

SOLIDAR's input on the proposal for a directive - COM(2023)755 (EU new Facilitation Directive)

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SOLIDAR is a European network of Civil Society Organisations (CSOs) working to advance social justice through a just transition in Europe and worldwide. Our network strives for a world where human mobility is treated as a common reality and comes with rights.

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We observe that political rhetoric, included coming from the highest EU officials, tends to conflate smuggling and trafficking. This is visible throughout the proposal for a directive, in references to 'ruthless migrant smugglers' that would be responsible for 'a staggering death toll of over 28 000 people', or 'networks (...) also involved in other crimes, such as trafficking in human beings, drugs and firearms smuggling'. This distorted picture conveys the idea that smuggling is inherently violent. Under the guise of concern to protect migrant people, this picture is used to justify tougher borders control. This results in anti-smuggling policies that criminalise both people crossing borders irregularly and mutually supporting each other, and civil society organisations (CSOs) and Human Rights Defenders (HRDs) supporting them. It is in fact primarily the increased militarisation of borders that leads to expansion of smuggling, not the other way around. The creation and enhancement of safe and regular pathways for migration of the EU remains the most humane and the most effective way to protect people in migration.

The following recommendations emerge from our analysis of the proposal and SOLIDAR network's long-standing experience advocating for fairer migration procedures and the end to criminalisation of solidarity with refugees and other migrants:

1. **Delete the crime of "publicly instigating third-country nationals"** to irregularly enter, transit and stay (art. 3(2)). Defined vaguely as it is in the proposal, there are high risks this national legislation could be used to criminalise the action of civil society and human rights defenders working to support refugees and other migrants, as well as any individual or organisation who simply shares information regarding access to fundamental rights.
2. **(Re)introduce and improve the humanitarian exemption as a binding measure.** Present in a narrow and non-binding form in recital 7, the mention of non-criminalisation of humanitarian activities is not legally strong enough to effectively protect CSOs and HRDs. We recommend the following three concrete improvements to the humanitarian exemption:
 1. **Moving it to article 3 to make it binding;**
 2. **Making it mandatory.** The humanitarian exemption under article 1.2 of the current Directive falls short of imposing legal obligations on Member States by stating that "Member States *may* not criminalise". As underlined by the [UN Special Rapporteur on Human Rights Defenders](#), by leaving the humanitarian exemption option, in 2020 only 8 Member States had included it in their national legislation when transposing the 2002 Directive. In a number of countries where this exemption has not been included in national

legislation, cases of criminalisation of humanitarian assistance were reported such as in [Latvia](#).

3. **Broadening the scope of the exemption so that it exempts criminalisation of humanitarian activities beyond the 'provision of basic needs'.** A good reference for an extensive definition of 'humanitarian assistance' is [the definition proposed by the Council of Europe's Expert Council on NGO law](#): 'classic humanitarian assistance work as well as protection initiatives and the promotion of social cohesion. This encompasses both short and longer-term actions taken to save lives, alleviate suffering and maintain human dignity during and after natural or man-made crises and disasters, including actions to reduce vulnerabilities and promote and protect human rights.'
3. **Remove references to 'instrumentalisation' of migrants.** Articles 9 and recital 14 of the proposal make allusions to instrumentalisation of migrants, a dangerous concept to legalise restrictions to the right to seek asylum (see [here a detailed analysis by ECRE](#)) and which made its way into to the [Crisis and Force Majeure Regulation](#) and the [amended Schengen Borders Code](#). In both cases, as in the new directive proposal, the mention of exclusion of humanitarian activities from criminalisation is vague and present in a recital, so non-binding. There are high risks that the concept of instrumentalisation of migrants will be used by Member States to criminalise humanitarian CSOs operating at the EU borders and this is not acceptable. **It should be deleted from the new directive.**
4. Not proceed with the adoption of this proposal **without an ex-ante impact assessment.** The Commission has released this proposal without such assessment despite important implications for human rights. Though ideally such assessment should intervene before the Commission's proposal as its outcome should shape the Commission proposal, this was not the case – we urge co-legislators to suspend negotiations on revising the Facilitation Directive until this IA is executed and its findings made public.

Further relevant readings:

- UN special rapporteur on Human Rights Defenders (2024). [Response to the EU Commission's proposed Directive to update the Facilitators Package](#)
- PICUM (2022). [Migrant smuggling: why we need a paradigm shift](#)
- Julija Kranjec, Ana Čuča for Centre for Peace Studies (2020). [Criminalisation of Solidarity in the EU - What should be done to stop it?](#)