ReSOMA:

Research Social platform On Migration and Asylum

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D1.3 - Synthetic state-of-the-art expert policy briefs

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01	06/15/2018	MPG	Creation of the document
02	09/19/2018	MPG	Briefs finalised taking into account quality review
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04	11/05/2018	ISMU	Final check
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Final	11/14/2018	ISMU	Final check and submission

Content

LIST OF ABBREVIATIONS AND DEFINITIONS

Abbreviation	Definition

INTRODUCTION

Three expert summaries on policy agenda setting and six on policy agenda responses represent the main impetus for the activities of the annual project cycle. These Discussion Policy Briefs identify major unmet needs on asylum, migration and integration with significant consequences for EU law/policy as well as for immigrant and local communities; and analyse needs and developments on the ground in relation to major upcoming annual priorities for the EU agenda on asylum, migration and integration.

Description of Action

The nine topics addressed in the briefs emerged from the ReSOMA Steering Group discussion on 27 February 2018 and subsequent consultations with Advisory Board members. Further exchange within the project partnership resulted in a final identification of the topics and their problematisation in terms of key dimensions and relevance (cf. Annex 1)

Policy briefs were drafted between April and June 2018, based on extensive desk research, consultations with experts and stakeholders and input provided by the Ask-the-expert Policy Briefs (D.1.5. and D.1.6). Authorship between CEPS and MPG was evenly divided according to the specific competences of the staff/two institutes involved.

The briefs are called 'Discussion Briefs' for clear and unequivocal communication of their purpose to a broader audience (replacing the precise, but somewhat clumsy "Synthetic state-of-the-art expert policy brief") .

Experts and stakeholders consulted:

- Anna Abela, Senior Policy Associate UNHCR (family reunification)
- Fabiane Baxewanos, Legal Officer, UNHCR (safe third country concepts)
- Zoe Campiglia, Associate Policy and Research Officer, UNHCR (responsibility sharing in EU asylum policy)
- Michele Levoy, Director, PICUM (EU Return policy)
- Sophie Ngo-Diep, EPIM Programme Manager
- Paola Panzeri, Policy and Advocacy Manager, COFACE – FAMILIES EUROPE (family reunification)
- Kris Pollet, Head Legal Policy and Research, ECRE (asylum topics)
- Antoine Savary, Deputy head of unit, DG Home, Legal migration and integration (cities and mainstreaming)
- Salvatore Sofia, Policy Advisor Migration & Integration, Eurocities (cities and mainstreaming)
- Members of the Eurocities Migration Working Group (cities and mainstreaming)

In addition. for drafts of some of the briefs external reviewers could be won to provide feedback and comments:

- Jean Pierre Cassarino, European University Institute (topic EU return policy)
- Petra Bard, Visiting Professor CENTRAL EUROPEAN UNIVERSITY (topic crackdown on NGOs)
- Paolo Cuttitta, Amsterdam University (topic crackdown on NGOs)
- Laurent Pech, Middlesex University London (topic crackdown on NGOs)

- Svea Koch, German development institute (topic migration conditionality in EU external funding)

Feedback from the quality review was received in two rounds in June and July 2018, requiring minor improvements of five papers and asking for substantial amendments of two papers (and no suggestions for further improvement of the other four papers). These comments and the feedback received from the project partners were duly taken into account for the finalised papers. After undergoing a final editorial/language check, the Briefs with minor or no need for amendments were ready for publication by beginning August 2018. The brief on Social Inclusion of Undocumented Migrants required more in-depth additional research and careful drafting, reflecting the highly contested nature of the topic, and to make sure the text is robust enough to withstand even the most critical scrutiny. By mid-September 2018 this last remaining Discussion Brief was completed. The Steering Committee approved of the first eight Discussion Briefs by mid-August (published on the ReSOMA platform on 31 August) and the one delayed paper on 21 September 2018.

Due to the limited attention which can be anticipated during the summer holiday season, the Steering Group decided to launch and widely promote the Briefs, with close involvement of partners' communication officers, starting in September 2018 and in line with the stakeholder partners' regular communication and advocacy activities in order to achieve maximum attention and impact.

ANNEXES

1. Identification of major upcoming EU-agenda topics and agenda setting topics
2. Discussion briefs

Annex 1 - Identification of major upcoming EU-agenda topics and agenda setting topics

IDENTIFICATION OF MAJOR UPCOMING EU-AGENDA TOPICS AND AGENDA SETTING TOPICS ON MIGRATION, ASYLUM AND INTEGRATION						
Subject	**Area**	**Top-down (upcoming EU-agenda topic) or Bottom-up (agenda setting topic)**	**Lead think-tank partner**	**Problematisation**		
				What are key dimensions of the problem	**Relevance Why decision likely in 2018**	**Relevance Why decision high-impact for EU migration policy**
Proving impossibility & hardship on family reunion of beneficiaries of international protection	Asylum	↑ (agenda setting)	**MPG**	**Study on the effect of legal & procedural obstacles/gaps on family reunification for many categories of international protection under EU law: subsidiary protection, humanitarian statuses and unaccompanied minors.**	**Asylum decisions being processed, decisions to renew temporary restrictions, major issue in relevant elections, link to REFIT & EU enforcement**	**Major workable legal channel available for beneficiaries of international protection, possibility for large-scale safe & well-organised migration with positive integration outcomes**
Responsibility-sharing for asylum decision-making	Asylum	↓ (upcoming EU-agenda)	**CEPS**	**Effect on diverse groups of hotspots & roles of agencies (EASO/FRONTEX) & deployed national experts on quality of procedures & decisions of asylum systems in relevant Member States as well as the structural problems of proposal for new Dublin Regulation. Specific focus on the organisation/management of systems, workflows, quality and efficiency of decision-making.**	**Increase in mandate & capacity of EASO & FRONTEX, key in implementation of current/future CEAS**	**Responsbility-sharing is likely model to handle future large-scale arrivals**
Safe Third Country	Asylum	↓ (upcoming EU-agenda)	**CEPS**	**Definition in intl/ European/ national law, jurisprudence & 'soft' norms, national practices & harmonisation. Mandatory application of the safe third country concept: effect of harmonisation on protection. Monitoring the situation in third countries on the basis of criteria used**	**Implementation of New York Declaration (CRRF) Negotiation of Global Compact on Refugees & EU migration partnerships**	**Effect of EU relationship with third countries & human rights abroad, major impact on asylum flows & access to durable solutions.**
The crackdown on migration-support NGOs	Migration	↑ (agenda setting)	**MPG & CEPS**	**Access to AMIF funding, rule of law, new forms of criminalisation, also related to national implementation of the "humanitarian clause" of the Facilitation Directive.**	**Strong link with AMIF/MMF negotiation, rule of law mechanisms and activation of Art. 7 TEU, future operations of EASO/FRONTEX & hotspots**	**Effect on reception & SAR capacity across the EU, human rights and civil society protection, public opinion**

Conditionality of external funding	Migration	↓ (upcoming EU-agenda)	**MPG & CEPS**	**Implementation & monitoring of effects of trust funds & migration partnerships: focus on border management, asylum & effective development cooperation**	**Implementation and negotiations ongoing, monitoring the EU Emergency Trust Fund for Africa e.g. Libya, Niger and Ethiopia)**	**Effect on migration flows, human rights & protection space**
Return rates	Migration	↓ (upcoming EU-agenda)	**CEPS**	**Definition of returnable & non-returnable, issuance of return decisions & mutual recognition, readmission, role of FRONTEX, the"Return Handbook" of the Commission.**	**Significant pressure on implementation of Return Action Plan, Return Expert & Contact Groups, agencies, in cooperation with NGOs & practitioners**	**One of top current and future priorities for EU institutions & Member States, may lead to major EU legislative change to increase return rates**
Better regulation for for support for social inclusion of the undocumented	Integration	↑ (agenda setting)	**MPG & CEPS**	**Support to undocumented as required under EU law & directives with specific attention to labour market integration**	**Links with future AMIF/MMF funding, NGOs capacity, implementation of Social Pillar & future European Labour Agency, effectiveness of current EU law**	**Large potential numbers of migrants concerned, Importance of EU funding & regulation for operational capacity on the ground**
Sustaining the mainstreaming of integration	Integration	↓ (upcoming EU-agenda)	**MPG**	**Implementation & monitoring of comprehensive integration plans at EU & national level with specific attention to labour market integration**	**Integration objectives across EU policies & programems (EC Action Plan post-2017) & new Multiannual National Programmes**	**Need to maintain agenda and renew commitments to integration from all DGs as part of new 2019-2024 Commission & after elections at national level**
Cities as direct service-providers	Integration	↓ (upcoming EU-agenda)	**MPG**	**Subsidarity & multilevel governance in the design, funding & implementation of integration policies and services. Coordination between Governments and local authorities. Specific attention to labour market integration**	**Complementarity with implementation of Urban Agenda actions, negotiation of AMIF/MMF & partnership principle**	**Increasing diversity of actors and importance of cities across EU as gateway destinations. Increasing need for rapid response & community-based integration involving multiple stakeholders**

Annex 2 – Discussion briefs

ReSOMA

RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

DISCUSSION BRIEF

July 2018

Carmine Conte

ASYLUM

Hardship of family reunion for beneficiaries of international protection

This project has received funding from the European Union's Horizon 2020 research and innovation program under the grant agreement 770730

ReSOMA Discussion Briefs aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- the social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

Download this document and learn more about the Research Social Platform on Migration and Asylum at: www.resoma.eu

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Discussion Brief

Hardship of family reunion for beneficiaries of international protection*

1. Introduction

Family reunification represents a safe and legal channel for migrants and beneficiaries of international protection to reunite with their separated family members and live a normal family life (UNHCR, 2018). It is a crucial element to foster integration of migrants and beneficiaries of international protection in host societies and promote economic and social cohesion in the Member States (Beaton, Musgrave & Liebl, 2018). The right to family reunification is widely recognised under EU law to promote the enjoyment of the right to family life by migrant families (Groenendijk, 2006). EU citizens who exercise their right to free movement in the Member States benefit from the favourable rules enshrined in the Directive 2004/38, also known as the Citizens' Rights Directive. By contrast, third-country nationals and refugees mainly rely on the provisions included in the Family Reunification Directive 2003/86 and other EU instruments to access family reunification.

In "UNHCR's experience, the possibility of being reunited with one's family is of vital importance to the integration process. Family members can reinforce the social support system of refugees and promote integration" (UNHCR, 2007). Beneficiaries of international protection lack the possibility to return home and enjoy the right to family. Therefore, in case the family member remains in the country of origin, the reunification procedure in the host country symbolises the only safe and feasible option for achieving family unity. To this end, EU law recognises more favourable conditions for beneficiaries of international protection to apply for family reunification in comparison with third-country nationals, where this right is included or limited as part of first admission or so-called sectorial directives – for seasonal workers, Intra-Corporate Transferees, Blue Card holders, students and researchers (MPG, 2011).

However, desk research and interviews with relevant stakeholders indicate the existence of legal gaps and barriers, which are in practice undermining the right to family reunification, especially for beneficiaries of subsidiary protection, humanitarian status holders and unaccompanied minors. UNHCR emphasises that "throughout Europe, many practical obstacles in the family reunification process lead to prolonged separation, significant procedural costs and no realistic possibility of success" (UNHCR, 2012).

Whereas family reunification is a right for EU

*By Carmine Conte (Migration Policy Group)

citizens as well as for refugees and other migrants, this discussion brief will focus on the right to family reunification for beneficiaries of international protection. The scope of the paper is to underline the ongoing reforms and policy developments on family reunification in the EU and its Member States that risk to increase hardship of family reunion for beneficiaries of international protection. In this regard, the present discussion paper seeks to identify those restrictive standards adopted at EU and national level which curtail the facilitated procedures for family reunification and the integration perspectives of beneficiaries of international protection.

2. Scoping the debate

The right to family life and family unity is enshrined in several international legal instruments such as the Universal Declaration of Human Rights (Article 16), the UN Convention on the Rights of the Child (CRC) (Articles 9 and 10) and the European Convention on Human Rights (Article 8). Article 9 of the CRC sets out that "a child shall not be separated from his or her parents against their will, except when… such separation is necessary for the best interests of the child".

The 1951 **Convention Relating to the Status of Refugees** instead does not expressly include the right to family reunification. However, the final act of the UN Conference of Plenipotentiaries on the Status of Refuges and Stateless Person emphasises that "the unity of the family … is an essential right of the refugee". It recommends "Governments to take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained … [and for] the protection of refugees who are minors, in particular unaccompanied children and girls, with particular reference to guardianship and adoption" (UN General Assembly, 1951).

Within the **Common European Asylum System** (CEAS) framework, specific provisions regarding family reunification for beneficiaries of international protection are included in the Directive 2003/86/EC (Family Reunification Directive) and in the Directive 2011/95/EU (Qualification Directive). In addition, Regulation 604/2013 (Dublin Regulation), establishing a common mechanism for determining the Member State responsible for examining an application for international protection, points out a specific regime for transfering requests for family reasons which must consider 'respect for family life' and unaccompanied minors' 'best interests' (Recital 13 and 14).

The right to family life is also embodied in EU primary law. Article 7 of **Charter of Fundamental Rights** of the European Union (EUCFR) indeed sets out that everyone has the right to respect for his or her private and family life, home and communications.

The **Family Reunification Directive** 2003/86 establishes common rules for exercising the right to family reunification in 25 EU Member States (excluding the United Kingdom, Ireland and Denmark). It determines the conditions under which family reunification is granted, establishes procedural guarantees and provides rights for the family members concerned (Groenendijk, Fernhout, Van Dam, Van Oers & Strik, 2007). The Directive specifically sets out the conditions for the exercise of the right to family reunification by third country nationals (referred to as

sponsors) who reside legally in a Member State.

It applies to the sponsor who is holding a residence permit issued by a Member State for a period of validity of one year or more or who has reasonable prospects of obtaining the right of permanent residence. Sponsors can be joined by their spouse, minor children and the children of their spouse in the Member State in which they are legally residing. Member States may also extend family reunification to unmarried partners, adult dependent children, or dependent parents and grandparents. The Directive includes a waiting period of no more than two years to apply for family reunification and may require the imposition of some conditions. For instance, the sponsor may be asked to prove adequate accommodation, sufficient resources and health insurance. Moreover, Member States may impose on third-country nationals the duty to comply with integration measures before or after arrival in the country.

