

RESILIENCE AND RESISTANCE IN DEFIANCE OF THE CRIMINALISATION OF SOLIDARITY ACROSS EUROPE

**EXECUTIVE SUMMARY
AND POLICY
RECOMMENDATIONS**



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EXECUTIVE **SUMMARY**

The European Union (EU) is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.¹ The Treaty on European Union (TEU) underlines that these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and gender equality prevail.²

“The protection of civil society – politically, legally, economically – to create a stable environment – has to become a priority.”

– Doros Polykarpou, KISA

Yet, in recent years, these values have been under threat within the EU, as many Member States’ policies and actions have led to a “shrinking space” for civil society. Perhaps this trend is nowhere more evident than in the treatment of migrants in Europe and the human rights defenders working to assist them. The “criminalisation of solidarity” strikes at the heart of European values and contributes to the erosion of rule of law and democracy, while seriously impacting the rights and welfare of the most vulnerable in our societies and those who seek to protect and assist them.

The criminalisation of solidarity with migrants remains a widespread phenomenon across the EU. According to our media monitoring, **at least 89 people were criminalised in the EU between January 2021 and March 2022.³ Out of them, 18 people faced new charges, while the other 71 were ongoing cases**

¹ Article 2, [Consolidated Version of the Treaty on European Union](#) [2008] OJ C115/13.

² *ibid.*

³ See Annex 3 for a list of media monitoring of case of criminalisation.

from previous years. Four of them are migrants themselves. Three people were convicted and 15 acquitted, while all the other cases are still ongoing. People have been criminalised for actions including providing food, shelter, medical assistance, transportation and other humanitarian aid to migrants in dire conditions; assisting with asylum applications; and rescuing migrants at sea.

In the vast majority of the cases (88%), human rights defenders were charged with facilitation of entry, transit or stay, or migrant smuggling (depending on how the crime is defined in the national legislation).⁴ It is also notable that the criminalisation of solidarity has continued, and in certain cases even soared (see section 1.2), during periods in which many countries adopted COVID-19 restrictions, at a time when human rights defenders risked their own personal safety and health to leave their homes to help others. Emergency measures adopted to address the COVID-19 pandemic have been used to limit access to reception facilities and detention centres, to impose fines on organisations providing services during lock-downs or after the curfew, and to limit the right to freedom of assembly.

National data further contributes to give an idea of the **magnitude of the criminalisation of solidarity in the EU.** For example, according to the Polish civil society network

⁴ Weronika Strzyżyńska, [‘Poland detains activists accused of smuggling migrants over Belarus border’](#) *The Guardian* (25 March 2022); Iuventa, [‘Italian prosecutor presses charges against the Iuventa crew’](#) (4 March 2021); [‘Un juez italiano archiva la investigación contra ONU por tráfico de migrantes’](#) *swissinfo.ch* (28 January 2022); Bartosz Rumieńczyk, [‘Aktywistka przesłuchana w kajdankach. KIK: „Dlaczego są dwie kategorie uchodźców i pomagających?”](#) [Activist interviewed in handcuffs. KIK: “Why are there two categories of refugees and helpers?”] *Oko.press* (29 March 2022); Memesita, [‘Criticism of church asylum verdict against religious sister’](#) (6 June 2021); Emma Wallis, [‘Greece: Migrant accused of smuggling sentenced to 146 years in prison’](#) *InfoMigrants* (14 May 2021); Paul Myers, [‘French judges clear farmer who offered humanitarian solidarity to migrants’](#) *RFI* (31 March 2021).

Grupa Granica, **nearly 330 people** were detained for helping people crossing borders irregularly between Belarus and Poland between August and November 2021.⁵ Those detained include EU nationals as well as migrants and their family members, many of whom had residence permits in Belgium, Germany and Poland. Many are likely to have been motivated by humanitarian reasons, including helping family members. In another example, a total of 972 people were convicted in Switzerland in 2018 on grounds of facilitation of irregular entry or stay.⁶ The vast majority, **almost 900 people, acted out of solidarity or family reasons.**⁷

These numbers are likely to only represent a very minimal percentage of the people who are criminalised in the EU for solidarity towards migrants. On the one hand, our media monitoring has no claim of comprehensiveness, as some news may not be detected by our alert system. On the other hand, the majority of the cases are likely to go unreported because of fears that media attention could further endanger the relations with the authorities and limit access to border areas or reception centres; to preserve volunteers' right to private life and not to put them and their families at risk; or because some human right defenders might prefer not to speak out while trials are ongoing. Many cases of harassment which do not amount to criminal prosecution might also not be picked up by the media.⁸ **The criminalisation of human rights defenders who are migrants themselves is even more underreported** because of the particularly vulnerable situation of individuals who might risk deporta-

tion, pushbacks, arbitrary detention and loss of status as well as harsh financial, social and economic consequences.

