



PICUM's inputs to the European Commission consultation on the Facilitation Directive

March 2024

Representing a network of 158 CSOs across 31 countries, PICUM has been working for more than two decades on the criminalisation of migration and solidarity and especially in recent years on the impact of counter-smuggling policies. Every

year, PICUM publishes a report analysing the most recent trends in the EU on criminalisation. In light of this experience, we would like to share the following recommendations on the proposed new Facilitation Directive:

1. Delete the crime of “public instigation” of irregular entry, stay and transit (art. 3(2)).

This provision is framed very broadly and could potentially apply to civil society organisations and individuals providing legal support and information. The exemption of the provision of “objective information or advice [...] in the conditions for legal entry and stay” (rec. 6) is framed too narrowly and is not sufficient. As highlighted also by the UN Special Rapporteur on Human Rights Defenders,

there is a serious risk that this article will be used against civil society organisations and will have a chilling effect on the provision of information and services to migrants. Unfortunately, this would not be the first time that human rights defenders have been criminalised for providing legal information and support to migrants.

2. Ensure migrants and family members are not criminalised.

This requires:

- Deleting art. 3(1)(b) establishing a separate crime for risk of serious harm, even when there is no financial or material benefit, and moving this provision to the list of aggravating circumstances, in line with the UN Smuggling Protocol;
- Clarifying that facilitation should be criminalised only if there is undue financial benefit and, deleting “directly or indirectly”, as this can lead to the criminalisation of mutual aid;
- Moving the provision on non-criminalisation of family members from recital 7 to article 3, to ensure its bindingness.

3. Ensure that human rights defenders and those providing services to migrants are not criminalised.

This requires:

- Moving the provision on non-criminalisation of humanitarian action from recital 7 to article 3 (see point 2.c). In addition, this provision should be rephrased to clarify that it covers the provision of services and support to migrants beyond the meeting of their “basic human needs”. The limitation to activities considered “in compliance with legal obligations” is also problematic in frameworks in which the national legislation might be unduly restrictive.
- Deleting art.16 and recital 24 on investigative tools: the new provisions allows to use tools such as interception of communications, covert surveillance and electronic surveillance, among others. These methods have already been used against migrants' rights defenders as well as lawyers, seriously hindering their right to privacy and ability carry on their work, and putting them at risk of defamation and smear campaigns.
- Deleting recital 25 on the deletion on content which could be used to facilitate instigation or facilitation, as this could lead to a form of censorship against provision of information and awareness raising on rights and services.

Lastly, we would like to highlight that, despite its potential widespread implications on migrants' rights and solidarity, the proposal was published without an ex-ante impact assessment. This is an integral part of the Commission's Better Regulation Guidelines. As requested by the European Parliament, the Commission should publish all the results of the consultations and evidence collected during the elaboration of this proposal. We urge

the Commission to refrain from presenting new proposals without conducting and publishing ex-ante impact assessments and to make public the results of any relevant document and consultation. This is essential to allow the Council and European Parliament to play their role as co-legislators.

Relevant resources:

PICUM (2022) [Migrant smuggling: why we need a paradigm shift](#)

PICUM (2023) [More than PICUM Briefing people criminalised for acting in solidarity with migrants in the EU in 2022](#)

Gionco, M; Kanics, J. (2022): [Resilience and Resistance in defiance of the criminalisation of solidarity across Europe](#)

Gionco, M. (2022): [Criminalisation of solidarity is a political act](#)



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for social justice.

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