It is worth noting that the Family Reunification Directive introduces special provisions for refugees who are not required to meet all the above conditions that apply for third country nationals. For instance, Chapter V of the Directive does not require refugees and family members to comply with income, housing and integration conditions if the application is lodged within three months of obtaining the refugee status (Article 12) (EMN, 2017). Refugees are also exempted from the requirement to reside in the Member State for a certain period of time, before being joined by his/her family member (OECD, 2016). Furthermore, Member States cannot reject an application for family reunification solely on the fact that documentary evidence is lacking (Art. 11).

Against this background, the Family Reunification Directive reveals significant gaps. It excludes from its scope asylum seekers, applicants for or beneficiaries of temporary protection and applicants for or beneficiaries of a subsidiary form of protection (Article 3(2)) (Peers, 2018). In practice, beneficiaries of subsidiary protection and humanitarian status holders are often required to prove that they are facing special hardship or the impossibility of family life in order to be accepted for family reunification.

In addition, the Directive is based on a restrictive concept of "nuclear" family and does not compel Member States to allow the reunification of different categories of family members such as unmarried partners, including same sex partners, siblings, parents and grandparents. Member States may authorise family reunification of other family members only if they are "dependent" on the refugee. Dependency is not defined under the Directive and Member States usually adopt a narrow interpretation of this concept which is merely linked to financial or physical dependency (ECRE, 2014). The Directive also includes a ''discretionary" clause in Article 9(2) according to which Member States may limit the scope of application of the relevant provisions to family ties predating the entry of the sponsor into their territory.

The Qualification Directive positively points out that ''Member States shall ensure that family unity can be maintained" (Art. 23). Nevertheless, it embodies a narrow definition of family members that refers only to those relationship which already existed in the country of origin and leaves out certain categories of relationship such as non-nuclear

and post-flight family members.

The **Dublin III** Regulation enshrines relevant provisions to ensure family unity and underlines that the Member State responsible for processing an asylum application is the one where a family member of an unaccompanied minor is legally present or where a family member has been recognised as a refugee or has an outstanding asylum application. The system delineated by the Dublin Regulation shows critical flaws that are obstructing family applications in practice. In particular, long family tracing procedures, excessive delays in age assessment and discordant evidential requirements between Member States are undermining the right of asylum seekers to have their claims processed in the same country. A restrictive interpretation of the definition of 'family members' embraced by several Member States excludes siblings, adult children, parents with adult children and unmarried couples from the scope of the Dublin Regulation (Danish Refugee Council, 2018). The current legal framework perpetuates family separation and jeopardises the goal to effectively realise family unity for beneficiaries of international protection.

3. EU policy agenda

Family reunification falls under the Union's competence and policy on migration. As noted in the previous section, EU law provides several legal instruments that are relevant to the family reunification rights of beneficiaries of international protection. In particular, it is worth noting that the Family Reunification Directive has been adopted under the old consultation procedure and it took about four years for the Council to find an agreement on the text. Unclear and restrictive provisions are likely to be due to the unanimity-based voting system in the Council.

EU law recognises privileged conditions for beneficiaries of international protection to apply for family reunification in comparison with ordinary third-country nationals, but it leaves broad leeway to Member States in implementing and granting family reunification. At national level, several Member States, such as Germany, Austria, Denmark, Finland and Sweden **narrowed family reunification rights** because of the increasing inflows of refugees in 2015 and 2016, particularly for those under temporary or subsidiary protection (M. D'Odorico, 2018).

Sweden introduced a temporary act in 2016 suspending family reunification for beneficiaries of subsidiary protection until 2019. Germany has suspended the right to family reunion for those under subsidiary protection from March 2016 onwards. As part of the coalition agreement to create a new grand coalition government, the two-year suspension period of family reunification for beneficiaries of international protection has been prolonged until July 31, 2018. Furthermore, a limit of only 1,000 people per month has been established to allow the entry of refugees in Germany on family reunification grounds. In Austria, a recent government legislative proposal seeks to introduce a new and potentially insurmountable obstacle for family reunification of refugees. Visa applications for family reunion may require the proof of legal residency in the first country of 'refuge'. However, relatives of refugees rarely reside lawfully in the first country of 'refuge', which is generally a state neighbouring the country of origin. Individuals who find temporary protection e.g. in Turkey or

Lebanon, often lack the right to legally stay and reside in the country. If adopted, it would be highly difficult for family members of refugees to fulfill this new requirement and join their families in Austria (Diakonie Flüchtlingsdienst, 2018).

Several **procedural and legal obstacles** in the Member States *de facto* limit the access to family reunification (UNHCR 2017, EMN 2017, ECRE 2014, Council of Europe Commissioner for Human Rights 2017, UNHCR 2018). Member States often differentiate between refugees and beneficiaries of subsidiary protection and ensure family reunification for non-refugees only in case of special hardship. The legal requirement according to which a minor must be under 18 when the decision to enjoy family reunification is made also compromises the family reunification of unaccompanied minors in some Member States. In general, a narrow legal approach towards the concept of eligible family members, restricted timeframes for lodging an application, costly and burdensome procedures hinder family reunification for all beneficiaries of international protection. Furthermore, the impossibility to access embassies abroad and the lack of appropriate family tracing procedures in the Member States reduce the chances to effectively reunite the sponsor with his/her family members.

The broad margin of discretion in interpreting and implementing the EU directives allow Member States to narrow the privileged access of beneficiaries of international protection to family reunification. The identified trends and controversies in access to family reunification may have a negative impact on the quality of life and integration opportunities of beneficiaries of international protection in the Member States. Family reunification is not fully recognised as a right to facilitate and foster the right to family life of migrants and beneficiaries of international protection. It may be instead used as a **migration management tool** for controlling and reducing migration flows from third-countries to the Member States.

In response to the ongoing political developments at national level, the Commission has decided to not reopen the legislative debate concerning the Family Reunification Directive. This topic is not a top priority in the current EU policy agenda and there have not been significant legislative developments since 2003 when the Family Directive was formally adopted. The Commission indeed shows the political willingness to address the topic by means of soft law instruments rather than legislative measures. In this regard, the Commission released in 2014 **Interpretative Guidelines** for a better enforcement of the Family Reunification Directive at national level. The Guidelines are not legally binding but aim to promote a uniform application and interpretation of the Directive's provisions. The Commission stressed that the Directive should not be interpreted as obliging Member States to deny beneficiaries of temporary or subsidiary protection the right to family reunification. The Commission considers that the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees and encourages Member States to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection.

As part of the **Common European Asylum System (CEAS) reform**, the Commission

presented on 13 July 2016 the Proposal for a Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection. The new Proposal positively clarifies that the notion of family member should consider the different particular circumstances of dependency and those families formed outside the country of origin, but before their arrival on the territory of the Member States (Council of Europe Commissioner for Human Rights, 2017). It also specifies that special attention should be paid to the best interests of the child. According to the Proposal, the concept of family member "should also reflect the reality of current migratory trends, according to which applicants often arrive to the territory of the Member States after a prolonged period of time in transit. The notion should therefore include families formed outside the country of origin, but before their arrival on the territory of the Member State". Currently, the proposal on the reform of the Qualification Directive is still under negotiations between the Council and the European Parliament.

This proposal needs to be seen in the light of the whole reform of the EU asylum system, in particular the reform of the Dublin system. The so-called "frontline" Member States such as Cyprus, Greece, Italy, Malta, and Spain expressed their concerns with regard to the ongoing negotiations on the CEAS and emphasised that the new rules would place a disproportionate burden on their national asylum systems (ECRE, 2018). In this respect, in order to alleviate those procedural burdens raising in challenging circumstances, the "frontline" Member States proposed a broader definition of family members that expressly includes siblings. Such an extension would indeed "facilitate family reunification and reduce uncontrolled secondary movements" (Position paper of Cyprus, Greece, Italy, Malta and Spain on the Proposal recasting the Dublin Regulation, 2018).

It may be said that the Commission is aware of the importance of addressing the key legal gaps in relation to family reunification. However, in the light of the current political context, the revision of the 2003 Directive would risk opening a Pandora's box and compromise the main guarantees included under EU law for family reunification of beneficiaries of international protection

4. Key issues and controversies

Family reunification is hampered by several factors which are contributing to narrow the rights of beneficiaries of international protection and diminish their chances of integration in the Member States. Bureaucratic hurdles and legal restrictions reduce the access to family reunification for beneficiaries of international protection. Lack of specific guarantees for unaccompanied minors, beneficiaries of subsidiary protection and humanitarian status holders contribute to separate many individuals from their closest family members for years (UNHCR 2018, EMN 2017).

Differential treatment between refugees and beneficiaries of subsidiary protection

One of the central controversies is the total exclusion of beneficiaries of subsidiary protection and humanitarian status holders from the scope of legislation on family reunification or the application of stricter rules when compared to refugees. Several Member States indeed apply restrictive requirements

for the family reunification of beneficiaries of subsidiary protection without taking into account individual circumstances and the conditions of vulnerable categories such as disabled and elderly people.

Long waiting periods, short application deadlines, high fees, income and integration requirements and heavy evidential burdens represent the most common barriers faced by beneficiaries of subsidiary protection seeking family reunification. In some Member States (e.g. Austria, Latvia and Denmark) a waiting period up to two or three years is required for beneficiaries of subsidiary protection to apply for family reunification. This condition raises several issues in terms of integration perspectives of beneficiaries of subsidiary protection who are separated from their family member for such a long time. The CJEU clearly held that the Family Reunification Directive's objective is to enable effective integration of beneficiaries of international protection (CJEU, Case C-540/03). Different national rules that impose longer waiting periods on subsidiary protection holders can be adopted only when their effective integration in the country is possible by other means (ECRE, 2016). By contrast, this practice may encourage beneficiaries of subsidiary protection to return to their countries due to the impossibility to reunite with their family members within a reasonable timeframe. UNHCR does not justify the differential treatment between refugees and beneficiaries of subsidiary protection, as neither category can safely return home to enjoy the right to family unity (UNHCR 2007).

The requirement to prove impossibility and hardship for ''non-refugees"

Beneficiaries of subsidiary protection and humanitarian status holders are frequenlty required to meet further conditions to access family reunification and prove that they are facing special hardship or the impossibility of family life.

Member States can impose an integration requirement on applicants for family reunion before entering the country as referred to in the first subparagraph of Article 7(2) of Directive 2003/86. This requirement may apply to all categories of third-country nationals, except when they are joining a refugee (Peers 2015). In recent years, several Member States have required non-EU citizens to comply with integration measures, such as tests for language or civic knowledge, to join their family members without a refugee status. Integration measures are likely to make family reunification impossible or excessively difficult for individuals with lower incomes and level of education. However, Member States may adopt a 'hardship clause' to exempt third-country nationals from complying with the additional requirement on health or other specific grounds.

For instance, in Germany, the Residence Act sets out that language skills requirements may be waived, if the family reunification takes place with a third-country national in Germany who is a beneficiary of subsidiary protection holding a residence or settlement permit (EMN, 2017). Moreover, on 17 March 2016, a transitional period entered into force for beneficiaries of subsidiary protection which does not allow family reunification, except in cases of special hardship. Similarly, the Dutch government has implemented the Family Reunification Directive by introducing an integration requirement demanding third country nationals to take a civic integration exam at the embassy in their country of

residence and test their knowledge of the Dutch language and society to apply for family reunification. According to Dutch law, "there are grounds for applying the hardship clause if, as a result of a set of very special individual circumstances, a third country national is permanently unable to pass the basic civic integration examination" (Article 3.71a(2)(d) of the Vb 2000).

The implementation of the 'hardship' provision is often very restrictive and impedes beneficiaries of subsidiary protection and humanitarian status holders to enjoy family reunification. In the case of *Minister van Buitenlandse Zaken v K and Abut*, the Court of Justice clarified the conditions that non-EU national must meet to join a family member under the Family Reunification Directive (Case C-153/14, 2015). The CJEU emphasised that the 'integration' condition cannot undermine the main purpose of facilitating family reunion and the 'hardship clause' in Dutch law is too narrow in comparison with the provision of EU law. The Court positively clarified that integration measures must aim "not at filtering those persons who will be able to exercise their right to family reunification, but at facilitating the integration of such persons within the Member States". Specific individual circumstances, "such as the age, illiteracy, level of education, economic situation or health of a sponsor's relevant family members" must be taken into consideration to dispense those family members from the requirement to pass an integration test.

Family members of beneficiaries of subsidiary protection and humanitarian status holders are called to prove those 'special circumstances' pertaining to the individual case that objectively form an obstacle to meet the requirement. For instance, the fact that the fees relating to an examination and the travel costs to an embassy are too high may constitute an evidence of the impossibility to exercise the right to family reunification. Individuals who have lower incomes and lack a high level of education must provide burdensome evidence in order to trigger the hardship clause and overcome the main barriers to family reunification. The hardship clause imposes a very high bar to meet and the requirements established by the law are rarely waived in practice on the basis of this clause (Strik, de Hart & Nissen, 2013).

Unaccompanied minors

The situation of refugee unaccompanied minors is also highly controversial as they face several obstacles to enjoy family reunification. For instance, the legal requirement according to which a minor must be under 18 when the decision on the asylum application is made represents a serious hardship for family reunification. This condition implies that, when a minor reaches the age of 18 in the course of the asylum procedure, the Member State is not obliged to authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives. The practice to postpone the decision of an asylum application is implemented by national authorities to impede the right of family reunification of young refugees.

To overcome this legal conundrum, on 12 April 2018, the Court of Justice of the European Union, in the case C-550/16 *A & S*, was called to clarify which date is determinative to qualify a person as an unaccompanied minor: the one

of entry in the Member States concerned or the one of the submission for family reunification. The Court positively found that the applicable date for determining whether a refugee is an unaccompanied minor for the purposes of Article 2(f), and therefore entitled to family reunification with his or her parents, is the date on which he or she entered the state and the date on which he or she made the asylum application (Groenendijk and Guild, 2018). This judgment is crucial to recognise as 'minors' those third-country nationals or stateless persons who are below the age of 18 at the time of their entry into the territory of a Member State, but who attain the age of majority during the asylum procedure (Peers, 2018). To the same extent, it reduces the Member States' margin of discretion to apply the provisions on family reunification for unaccompanied minors and frustrates the Family Reunification Directive's goals.