A range of elements contribute to creating a **"hostile environment"** for those engaged in humanitarian action and solidarity efforts towards migrants in the EU:

- The **"criminalisation of migration"** itself leads to migrants being treated as criminals and even viewed as a threat to national security.⁹ It follows then that those who seek to assist them can also be perceived and labelled as engaging in "illicit" activity and causing harm to society. Negative attitudes towards migrants greatly influence how official policies and practices are shaped. The legal and policy framework appears in many cases to be underpinned by xenophobic narratives and a lack of implementation of human rights obligations.
- In many EU Member States, there are **administrative and criminal laws** which constrain and prosecute civil society actors providing humanitarian assistance to migrants or denouncing human rights abuses.
- Limitations to freedom of expression, assembly and association contribute to a **shrinking civic space** which can make it very challenging for human rights defenders to respond to judicial and other forms of harassments. When civic space is eroded, this further un-

5 Grupa Granica, *Kryzys humanitarny napograniczu polsko-białoruskim* [Humanitarian crisis on Polish-Belarusian border] (2021), p.19.

6 *Swiss Federal Act on Foreign Nationals and Integration Act of 16 December 2005*, (Status as of 1 April 2020) Article 116.

7 Humanrights.ch, *Die Kriminalisierung von Menschenrechtsverteidiger*innen*. In only 32 cases were smugglers or people who had enriched themselves from the misery of refugees and migrants actually on trial. In addition, 58 judgments were made in connection with illegal gainful employment.

8 See, for instance, *GISTI* (2019), which lists several different reasons for which people have faced charges under administrative law, such as depositing waste on the street or violations of the town planning code, and which were not reported in the media.

9 For examples on how the legal and policy framework can criminalise migrants and lead to discrimination, see: Platform for International Cooperation on Undocumented Migrants (PICUM), *How do the new EU regulations on interoperability lead to discriminatory policing?* (2020); European Commission, *Proposal amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders*. Article 25 of which provides for a general framework applicable to the reintroduction of internal border controls based on a perceived threat that may lead to unilateral reintroduction of border controls at internal borders and circumstances under which internal border controls can be prolonged.

dermines civic dialogue, transparency and accountability.

- Additionally, a **lack of independent human rights monitoring** contributes to impunity following attacks on human rights defenders and increases the risk of human rights violations.
- Finally, **decisions on resource allocation** further minimise the space for civil society and their capacity to engage and to respond.

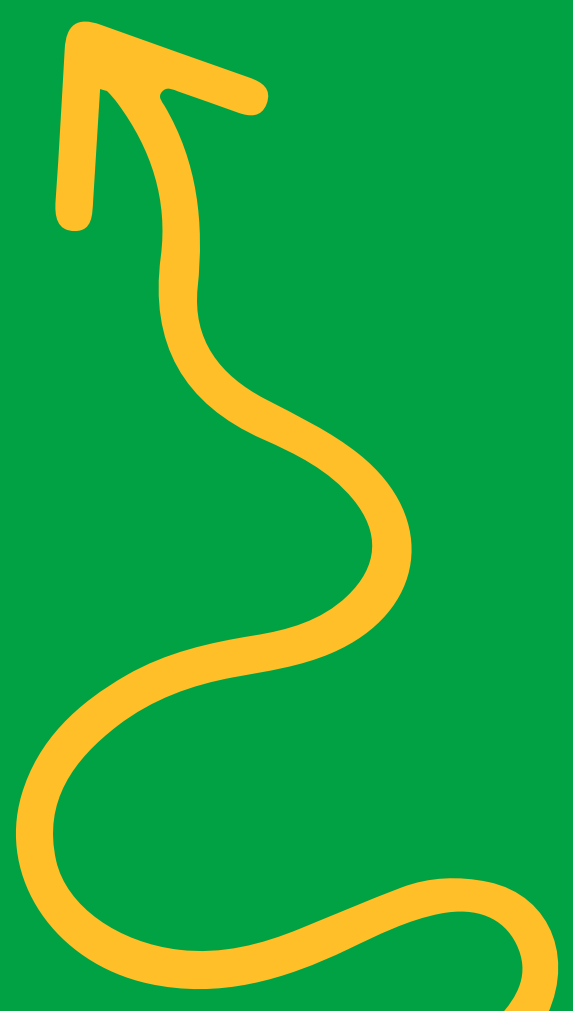
Nevertheless, despite all these challenges, human rights defenders continue to make valiant efforts to assist migrants and to demonstrate solidarity with migrants in vulnerable situations. Their resilience, persistence and resistance is demonstrated by the actions they have taken in the face of intimidation, harassment and violence, which they have often confronted alone on the frontline at EU borders and in communities across Europe.

