The fight against migrant smuggling: European criminal cooperation from a French perspective

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Introduction

Since 2015, Europe has been facing an unprecedented crisis arising from the increase in illegal immigrant smuggling. As a matter of fact, over one million migrants illegally entered the European Union in 2015\(^1\) and it is estimated that more than 90% of these entries were facilitated\(^2\).

Indeed, there are multiple smuggling networks that are very efficiently organised and operate along the Mediterranean route. As shown in the diagram, migrant smugglers use various land, air or sea routes in order to reach destination countries that are based in the EU \(^3\). Among other services, they offer transportation, accommodation and fake documents. It can therefore become a very lucrative activity.

Europol considers that people smuggling networks made more than 6 billion euros from their criminal activities in 2015\(^4\). Fighting this multi-billion-euro trade has hence become a top priority for the EU. “Facilitation of illegal immigration” is one of the EU Crime Priorities set out by the Council within the framework of the EU Policy Cycle for Organised and Serious International Crime for 2014-2017\(^5\).

Considering the scale of migrant smuggling as well as the various forms in which criminal networks operate\(^6\), strong cooperation between Member States and operational

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\(^1\) On the Greek islands alone, 870 000 immigrants arrived in 2015. [Frontex Website – Profiting from misery – How smugglers bring people to Europe](https://www.frontex.europa.eu/)

\(^2\) Europol, [Migrant smuggling in the EU](https://www.europol.europa.eu/), February 2016.

\(^3\) Ibid.

\(^4\) Ibid.

\(^5\) [Europol Website - EU Policy Cycle – Empact](https://www.europol.europa.eu/)

\(^6\) For instance, migrant smuggling and migrant trafficking are two diverse yet interlinked criminal activities perpetrated by criminal networks. As explained in the [Glossary, facts and figures for the European Agenda on Migration](https://ec.europa.eu/home-affairs/what-we-do/policies/migration_en), the difference between the two is that “in the former, migrants willingly engage in the irregular migration process by paying for the services of a smuggler in order to cross an international border, while in the
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Information sharing through all available channels is crucial. To this effect, a European legal framework has been implemented and various EU agencies, such as Frontex, Eurojust and Europol, support Member States’ efforts in the area of migration.

I. The fight against migrant smuggling: the current legal framework

Various legislative instruments have been adopted at International, European and National level to criminalise migrant smuggling.

1. The United Nations Smuggling Protocol

Before analysing the European framework on migrant smuggling, it is relevant to mention the United Nations (UN) Smuggling Protocol7 in order to identify the differences and similarities between the different instruments and to better understand the specificity of European Union legislation on this issue.

The UN General Assembly adopted the Smuggling Protocol on 15 November 2000. Article 2 of the Protocol specifically states that the aim of this instrument is “to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants”. The signing conference took place in Palermo in December 2000 and the Protocol eventually entered into force on 28 January 2004. Both the European Union (EU) and, bilaterally, all EU Member States, with the exception of Ireland, ratified it8.

Migrant smuggling is defined in the Protocol as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into

latter they are the victims, coerced into severe exploitation which may or may not be linked to the crossing of a border”.


8 Study Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants (page 23). This study was commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the LIBE Committee.
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*a State Party of which the person is not a national or a permanent resident*9 (emphasis added). This definition diverges slightly from the one chosen at EU level since the financial motive that drives smugglers is not always required for their behaviour to be sanctioned in the EU (cf. below). According to the *travaux préparatoires* of the Smuggling Protocol, the reference to “financial or other material benefit” was intended to prevent sanctioning family members or support groups such as religious or non-governmental organisations10. Finally, this Protocol, contrary to EU legislation, explicitly prohibits the criminalisation of migrants who have been victims of smuggling11.

### 2. The “facilitator’s package”12: current EU legislation on migrant smuggling

The French Presidency initially presented two legislative proposals to the Council of the EU on 28 July 200013. Two legal instruments were officially adopted on 28 November 2002: *Council Directive 2002/90/EC* defining the facilitation of unauthorised entry, transit and residence and *Council Framework Decision 2002/946/JHA* on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. These instruments constitute what today is known as the *facilitator’s package*.

The European Union targets illegal immigration and these instruments were adopted in that context. The idea was to take measures to “*combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings*”14.