Concept of family member

EU law leaves wide flexibility to Member States when deciding the categories of family members who are eligible to access family reunification. The nuclear concept of family in practice excludes from family reunification several categories of individuals such as parents of adults, adult children, same sex partners and non-married partners who have not been able to live in a stable relationship with the sponsor (Danish Refugee Council, 2018). The interpretation at national level of the concept of 'dependency' encompassed by the Family Reunification Directive may disregard social and emotional factors and therefore exclude adult children, parents of adult, siblings and non-officially married partners (ECRE and Red Cross, 2014).

The nuclear concept of family may also not reflect the reality of those evolving family structures and ties that result from forced displacement. Reports shows that in situations of armed conflict or internal violence, households are often composed of children whose parents are no longer alive or have been reported missing. Family links are also formed during flight and exile, as beneficiaries of international protection are forced to spend several months or years in transit countries or in camps before being able to reach the Member State.

Restricted timeframes for lodging an application

Several countries also impose a 'three-month time' limit to apply for family reunification under more favourable conditions, otherwise additional stringent requirements have to be met by the sponsor. In practice, this deadline jeopardises family reunification because of the impossibility for beneficiaries of international protection to collect the necessary documents and timely attend appointments at the relevant embassies. Moreover, most beneficiaries of international protection need to reach a minimum level of financial and employment stability in order to reunite with their families and provide them adequate living conditions (UNHCR, 2012). The 'three-month time' limit is a short period of time which may constitute an obstacle to family reunification, as the sponsor often lacks the financial means to effectively support members upon their arrival to the Member State.

Lack of family tracing procedures and impossibility to access embassies

As mentioned above, the lack of family tracing services hinders the possibility for beneficiary

of international protection to reunite with their family members. A request for family reunification can be lodged only when the sponsor is aware of the location of the family member he/she wishes to reunite with. Beneficiaries are therefore forced to rely on NGO support in order to locate family members when their location is unknown. Furthermore, Member States may require family members to lodge applications in their embassies or consulates within the country of origin. However, it is worth noting that some EU countries have closed their diplomatic offices in Syria and other countries of conflicts. This context forces individuals to apply for visa and undertake long and expensive journey in order to reach the country where the closest embassy is available (ECRE and Red Cross, 2014).

Burdensome and costly procedures

The procedure to apply for family reunification is characterised by burdensome and costly requirements. Beneficiaries of international protection often lack adequate access to detailed and precise information in a language that they can understand. Official authorities do not systematically provide sufficient information regarding requirements and deadlines to access family reunification and enjoy more favourable conditions (UNHCR, 2017).

Beneficiaries of international protection are also required to submit official documents to apply for a residence permit and prove family links such as passport, birth and marriage certificates. However, the submission of these documents is in practice highly difficult as beneficiaries of international protection must approach the embassy of their country of origin to obtain the relevant documentation. This practice may increase the risk for them and family members of being persecuted in the country of origin. Furthermore, non-compliance with evidential and bureaucratic requirements may result in critical delays of the entire reunification procedure as cases are reviewed on a case-by-case basis.

Overall, the family reunification procedure can be a major financial burden for all family members. Costs related to visa applications and embassy fees, documents translation and verifications, travels to the Member States may constitute an onerous financial obstacle to family reunification (ECRE and Red Cross, 2014). In some countries, the average fees and costs for family reunification are significantly higher in comparison with the minimum income level of social assistance provided by the Member States (NIEM, 2018).

5. Potential impacts of policies adopted

EU and international human rights standards

- EU and national policies restricting family reunification **threaten the right to family life and unity** of beneficiaries of international protection as established under international human rights law in the Universal Declaration of Human Rights, in the Convention on the Rights of the Child and in the European Convention on Human Rights.
- Restrictive legislations that unequally differentiate between refugees and beneficiaries of subsidiary protection raise critical legal issues with regard to their compatibility with the **prohibition of discrimination under Art. 14 ECHR** and

the general principle of non-discrimination of EU law. Article 14 of the ECHR (non-discrimination) prohibits discrimination based on 'other status' and requires strong justification for differences in treatment between groups of individuals. In the case of *Hode v Abdi*, the Court held that "the argument in favour of refugee status amounting to other status would be even stronger, as unlike immigration status refugee status did not entail an element of choice". This judicial interpretation may imply that also subsidiary protection falls under the concept of 'other status' of Art. 14 ECHR and therefore require that differential treatments are justified only to pursue a legitimate aim through proportionate means (Council of Europe Commissioner for Human Rights, 2017). The ECtHR's case law may potentially influence EU and national law by requiring Member States to provide objective and reasonable justifications for allowing differences in treatment between refugees and beneficiaries of subsidiary protection (M. D'Odorico, 2018).

Political implications

- The topic of family reunification is high on the political agenda in several Member States (i.e. Germany, Austria and Sweden) which are introducing restrictive provisions to reduce access to family reunification for beneficiaries of international protection. Family reunification is increasingly becoming a **migration management instrument** for the Member States to slow down migration from third-countries.

Inclusiveness of European society

- Family separation has a major impact on integration perspectives of beneficiaries of international protection and social cohesion in the Member States. According to the Preamble 4 to Directive 2003/86/EC, "family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty." To this end, Member States should ensure rights and obligations for beneficiaries of international protection that are comparable to those of EU citizens. Family unity is essential for fostering **integration and societal cohesion** in economic, social, and cultural life. Forced family separation may instead negatively affect mental health and wellbeing of beneficiaries of international protection families who experience feelings of stress and abandonment.

Migration trends and dynamics

- A comprehensive and uniform implementation of the Family Reunification Directive across the Member States would help to stabilise the situation of beneficiaries of international protection and reduce secondary movements in Europe. The lack of favourable family reunification

provisions in some Member States may indeed induce migrants to choose different destination countries and **increase movements through borders**. Evidence shows that family reunification represents a fundamental driving factor for asylum seekers when they choose a destination country.

- The lack of fair family reunification procedures and rights may also be one of the causes of the so-called **holiday refugee phenomena** and the voluntary return of asylum-seekers, beneficiaries of subsidiary protection and humanitarian status holders to their country of origin. There is indeed an increasing trend of refugees who travel to their countries of origin because of sickness or death of an immediate relative. This situation may put at high risk the safety of beneficiaries of international protection and also may lead to reopening their asylum case in the Member States.

- Absence of quick and accessible legal channels for family reunification may induce migrants to resort to **human smugglers**

EU international relations

- The improvement of family reunification procedures and rights in the Member States may **reinforce the role of the EU** in setting the agenda on migration at international level.

- Those countries hosting the highest numbers of refugees around the world would expect to enhance their relations and partnerships with the EU to address the refugee crisis. In this regard, beneficiaries of international protection should have access to a wider set of safe and legal channels to reunite with their family members in Europe. By doing so, the EU may lead the development of the international agenda on migration and the ongoing negotiations on the **Global Compact**.

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ReSOMA - Research Social Platform on Migration and Asylum is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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DISCUSSION BRIEF

July 2018

Roberto Cortinovis

ASYLUM

Responsibility sharing in EU asylum policy

ReSOMA Discussion Briefs aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

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Discussion Brief

Responsibility Sharing in EU Asylum Policy*

1. Introduction

As a result of the increase in the number of asylum seekers arriving in Europe during 2015 and 2016, the debate on the distribution of asylum responsibilities among member states of the EU has gained relevance, leading to the introduction of several emergency measures aimed at addressing what was perceived as a 'crisis' situation. An emergency relocation mechanism was adopted to the benefit of member states under pressure: specifically, in September 2015, the Council adopted two decisions regarding the relocation of 106,000 asylum seekers from Greece and Italy to other member states to take place over 24 months from the adoption of the decisions. In addition, in order to provide operational assistance to 'frontline' member states, the 2015 EU Agenda on Migration laid down the 'hotspot approach to migration', which entails the deployment of EU agencies – Frontex, the European Asylum Support Office (EASO) and Europol – to conduct a variety of tasks. These include the screening of third country nationals (identification, fingerprinting and registration), provision of information and assistance to applicants of international protection and preparation for removing irregular immigrants.

The difficulties experienced since 2015, however, have clearly underlined the lack of pre-agreed criteria and measures to effectively manage situations of large inflows of asylum seekers and to equitably share responsibility among member states. To remedy these recognised structural weaknesses, in 2016 the Commission launched an overall reform of the Common European Asylum System (CEAS), which also foresees a set of new provisions related to solidarity and responsibility sharing. In particular, the Commission proposed a reform of the Dublin system that foresees the introduction of a corrective allocation mechanism that would be activated automatically in cases where a member state has to deal with a disproportionate number of asylum seekers. Moreover, the Proposal for a Regulation on the European Union Agency for Asylum presented by the Commission in May 2016 takes stock of the hotspots' experience by enhancing EASO's mandate and resources. The proposal assigns new tasks to the agency in the field of operational support, including assessing asylum applications.

The suggested reform of the CEAS places a set of crucial choices in front of both member states and EU institutions that will shape EU asylum policy in the next years and, in light of the increasing salience of asylum issues in EU debates, also act as a testing ground of the EU capacity to effectively respond to a pressing policy challenge, while upholding the principles and obligations enshrined in the Lisbon Treaty. In this context, the principle of solidarity and fair sharing of responsibility, as well as its practical implementation, is both a key issue and major fault line in debates on the future of EU asylum policy.

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2. Scoping the debate

During the first stage of development of the EU's asylum policy (2000–05), most of the efforts were concentrated on legislative harmonisation and, specifically, on the adoption of a set of legislative instruments to achieve that aim (EASO 2016). The focus on harmonisation was logical at the time, since EU asylum policy was taking its first steps and the EU Treaties provided only a limited legal basis for adopting solidarity-related measures in this field. It thus comes as no surprise that, except for the limited provisions included in the Temporary Protection Directive adopted in 2001, the rest of the asylum instruments adopted in that period contained no provisions related to responsibility sharing through the physical transfer of asylum seekers and beneficiaries of international protection.

The 1990 Dublin Convention, and subsequently the Dublin Regulation, allocated responsibility for asylum applications on the basis of a set of criteria, but no mechanism was foreseen to alleviate pressure if the application of these criteria led to an unequal distributive effect (Garlick 2016). In fact, the Dublin system assigns responsibility to the state that has played the most important part in the entry or residence of the person concerned, such as the state issuing a valid residence permit or visa, or the state whose borders have been regularly or irregularly crossed by the asylum seeker on his or her way to the EU (Hurwitz 1999).

The 2007 Lisbon Treaty allowed the CEAS to move beyond minimum standards, providing a legal basis for the adoption of a common EU policy on asylum, subsidiary protection and temporary protection. According to Art. 78(1) of the Treaty on the Functioning of the European Union (TFEU), EU policies on asylum should be aimed at offering appropriate status to any third country national requiring international protection, ensuring compliance with the principle of non-refoulement, fully respecting the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol, and other relevant international treaties. More broadly, the EU Charter of Fundamental Rights (and in particular, its Art. 18 on the right to asylum) must be taken into account when designing and interpreting EU rules.

Crucially, the Treaty of Lisbon elevated solidarity to the rank of a founding principle of EU migration and asylum policy. Art. 80 TFEU provides that EU migration and asylum policies "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications between the Member States". The introduction of Art. 80 TFEU means that solidarity is no longer simply a subject for political debate but a legal obligation that must be implemented in all the policies adopted by the EU on migration and asylum (De Bruycker & Tsourdi 2016). At the same time, observers have pointed out that solidarity in asylum policy can take different forms. While Art. 80 TFEU explicitly mentions "financial implications", other means are available to give substance to this principle, such as relocating asylum seekers, enhancing operational support through EU agencies or establishing links with other policy fields. This implies that EU institutions retain a margin of appreciation when deciding what specific action is to be adopted (Thym and Tsourdi 2017).

2011 was crucial for debates on solidarity in asylum policy at the EU level. In fact, that year about 50,000 people from North Africa arrived in Italy over ten months, while the conflict that had begun some months earlier in Syria was beginning to produce the first flows of refugees towards several European states. In 2011, moreover, the respective *M.S.S.* and *NS/ME* cases were decided by European courts (see section 4 below). Those judgments raised serious concerns over the compatibility of national systems for asylum reception with fundamental rights standards, thus undermining the principle of

mutual trust on which the Dublin system is based. That difficult situation pushed EU institutions to publicly outline their vision on solidarity in asylum matters (Garlick 2016). In a Communication on Enhanced intra-EU Solidarity in the field of Asylum released in December 2011, the Commission articulated some of the dilemmas related to the establishment of an EU asylum policy based on solidarity. While acknowledging the "Union's responsibility to assist" member states confronted with increasing arrivals of asylum seekers, the Commission expressed the view that "solidarity must be coupled with responsibility" for fulfilling obligations established in international and European law, adding that "the need to keep one's house in order to avoid impacts on other Member States is a key aspect of solidarity" (European Commission 2011).

In that way, the Commission articulated the opposition between two alternative ways of understanding solidarity, which has continually resurfaced in EU policy debates. In one vision of solidarity, member states facing 'particular pressure', irrespective of its cause, should receive support; in the alternative vision, solidarity should be preceded by a member state's readiness to accept and fulfil its responsibilities established under EU law. This discussion has often turned into a dialogue of the deaf. Some member states have called for respect of EU law (in particular the fingerprinting of irregular migrants and asylum seekers under the EURODAC Regulation) as a precondition for introducing responsibility-sharing mechanisms. By contrast, another group of states (i.e. those states placed at the external border of the EU) have repeatedly denounced the unequal distributive effect of the system currently in place, calling for fair sharing of responsibility (De Bruycker & Tsourdi 2016).

Another central dimension of the debate on solidarity, in both the academic and policy domains, has addressed the forms in which solidarity should be conceptualised and operationalised, be it through sharing "norms", "money" or "people" (Noll 2000; Thielemann and Armstrong 2012). Analyses of EU policy-making in the field of asylum have identified in this respect how the majority of measures implemented so far have been of an operational, technical or financial nature. The bulk of efforts on operational solidarity have been ensured through the engagement of EASO, established in 2010. In the Multiannual Financial Framework for 2014–20, financial solidarity is guaranteed by the Asylum, Migration and Integration Fund. By comparison, so-called physical solidarity, that is, the EU transfer of asylum seekers or beneficiaries of international protection among member states, has played only a marginal role in EU policy, at least until the introduction of the temporary relocation mechanism in 2015 and the ensuing debate on reform of the Dublin system.