In order to support them, the EU has a range of avenues for engagement through which it can strengthen protection of migrants' rights as well as address the key elements of the "hostile environment" outlined above. While many of these developments, such as proposed legislative changes to the EU Facilitation Directive, are goals to be achieved in the longer term, there are other actions that the EU can take in the short-term to nurture and support an enabling environment for those working for solidarity and justice within the EU.

THIS REPORT PROPOSES FIVE OVER-ARCHING RECOMMENDATIONS FOR EU ACTION:

- Prevent the criminalisation of humanitarian assistance
- Cultivate the civic space and better protect human rights defenders
- Adequately fund humanitarian assistance and human rights monitoring
- Promote and advance a more balanced EU migration policy in line with European values
- Strengthen human rights monitoring and solidify the evidence base on criminalisation of migration and solidarity

Specific recommended actions under this framework are provided below in Section 5 of this report.





POLICY RECOMMENDATIONS TO EU ACTORS

These recommendations aim to address the five elements of the “hostile environment” identified and explored through interviews with human rights defenders for this report

1. PREVENT THE CRIMINALISATION OF HUMANITARIAN ASSISTANCE

1.1 RECOGNISE AND PROMOTE HUMANITARIAN ASSISTANCE

EU actors should publicly acknowledge and support the solidarity demonstrated by and the humanitarian assistance provided by CSOs, volunteers, individuals and migrants themselves.

The European Parliament could organise an exchange of views on the fundamental role of civil society in the defence of human rights, expressly including the role of human rights defenders who are migrants themselves, and adopt a resolution recognising the importance and legitimacy of their work and the right to defend human rights in the territory of the EU and at its external borders.

1.2 ENSURE THAT EU POLICIES AND LEGISLATION DO NOT CONTRIBUTE TO THE CRIMINALISATION OF HUMANITARIAN ASSISTANCE

The EU Facilitation Directive should be revised in order to clearly differentiate between the criminal act of smuggling and acts of humanitarian assistance or solidarity.

- Migrant smuggling should be clearly defined as requiring unjust enrichment, in line with the UN Migrant Smuggling Protocol (which refers to “financial or other material benefit”) and to prevent the criminalisation of landlords, taxi drivers and provision of other services to undocumented people. The legislation should explicitly exclude normal interactions and transactions without undue financial profit. This is necessary to ensure that normal transactions with undocumented migrants (e.g. renting a flat) are not criminalised.
- The “humanitarian exemption” clause should be made mandatory for the Member States and concern facilitation of entry, transit and stay.
- The scope of humanitarian action should include activities carried out both at sea and on land, and not be exclusively linked with the state of necessity.

2. CULTIVATE CIVIC SPACE AND BETTER PROTECT HUMAN RIGHTS DEFENDERS

2.1 CREATE A CONDUCIVE ENVIRONMENT FOR WATCHDOG CSOs AND OTHER HUMAN RIGHTS DEFENDERS

The EU and Member States should promote and create a conducive environment for humanitarian assistance and solidarity towards migrants. To follow up on the recent LIBE report¹⁰ on the shrinking space of civil society in Europe, the Commission should adopt a coherent and structured policy to ensure that civic space in Member States does not deteriorate further. Measures suggested should include, but not be limited to:

- the creation of a “European civic space index”. As highlighted by EU FRA in an earlier report, the methodology of the European Commission’s ‘CSO Meter’¹¹ applied in Eastern

¹⁰ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, [Report on the shrinking space for civil society in Europe \(2021/2103\(INI\)\)](#) Rapporteur: Anna Júlia Donáth (22 February 2022).