The main purpose of the directive is to give a single definition to the offence of facilitation (of unauthorised entry, transit and residence) and “to render more effective the implementation of framework Decision (...) in order to prevent that offence15”. The Directive requires Member States to take sanctions on:

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9 UN “Smuggling Protocol”, Article 3(a).
10 Supra 8; *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (page 469), United Nations Office on Drugs and Crimes, 3 November 2000 (“*Travaux Préparatoires*”).
11 UN “Smuggling Protocol”, Article 5.
12 Supra 8, page 24.
13 Ibid.
“(a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens16” (emphasis added)

The directive thus distinguishes between irregular stay and irregular entry or transit. Therefore, the financial gain condition is, contrary to the UN Protocol, only required when sanctioning persons who facilitate an irregular stay, while smugglers who facilitate the entry or transit of migrants can be punished if their behaviour is proven to be merely intentional.

The Directive provides that “any Member State may decide not to impose sanctions with regards to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned”17” (emphasis added). While the UN Smuggling Protocol makes specific reference to “financial or material benefit” in order to prevent certain people from being prosecuted, the Directive includes an optional “humanitarian clause”. This clause can only be applied when the behaviour targeted was not adopted for financial gain. Member States potentially have a lot of discretion with regards to applying this clause since the directive itself gives no definition of “humanitarian assistance”18.

3. The European Agenda on Migration

On 13 May 2015, following the tragedies in the Mediterranean and in order to prevent more people from dying at sea, the European Commission adopted a European Agenda on Migration19. Dimitris Avramopoulos, the Migration, Home Affairs and Citizenship Commissioner presented this Agenda as a concrete response “to the immediate need to save lives and assist frontline countries with bold actions”20.
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As a matter of fact, this Agenda gave both immediate instructions and guidelines for the foreseeable future. Among the concrete actions set out by the Commission in 2015 (short-term priorities), there was the will “to triple the capacities and assets for the Frontex joint operations Triton and Poseidon, to propose a temporary distribution mechanism for persons in clear need of international protection within the European Union” but also “to work on a possible Common Security and Defence Policy operation in the Mediterranean to dismantle traffickers’ networks and fight smuggling of people”21.

In terms of guidelines for the future (long-term priorities), the European Agenda on Migration took into account the deficiencies of the European migration policy brought to light by the migration crisis and in doing so, was based on four pillars22 that aimed at managing migration better in all aspects. The Agenda laid out the necessity for a stronger asylum policy, insisted on the need to save lives and secure external borders, called for the creation of a new policy on legal immigration and underlined the necessity to reduce the incentives for irregular immigration.

Concerning this last aspect, the European Agenda on Migration insisted on targeting criminal smuggling networks in order to prosecute them23, set the goal to transform migrant smuggling networks from “low risk, high return” operations into “high risk, low return” ones and announced that an Action plan would be proposed by the Commission by the end of May.

4. The European Union Action Plan on Migrant Smuggling

The EU Action Plan on Migrant Smuggling24 was adopted by the Commission on 27 May 2015. It details the specific actions necessary to implement the European Agenda on Migration and the European Agenda on Security25. This action plan has four objectives: 1) enhance police and judicial response (e.g. launching cooperation with financial institutions to step up financial investigations). 2) Improve gathering and sharing of information (e.g. deployment of European migration liaison officers in key EU Delegations). 3) Enhance prevention of smuggling and assistance to vulnerable migrants (e.g. information and prevention

21 Ibid.
22 These pillars had been identified in 2014 by President Jean-Claude Juncker in his Political Guidelines.
23 Supra 19.
25 The European Agenda on Security, European Commission.
campaigns in third countries on risks of smuggling). 4) *Stronger cooperation with third countries* (e.g. funding of projects to support third countries in setting up strategies on migrant smuggling, stepping up police and judicial responses, and developing integrated border management).

5. **National Law on migrant smuggling: focus on French Law**

After Directive 2002/90/EC was adopted, France was compelled to modify its legislation on migrant smuggling. Article L 622-1 of the Code of Entry and Residence of Aliens and the Right to Asylum (CESEDA) now provides that: “any person who has, by direct or indirect help, facilitated or tried to facilitate the entry, circulation or irregular stay of a foreign person in France will be sentenced to five years in prison and a 30,000 euro fine”. The same article adds that this behaviour can also be sanctioned if it is committed either in the territory of a State that is party to the Schengen Convention or in the territory of a State that is party to the UN Smuggling Protocol.