The limited scope of EU initiatives to increase solidarity in EU asylum policy (particularly by physically redistributing asylum seekers among the member states) has been the object of widespread criticism. More fundamentally, the Dublin system has raised several concerns among both academic and civil society actors for its inherent inability to equitably share responsibility among the member states and also towards asylum seekers. The 'first country of entry' rule, following which an asylum claim is to be allocated to the member state most responsible for the presence of an asylum seeker in the EU, has been widely criticised for placing a disproportionate burden on member states at the EU external border, thus shifting, rather than sharing, responsibility (Carrera et al. 2015).

3. EU policy agenda

As a result of the difficulties experienced in recent years by member states in managing the increasing number of asylum seekers arriving in their territory,

the debate on the distribution of asylum responsibilities has taken priority on the EU agenda. Over a very short timeframe, a set of new initiatives has been launched, with the objective of providing support to frontline member states facing disproportionate pressure on their asylum systems.

The hotspots approach to migration management was presented by the European Commission as one of the building blocks of the EU's response to the 'refugee crisis'. The aim of the hotspots approach is to provide coordinated, on-the-ground operational support to frontline member states in dealing with large inflows of arrivals of migrants at sea. The May 2015 EU Agenda on Migration specified that the hotspots approach entails operational deployment of different EU agencies, notably Frontex, EASO and Europol, whose activities are coordinated by a Regional Task Force in each member state where hotspots are in operation – namely Italy and Greece. In this context, EASO has been tasked with helping to register asylum requests and prepare case files (Neville et al. 2016).

Alongside operational support, a temporary relocation mechanism was adopted in 2015 to support Italy and Greece: specifically, in September 2015, the Council adopted two decisions regarding the relocation of 106,000 asylum seekers from Greece and Italy to other member states to take place over 24 months from the adoption of the decisions. The adoption of the emergency relocation mechanism ignited a heated debate among member states, with a group of them declaring their principled opposition to any kind of mandatory redistribution mechanism. In June 2017, the Commission launched infringement procedures against the Czech Republic, Hungary and Poland for non-compliance with their obligations under the scheme (European Commission 2017). In an implementation report published in March 2018, the Commission took stock of the two-year-old initiative: about 34,000 people, more than 96% of all eligible applicants[1], had been relocated, "with almost all Member States contributing" (European Commission 2018).

In 2016, the Commission launched an overall reform of the CEAS, which aims, among other things, to provide for structural responses to responsibility-sharing issues raised by the refugee crisis. The Commission's proposal on the reform of the Dublin Regulation foresees the introduction of a permanent allocation mechanism that would be activated automatically in cases where member states have to deal with a disproportionate number of asylum seekers. The application of the corrective allocation for the benefit of a member state could be triggered automatically where the number of applications for international protection for which a member state is responsible exceeds 150% of the figure identified in a 'reference key'. The key is based on two criteria with equal 50% weighting: the size of the population and the total GDP of a member state (European Commission 2016a).

The reform of the Dublin system has been the subject of fierce controversy within the Council. As was the case of discussions related to the temporary relocation mechanism adopted in 2015, Visegrad countries have resolutely opposed any proposal introducing a mandatory and automatic distribution system under the Dublin Regulation. On the other hand, a group of southern member states (including Cyprus, Greece, Malta, Italy and Spain) have expressed concerns about the direction taken in discussions by the Council, indicating a set of 'red lines' regarding a possible compromise for the Dublin reform. Those member states consider that their efforts in the control of EU external

[1] Eligibility for the relocation scheme was limited to applicants in clear need of international protection and belonging to a nationality with an EU-wide average recognition rate of 75 percent or higher (Guild et al. 2017).

borders and in search and rescue operations should be considered when setting up new rules on relocation of asylum seekers. Moreover, according to southern states, other aspects of the reform under consideration, in particular the mandatory use of pre-Dublin checks based on safe country rules and extension of the period of responsibility for asylum applicants (ten years according to a compromise proposal advanced by the Bulgarian Presidency) would place a disproportionate burden on their asylum systems (*Politico* 2018; Cortinovis 2018).

In November 2017, the LIBE Committee of the European Parliament (EP) adopted its report on the Dublin reform as a basis for interinstitutional negotiations (European Parliament 2017). The EP report calls for amending the Dublin responsibility criteria on the following main points: 1) deleting the irregular entry criterion; 2) expanding the criteria based on family links; 3) introducing academic and professional qualifications as relevant criteria; and 4) introducing a distribution mechanism between member states as the default rule when none of the criteria laid down in the Dublin's hierarchy apply. The EP report envisages the fair allocation of asylum seekers as a core component of the Dublin system, without distinguishing between normal and emergency circumstances. Furthermore, the EP report introduces an element of choice in the allocation process that represents an absolute novelty in the Dublin procedure. Specifically, the report envisages a process whereby the applicant is given five days to choose one of the 'bottom four' member states, i.e. those with the lowest number of asylum seekers, if none of the revised Dublin criteria advanced in the report apply (ECRE 2017; Maiani 2017).

Alongside allocation of responsibility for asylum claims, increasing operational support to member states in managing their asylum systems is another key element of the ongoing reform of the CEAS. The Proposal for a Regulation on the European Union Agency for Asylum presented by the Commission in 2016 aims to transform EASO into a fully-fledged agency by significantly expanding its mandate and resources (European Commission 2016b). The European Parliament and the Council reached a partial agreement on the file by June 2017. The final agreement, however, has not yet been formalised since parts of the new agency mandate are linked to other areas of the CEAS reform still under negotiation, in particular the Dublin system and the reform of asylum procedures (Tsourdi 2018).

Under the revised mandate assigned to the agency, so-called asylum support teams, which are composed of officials made available by the member states and coordinated by the agency, are assigned a wide array of tasks. These include assisting member states with the identification and registration of third country nationals and facilitating joint initiatives by member states in processing applications for international protection. In hotspot areas, the tasks assigned to EASO experts may include the registration of applications for international protection and, where requested by member states, the examination of such applications. In addition, following a development similar to that experienced by Frontex, the proposed regulation assigns the new agency a new monitoring role regarding the functioning of member states' asylum systems (Council of the European Union 2017).

4. Key issues and controversies

The Dublin system has been the subject of major controversy since its establishment three decades ago. While Dublin is considered by its supporters to be the 'cornerstone' of the CEAS, its operation has been characterised by substantial problems. One of the main criticisms addressed towards Dublin is its alleged failure to further the objective of solidarity and a fair sharing of responsibility for asylum within the EU as enshrined in Art. 80 TFEU. The Parliamentary Assembly of the Council of Europe,

for example, has declared that the Dublin system is "dysfunctional and ineffective and should be urgently reformed to ensure 'equitable burden sharing' among member States" – a position shared by the Human Rights Commissioner of the Council of Europe (Council of Europe, Parliamentary Assembly 2015; Muižnieks 2015).

The above criticisms should come as no surprise given that, among the provisions included in the Dublin Regulation, there is no mention of the issue of responsibility sharing. The system's original purpose was to introduce a set of rules to swiftly allocate responsibility for asylum claims among the member states, without taking into account questions of overall numbers, capacity or other criteria aimed at harmonising outcomes (Garlick 2016). Far from equally distributing asylum seekers across the EU, several observers have argued that the Dublin system is based on a logic that is antagonistic to responsibility sharing. Specifically, the most frequently used criterion for requesting transfers under Dublin, which assigns responsibility to the member state of 'first entry', places a disproportionate burden on member states situated at the external border of the EU (Guild et al. 2015a).

At the same time, it should be remembered that this circumstance has often not materialised in practice, owing to the extremely poor implementation of Dublin rules. The fear of incurring overwhelming responsibilities for asylum claims has in the past motivated frontline member states to refrain from registering incoming migrants, undermining the effective operation of the system (Maiani 2017, p. 15). As an example, during the 2015 'crisis', Dublin rules were largely ignored by transit countries adopting a 'wave-through policy', especially following the German government's temporary decision to grant protection to all Syrian refugees coming into its territory (Di Filippo 2017, p. 66).

Available statistics also reveal substantial implementation gaps: during the period 2008–12, on average some 35,000 outgoing Dublin requests were made annually; 80% of the outgoing requests were accepted, but only around 25% of the outgoing requests resulted in the physical transfer of a person from one member state to another (on average, about 8,500 persons annually) (EASO 2014, p. 30). According to an evaluation of the Dublin system requested by the European Commission, this very low proportion of transfers suggests that there are problems with the feasibility of the Dublin III Regulation, as it shows that member states only rarely succeed in implementing the last stage of the Dublin procedure, i.e. the transfer of applicants to other member states (European Commission 2015).

The Dublin system has been observed as being characterised by a double solidarity deficit, not only towards the EU member states concerned, but also towards the asylum seekers themselves (Carrera et al. 2017). The Dublin system is based on the general principle of 'mutual trust', which presumes that EU member states' asylum systems are fit to correctly implement EU asylum law. At the same time, implementation of the Dublin system has demonstrated that the presumption of safety for asylum seekers in all member states of the EU cannot be presumed as a basis for Dublin transfers.

In its landmark judgment *M.S.S.* v *Belgium and Greece* of January 2011, the European Court of Human Rights concluded that Greece was in violation of Art. 3 of the European Convention on Human Rights (ECHR) because of the extremely poor reception conditions to which an asylum applicant had been subject in Greece, which amounted to inhuman and degrading treatment, as well as the shortcomings in the asylum procedure, which placed the applicant at risk of refoulement. The Court also held that Belgium had violated Art. 3 of the ECHR by transferring the applicant to Greece without prior verification of Greece's compliance with EU and Greek standards in terms of asylum procedures, and for exposing the

applicant to detention and living conditions that are contrary to Art. 3 of the ECHR. The Court of Justice of the European Union (CJEU), in the case *NS/ME* of December 2011, also found that Dublin transfers to Greece could breach Art. 4 of the EU Charter of Fundamental Rights, which prohibits inhuman or degrading treatment or punishment. These cases marked a watershed in Dublin practices, forcing member states to suspend all Dublin transfers to Greece and even to include an amendment to the Dublin III Regulation specifying that no transfer should be executed towards a member state affected by systemic flaws in the asylum procedure and in the reception conditions for applicants (Garlick 2016).

Besides widespread divergences in asylum standards across the member states, which in some cases fall below international and European standards, the unfairness of the Dublin system is further exacerbated by the narrow and unidirectional way that the principle of mutual trust on which the system is premised is currently formulated. In fact, that principle only provides for the mutual recognition of negative asylum decisions issued by member states. Instead, neither Dublin nor other instruments in the CEAS provide for recognition of positive asylum decisions, which means that refugees who have been granted international protection in a member state cannot enjoy the rights associated with that status in another member state. Thus, the principle of mutual trust as currently applied in EU asylum policy only responds to the interest of states wishing to transfer responsibility to other states, and not to the interest of people who have been granted protection in a member state and would like to move elsewhere in the EU (Garlick 2016).

Both the UN High Commissioner for Refugees (UNHCR) and NGOs working in the field of asylum have referred to mutual recognition of positive asylum decisions as the logical long-term goal of the CEAS (UNHCR 2014; ECRE 2014). Along the same line, scholars have argued that mutual recognition of positive decisions to grant asylum, accompanied by mobility rights at an earlier stage than currently available to beneficiaries of protection, would address many of the dysfunctions of the Dublin system. In particular, it would reduce the importance of the member state in which an asylum claim is determined and the ensuing incentive for asylum seekers to undertake secondary movements to reach their preferred destination (Guild et al. 2015b; Mitsilegas 2017; Mouzourakis 2014).

Yet due to member states' reluctance to consider mutual recognition of positive asylum decisions, discussions in recent years have focused instead on how to 'correct' the current system by better sharing responsibility with member states under pressure, without changing its overall structure. The launch of the emergency relocation mechanism in 2015, generated a tense debate among member states, with a group of them declaring their principled opposition to any kind of mandatory redistribution mechanism. Further criticism was targeted at the rules governing the functioning of the mechanism, e.g. the criteria for determining eligible asylum seekers and the distribution key on the basis of which member states' quotas were to be calculated. Owing to a lack of commitment and operational difficulties, the relocation mechanism has experienced a difficult and unsatisfactory implementation process (Guild et al. 2017).

Slovakia and Hungary, which, like the Czech Republic and Romania, opposed the adoption of the relocation mechanism in the Council of Ministers, also brought an action for annulment of the second Relocation Decision in front of the CJEU. Nevertheless, in its judgment delivered on September 2017, the CJEU dismissed in their entirety the actions brought by Slovakia and

Hungary. [2] The Court made it clear that the relocation scheme established by the Council should be considered an appropriate measure to give effect to the principle of solidarity and fair sharing of responsibility, which applies when the EU common policy on asylum is implemented (Di Filippo 2017, p. 55).

In light of the controversies that have characterised the adoption and functioning of the emergency relocation mechanism, it is no wonder that discussions on solidarity and fair sharing of responsibility in the context of the envisaged reform of the Dublin Regulation have exposed major diverging views among relevant EU actors. Contrary to the Commission's proposal, the EP report on the Dublin reform envisages an automatic quota-based allocation of responsibility as the normal function of the system (European Parliament 2017). While analysts have welcomed the EP report as the 'boldest' proposal ever submitted for the reform of responsibility allocation, they have also underlined that the system therein envisaged is premised on the feasibility of substantially increasing the number of transfers of asylum seekers among the member states. However, one of the main lessons learned from the history of implementing the Dublin system is that transferring a large number of asylum seekers against their will, while respecting their fundamental rights, is a particularly daunting task (Maiani 2017).

While the reform of the Dublin system has monopolised EU debates in the last two years, another relevant dimension of solidarity in EU asylum policy concerns the provision of operational support to member states subject to particular pressure. EASO has been assigned a central role in the implementation of the hotspots approach in Italy and Greece. The tasks conducted by EASO in hotspots are manifold, including assistance in the implementation of the relocation process, the detection of document fraud, registration of relocation and asylum requests and practical support in the operation of reception centres. Moreover, since adoption of the EU–Turkey Statement in 2016, EASO has been directly involved in the processing of asylum requests in Greece's hotspots. Specifically, EASO officials have been tasked with independently conducting interviews with asylum seekers and recommending final decisions on individual cases to the Greek Asylum Service (Guild et al. 2017).