¹¹ Please see more details at: [The CSO Meter](#) supports regular and consistent monitoring of the environment in which civil society organisation (CSOs) operate in the Eastern Partnership countries. It consists of a set of standards and indicators in 10 different areas to measure both law and practice. It is based on international standards and best practices. The CSO Meter is split in two main parts: Fundamental rights and freedoms that are essential for the existence of civil society: (1) freedom of association, (2) equal treatment, (3) access to funding, (4) freedom of peaceful assembly, (5) right to participation in decision-making, (6) freedom of expression, (7) right to privacy and (8) state duty to protect. Necessary conditions that ensure additional support for the development of civil society (though their existence without fundamental rights and freedoms is not sufficient to ensure an enabling environment), including: (1) state support and (2) state-CSO cooperation.

Partnership countries could be adapted for this purpose;

- the systematic addition of a dedicated civic space chapter to the Commission’s annual Rule of Law Report;
- the adoption of a comprehensive civil society strategy.¹²

2.2 DEVELOP GUIDELINES FOR THE RESPECT OF FUNDAMENTAL RIGHTS OF HUMAN RIGHTS DEFENDERS WITHIN THE EU

The European Parliament should request the European Commission, in consultation with the Fundamental Rights Agency and civil society, to develop guidelines for the respect of fundamental rights of human rights defenders. This would be a necessary step to ensure coherence between the EU external commitments, as exemplified by the EU Guidelines on Human Rights Defenders¹³ and its internal policies. These guidelines could draw from the UN Declaration on human rights defenders¹⁴ and the OSCE Guidelines on the Protection of Human Rights Defenders¹⁵.

¹² [Report on the shrinking space for civil society in Europe \(2021/2103\(INI\)\)](#) “As called for by Members of the European Parliament such a comprehensive civil society strategy should address: common minimum legal and administrative standards; a statute of European cross-border associations and non-profit organisations; focal points between European institutions and civil society; consistent access to policy debates and agenda-setting at EU level; access to monitoring of Union policies and implementation of the Union budget; and expanding flexible access to Union funding.”

¹³ EU External Action, [EU Guidelines on Human Rights Defenders](#) (21 June 2016).

¹⁴ UN General Assembly, [Resolution A/RES/53/144 adopting the Declaration on human rights defenders](#) (1998)

¹⁵ Organization for Security and Cooperation in Europe (OSCE), [Guidelines on the Protection of Human Rights Defenders](#) (10 June 2014).

2.3 DEVELOP LEGAL AND POLICY TOOLS TO PROTECT HUMAN RIGHTS DEFENDERS FROM RETALIATION

Article 15 of the Treaty on the Functioning of the EU recognises civil society’s role in the EU’s good governance. Watchdog CSOs and other human rights defenders routinely denounce malpractices such as corruption or mismanagement of EU funds as well as violations of fundamental rights. In performing this role, civil society actors should be protected against reprisals and retaliation. The European Commission could issue a proposal for a Directive protecting human rights defenders from retaliation.

The European institutions should ensure that the proposed Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”)¹⁶ offers effective protection to CSOs and human rights defenders against legal and judicial harassment.

¹⁶ European Commission, [Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings](#) (“Strategic lawsuits against public participation”) 2022/0117 (COD)

2.4 INVOKE INFRINGEMENT PROCEEDINGS WHEN THERE IS A BREACH OF EU LAW

The European Commission should continue to bring infringement proceedings when there is a breach of EU law and the rights associated with the Charter of Fundamental Rights, also considering the use of expedited procedures and interim measures when there is a risk of irreparable damage.

The European Commission should invoke infringements against the Member States that are abusing criminal law provisions to prosecute humanitarian actors and migrants themselves.

3. ADEQUATELY FUND HUMANITARIAN ASSISTANCE AND HUMAN RIGHTS MONITORING

EU institutions and Member States should ensure that the legal and policy environment is conducive to the possibility of CSOs having access to diverse pools of resources and that they face no undue obstacles when accessing funding from domestic or foreign sources. The financial support should cover the full range of civil society activities, including advocacy, community engagement and civil society development. Beyond project funding, infrastructure core funding and multiannual funding cycles would strengthen the civil society sector and ensure the sustainability of civil society's human rights work.