As the 2002 Directive laid down no specific obligations for Member States, France, like Greece or the UK, chose not to require financial gain for the conduct to be sanctioned. Several persons were thus convicted under the provision, for example for simply hosting an illegal alien or for making fake recognitions of paternity in order to facilitate the stay of foreign minors.

The French legislator chose to introduce several types of immunity, as the 2002 Directive had encouraged Member States to do. For instance, the aforementioned behaviour cannot be punished if committed by a close family member (parents, offspring, brother, sister, spouse…). However, this family exception is quite narrow and does not include the entire circle of the alleged smuggler. Indeed, a man who had taken in his son-in-law who was staying illegally, was convicted under the CESEDA. In *Mallah v. France*, the European Court of Human Rights

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26 Personal translation.
28 Examples: Douai, 14 November 2006, n°06/01132 ; Paris, 16 September 2009, n°09/00956.
29 Crim. 7 January 2009.
30 Supra 16, Article 1.2.
31 Article L 622-4 CESEDA.
found this conviction compatible with the right to respect for private and family life under article 8 of the European Convention on Human Rights. The French choice to introduce exemptions of liability was also made by Greece and Spain. The UK chose to limit this immunity to persons who aim at assisting asylum-seekers and do not charge for their services.

Another exception to prosecution under article L 622-1 CESEDA was eventually introduced by a 2012 Act. No one committing an act that does not result in direct or indirect compensation and that consists in providing legal advice or catering, housing or medical care services destined to ensure decent and dignified life conditions abroad can be punished. Any person who provides any other kind of help aiming to preserve dignity or physical integrity is also protected under the provision. Cedric Herrou, a French farmer who helped migrants cross the Italian border to come and stay in France, recently invoked this provision. He was however sentenced to a 3000 euro fine (suspended) at first instance by the Nice Court for helping migrants cross the Italian border in his vehicle. Nevertheless, he was acquitted, pursuant to article L 622-4 CESEDA, for helping migrants find a place to stay in France and for transporting migrants who had already crossed the border.

Member States, France included, have created Police and Customs Cooperation Centres (PCCC) in order to facilitate police cooperation and the exchange of information between neighbouring countries. These PCCCs, created by bilateral agreements between Member States, are composed of customs officers, police and gendarmes. France signed agreements with Germany, Switzerland, Italy, Belgium, Spain and Luxembourg. The Council Framework Decision of December 18th 2006 strengthened cross-border cooperation. Indeed following the 2006 decision, France adopted new provisions in the Criminal Procedural Code that gave investigators the right to obtain information on perpetrators or to gather evidence without having to make a written request or use any other coercive measures.

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33 Supra 8. Page 30.
34 UK Immigration Act, Section 25A (3) (1) cited in Study *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants* (page 30).
35 Article L 622-4, 3° CESEDA.
37 Wikipédia, *Centre de coopération policière et douanière*.
38 Ibid.
39 Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.
40 Article 695-9-31 Code de Procédure Pénale.
II. **European Agencies involved in the fight against migrant smuggling: the “Hotspot approach”**

Migratory flow at the EU’s external borders is generally characterised by mixed flows of asylum seekers and economic migrants, with the involvement of organised migrant smuggling networks. Criminal networks often facilitate not only the hazardous journeys across sea and land borders, but also secondary movement across the Member States.

EU Agencies, such as **Europol, Frontex and Eurojust**, provide operational assistance to the Member States in the field of managing external borders and combatting serious organised crime groups.

In the European Agenda on Migration, the Commission proposed the development of a **new approach to meet the challenges presented by the recent high migratory flows**, namely the “hotspot approach”. A “Hotspot” is characterised by specific and disproportionate migratory pressure. The coordinated action to assist border Member States in dealing with high frontline pressure is centralised in defined locations called hot spots: Catania (Sicily), Italy and Piraeus, Greece.