EASO's role in the examination of asylum claims assigned in Greece's hotspots has been considered by some commentators to exceed the mandate of the agency laid out in its founding regulation (Guild et al. 2017; Tsourdi 2016). Additionally, NGOs providing legal advice to refugees have identified a number of procedural shortcomings (related to the quality of interviews and opinions on asylum applications) that raise doubts about EASO's capacity to process applications for international protection, in respect of the principles of fairness and neutrality (ECRE 2016; HIAS & IRU 2018).

The Commission's proposal on a new EU asylum agency, which aims, among other things, to take stock of the expanded role assumed by EASO in hotspot areas, inevitably brings to the fore the question of the added value of models for the joint processing of asylum claims at the EU level. Analyses conducted so far have argued that 'joint' or 'supported' processing arrangements have the potential to improve asylum systems, especially by

[2] See the judgment in the joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary* v *Council* of the European Union, 6 September 2017(https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf).

fostering learning between member state authorities and sharing best practices (Guild et al. 2015a; Urth 2013). Still, it is important that concerns raised as to the legality and legitimacy of EASO's action (as in the case of Greek hotspots) are given proper consideration and legal certainty when defining joint processing mechanisms to be operated by the envisaged EU asylum agency.

5. Potential impacts of policies adopted in this area

EU and international human rights standards

Landmark judgments from European courts relating to Dublin transfers have shown how the application of the system could lead to serious violations of the human rights of asylum applicants. The reform of the Dublin system currently under negotiation touches upon a number of substantive and procedural issues – such as the amendment of responsibility criteria, rules on the mandatory

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application of accelerated and inadmissibility procedures before applying the criteria allocating responsibility, sanctions against asylum seekers who undertake secondary movements and remedies against transfer decisions – that require a comprehensive assessment as to their compliance with EU international and human rights standards.

Concerning operational solidarity, the direct involvement of EASO in the examination of asylum applications in the Greek hotspots has raised concerns from several sides regarding the protection of fundamental rights of asylum seekers. More specifically, it has been stressed that the use of fast-track inadmissibility procedures risks undermining the effectiveness of procedural safeguards to ensure access to protection. In light of this, the regulation on the EU asylum agency should include adequate provisions so as to guarantee that fundamental rights standards are fully respected in the fulfilment of the agency's tasks, including tasks carried out in hotspot areas.

EU rule of law and better regulation principles

Current debates on the Dublin reform show a stark disagreement among the main actors at the negotiating table on how to give effect to the principle of solidarity enshrined in Art. 80 TFEU. While some reform proposals seem to be inspired by a status quo rationale (i.e. preserving the structural elements of the current system), other proposals aim to produce a fundamental reform of the governance of the Dublin system. Against this background, it is important to recall once again the widespread recognition, even among EU policy-makers, that the Dublin system in its current form was not designed to ensure a fair sharing of responsibility and that its functioning may result in a disproportionate burden placed upon some member states.

The recognition that the Dublin system suffers from structural shortcomings points to the inadequacy of merely corrective measures, calling instead for a comprehensive reform of its design. Specifically, a broad reform of the Dublin system represents a crucial step towards making the system compatible with the principle of solidarity and fair responsibility sharing established in Art. 80 TFEU.

The proposal on an EU asylum agency includes a set of measures that enhance the mandate of the agency as well as the resources at its disposal. The reform introduces new competences for EASO in the provision of operational support and in

monitoring member states' asylum systems. The expansion of EASO's mandate raises a set of issues regarding the governance design needed to effectively carry out the new tasks assigned to the agency, as well as the legal framework that should regulate those tasks and the existence of adequate accountability mechanisms.

The issue of solidarity in EU asylum policy should not be considered merely an internal policy issue. Forced displacement is a global issue that requires cooperation at the international level in order to be addressed in an effective and sustainable manner. In 2016, the EU member states committed in the New York Declaration to achieve a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees. An efficient, sustainable, equitable system for sharing responsibility within the EU and providing support to member states under pressure is a precondition for the EU to honour its commitments at the global level, including by increasing resettlement efforts and opening additional legal pathways to access protection in Europe.

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RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

DISCUSSION BRIEF

July 2018

Roberto Cortinovis

ASYLUM

The Role and Limits of the Safe Third Country Concept in EU Asylum

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ReSOMA Discussion Briefs aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- the social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

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Discussion Brief

The Role and Limits of the Safe Third Country Concept in EU Asylum Policy*

1. Introduction

Cooperation with countries of origin and transit of migrants has featured prominently in EU responses to the so-called refugee crisis. The EU–Turkey Statement, agreed by EU heads of state and their Turkish counterpart in March 2016, is at the heart of this strategy. This statement enables the removal to Turkey of all irregular migrants coming to the Greek islands after 20 March 2016, including migrants not applying for asylum or whose applications have been found to be inadmissible in accordance with EU asylum law. The premise on which the transfers of asylum seekers from Greece to Turkey is based is that the latter can be considered a 'safe third country' for refugees.

The safe third country notion rests on the assumption that an asylum applicant could have obtained international protection in another country and therefore the receiving state is entitled to reject responsibility for the protection claim. In EU asylum law, the safe third country concept is applied as a ground for declaring applications inadmissible and barring applicants from a full examination of the merits of their claim, as is the case for the related concept of 'first country of asylum', which covers refugees who have already obtained and can again avail themselves of protection in a third country.

Beyond the crucial role it has played in ensuring the viability of the EU–Turkey 'deal', the safe third country notion also features prominently in the reform of the Common European Asylum System (CEAS) presented by the Commission in 2016. Specifically, a key provision of the proposed regulation on asylum procedures is to make mandatory the use of safe third country (and first country of asylum) criteria, instead of leaving it optional as is the case under legislation currently in force. Moreover, the Commission proposes to progressively move towards full harmonisation in this area, by replacing national safe country lists with EU lists within five years of entry into force of the regulation.

Far from being uncontroversial, however, the notion of a safe third country has traditionally attracted strong criticism on several grounds, not least due to its uncertain legal status under the 1951 Geneva Convention relating to the Status of Refugees. Critics have stressed the potential negative impact of safe third country rules on refugees' rights, in particular on access to protection and the non-refoulement principle. Furthermore, safe third country rules have been associated with a strategy of deflecting asylum seekers towards third countries, which risks undermining the principle of burden sharing on which the long-term sustainability of the international protection regime is based.

2. Scoping the debate

Throughout the 1970s and 1980s, faced with a

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negative economic outlook and with rising anxieties about migration within their societies, governments across Europe started to introduce a set of restrictive migration policies. The perception that a systematic misuse of the right to asylum was being perpetrated by 'economic migrants in disguise' legitimated the adoption of a *non-entrée* regime, which centred on restrictive visa policies, carrier sanctions and reinforced border controls (Hathaway 1993). The safe third country notion was one of the measures devised in that context, out of the conviction that adequate policy responses should be adopted to prevent 'forum shopping', that is, applicants' strategy of lodging multiple applications in different states to increase their likelihood of obtaining a positive decision (Moreno-Lax 2015).

The objective of preventing forum shopping and the related phenomenon of 'orbiting', whereby refugees are continually shuttled from one country to another without access to proper status determination, was also a central motivation for adopting the Dublin Convention in 1990. Although the Dublin system has often been seen as a 'burden-sharing tool', its goal is not to spread refugees equitably among Contracting Parties, but to introduce a set of criteria to swiftly assign responsibility for asylum seekers among them. The system is based on the fundamental assumption that member states may be considered 'safe' countries for asylum seekers, and for that reason, it is presumed that transfers from one member state to another do not violate the principle of non-refoulement. Seen against this backdrop, the ensuing development of safe third country notions in EU asylum law can be interpreted as an attempt to extend the logic underlying the functioning of the Dublin system also to countries outside the EU (Van Selm 2001, p. 3).

The term 'safe third country' is often used in public debates to denote a variety of situations. In particular, a distinction should be made between the two concepts of first country of asylum and safe third country. According to the UN High Commissioner for Refugees (UNHCR), the first country of asylum concept is generally applied in cases where a person has already, in a previous state, found international protection that continues to be accessible and effective for the individual concerned. The safe third country concept has been applied in cases where a person could have found or can find protection in a third state either in relation to a specific individual case or pursuant to a formal bilateral or multilateral agreement between states on the transfer of asylum seekers (UNHCR 2018).[3]

The notion of a safe third country (and that of first country of asylum) has been widely debated in the literature. As stated by Moreno-Lax, "saving non-refoulement and the refugee definition, possibly no other single notion in refugee law has prompted such a heated and lasting debate" (Moreno-Lax 2015). While scholars have questioned the legality of the safe third country notion, arguing that the Refugee Convention does not provide an adequate legal basis for its use, thus far debates have concentrated on identifying the necessary conditions for a third country to be considered safe in accordance with international refugee and human rights law (Foster 2008; Gil-Bazo 2006, 2015; Lambert 2012; Moreno-Lax 2015; Van Selm 2001).

Recently, in light of ongoing discussions on the use of safe third country rules at the EU level, the

[3] A related concept that is codified in EU law, which is not addressed specifically in this brief, is that of 'safe country of origin'. This concept is used to refer to a country whose nationals may be presumed not to be in need of international protection. The concept is defined in the EU Procedures Directive and is a ground for channeling an asylum application into an accelerated procedure. As in the case of the safe third country concept, the Commission's 2016 proposal on the asylum procedures regulation calls for increased harmonisation in this area through the establishment of an EU list of safe countries of origin. For a detailed discussion on the safe country of origin concept, see ECRE (2015).

UNHCR has summarised its position on this subject (UNHCR 2018). In particular, the UNHCR has focused on two main issues to be addressed when carrying out returns to safe third countries: a) the relevance of a connection between the refugee and the third country; and b) the issue of access to and level of protection that needs to be guaranteed by the third country to be considered safe.

Regarding the first issue, the UNHCR has consistently advocated a 'meaningful link' or connection between an asylum seeker and a third country that would make it reasonable and sustainable for her or him to seek asylum in that country. According to the UNHCR, aspects such as the duration and nature of any stay, and connections based on family or other close ties, should be seen as crucial for increasing the viability of the return or transfer from the viewpoint of both the individual and the state.

On the issue of access to and level of protection that should be available in a third country to be deemed safe, the UNHCR legal considerations stress the requirement to establish that asylum seekers have access in that country to standards of treatment commensurate with the 1951 Refugee Convention, its 1967 Protocol and international human rights standards (notably protection from refoulement and access to the legal right to pursue employment). According to the UNHCR, in order to ensure that access to protection is effective and enduring, being a state party to the 1951 Convention and its 1967 Protocol and basic human rights instruments without any limitations are critical indicators. On this point, the UNHCR further specifies that access to those standards may only be effectively and durably guaranteed when the state is obliged to provide such access under international law and has adopted national laws to implement the relevant treaties.

3. EU policy agenda

The recast Asylum Procedures Directive, adopted in 2013, gives member states the option not to examine an asylum application on the merits and to dismiss it as inadmissible on grounds that an applicant has already received protection in a first country of asylum, or may effectively obtain it in a safe third country. The Directive also lays down the criteria for applying the two concepts. Under Art. 35 of the Directive, the concept of "first country of asylum" entails that an asylum seeker has obtained refugee status in a third country and may avail him- or herself of this protection, or otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement. Art. 38 on the concept of "safe third country" lists five criteria for a country to be considered "safe", including the possibility for the applicant to request refugee status and, if found to be a refugee, to receive protection "in accordance with the Geneva Convention". The Directive also requires that an assessment must be made as to the reasonableness of requiring the applicant to apply for international protection in the safe third country, through the existence of a connection to that country; the presumption of safety must be rebuttable and applied on a case-by-case basis; and the presumption of safety of the country for an individual applicant as well as his or her connection with that country must be challengeable (Council of the European Union and European Parliament 2013; ECRE 2017).

A study of asylum legislative frameworks of EU member states conducted by ECRE in 2016 revealed considerable disparities in the way admissibility criteria based on safe third country notions have been incorporated in domestic asylum systems. The study found that a significant number of countries have not introduced the notions of first country of asylum (Austria, Belgium, Bulgaria, Italy, Sweden, UK, Switzerland) or safe third country (Belgium, France, Ireland, Italy, Poland). Hungary introduced a list of safe third countries in July 2015, including Serbia, FYROM and Kosovo among others, and

resorting to a systematic application of the concept in respect of Serbia, which has been widely criticised for disregarding fundamental rights and protection guarantees in the asylum process (ECRE 2016a).

On 13 July 2016, the Commission put forward a legislative proposal on reform of the Asylum Procedures Directive (European Commission 2016a). The Commission proposed to replace the current directive with a regulation establishing fully harmonised, common procedures for international protection. The main objectives of the proposed regulation are to reduce differences in recognition rates from one member state to the other, discourage secondary movements and ensure common, effective procedural guarantees for asylum seekers.

The proposed regulation introduces a set of new provisions regarding safe country concepts. Specifically, a key provision of the proposal is to make mandatory the application of safe third country (and first country of asylum) criteria as a ground for inadmissibility, instead of leaving this to the discretion of the member states as is the case under the current EU Asylum Procedures Directive. Moreover, the Commission proposes to progressively move towards increased harmonisation in this area, by replacing national safe third country lists with EU lists or designations within five years of entry into force of the regulation.

In addition, the proposed reform of the Dublin Regulation presented by the Commission in May 2016 introduces an obligation for member states to check whether an application for asylum is inadmissible on the grounds that the applicant comes from a first country of asylum or a safe third country before applying the criteria for determining the member state responsible under the regulation (European Commission 2016b). In order to ensure the efficient functioning of the Dublin system, when such pre-Dublin checks are applied by the member state of first entry, the proposed regulation on procedures also foresees that the duration of the examination of inadmissibility on the grounds relating to first country of asylum or safe third country rules should not take longer than ten working days.

At the time of writing, the asylum procedures regulation is still the object of negotiations between the Council and the European Parliament. The possibility of reaching a compromise on this proposal is linked to ongoing negotiations on other legislative measures that make up the 'asylum package' presented by the Commission in 2016, in particular the reform of the Dublin system. In this regard, a group of southern member states (including Cyprus, Greece, Italy, Malta and Spain) have voiced strong concerns about the overall direction taken in negotiations on the CEAS reform, pointing out how the envisaged rules would be disadvantageous for them. Those member states are refusing to introduce mandatory 'pre-Dublin checks' on applicants from safe third countries, arguing that such provisions would put an additional burden on their asylum systems, calling instead for inadmissibility checks to remain optional (ECRE 2018).

