



## **Comments on the Commission Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities (C (2020) 6468 final) and Commission guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence (C (2020) 6470 final).**

In the two above-mentioned documents, which form part of the Pact, the Commission tries to address two burning issues of EU relevance, namely search and rescue as well as criminalisation of humanitarian support to migration. In both areas the Commission has decided not to propose legislation<sup>1</sup> but rather to work through a recommendation and a guidance. In its recommendation on Search and Rescue (SAR), the Commission reiterates principles of international and European law on SAR and suggests cooperation between Member States as well as gathering and exchange of information on privately operating SAR vessels. In this regard, an interdisciplinary Contact Group shall be established. In the guidance on criminalisation the Commission tries to offer an interpretation of the Facilitation Directive of 2002<sup>2</sup> in view of international and European law, clarifying that it is not the intention of the directive to criminalise humanitarian assistance.

In the life of churches as well as Christian organisations and agencies, the starting point of engagement is the belief that human beings are created in the image of God and equipped with an inherent dignity – every human being irrespective of one's legal status or way of accessing the territory of, for example, the EU. Support is rendered without asking those in need for their papers, especially during measures of saving lives from immediate danger such as at sea.

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### **❖ Clarification on SAR and criminalisation urgently needed**

The issue is of great importance to churches and Christian organisations. In addition to the general concern of helping those in need as well as those assisting them, in recent years we have seen an increasing number of cases in which state authorities have accused and prosecuted, among many others, church and religious institutions and individuals for allegedly facilitating irregular entry, transit or residence. Criminalisation has particularly touched the activities of churches, faith-based actors and their partners in SAR of persons suffering shipwreck at sea (e.g. arbitrary blockade of the Sea-Watch 4 in Palermo). This has

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<sup>1</sup> Some aspects of SAR, namely the reception of those rescued at sea, are covered in other legislative proposals in particular Proposal for a Regulation of the European Parliament and the Council on Asylum and Migration Management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX (Asylum and Migration Fund) COM (2020) 610 final.

<sup>2</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence and 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.

happened against the highly regrettable decision of the EU Member States to abandon state organised, proactive SAR. Even in instances where SAR activities were not criminalised, the disembarkation of persons rescued at sea has often led to lengthy standoffs in which those vulnerable migrants were kept at sea while Member States fought politically over who has responsibility for them. Related activities of EU Member States to register and regulate activities of civil society vessels in search and rescue have often been used as a pretext to intercept vessels, to stop and discredit their activities. The attempts to criminalise activities do not only concern churches, Christian organisations and individuals but, as indicated, also other civil society actors and religious entities, and this has a strong deterrent impact<sup>3</sup>.

#### ❖ **EU guidance welcomed in principle**

We therefore welcome in principle the recommendation and the guidance by the European Commission aiming for more cooperation between Member States in the area of SAR and for more legal clarity on what constitutes facilitation of unauthorised entry.

We particularly appreciate the reference made to international and EU law in both documents, including the clear statement that ‘providing assistance to persons found in distress at sea is a legal obligation’ and that ‘EU law does not intend to criminalise humanitarian assistance’<sup>4</sup>. In principle, we welcome that solidarity, in cases of SAR leading to disembarkation, is covered by the provisions of the proposed Asylum and Migration Management Regulation<sup>5</sup>. We also appreciate the central role of the Commission in coordinating and directing the Member States’ commitment to relocate asylum seekers from the States that receive recurring disembarkations due to SAR operations.

#### ❖ **Concerns on discourse linking SAR to smuggling and on implementation**

A positive assessment of the SAR recommendation is diminished, however, when reading of the intention ‘to avoid a situation in which migrant smuggling or human trafficking networks [...] take advantage of the rescue operations conducted by private vessels in the Mediterranean’<sup>6</sup>. In this respect we would like to recall that there is no evidence of SAR vessels being used by smugglers/traffickers, contrary to what the recommendation could suggest or what some national and EU officials have claimed. There is also no evidence that the activities of private vessels create a pull factor for migrants and refugees to cross the sea.

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<sup>3</sup> In addition to the studies cited in the guidance: Fundamental Rights Agency: Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations – 2018; Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, ‘Update Study “Fit for purpose?” The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants’, Study for the EP Petitions Committee (PETI), European Parliament, December 2018.

<sup>4</sup> Commission guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence (C (2020) 6470 final), p.8.

<sup>5</sup> Proposal for a regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX (Asylum and Migration Fund) COM (2020) 610 final.

<sup>6</sup> Commission Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities (C (2020) 6468 final), para. 9.

Moreover, it is not clear whether the Commission will have the capacity to fully take up the coordination role suggested on SAR and to enforce this mechanism in the future given its great reluctance to enter into conflict with Member States on asylum and migration matters. In addition, we want to highlight that both documents are still rooted in a soft law approach and that some practical provisions suggested might be misused in practice. It is undoubtedly a delicate task to achieve higher coherence and application of international and EU law in two areas where the EU competence is limited.