The “Hotspot” consists of a headquarters hosting the European regional task force (EURTF) and operational expert teams that support the work of the host Member State on the ground. **The EURTF is the organisational entity implementing the “Hotspot approach”** and was set up in June 2015. The EURTF will assist the Italian and Greek authorities, identified as frontline countries, to fulfil their obligations under EU Law in the field of identification, asylum support, intelligence sharing, criminal investigations and the prosecution of criminal networks of people smugglers. It will provide Member States with real time information to disrupt smuggling networks. Among others, it will offer leads on the activities of organised groups and facilitate access and cross-checking on various European databases, intelligence on new trends and investigation documents.

Frontline Member States will therefore be assisted by authorities in the field of criminal investigations and the prosecution of criminal networks of people smugglers. More specifically, **all EU specialised agencies involved in the “migrant crisis”** (EASO41, Frontex, Europol and Eurojust) will work hand in hand with frontline Member States. The EURTF provides

[41] European Asylum Support Office. The EU agency will not be addressed in the present written paper as it is not a body for criminal cooperation.
a platform for these agencies to act in a coordinated manner and to intervene rapidly in frontline Member States.

1. **Border Management: Frontex**

Frontex was established as the *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*42 on 26 October 2004 with the aim of “*promoting, coordinating and developing European border management* in line with the EU fundamental rights charter and the concept of Integrated Border Management*43.

On 14 September 2016, the *European Border and Coast Guard Agency*44 replaced the *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* while keeping both the same legal nature and the same short name: Frontex. However, the agency’s prerogatives have become more considerable as Frontex now has a “*stronger role in supporting, monitoring and, when necessary, reinforcing national border guards*”. It now focuses primarily on “*early detection and prevention of weaknesses in the management of the EU external borders*”45.

Frontex’s **resources** have also been **significantly enhanced**46. This evolution in the resources allocated to Frontex is of crucial importance as only substantial means will enable true effectiveness of the European Union measures relating to the management of external borders, including the Schengen Borders Code47.

In order to do so, Frontex is entrusted with different missions and tasks, such as monitoring migratory flow and carrying out *risk analysis* regarding all aspects of integrated

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43 Frontex Website – Mission and tasks.
45 EU Operations in the Mediterranean sea – Factsheet
46 Frontex Budget 2016. As a matter of fact, the budget devoted to the agency increased from € 97,945,077 in 2014 to € 143,300,000 in 2015 before reaching € 254,035,000 in 2016. The amount allocated to joint operations such as the Triton and Poseidon operations went from € 92,009,000 in 2015 to € 119,795,000 in 2016.
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border management (a); **coordinating and organising joint operations** (b); assisting in the development and operation of **Eurosur** (c); **supporting search and rescue operations** that arise during border surveillance operations at sea; **providing support at hotspot areas**; as well as **fighting organised cross-border crime and terrorism at the external borders by supporting Member States in cooperation with Europol and Eurojust**.

a) **Risk analysis**

The risk analyses that Frontex carries out are a starting point for all its activities. By **collecting data from different stakeholders** (Member States, EU bodies, organisations), Frontex creates a picture of the situation at the European Union’s external borders and establishes trends.

The risk analyses undertaken by Frontex can be divided into three categories: strategic analysis, analytics and **operational analysis**. The latter plays a major role in the fight against smugglers, as the information collected (nationalities of migrants, routes, smuggling networks involved) is used to **maximise the effectiveness of the actions undertaken**.

On 26 May 2015, Frontex Executive Director Fabrice Leggeri announced that Frontex was going to intensify its efforts to dismantle people smuggling networks by deploying nine debriefing teams, underlining the importance of these debriefing officers that “collect intelligence about the criminals operating in Libya and other countries of transit”.

b) **Joint operations**

Unlike operation Sophia (cf. below), the joint operations carried out by Frontex are **not specifically aimed at suppressing smuggling networks even if they can give rise to their discovery**. Different actions occur under the aegis of Frontex: operations Hera, Indalo and

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48 The aim of Frontex is firstly to provide information and surveillance in order to combat human trafficking and criminal networks. Frontex rescue operations are therefore only incidental and occur exclusively in the form of support.
49 Frontex Website – Mission and tasks
50 Frontex Website – Strategic Analysis
51 Frontex Website – Analytics
52 Frontex Website – Operational Analysis
53 Frontex Website – News – Frontex expands its join operation Triton
Minerva in the Western Mediterranean, and operations Triton\(^4\) and Poseidon\(^5\) in the Central and Eastern Mediterranean. The latter are those for which the most resources are allocated.

c) **Eurosur**

Eurosur stands for “**European Border Surveillance System**” and was adopted on 10 October 2013 by the European Parliament. It uses **innovative and smart technologies** such as drones, reconnaissance aircraft, offshore sensors and satellite remote sensing in order to track illegal immigration into the European Union. For instance, the **Eurosur Fusion Services** use optical and radar satellite technology to **locate the vessels of suspected smugglers**\(^6\).