The LIBE Committee of the European Parliament (EP) adopted its report on the Asylum Procedures Regulation on 25 April 2018 as a basis to start interinstitutional negotiations with the Council. The EP Report introduces some important changes on safe third country rules. For example, contrary to the Commission's proposal, the EP would revise Art. 36 of the proposed regulation to keep the use of inadmissibility procedures optional. The EP report also sets a very high threshold in terms of the level of protection that should be available in a third country to be considered safe. According to the EP's position, the safe third country concept may only be applied when the applicant will receive in that country protection in accordance with the Refugee Convention (ratified and applied without geographical limitation) or will enjoy "effective protection" in that country equivalent to the

protection granted to refugees. Furthermore, the EP report states that a "sufficient connection" between the applicant and a third country is not ensured by mere transit but requires the existence of a previous residence or stay in that country (European Parliament 2018).

4. Key issues and controversies

A commonly held assumption among commentators is that the 1951 Geneva Convention relating to the Status of Refugees neither explicitly authorises nor formally prohibits the contested notion of a safe third country. According to some legal scholars, the 'silence' of the Refugee Convention regarding the right of refugees to choose their country of destination implies that states should be free to carry out removals to safe third countries as long as the non-refoulement principle stated in Art. 33 of the Convention is not violated and refugees are treated in the country of destination in accordance with recognised human rights standards (Hailbronner 1993; Thym 2018).

However, the majority of legal scholars have questioned the lawfulness of the safe third country notion, arguing that an interpretation in 'good faith' of the Refugee Convention implies that states should refrain from adopting practices that shift rather than share protection burdens and are thus not compatible with the object and purpose of the Convention (Moreno-Lax 2015, p. 718). From the point of view of rights accruing to individuals, the safe third country concept is also problematic in relation to Art. 31 of the Refugee Convention, which states that refugees must not be penalised for unauthorised entry. This is because the safe third country notion imposes an obligation on refugees to seek protection in the geographically closest safe place, punishing non-compliance with removal without full scrutiny of their protection claims (Moreno-Lax 2015, p. 669). More broadly, it has been noted that denying the will of refugees in the selection of the country in which to submit a claim may create barriers to effective integration, thus precluding the achievement of a durable solution for refugees, which is a key objective of the international protection regime (Van Selm 2001, p.25).

Yet concerning use of the safe third country notion, the overriding emphasis in debates has been on specifying the requirements for a country of transfer to be considered safe for refugees. Traditionally, the scope and applicability of the safe third country principle has been a source of disagreement between states, as emerged from the discussion carried out in the framework of the United Nations. While major destination countries (including Western European countries) have generally embraced an expansive interpretation of safe third country rules, maintaining that earlier presence of an asylum seeker in the territory of a state, either through transit or stay, implies the responsibility of that state, countries in regions of origin of refugees have stressed the negative impact of this approach, requiring evidence of a more substantial link with the refugee (Moreno-Lax 2017).

Similar controversies have accompanied the codification of safe third country rules in EU law and their application in specific cases. The proposal to 'mainstream' the use of safe third country rules in EU asylum policy by making their application mandatory has been one the main concerns raised by human rights advocates in relation to the proposed asylum procedures regulation. More specifically, criticism has centred on two main issues: the non-inclusion in the Commission's proposal of full ratification of the Refugee Convention without geographical limitation among the requirements for applying the safe third country concept, and the reference to "mere transit" as a sufficient condition for assuming a meaningful connection between the applicant and a third country (ECRE 2017).

Still, current discussions on safe third country rules

cannot be considered in isolation from the broader political context in which they take place. Critics have pointed to potential changes in the definition of safe third countries currently discussed at the EU level as a case of ad hoc legislation, that is, as a way to regularise existing practices like those carried out under the 2016 EU–Turkey Statement (Chetail 2016). The EU–Turkey Statement enables the removal to Turkey of all irregular migrants coming to the Greek islands after 20 March 2016, including those migrants not applying for asylum or whose application has been found to lack sufficient grounds or be inadmissible in accordance with the Asylum Procedures Directive. The statement is based on the implicit premise that Turkey is a safe third country despite the fact that Turkey maintains a geographical limitation to the 1951 Refugee Convention. This assumption has nonetheless been subject to widespread criticism by scholars, NGOs, the UNHCR and also the Parliamentary Assembly of the Council of Europe, not least in light of mounting proof that Turkey cannot actually be considered 'safe' for refugees given increasing political instability and widespread rule of law and human rights violations in the country.[4]

The implementation of the EU–Turkey Statement has been subject to scrutiny regarding compliance with criteria set out in EU law. According to the UNHCR (2016, p. 2), when a state is considering applying the first country of asylum or safe third country concept, the individual asylum seeker must have an opportunity within the procedure to be heard, and to rebut the presumption that she or he will be protected and afforded the relevant standards of treatment in a third country based on his or her personal circumstances. In addition, the Asylum Procedures Directive provides that an applicant must be able to appeal the inadmissibility decision before a court or tribunal and a have a right to remain pending the outcome of an appeal.

NGOs providing legal support to asylum seekers in hotspots in Greece have reported that asylum officials (including those deployed by the European Asylum Support Office) apply the safe third country rule in a stereotyped fashion, relying only on the existing legislation in Turkey and the diplomatic assurances given by Turkish delegates in the framework of the EU–Turkey Statement with no reference to or assessment of other reports by independent bodies, such as the UNHCR. Moreover, admissibility assessments are carried out in truncated border procedures with short deadlines and limited safeguards for the applicants (ECRE 2017; HIAS & IRU 2018). This way of handling asylum claims raises serious questions of procedural fairness and compliance with the level of scrutiny of country information required by the European Court of Human Rights (ECtHR). In the case of *Ilias and Ahmed* v *Hungary,* the ECtHR found the automatic application of the safe third country rule by Hungarian authorities and their failure to consider country of origin information from reputable international organisations (such as the UNHCR) as inappropriate for providing the necessary protection against a real risk of inhuman and degrading treatment.[5]

A last controversial point associated with an expanded use of safe third country rules in the CEAS is the impact of that policy choice beyond EU borders. In the 2016 New York Declaration, the international community reconfirmed its commitment to "a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States". As underlined by ECRE, deflecting protection

[4] See Carrera and Guild (2016), Peers and Roman (2016), Carrera, den Hertog and Stefan (2017), ECRE (2016b), Amnesty International (2016), UNHCR (2016) and Council of Europe, Parliamentary Assembly (2016).

[5] See *Ilias and Ahmed* v *Hungary*, Application No. 47287/15, ECtHR, 14 March 2017.

obligations to third countries through the mandatory application of safe country concepts stands in contradiction with that responsibility-sharing commitment (ECRE 2017).

Furthermore, as safe third country rules need to be accompanied by a readmission agreement in order to be applied, their expanded use is likely to be hampered by the same political and implementation issues that have so far limited the effectiveness of EU readmission policy (Carrera 2016). In particular, experts have highlighted the inherently asymmetric relation that exists between countries of destination and countries of origin or transit on readmission, pointing to the failure of EU policy to balance the costs incurred by countries of origin or transit with concessions on other strategic issues areas of interest to them, such as the opening of channels for legal migration (Cassarino 2018; Cortinovis 2018).

5. Potential impacts of policies adopted in this area

EU and international human rights standards

NGOs, independent scholars and also international organisations, such as the UNHCR and the Council of Europe, have warned about the potential impact of safe third country rules on access to asylum and respect of the non-refoulement principle. This is because the concept indirectly creates an obligation to seek asylum in the geographically closest safe state, punishing non-compliance with forced removal and limiting self-determination as regards the choice of the country of refuge. As a consequence, if this mechanism is not accompanied by adequate safeguards, the risk of refoulement may be substantial.

Some authors have even spoken of a 'domino effect', where the systematic use of safe third country rules creates a spiral of 'chain refoulement' that pushes refugees ever closer to the countries they have fled. In light of the above criticisms, current discussions on making mandatory the application of safe third country rules should carefully consider the potential impact of this policy choice on fundamental rights standards established in EU and international law.

EU rule of law and better regulation principles

The use of the Safe Third Country rule in the context of the EU-Turkey statement has raised concerns not only in relation to the status of Turkey a safe country, but also because of the specific legal nature of this "deal". In fact, the EU–Turkey Statement has been presented in the form of a 'press release', that is as a non-binding document concluded by the Heads of State or Government of the member states, acting outside the EU legal framework and decision-making process. The EU-Turkey statement is part of a trend at the EU level towards increased informalization of cooperation with third countries on migration issues that contrasts with the process of 'Europeanisation' of readmission policy sanctioned by the Treaty of Lisbon. The proliferation of extra-Treaty and "crisis-led" policy-making undermines the EU *acquis* consistency and is likely to exacerbate mistrust in EU inter-institutional relations. More importantly, as highlighted in the case of the EU-Turkey Statement, it precludes the possibility to adequately address potential violations of fundamental rights of asylum seekers and refugees.

In parallel, proposals to make mandatory the use of Safe Third country rules currently discussed at the EU level have been criticized as an attempt to "mainstream" contested practices carried out under the 2016 EU–Turkey Statement. As stated by the European Commission, consultations with interested parties revealed differing views on

rendering mandatory the use of the concepts of first country of asylum and safe third country for rejecting applications as inadmissible. While several member states stressed the need for measures aimed at making the system more effective, including through further harmonisation at the EU level, most representatives of civil society cautioned against the mandatory use of safe third country rules. In light of these divergent perspectives, EU co-legislators should carefully assess the added value of introducing harmonised rules on safe third countries at the EU level, against the alternative of leaving the use of these rules to the discretion of member states.

effect of safe third country rules, current debates on the use of this notion at the EU level should thus take into consideration the impact of policies in this field on the sustainability of the international protection regime. This is especially relevant at a time when the international community is in the process of negotiating a 'global compact on refugees', whose central aim is to address the need for more predictable and equitable burden and responsibility sharing on refugee issues among states.

EU international relations

The systematic use of safe third country provisions at the EU level may induce third countries, including major refugee-hosting countries, to follow this same strategy in order to limit access to protection on their territories. In September 2016, EU member states committed in the New York Declaration to achieve a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among states. Given the burden-shifting

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RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

DISCUSSION BRIEF

July 2018

Lina Vosyliūtė
Carmine Conte

MIGRATION

Crackdown on NGOs assisting refugees and other migrants

ReSOMA Discussion Briefs aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- the social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

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Discussion Brief

Crackdown on NGOs assisting refugees and other migrants*

1. Introduction

Civil society actors, such as non-governmental organisations (NGOs) conducting search and rescue (SAR) operations, and volunteers providing food, shelter and legal advice, have been the first responders to the so called 'refugee humanitarian crisis' in Europe (Carrera et al. 2015). They have filled the gaps left by EU agencies and national governments, for example saving lives at sea in the Aegean and the central Mediterranean. Civil society actors, by monitoring the human rights, treatment and living conditions of refugees and other migrants, also help to uphold the rule of law and enable democratic accountability for what is happening on the ground.

However, the political and operational priority to tackle migrant smuggling has impacted civil society actors assisting refugees and other migrants. In 2015, both the European agenda on migration (European Commission 2015a) and the European agenda on security (European Commission 2015b) declared the fight against migrant smuggling as a key political priority. The EU action plan against migrant smuggling (European Commission 2015c) sets out the specific actions to implement the above-mentioned agendas. In turn, the EU's financial and operational resources have been channelled to relevant EU and national agencies – the judiciary, law

enforcement, border and coast guard, and even the military.

The implementation of EU and national anti-migrant smuggling operations have taken place where civil society actors provide humanitarian assistance – at sea and in the hotspots – and also during the phases of transit and residence in the EU (Carrera, Allsopp and Vosyliūtė, forthcoming). Research indicates that the careful balancing of the legitimate political objectives of countering and preventing organised criminal groups involved in migrant smuggling with the right of association and humanitarian assistance has been challenged. This has resulted in considerable obstacles in the space for civil society actors – NGOs and volunteers to carry out their work (FRA 2014; Carrera et al. 2016; Fekete et al. 2017; Gkliati 2016). Since 2015, civil society actors providing humanitarian assistance and upholding the fundamental rights of refugees, asylum seekers and undocumented migrants have reported increased criminalisation of their activities (Carrera et al. forthcoming; PICUM 2017; FRA 2018). In addition, multiple restrictions have been adopted against civil society organisations (CSOs) in the member states that do

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not constitute criminalisation but which have other pervasive and chilling effects, leading to "shrinking civil society space" (Youngs and Echague 2017).

This discussion brief explores the kinds of developments taking place across the EU and outlines the political and legal trends limiting civil society space in the member states. The links between insecurities created among civil society actors and broader societal implications, such as effects on the rule of law, democracy and fundamental rights –particularly freedom of assembly and association – are also analysed. This discussion brief underlines that the crackdown on NGOs assisting refugees and other migrants is a multi-faceted phenomenon characterised by the increased restrictions and fear of criminalisation among all civil society actors assisting refugees and other migrants. The crackdown on civil society is especially visible in the context of rule of law backsliding and subsequent reduction of space for civil society to fulfil its mission to uphold the values of democratic society (Szuleka 2018).

2. Scoping the debate

2.1 Criminalisation of NGOs, facilitated by EU law

Three key factors have contributed to the unfolding of this phenomenon. First is the vagueness of the EU's main legal provisions in the 2002 Facilitators' Package on what constitutes the crime of migrant smuggling. It gives a wide margin of appreciation to the member states as to whether to criminalise actions that have a not-for-profit intent and whether to exclude humanitarian assistance from criminalisation. Second, the 'emergency' nature of the EU's response to the, so called, 'European refugee humanitarian crisis' has led to a blending of the different mandates of EU asylum, law enforcement and judicial agencies, and those for military operations. The 'fight against migrant smuggling' has been used with the underlying rationale of border management – as a way of preventing new arrivals rather than as a criminal justice one for prosecuting organised criminal groups (Carrera et al. 2015). Third, member states' unilateral decisions to shift the responsibility for the situation to civil society actors have prevailed, thus challenging the EU's founding values on democracy, rule of law and fundamental rights (Carrera and Lannoo 2018).