3.1 ENSURE ADEQUATE FUNDING FOR HUMANITARIAN ASSISTANCE AND FOR ACTIONS PROMOTING EU VALUES

The EU should broaden and facilitate direct access to EU funding for civil society under the *EU Multiannual Financial Framework for 2021-27*, including for humanitarian assistance provided to migrants and for actions promoting EU values and the rule of law.

An increased portion of the Asylum Migration,

Integration Fund's budget should be directly disbursed to CSOs, in particular in national contexts where evidence shows that human rights defenders have been excluded from accessing national-level funding or defunded. Administrative requirements of EU funding should be simplified to ensure that smaller CSOs and migrant-led organisations are able to access funding, including core funding. A percentage of the Asylum Migration, Integration Fund should be dedicated to supporting migrant-led organisations.

The European Commission should dedicate funding and issue a call for proposals for CSOs, which are involved in assisting migrants through humanitarian action including migrant-led organisations, in order to facilitate the placement of young volunteers with such organisations through the European Solidarity Corps.

3.2 DEDICATE FUNDING FOR STRATEGIC LITIGATION IN SUPPORT OF HUMAN RIGHTS DEFENDERS

The EU should dedicate funding to strategic litigation at both national and regional levels in support of human rights defenders in Europe, with specific support to civil society in EU Member States where human rights defenders have been criminalised for providing humanitarian assistance and engaging in acts of solidarity.

The EU should ensure that funding is available to CSOs and individuals who are being investigated and prosecuted for engaging in acts of solidarity and providing humanitarian assistance to migrants.

3.3 EXPAND AND INVEST IN THE PROTECTDEFENDERS.EU PLATFORM TO COVER EU MEMBER STATES IN ORDER TO ALLOW REPORTING AND ALERTS AS WELL AS TO ENABLE TIMELY SUPPORT TO VICTIMS

The EU should implement the EU FRA opinion¹⁷ and build on the example of the existing external EU human rights defenders mechanism protect-defenders.eu, by providing appropriate financial support for the creation and maintenance of a similar monitoring mechanism in the EU, allowing CSOs and human rights defenders to report attacks, register alerts, map trends and provide timely and targeted support to victims.

3.4 ALLOCATE FUNDING TO INDEPENDENT MONITORING BY CIVIL SOCIETY ORGANISATIONS

Through the funds of the European CERV programme, the EU should financially support CSOs and watchdogs that conduct independent monitoring of pushbacks and other human rights violations committed against migrants as well as monitoring of judicial and other forms of harassment against human rights defenders defending migrants' rights.

The budget for the European CERV programme for 2021-2027 should be significantly increased to address the challenges outlined above and, in particular, to support watchdog activities and defend human rights.

¹⁷ See Fundamental Rights Agency, [Opinion 5 - Ensuring a safe space free from harassment and attacks](#) (23 September 2021)



4. PROMOTE AND ADVANCE EU MIGRATION POLICY IN LINE WITH EUROPEAN VALUES

4.1 ADOPT A POSITIVE NARRATIVE ON MIGRATION AND TAKE CONCRETE ACTIONS TO COMBAT RACISM, INTOLERANCE AND XENOPHOBIA

The European Commission should uphold its commitments under the *EU Anti-racism Action Plan 2020-2025*,¹⁸ and take measures to address and combat structural and institutional discrimination. This should include adopting measures which ensure the equal protection of human rights defenders, independent of their residence status, ethnicity or country of origin.

Explicit references to the *EU Anti-racism Action Plan 2020-2025* should be integrated in different EU instruments on migration and protection of civic space.

The EU Fundamental Rights Agency should support Member States in developing and monitoring integration policies that include activities tackling discrimination and hate crime, including measures to combat racism, intolerance, xenophobia and hate speech.

¹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, [A Union of Equality: EU Anti-racism Action Plan 2020-2025](#) (18 September 2020) COM(2020) 565 final.

4.2 MOVE TOWARDS A MORE BALANCED EU MIGRATION POLICY AND TAKE ACTION TO DECRIMINALISE MIGRATION

All legislative amendments to the CEAS instruments and the Pact on Migration and Asylum should ensure fundamental rights compatibility. In particular, respect for the principle of *non-refoulement*, the principle of non-penalisation for irregular entry, the principle of human dignity, the right to an effective remedy, the prohibition of arbitrary deprivation of liberty, and the right to asylum should be ensured.

