that does not mean that granting them such a role is appropriate for institutions that have their foundations in liberal democratic values.

In particular, it is deeply worrying that there are no judicial means to hold these operations to account, particularly when it has been established that they are complicit in aiding in the return of migrants to arbitrary detention and vicious human rights abuses in Libya.<sup>4</sup> It is welcome that the Commission believes that CSDP missions should come within the renewed remit of the EU Fundamental Rights Agency.<sup>5</sup> However, more ambition is needed: it must be possible for the actions and omissions of those operations, and those deployed on them, to be held accountable before the courts.

---

<sup>4</sup> 'EU military mission aids pull-backs to Libya, with no avenues for legal accountability', *Statewatch*, 27 October 2020, <https://www.statewatch.org/analyses/2020/eu-military-mission-aids-pull-backs-to-libya-with-no-avenues-for-legal-accountability/>

<sup>5</sup> EU Council excludes Common Foreign and Security Policy from scope of activity of Agency for Fundamental Rights, Agence Europe, 7 June 2021