The 2002 Facilitators' Package represents the main EU legislative instrument to tackle migrant smuggling in the EU. The Facilitators' Package includes the Council Directive (2002/90) defining the crime (Council of the European Union 2002a) and its Framework Decision (2002/946) strengthening the penal framework across the EU (Council of the European Union 2002b). The Facilitators' Package constitutes the cornerstone of European policies tackling migrant smuggling and criminalising the facilitation of unauthorised entry, transit and residence (Carrera et al. 2016).

Yet, unlike the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (UN General Assembly 2000a), the Facilitators' Package does not insist on a "financial or other material benefit" requirement in order to establish the facilitation of entry as the base crime; however, it is a requirement for the facilitation of residence (Council of the European Union 2002a, Art. 1(1)). The current EU legislation contains a facultative exemption under the 'may' clause for humanitarian actors (Council of the European Union 2002a, Art. 1(2)). Thus, the vagueness left by the EU legislation on this matter and the lack of an obligatory exemption for humanitarian assistance falls short of the UN Protocol against the Smuggling of Migrants (UN General Assembly 2000a; UNODC 2017).

Many academics have reached the conclusion that the lack of a clear and mandatory exemption based on a humanitarian purpose risks increasing the criminalisation of NGOs and individuals who show solidarity with and provide assistance to migrants (e.g. Peers 2016: 477-478; Carrera and Guild 2015;

Allsopp 2012; Fekete 2009; Webber 2008; Gkliati 2016; Heller and Pezzani 2017). The recent developments indicate that even when exemptions are made, criminal prosecutions may still take place: for example, in Greece, five volunteers of Team Humanity and PRO-EM Aid were arrested and prosecuted, although the trial in May 2018 eventually acquitted them (European Parliament, Committee on Petitions 2017; Carrera et al. forthcoming).

2.2 Harassment and policing of NGOs beyond formal criminalisation

New trends in policing are emerging outside of formal criminalisation. In a number of EU member states, civil society actors have experienced different forms of policing, ranging from suspicion and intimidation to legal restrictions, limited access to funding, administrative penalties and criminal charges (Carrera, Allsopp and Vosyliute forthcoming; Szuleka 2018; Fekete et al. 2017; PICUM 2017; Gkliati 2016; Heller and Pezzani 2017).

In some countries, like Hungary and Poland, policing has occurred as a result of rule of law backsliding (Szuleka 2018), while in others, like Italy, Greece, France and the UK, as a by-product of formal and informal responses to the refugee humanitarian crisis that have reframed civil society activities as a "pull factor" (Carrera et al., forthcoming). Nevertheless, practices undermining the work of NGOs supporting irregular immigrants are being witnessed across the EU and follow a global trend (Kreienkamp 2017). In addition, academia and civil society have documented shifting attitudes in the public and media that coincide with the systemic interference with civil society actors – CSOs and individual volunteers engaging with refugees and other migrants.

Overall, the restrictive national legal frameworks and hostile policy environments reduce the capacity of civil society to effectively and independently promote the fundamental rights of refugees and other migrants, and to uphold the EU's founding values, such as rule of law, democracy and fundamental rights (Guild 2010; FRA 2018; Szuleka 2018; Carrera et al. forthcoming).

2.3 The 'criminalisation of solidarity'

To describe all these developments, after 2015 new labels for the 'criminalisation of solidarity' have emerged across EU, such as 'hostile environment' in the UK, 'blaming the rescuers' in Italy and Greece, '*déelits de solidaritée*' in France or 'shrinking civil society space' in Hungary and Poland. These terms have (re-)entered national and European debates, essentially questioning what the role of civil society actors should be in upholding fundamental rights of refugees and other migrants, as well as in financial and political accountability for migration management and border controls and EU's values (Carrera et al. forthcoming; Fekete et al. 2017; Heller and Pezzani 2017; Gkliati 2016).

The criminalisation of solidarity was possible partly because of the pre-existing 'criminalisation of migration'. The underlying rationale was that of using criminal justice tools to discourage migrants from arriving and moving within the EU irregularly (Allsopp 2012; Provera 2015; Carrera and Guild 2016). Criminalisation of migration was also instrumentalised as a tool for ministries of interior to enable migrants' swift return to countries of origin or 'safe' third countries (Guild 2010; Provera 2015; Guild 2010).

3. EU policy agenda

3.1 Migrant smuggling

The fight against migrant smuggling has been high on the EU migration agenda since 2005 in the external dimension. In December 2005, the European Council adopted the Global Approach to Migration (GAM): Priority actions focusing on Africa and the Mediterranean. It was later transformed into the Global Approach to Migration and Mobility (GAMM) (European Commission 2011). Both the GAM and GAMM had the objective to build the

capacity of third countries' agencies to address irregular migration, combating the trafficking in human beings and smuggling of migrants.

In response to the humanitarian refugee crisis, the EU framed migrant smuggling as a top political priority on the European agenda on migration and European security agenda (European Commission 2015a and 2015b). The Commission subsequently followed up the political priority to tackle migrant smuggling and those who profit from it with operational goals. The EU action plan against migrant smuggling (European Commission 2015c) aims to prevent and counter the phenomenon by revising smuggling legislation, disposing of smugglers' vessels and depriving smugglers of their profits and criminal assets, increasing information exchange and operational cooperation with third countries.

EU and national judiciary, law enforcement, border and coast guard, and military agencies were tasked with gathering intelligence, investigating and prosecuting organised criminal groups that are profiting from migrant smuggling. EU military and law enforcement operations have also sought to recover the criminal assets of smugglers and to destroy the vessels or other means of smuggling (European Commission 2015c).

A study conducted in 2016 for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) (Carrera et al. 2016) indicated that national and EU policies had the controversial effect. The movements of civil society actors and citizens faced prosecution or administrative penalties for assisting migrants. However, after an evaluation of the Facilitators' Package under the Commission's Regulatory Fitness and Performance Programme (REFIT), the European Commission (2017) has refrained from changing the legal framework. It concluded that the risks of being criminalised for providing humanitarian assistance "do not appear to be so prominently linked to the legal framework in place as to its understanding and actual application" (European Commission 2017: 22).

This REFIT conclusion was seen as a missed opportunity to provide a comprehensive reform of the Facilitators' Package – first, to bring EU legislation in line with the international standards embodied in the UN Protocol against the Smuggling of Migrants (UN General Assembly 2000a); and second, to renew the old-style Council Directive and Framework Decision via the post-Lisbon Treaty co-decision procedure between the Council and the European Parliament (Carrera et al. forthcoming). As a result, EU law has left a wide margin of discretion to the member states in implementing the directive and has not sufficiently prohibited punishing activities aimed at assisting migrants. Recent empiric research shows that since 2015 civil society actors assisting refugees and other migrants upon and after entering the EU irregularly have experienced increased policing of their activities (Carrera et al. 2016; Fekete 2017; Szuleka 2018; Zhang, Sanchez and Achilli 2018; Carrera et al. forthcoming).

The Aquarius controversy in mid-June 2018 has put back on the EU's agenda the question of the EU's commitment to strike the balance between anti-smuggling operations and SAR at sea and subsequent humanitarian protection. The European Council's meeting on June 28 conclusions emphasised the EU's commitment "to further stem illegal migration on all existing and emerging routes". Regional disembarkation platforms and increased cooperation with third countries were proposed "[i]n order to definitively break the business model of the smugglers, thus preventing the tragic loss of life, it is necessary to eliminate the incentive to embark on perilous journeys" (Council of the EU 2018, para. 5). The EU agenda is moving potentially towards models that externalise and offshore legal responsibilities for asylum that have failed in Australia, the US, Tunisia and Spain and are even more unfeasible in the EU's legal framework (Carrera et al. 2018). Such proposals without

accessible safe and legal migration alternatives are not likely to dismantle 'migrant smuggling' business model, but rather to consolidate involvement of better organised criminal networks, increase the prices and vulnerability of migrants (Zhang, Sanchez and Achilli 2018).

Reacting to the recent political developments and the lack of clarity left by the EU's Facilitators' Package, the European Parliament (2018a) has put forward a resolution on the guidelines for member states to prevent humanitarian assistance from being criminalised. The debate in the European Parliament's LIBE Committee has focused on the definition of what is not a crime and requested member states to provide information about all relevant cases of criminalisation of civil society actors.

3.2 New Multiannual Financial Framework

As many CSOs are facing growing difficulties to secure the necessary funding to develop and perform their activities independently and effectively, funding opportunities under the EU's upcoming programme and funding period (the 2021 to 2027 Multiannual Financial Framework, MFF) have become a crucial element. The funding possibilities for independent, watchdog civil society actors are very limited within the EU, notably for organisations operating at the local and national levels. The funding also can be used as one of the tools to silence them (Carrera et al forthcoming). At the same time, the watchdog efforts of civil society are key to upholding European standards in internal and external border management (such as Schengen Borders Code) as well as in the functioning of the Common European Asylum System (Carrera and Stefan 2018; Szuleka 2018).

In April 2018, the European Parliament adopted a resolution on the need to establish a European values instrument to support CSOs, which would promote fundamental values within the EU at the local and national levels (European Parliament 2018b). The main proposal of the European Parliament is "to set up a dedicated funding instrument – which could be called European Values Instrument – for the promotion and protection of the values enshrined in Art. 2 TEU [Treaty on European Union], especially democracy, rule of law and fundamental rights" within the next MFF. This instrument should ensure a healthy and sustainable environment for those CSOs operating at the national and local levels. The main goal of this initiative is to strengthen the capacity of CSOs to engage with the general public so as to increase its understanding of pluralistic and participatory democracy, the rule of law and fundamental rights.

In addition, an EU fund for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights has been proposed by the European Parliament, so as to empower CSOs, movements and individuals to uphold a truly democratic EU. All these proposals echo the European Parliament's earlier general resolution on the future MFF from March 2018, calling for a European democracy fund for the support of civil society and NGOs working in the field of human rights (European Parliament 2018c).

Starting with its Communication on the scope and structure of the 2021–27 MFF (European Commission 2018b; 2018c), the European Commission in May and June 2018 tabled the provisions of future programmes relevant for the actions of civil society actors on migration, asylum and integration. Reacting to the developments and criticism, not least as voiced by the European Parliament, the Commission aims to structurally strengthen the rule of law, fundamental rights and the role of civil society actors in the implementation of the following instruments:

- Asylum and Migration Fund (AMF) (replacing the Asylum, Migration and Integration Fund (AMIF); European Commission 2018d);
- Internal Security Fund (ISF) (European Commission 2018e);

- Border Management and Visa Instrument (BMVI) (European Commission 2018f);
- European Social Fund (ESF)+ (replacing the ESF and intended to become the main funding source for long-term integration; European Commission 2018g); and
- Rights and Values Programme (replacing the Rights, Equality and Citizenship, Justice, Europe for Citizens and Creative Europe programmes; European Commission 2018h).

Moreover, the Commission has proposed a new significant plan to strengthen the link between EU funding and the rule of law – so-called rule of law conditionality (European Commission 2018i). The Commission recognises that the rule of law is "an essential precondition for sound financial management and effective EU funding" and proposes a "new mechanism to protect the EU budget from financial risks linked to generalised deficiencies regarding the rule of law in the member states" (European Commission 2018 b). The new tools would allow the European Commission to suspend, reduce or restrict access to EU funding in a manner proportionate to the nature, gravity and scope of the rule of law deficiencies in the member state.

While this new proposed instrument would kick in only if the Commission observes flagrant breaches of the rule of law in the use of EU funds, the *ex ante* conditionality from the Structural and Investment Funds is to be expanded. In the proposed common provisions regulation (European Commission 2018j) covering all EU funds that are programmed for the member state level ('shared management'), the effective application and implementation of the EU Charter of Fundamental Rights in operations supported by the funds would be assessed by the Commission. Including the AMF, ISF, BMVI, ESF+, ERDF and CF, the Commission would be able to ultimately suspend funding if it considers this enabling condition no longer fulfilled (Art. 11, Annex III, European Commission 2018 j).

Another key proposal to reinforce the role of CSOs in EU programme development and implementation is a strengthened 'partnership principle' for all EU funds under shared management (Art. 6, European Commission 2018j).

In future the AMF will play an even bigger role in its three operational fields (i.e. the Common European Asylum System, including its external dimension, countering irregular migration and supporting effective return, and supporting legal migration and integration). More funding opportunities for CSOs are proposed in the context of the 'Thematic Facility', the programme part directly managed by the Commission, to cover 40% of all AMF means. Next to emergency assistance, resettlement and 'solidarity and responsibility efforts' in a reformed Dublin system, this facility in particular is to support early integration measures implemented by CSOs (Art. 9(6) and Annex II, European Commission 2018d). With a higher co-funding rate of up to 90% and bypassing the national AMF programmes under shared management. If the proposal is passed, this funding line could potentially benefit many of those NGOs currently harassed for their efforts in providing food, shelter and legal advice.

4. Key issues and controversies

4.1 'Migrant smuggling' as a 'migration management' tool

The UN Office on Drugs and Crime (UNODC) guidelines have injected a level of scepticism about the (mis)use of criminal justice tools for migration management purposes, which runs the risk of increasing the profits of organised criminal groups and making migrants even more vulnerable (UNODC 2017). A forthcoming study by Carrera et al. provides evidence that 'anti-smuggling' laws in some EU member states are not embedded in the criminal codes, but rather in national migration laws.

Similarly, academic experts commenting on Europol's Serious Organised Crime Threats Assessment (SOCTA) for 2017 (where migrant smuggling was seen as a top operational priority) have cautioned about the counterproductive effects on fundamental rights. Some have emphasised that in the area of migrant smuggling, "criminalisation and prosecution are not the only or necessarily the best strategy for dealing with the harms of organised crime groups and their activities", as the phenomenon is linked to the broader geo-political and socioeconomic factors beyond the reach of criminal justice tools (Taylor et al. 2017).

In addition, in order to justify the increase of funding and swift action against migrant smuggling, the EU's political discourse has progressively conflated the phenomenon of 'human trafficking' with 'migrant smuggling'. At the UN level these are clearly distinct types of crimes (UNODC 2017). The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (UN General Assembly 2000b) provides that human trafficking is a violent crime – traffickers are using or threatening to use violence against the victim as a means and the very purpose of trafficking is to exploit the victim.

The UN Protocol against the Smuggling of Migrants sets out that "'smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, **a financial or other material benefit,** of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (Art. 3(a), UN General Assembly 2000a, emphasis added).