Eurosur is based on the **exchange of information** between European Union countries through their National Coordination Centres (NCCs). These centres receive local and national information from their coastguards and centralise it. They also receive information from other NCCs through the Eurosur network\(^7\).

Eurosur’s goal is to improve the management of Europe’s external borders by **increasing situational awareness**. Using the information collected by the NCCs, Eurosur creates a “**European situational picture**” and a “**common pre-frontier intelligence picture**”\(^8\). These pictures represent an overview of the situation at the borders, are shared by all NCCs and can indicate the adequate level of operational reaction at different border sections.

2. **Europol**

Following the recommendations of the Council and the Commission, Europol upgraded all of its activities in the field of the facilitation of illegal migration.

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\(^4\) Launched on 1 November 2014, **operation Triton** takes over from “**Mare nostrum**”, a rescue operation carried out for one year by the Italian military navy. It is however not a surrogate for the Italian operation as “**Mare nostrum**” had been created specifically for the rescue of migrants and was authorized to work in Libyan waters. Operation Triton only plays a role of support in border control and surveillance and is confined to the Italian territorial seas.

\(^5\) The **Poseidon operation** is the Greek counterpart of the Triton operation as Frontex assists Greece in its border surveillance.

\(^6\) [Frontex Website – Feature stories – Eurosur tools plays key role in boat rescue](#)

\(^7\) Eurosur ensures that no information currently circulating in the network contains personal data.

\(^8\) [Frontex Website - Eurosur](#)
a) **The European Migrant Smuggling Centre**

With the “facilitation of illegal immigrants” being a top EU crime priority in the 2014-2017 EU Policy Cycle for Organised and Serious International Crimes, Member States called for an adequate and coordinated response to the wide increase of migratory flow and the endemic involvement of large scale criminal networks in the smuggling of migrants.

Envisioned in the European Agenda on Migration in May 2015, Europol’s new European Migrant Smuggling Centre (EMSC) was launched in February 2016, following a decision of the EU Justice and Home Affairs ministers. The EMSC’s task will be to provide Member States with operational support to prevent and fight organised migrant smuggling networks active throughout Europe. The Centre will focus on areas with high levels of criminal activity, mostly in the identified hotspots. According to Robert Crepinko, head of the Centre, the EMSC will act “as an information hub” and “will support the EU Regional Task Force and the work of other partner agencies.” The EMSC may also deploy fast action support teams to assist Member States in achieving widespread operations: the EMIST (Europol Mobile Investigation Support Team) and the EMAST (Europol Mobile Analytical Support Team).

b) **JOT MARE**

The EMSC encompasses a joint operation team: Europol’s JOT MARE, launched around the same time. **JOT MARE is a team of experts from Member States which supports migration and law enforcement authorities in collecting evidence and conducting investigations against smugglers via the Mediterranean Sea, mainly Turkey, Libya and other North African countries.** JOT MARE builds on Europol’s intelligence work over the past decade in the field of combating organised migrant smuggling and using intelligence directly provided by agencies and major partners active in the field – Frontex and Interpol for example.

JOT MARE is an essential part of the EMSC. It acts as an information hub on migration coming from the Mediterranean route, providing Member States with criminal data on people

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59 Supra 5.

60 The EMSC is modelled on other Europol initiatives such as the European Cybercrime Centre (EC3) and European Counter Terrorism Centre (ECTC).

61 Council Conclusions on Measures to handle the refugee and migration crisis, Justice and Home Affairs, meeting n°3422, 9 November 2015.


63 Nearly 40 000 suspected smugglers have been identified and 1551 cross border investigations have been supported by Europol in 2015.
suspected of being part of organised smuggling networks and facilitating their identification. The existence of such an operational team is meant to increase the number of coordinated operations and support investigations into organised crime groups that smuggle migrants.