The Facilitation Directive<sup>7</sup> in Art. 1 (2) provides that Member States *may* decide not to impose sanctions on the people who intentionally assist a third country national to enter or transit across the territory of a Member State. Nevertheless, we would have appreciated the exemption of humanitarian assistance provided by Article 1 (2) of the Directive to be binding, as the current ‘may’ provision is underused in Member States<sup>8</sup>. In 2015 the Commission announced its intention to release new proposals to define the offence of facilitation of unauthorised entry and 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’<sup>9</sup>. This more robust approach announced by the Commission would have helped strengthen the principle of legality.

#### ❖ Recommended considerations for follow-up

A truly comprehensive approach to migrant smuggling and deaths at the EU border will need to be built around a system including legal safe passages for those seeking protection as well as a framework regulating the possibility to travel legally to Europe for the purpose of labour. We are confident that such provisions will not only be in favour of those seeking a better future in Europe, but also in the interests of those individuals and societies welcoming and hosting them.

In the absence of a comprehensive approach and of more binding provisions on SAR and on the implementation of the Facilitation Directive, we encourage the Commission to organise a follow-up to the recommendation and the guidance, which can at least achieve a higher degree of coherence and legal certainty through elements of practical cooperation (e.g. ad hoc task forces, contact committees).

In such a follow-up we **recommend** highlighting the following aspects in order to reach a situation where churches, Christian and other faith-based organisations, NGOs and individuals can fulfil their calling to save and support human life without being criminalised.

- The clear legal and moral obligations **to save lives**, grounded in international and European law (Art. 3 UDHR, Art. 2 ECHR, Art. 2 EU Charter), should be respected by Member States – as demonstrated in the Commission’s recommendation.

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<sup>7</sup> See footnote 2.

<sup>8</sup> EU Action Plan against migrant smuggling (2015 - 2020) COM(2015) 285 final, p. 3.

<sup>9</sup> EU Action Plan against migrant smuggling (2015 - 2020) COM(2015) 285 final, p. 3.

- Following the end of operation Sophia there is currently no initiative by which the EU or its Member States proactively take responsibility to organise search and rescue operations. In the context of operation ‘Irinì’, Member States have explicitly excluded search and rescue activities<sup>10</sup>. However, there should be a **re-engagement of Member States in search and rescue missions**.
- The possibility of using the provisions on enhanced cooperation (Art. 20 TEU and Art. 326 et seq. TFEU) to establish a **binding mechanism of search and rescue**, as well as predictable disembarkation for those Member States wishing to overcome the situation of ad hoc solutions, should be pursued with renewed ambition.
- Any measures of registration and coordination of **civil society** operating search and rescue vessels should be kept to a necessary minimum and be determined by the wish to facilitate better search and rescue, not to stop it.
- Respect the fact that the UDHR, ECHR and EU Charter as well as other instruments (such as the International Covenant on Economic, Social and Cultural Rights or the European Social Charter of the Council of Europe) establish a set of minimum rights, which create a moral obligation for citizens to act if such rights are not ensured by States. These activities mandated by law must not be criminalised.
- Acknowledge the fact that ‘smuggling of migrants’ shall mean the procurement of the illegal entry of a person, in order to obtain, directly or indirectly, *a financial or other material benefit* (UN Protocol against the Smuggling of Migrants by Land, Sea and Air<sup>11</sup>). Even if the EU Facilitation Directive in its definitions does not include the element of facilitation having to be for the purpose of ‘financial or other material benefit’ in order to be punishable, Member States should always take into account the provisions of the UN Protocol and its *travaux préparatoires*.
- The envisaged **interdisciplinary Contact Group** in which Member States can cooperate and coordinate activities in order to implement the SAR Recommendation should not only consult NGOs ‘as appropriate’ but include them on a permanent and transparent basis.

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- Caritas Europa, [www.caritas.eu](http://www.caritas.eu)
  - CCME – Churches’ Commission for Migrants in Europe, [www.ccme.eu](http://www.ccme.eu)
  - COMECE – Commission of the Bishops’ Conferences of the European Union (Secretariat), [www.comece.eu](http://www.comece.eu)

<sup>10</sup> The increase of crossings in the Central Mediterranean in the time of COVID and recent arrival on the Canary Islands are a final proof that the theory of SAR missions being a “pull factor” is a complete myth.

<sup>11</sup> United Nations Protocol against the smuggling of migrants by land, sea and air supplementing the United Nations Conventions against Transnational organised Crime of 2000, art. 3.

- *Don Bosco International*, [www.donboscointernational.eu](http://www.donboscointernational.eu)
- *Eurodiaconia*, [www.eurodiaconia.org](http://www.eurodiaconia.org)
- *Sant'Egidio BXL Europe*, [www.santegidio.org](http://www.santegidio.org)
- *ICMC – International Catholic Migration Commission*, <https://www.icmc.net/europe/>
- *JRS Europe – Jesuit Refugee Service Europe*, [www.jrseurope.org](http://www.jrseurope.org)
- *Protestant Church in Germany – EKD*, [www.ekd.de/Bevollmaechtigter-EKD-Dienststelle-Bruessel-25117.htm](http://www.ekd.de/Bevollmaechtigter-EKD-Dienststelle-Bruessel-25117.htm)