EU migration policies should be adopted and implemented that include safe and regular pathways to Europe, including resettlement schemes, complementary pathways such as humanitarian visas and work permit schemes, and labour migration schemes grounded in the decent work principles and across skills levels.

In the next EU Action Plan against Migrant Smuggling (2025-2029), the European Commission should expand the scope of regular pathways and ensure that anti-smuggling legislation is not used against migrant themselves as well as people acting in solidarity with them.

5. STRENGTHEN INDEPENDENT HUMAN RIGHTS MONITORING AND SOLIDIFY THE EVIDENCE BASE

5.1 MONITOR THE TREATMENT OF HUMAN RIGHTS DEFENDERS ENGAGED IN HUMANITARIAN ASSISTANCE AND ACTS OF SOLIDARITY

The EU should monitor all immigration and organised crime legislation and policy for its impact on the rights of migrants and human rights defenders. This should be done through the collection of an evidence base from an intersectional approach¹⁹ by a broad range of stakeholders, including migrant communities. The monitoring should not only include cases which end with convictions but also all cases of ongoing criminal investigations including those which end in acquittals, as well as other forms of harassment and targeting of human rights defenders of migrants.²⁰

¹⁹ Gabriella Sanchez, 'Beyond the matrix of oppression: Reframing human smuggling through intersectionality-informed approaches' (2017) Vol 21, Issue 1 Theoretical Criminology 46.

²⁰ See also: European Parliament, [Resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised \(2018/2769\(RSP\)\)](#) "6. Calls on Member States to transpose the humanitarian assistance exemption provided for in the Facilitation Directive and to put in place adequate systems to monitor the enforcement and effective practical application of the Facilitators Package, by collecting and recording annually information about the number of people arrested for facilitation at the border and inland, the number of judicial proceedings initiated, the number of convictions, along with information on how sentences are determined, and reasons for discontinuing an investigation."

In particular:

- The European Parliament could set up a parliamentary inquiry to gather evidence and to hear the testimonies of human rights defenders who have been the targets of harassment and whose acts of solidarity have been criminalised, as well as to investigate whether such cases were driven by political agendas.
- In 2023, in the context of the evaluation of the Facilitation Package and the *Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*²¹, the European Commission should collect and publish statistics on the number of people charged with facilitation of irregular entry, transit and stay in the EU per year, including how many cases ended in acquittals or convictions, disaggregated by age, gender, country of origin and residence status.
- As pointed out by EU FRA²², the European Commission should include reference to attacks against human rights defenders in its reporting under the *Framework Decision on combating certain forms and expressions of racism and xenophobia*,²³ when monitoring and

²¹ As committed to in [A renewed EU action plan against migrant smuggling \(2021-2025\) COM\(2021\) 591 final](#).

"The Commission will also step up its monitoring of the implementation of the *acquis* to ensure that appropriate, effective and dissuasive criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress. The Commission will take close contact with Member States' national authorities, to collect information about the implementation of the Facilitators package and – where appropriate, in case of breaches of EU law – launch infringement procedures. The Commission intends to report on the implementation of the Facilitators package, including on the implementation of the 2020 guidance, in 2023. If necessary, the Commission will propose to revise the legal framework to ensure that the EU is equipped to implement the policy framework created by this EU action plan to respond to the constantly evolving challenges in this area."

²² See Fundamental Rights Agency, [Opinion 5 - Ensuring a safe space free from harassment and attacks](#) (23 September 2021)

²³ [Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law](#).

assessing EU rules and tools to protect the rights of victims of crime, and when revising EU provisions on combating hate speech and hate crime. Additionally, the European Commission should also pay particular attention to the treatment of migrants when reporting under this Framework Decision.

5.2 STRENGTHEN INDEPENDENT HUMAN RIGHTS MONITORING, PARTICULARLY AT BORDERS

Member States should establish and strengthen independent monitoring mechanisms to investigate allegations of fundamental rights violations at borders, including attacks against human rights defenders and migrants. CSOs and international organisations should be allowed to participate in the fundamental rights monitoring at borders, including by providing information and monitoring that effective steps are taken towards accountability.





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