Europol was also encouraged to extend its action in the western Balkan area\footnote{Supra 61.} in order to propose a realistic solution to the situation as it evolves.

### 3. A military response: EUNAVFOR Med operation Sophia

On 18 May 2015, the Council of the European Union established a military operation in the Southern Central Mediterranean, EUNAVFOR Med\footnote{EUNAVFOR Med stands for EU Naval Force Mediterranean. On 28 September 2015, the Political and Security Committee agreed to rename the operation “Sophia” after the name of a baby born on one of the EUNAVFOR Med ships on 24 August 2015 to a Somalian mother that had just been rescued along with 453 other migrants. Federica Mogherini, Vice-President of the Commission, suggested the change of name “to honour the lives of the people we are saving, the lives of people we want to protect, and to pass the message to the world that fighting the smugglers and the criminal networks is a way of protecting human life”.}\footnote{EUNAVFOR Med Website}, intended to break the business model of smugglers and traffickers of people in the Mediterranean.

The operation is designed around four phases\footnote{EUNAVFOR Med Website}. The first one started on 22 June 2015 and consisted of the deployment of forces in order to build a comprehensive understanding of smuggling activity and methods. The second phase, which is the active phase of the operation, started on 7 October 2015. It implies the boarding, search, seizure and diversion of vessels suspected of being used for human smuggling or trafficking on the high seas, in line with international law\footnote{The international law includes human rights, humanitarian and refugee law and the “non-refoulement” principle which means that no rescued person can be disembarked in a third country.}.

The third phase will expand this activity further and will include taking operational measures against vessels and related assets suspected of being used for human smuggling or trafficking inside the coastal states territory.

The fourth and last phase will consist in the withdrawal of forces and in the completion of the operation.

As of 14 September 2016, fifteen months after the beginning of the EUNAVFOR Med operation, \textit{89 smugglers and traffickers had been arrested by Italian authorities following...}
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The operation’s activities. Though this number is encouraging, it is still not sufficient, as it proves that smugglers are perfectly capable of adapting to the constraints imposed by the diversification of surveillance. In fact, for Admiral Hervé Bléjean, second in command of the Sophia mission, the main goal is “to destabilise the adversary” and “disrupt” trafficking. The Mediterranean route remains one of the most profitable for smugglers and “the traffic revenue is estimated at € 250 million per month”.

Operation Sophia’s mandate was meant to end in 2016 but on 20 June 2016, the Council extended it until 27 July 2017. The Council also broadened the operation’s mandate by adding two supporting tasks. The EUNAVFOR Med operation will now train the Libyan Coastguards and Navy, in order to enhance their capability to disrupt smuggling and trafficking networks in Libya. It will also support the implementation of the UN arms embargo on the High Seas off the coast of Libya, in order to limit arms flows to terrorist groups.

Partnership is the key word in this operation that numbers 25 troop contributing nations. With this aim in mind, EUNAVFOR Med implemented the Shared Awareness and De-confliction in the Mediterranean (SHADE MED). This forum, intended for “representatives from nations and organisations interested in or impacted by the migratory phenomenon in the Mediterranean basin”, enables different stakeholders to meet and share their experiences. It has been held three times so far and has become a regular rendez-vous for the acting community to coordinate efforts in the Mediterranean. This event allows a better understanding between civilian and military stakeholders involved in the Mediterranean and helps find the best practices in order to deal with common security challenges.

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68 EU Operations in the Mediterranean sea – Factsheet
69 Le Monde, 7 octobre 2015, Migrants : l’UE accélère sa lutte contre les passeurs dans la Méditerranée
70 Political and security committee decision (CFSP) 2016/1635 of 30 August 2016 on the commencement of the capacity building and training of the Libyan Coast Guard and Navy by the European Union military operation in the Southern Central Mediterranean.
71 SHADE MED Website
4. **An efficient judicial body: Eurojust**

Eurojust was established in 2002 with the role of helping national authorities cooperate to combat serious organised cross border crime. As soon as a crime affects at least two Member States, Eurojust is competent in providing support and strengthening coordination and cooperation between national investigating and prosecuting authorities. Eurojust can assist in the execution of European Arrest Warrants and requests for mutual legal assistance, advise on jurisdiction and provide support in the setting up and running of Joint Investigation Teams (JITs). The JITs consist of judges, prosecutors and law enforcement authorities and may be set up by two or more Member States for a specific purpose and a limited period to carry out criminal investigations in one or more of the Member States setting up the team.

**Since 2015, Eurojust has faced an increasing demand for judicial coordination in the field of illegal immigrant smuggling.** In fact, in 2015, Eurojust’s casework in this field increased to 60 cases (in comparison to a total of 32 cases in 2014) and 9 joint investigation teams were active. The most requests from Member States came from Greece, France and Austria. Meanwhile, Germany received the greatest number of requests, followed by France and Hungary.

Also, in line with the recommendations from the EU Action Plan, Eurojust set up a themed group on illegal immigrant smuggling with the following objectives: support prosecution needs, identify and analyse the obstacles regarding prosecution and improve the use of EU legal instruments. The thematic group will work in close cooperation with specialised prosecutors from the Member States.

During a meeting addressing the issue of migrant smuggling in the North Sea region in May 2016, France, the United Kingdom, Belgium and the Netherlands, as well as liaison

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73 Council Decision 2002/187/JHA
74 The JITs were created by article 13 of the Council Act establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01), the “MLA Convention”. JITs were later on confirmed in article 1 of the Framework Decision adopted by the Council on 13 June 2002 and to be implemented by 1 January 2003.
76 Ibid, page 34.
77 Supra 19.
78 In its conclusions on the Eurojust Annual Report 2015, the Council recognised Eurojust’s active involvement to “face the sharp increase of illegal immigrant smuggling”, especially with the setting up of the thematic group (Council conclusions on the Eurojust Annual Report 2015, 9 June 2016, 10003/16).
79 The thematic group was set up by Eurojust on 29 September 2015.
magistrates and specialists from Europol, agreed on the need for a **specific regional task force** to act more quickly and efficiently against the networks operating in the area. Therefore, they decided to set up a task force comprising representatives of national judicial and law enforcement authorities as well as liaison magistrates, with the aim of enhancing practical cooperation in cross-border investigations and prosecutions to ensure an effective collective response to illegal immigrant smuggling. The task force will complement arrangements already in place between the four Member States.  

Considering the setup of such task force promises, Eurojust called on the responsible authorities in the Western Balkans region to review routes used in other crime areas to make use of established prosecutorial agreements and coordinate their response to migrant smuggling.

Conscious of the importance of cooperation through the hotspots, Eurojust appointed national prosecutors in Italy and Greece as contact points to provide specific support in the hotspot locations and channel relevant information to Eurojust for judicial follow-up on cases at EU level.

### III. Criticism and Proposals

#### 1. Strengthening cooperation with third States

During a press conference last September, Michèle Coninsx, President of Eurojust, stressed “*the importance of a strong, cooperative and consistent EU judicial response when facing the unprecedented security threat to European citizens from terrorism and cybercrime, and the human tragedies caused by illegal immigrant smuggling*”\(^{81}\). She also called for increased judicial cooperation with third States and for the need to enlarge the EU’s judicial contact point network beyond its borders.

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\(^{81}\) Eurojust in 2015: coping with a sharp increase in cases, press conference of 6 September 2016, on the occasion of the LIBE Committee of the European Parliament to discuss the work and ongoing activities of Eurojust in the area of judicial cooperation in criminal matters.
In fact, despite all the action taken over the past two years, the situation at the European Union’s borders is much the same as two years earlier, with hundreds of desperate individuals setting off each week from third countries in the hope of finding a passage to Europe.

Very conscious of the need to develop more partnerships with third States, and bearing in mind the alleged success of the EU-Turkey deal, the EU has taken several steps towards a more consistent cooperation with Libya. Alas, the EU might face greater issues as Libya appears too weak as a State to implement everything that is being asked of it and may not have the capacity to deliver what Europe has proposed.

The lack of cooperation on the part of Libya is illustrated, for example, in the implementation of the EUNAVFOR Med operation mentioned earlier. Indeed, the ultimate objective of this action was to control vessels in Libyan territorial waters but this required a mandate from the UN Security Council and the agreement of the Tripoli authorities. These two conditions could never be met, and so it is regrettable that operation Sophia is currently confined to international waters off Libya. It would indeed be much more appropriate to fight the smugglers at the source, that is to say before they load ships with migrants or at least very soon after their embarkation.

2. **Strengthening cooperation between EU agencies**

In line with the EU Action Plan against Migrant Smuggling, Eurojust, Europol and Frontex worked closely to gather information on smugglers’ modus operandi, to support national authorities in tracing money, and to assist in investigations.

Agencies also stepped up their bilateral cooperation. For example, Eurojust strengthened cooperation with Europol Focal Point and JOT Mare and a letter of understanding on Cooperation between Eurojust and the EUNAVFOR MED was signed on 1 October. Within Eurojust, concrete steps are being discussed to enhance the use of JITs in illegal immigrant smuggling so they can contribute to facilitating swift prosecution of criminal networks of smugglers.

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82 Le Monde, 25 juin 2015, Pas d’accord à l’ONU sur l’opération navale contre les passeurs
83 Le Monde, 20 janvier 2017, Migration : l’UE va tenter de négocier un accord avec la Libye
Eurojust, and Europol especially, are foreseen as playing a major role in assisting Member States in dismantling smuggling and trafficking networks.

A recent Eurojust-Europol case is a good example of successful cooperation in criminal matters. On 6 and 7 December 2016, judicial and law enforcement authorities from France and the Netherlands, supported on-the-spot by Europol’s European Migrant Smuggling Centre, took action against an organised crime network suspected of having smuggled some 500 migrants from Somalia to different destination countries in the European Union along secondary routes, using fake identification documents. Eight suspects were arrested in France (Strasbourg, Modane, Paris) and one in the Netherlands (Geleen) as a result of this joint action. This operation was preceded by extensive and complex criminal investigations supported by Europol, which coordinated the law enforcement authorities in France and the Netherlands and provided on-the-spot support by performing real-time analysis and cross-checks against its databases of the information and telecommunication data that were provided by the participating Member States.

Another network was also dismantled in September 2016: sixteen arrests have been made and a large amount of assets, money and other goods were seized. Investigations lasted two years, the Italian police was very much involved and Eurojust facilitated the procurement of authorisation to intervene, especially in Austria and Germany.

Nevertheless, from the little information disclosed by Eurojust on its website, it is difficult to apprehend the frequency of such cross-border operations. Indeed, despite all the efforts made by the agency to strengthen its capacity, it seems that smugglers are becoming increasingly creative, sophisticated and reactive to the evolution of domestic regulations, making it even harder for EU countries to address judicially.

3. Revising the Humanitarian clause of the 2002 Directive on migrant smuggling

One of the remaining issues with regards to migrant smuggling legislation is the absence of a single policy on how to deal with Non-Governmental Organisations or individuals who provide help to migrants. Indeed the “humanitarian clause” of the 2002 Directive\(^{85}\) raises some concerns.

\(^{85}\) Supra 16, Article 1.2.
Firstly, this clause is optional. The text of the Directive only provides that Member States may adopt such a clause. Therefore any State that decides to sanction people who help migrants for humanitarian purposes is free to do so under the Directive.

Secondly, since the Directive does not define the term “humanitarian assistance”, States can interpret it as they wish. These differences between national legislations at EU level create legal uncertainty and put volunteers who selflessly decide to help migrants in a difficult situation. Indeed, although France, for example, chose to introduce an exemption clause, several volunteers were nonetheless convicted for that offence. Besides the recent conviction of Cedric Herrou mentioned earlier, Claire Marsol, a 73 year-old retired woman, was sentenced in December 2016 to a 1500 euro fine by the Aix Court of Appeal for transporting two men from Eritrea to prevent them from being checked by police.

Finally, this humanitarian clause “can only occur in the absence of an element of financial gain.” It does not contemplate instances of assistance by service providers and landlords requiring non-exploitative remuneration for their services.

This Directive thus deserves to be revised in order to take these concerns into account. The EU Action Plan on Migrant Smuggling does mention the revision of the migrant smuggling legal framework as one of its objectives.

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86 Supra 8. Page 27.
87 Article L 622-4 CESEDA.
88 Site Web « Citoyens solidaires du 06 » - Les Procès et Gardes à Vue des Citoyens Solidaires dans le 06
89 Article 1.2 of the Directive, also known as the humanitarian clause, is only applicable to article 1.1(a) of the same instrument that corresponds to facilitation done without financial gain.
90 Supra 8. Page 27.