Thus, 'migrant smuggling' is essentially a paid service provided by a smuggler to a migrant in order to bypass legitimate border controls. The migrant's consent is implicit in the very definition and therefore the Protocol does not speak of violent means of 'smuggling'. At the EU level two types of crimes are seen as increasingly 'interlinked' and migrant smuggling is portrayed as an inherently 'violent crime' (Council of the European Union 2016).

The binary understanding of 'ruthless smugglers' and 'helpless migrants' is another misconception that is challenged by the findings of empiric research in Niger, Mexico, Afghanistan and elsewhere (Zhang, Sanchez and Achilli 2018). Nevertheless, the use of criminal justice approaches is still seen by political masters in the Council and Commission as one of the key ways to prevent migration and at the same time to justify increased cooperation with third countries (Barigazzi 2018). For example, the European Council Conclusions of 28 June 2018 emphasised that "efforts to stop smugglers operating out of Libya or elsewhere should be further intensified", stressing the EU's support "for the Sahel region, the Libyan Coastguard, coastal and Southern communities, humane reception conditions, voluntary humanitarian returns, as well as cooperation with other countries of origin and transit" (Council of the European Union 2018, para. 3).

The EU is prepared to enhance financial and operational support also to Turkey, Morocco and the Western Balkans, as well as African countries of

origin and transit. Civil society actors and, in particular, NGOs providing SAR and other assistance to migrants and refugees trying to leave the above-mentioned countries, are seen as obstructing or challenging this strategy of containment. The European Council Conclusions of 28 June has implicitly referred to NGO SAR operations when stating that "all vessels operating in the Mediterranean must respect the applicable laws and **not obstruct operations of the Lybian Coastguard**" (Council of the European Union 2018, para. 3, emphasis added). Earlier, some national officials in Italy and Greece and also Frontex have raised suspicions and accused NGOs active in SAR of constituting a 'pull factor', though without any solid evidence (Carrera et al. forthcoming; Heller and Pezzani 2017).

4.2 What is (not) criminal according to the Facilitators' Package?

The main gap in the 2002 Facilitators' Package is the lack of a 'financial or other material benefit' requirement for classifying 'migrant smuggling' as a crime (UNODC 2017). The package falls short of existing UN standards under the Protocol against the Smuggling of Migrants (UN General Assembly 2000a). EU law gives member states a wide margin of discretion to decide what is the base crime of migrant smuggling. As a consequence, for the facilitation of entry, the financial benefit requirement in the majority of EU member states is not part of the base crime but is used merely as an aggravating circumstance.

The facilitation of entry is criminal, even without the intent to gain profit, in 24 out of 28 EU member states, namely Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden and the UK (FRA 2014: 9). That leaves only Germany, Ireland, Luxembourg and Portugal as exceptions to the rule, where financial gains need to be proved in a criminal court. Moreover, in half of the EU countries, the facilitation of residence and stay without a profit factor is sufficient to establish a crime or offence (FRA 2014: 11). These are Belgium, Croatia, Denmark, Estonia, Finland, France, Greece, Latvia, Lithuania, Malta, Romania, Slovenia and the United Kingdom.

The Directive 2002/90 contains an Art. 1(2), which is of a facultative nature and allows member states to decide whether civil society actors and family members will be exempted from criminalisation. As of 2017, some forms of explicit exemption from criminalization in national law were reported in Belgium, Greece, Spain, Finland, Italy, Malta and the United Kingdom (European Parliament, Committee on Petitions 2017). However, prosecutions of rescuers happened in the abovementioned member states (Carrera et al. forthcoming). When applying such exemptions, often do so with a narrow understanding of the European consensus on humanitarian aid (Council et al. 2008). The exemptions are limited to situations of life and death (as for example in the context of SAR) and exclude broader notions of upholding the fundamental rights of refugees and other migrants. The EU's strategy of voluntary exemptions risks a debate about what is 'genuine' or 'pure' humanitarian assistance, as opposed to UN standards of non-criminalisation of actions without the intent to obtain financial or other material benefits (Carrera et al. forthcoming; UNODC 2017).

This leads to a discussion of what constitutes 'purely humanitarian' acts, which narrows the civil society space to situations in which it would actually be criminal for any person not to intervene, in other words to refrain from an obligation to undertake an imminent life-saving activity. For example, in France proposals for the new amendments to asylum law have suggested the exception from exemptions of those acting under 'ideological' or 'political motives'. This raises new questions as to whether the activities to safeguard human rights can be seen as 'ideological' and not

worthy of exemption from criminalisation.

In reaction to evidence gathered by Fekete et al. (2017) of the criminalisation of solidarity cases, the European Commission (2018a) has announced that it will

> engage with relevant players, primarily civil society organisations as well as national authorities and EU agencies such as Eurojust and the FRA, to get a better understanding of the application of the existing rules, supporting both the effective implementation of the existing legal framework and a reinforced exchange of knowledge and good practice between prosecutors, law enforcement and civil society [in order to ensure] that criminalisation of genuine humanitarian assistance is avoided.

The UNODC (2017) suggested shifting the discussion to what should not be criminalised. For example, the UNODC Legislative Guide on the application of the Protocol reiterates the drafters' concern: "the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers" (UNODC 2004: 333). As mentioned above, the European Parliament (2018a) has also recently called for clearer guidelines on what should not be seen and prosecuted as migrant smuggling.

The French Constitutional Council has entered into this discussion and ruled that the "*delit de solidarité*" is partially unconstitutional (Boudou 2018). The Court clarified that "the freedom to help another, for humanitarian reasons, follows from the principle of fraternity, without consideration of the legality of their presence on the national territory". Therefore, immunity from prosecution should apply to "all assistance provided with a humanitarian aim". This judgment marks an outstanding judicial development that may positively contribute to challenging the criminalisation of solidarity.

4.3 Escalation from suspicion to disciplining and criminalisation

NGOs conducting SAR in both Italy and Greece were initially seen as allies of national border and coast guard authorities, helping to cope with the unprecedented number of arrivals. They were increasingly mistrusted by national authorities and EU agencies, as being a pull factor to encourage irregular migration, or as having 'undercover aims' (Carrera, Allsopp and Vosyliūtė, forthcoming). The allegations started in an article in the *Financial Times* in December 2016, which exaggerated a leaked Annual Frontex Risk Analysis of 2016, to "raise concerns" about "interaction of charities and people smugglers operating in the Mediterranean" (Robinson 2016).

Later, in March 2017, Italian prosecutor Carmelo Zuccaro claimed in the media to possess evidence that NGOs conducting SAR are "colluding with smugglers" and raised widespread suspicion about the activities of civil society at sea (Heller and Pezzani 2017). The Italian prosecutor spoke before a parliamentary committee convened to investigate his claims about NGO links with smugglers. The parliamentary committee concluded that the prosecutor did not have sufficient evidence to make such claims (Scherer 2017). Nonetheless, the accusations have affected the general climate of mistrust in Italian society towards civil society NGOs and it has further facilitated the imposition of the governmental Code of Conduct on NGOs saving lives at sea.

In Italy, the Code of Conduct to regulate the activities of NGOs performing SAR operations in the Mediterranean is a clear example of interference with civil society independence. In the central Mediterranean, the Code of Conduct has discouraged their proactive SAR missions due legal uncertainty, and many NGOs have left. This has led to a nine-fold increase in the death rate per 1,000

sea crossings since 2015, despite drastically reduced numbers of overall sea crossings (Vosyliūtė 2018). Furthermore, as foreseen in the Code of Conduct, NGOs are obliged "to receive on board … judicial police officers for information and evidence gathering with a view to conducting investigations related to migrant smuggling and/or trafficking in human beings" (Italian Authorities 2017). The Code of Conduct underpins the idea that NGOs are pull factors for migrants and a catalyst of human smuggling. One of the non-signatory NGOs, Jugend Rettet, and Priest Mussie Zerai are now under investigation for facilitation of illegal migrants in Italy and the judicial authorities have seized the organisation's rescue boat Iuventa (Osborne 2017). The Open Arms vessel of the NGO Pro-Activa Open Arms was also seized as of 18 March 2018 (Amnesty International 2018), but the Ragusa court decided to lift the seizure of the ship on 16 April 2018 (Cuttitta 2018b).

The hostile political environment against NGOs reached its peak on 10 June 2018, when Matteo Salvini, Italy's new interior minister, declared that all Italian ports were closed to the Aquarius ship (Nadeau et al. 2018). The ship is jointly operated by SOS Méditerranée and Doctors Without Borders. It was carrying more than 600 rescued migrants, including 123 unaccompanied minors and 7 pregnant women. It remained stranded in the Mediterranean between Malta and Italy in a standoff between the two nations not willing to become responsible for their asylum claims. Eventually, Spain agreed to disembark the migrants (Nadeau et al. 2018). The Mission Life-Line experienced similar incident. On 27 June, after six days spent at sea with 200 migrants on board, it was finally allowed to dock in Malta, as Portugal agreed to take responsibility for the asylum claims of the rescued persons (InfoMigrants 2018). Therefore, NGOs conducting SAR are being blamed for the unresolved questions of fair responsibility sharing and lack of solidarity with the refugees and with frontier member states (Carrera and Lannoo 2018).

4.4 The role of EU funding

NGOs are generally affected by legal restrictions in terms of freedom of association, declining public financial support, lack of adequate consultation mechanisms among governments and CSOs, and legislative measures in the area of security, which are likely to generate a "chilling effect" on civic space in the area of migration (CIVICUS 2016).

In this context, EU funding opportunities can play a crucial role for CSOs to finance their activities. However, in the current EU funding and programme period, the limited access to the AMIF and ESF for civil society projects aiming at providing humanitarian assistance to irregular migrants is a key challenge (Westerby 2018). Most EU funds are allocated directly to member states, which may apply funding constraints for those CSOs and cities that ensure essential services for irregular migrants. A recent report on AMIF funding shows that whereas in other countries, like Finland, Portugal, Slovakia and Spain, civil society is a main implementer of AMIF projects, in others, like "Estonia and Poland, for example, AMIF National Programme implementation remains largely state-led" (Westerby 2018). The report illustrates the hurdles for NGOs to access funding due to very peculiar requirements and difficulties in getting co-funding.

For example, in Bulgaria, the responsible authority requires "NGOs applying for AMIF funding to have previously implemented projects with a financial value of 50% of the project they are applying for" (Westerby 2018: 41). In Hungary, when disbursing funding for civil society, the Ministry of Interior asked for "blanket authorisation to directly withdraw money from the organisation's bank account at any point during and after the project implementation" (Westerby 2018: 41), thus making CSOs highly dependent on the Ministry of Interior. In Hungary and Romania, national authorities have decided not to provide 25% of AMIF co-financing for civil society, "meaning that civil society

organisations must independently source financing for any proposed AMIF initiative" (Westerby 2018: 41). Szuleka (2018) further highlights that in Poland funding has been one of the sources of pressure: "The government has limited access to public funds for certain NGOs, especially those dealing with migrants and refugees as well as helping victims of domestic violence. For example, in 2016, the Ministry of Interior announced that the call for proposals within the Asylum, Migration and Integration Fund was annulled" (Szuleka 2018: 16).

As a result, the available amount of financial resources for carrying out humanitarian activities and providing irregular migrants with access to fundamental services is reduced at the local and national levels.

As proposed by the Commission and enjoying considerable support in the European Parliament (cf. section 3.2), the future 2021–27 MFF will offer facilitated access for CSOs to EU funding and stress rule of law and fundamental rights considerations in the implementation of funds. Contradicting the line of many member state governments, which seek a reduced NGO role, the whole range of relevant legislative provisions (European Commission 2018b-j) is set to be contested in the Council and very likely to become the subject of intense debate within the European Parliament, as well as between Parliament and the Council.

4.5 Denying NGOs access to migrants within a hostile political environment

In Europe, NGOs rely on service-provision projects and contracts in order to serve their beneficiaries. The increasingly hostile political environment significantly reduces the access of NGOs to their population of interest and negatively impacts their mission to carry out strategic litigation, advocacy and evidence-based research. This section gives different examples showing the extent to which member states are narrowing NGOs' access to migrants.

In **Austria,** a proposal of the government seeks to create a federal agency that, assisted by the Ministry of Interior, will provide legal advice for asylum seekers. The establishment of the agency would negatively affect the fundamental role of those NGOs that ensure legal assistance to asylum seekers in Austria. This proposal has been publicly criticised by several prominent citizens in an open letter addressed to the federal government, as it will undermine the quality and independence of the legal assistance provided to asylum seekers (*Menschenwürde Österreich 2018)*. The adoption of this bill would compromise independent refugee law advice and deny the access of NGOs to the population of interest.

In **Slovenia**, reports show that NGOs were denied access to registration facilities at the Slavonski Brod winter transit camp, where registration and identification of new arrivals take place (FRA 2015). The hardships and restrictions imposed on NGOs and other civil society representatives hinder their capacity to effectively reach out to their population of interest and deliver those essential services that would improve the conditions of migrants.

The work and independence of NGOs can also be jeopardised by burdensome regulatory requirements (FRA 2018). In **Greece**, NGOs are required to be accredited by the minister of interior to access hotspots and provide assistance to migrants. On numerous occasions, NGOs have reported being turned down at the gates of the hotspots even when having the formal permission of the competent authorities (Carrera et al. forthcoming; PICUM 2017). This measure imposes undue obstacles to the freedom of association of NGOs by means of administrative and legal barriers (FRA 2018). Moreover, unregistered NGOs and volunteers who conduct human rights work to support migrants may risk being criminalised, intimidated or disciplined. Civil society has reported calls 'for better coordination and registration' to 'avoid duplication' as seeking leverage and control over their operations (Carrera

et al. forthcoming).

Similarly, in **Italy** for example, the Council of Europe's Human Rights Commissioner Tomas Bocek has highlighted that access to hotspots, such as the one in Lampedusa, is also restricted for the majority of NGOs and CSOs willing to provide assistance or monitor human rights (Council of Europe 2016).

The imposition of administrative barriers and discretionary procedures may also be a political tool to deny NGOs access to migrants and quell dissenting views or beliefs. For instance, **Hungary**'s government proposed the 'Stop Soros' legislative package, which enables the minister of interior to ban civil groups deemed to support migration. The bill was formally adopted by the Hungarian Parliament on 20 June 2018. The bill targets any NGOs that "sponsor, organise or otherwise support a third country national's entry or stay in Hungary via a safe third country in order to ensure international protection" (Eötvös Károly Policy Institute et al. 2017). Under the bill, NGOs will be required to register and obtain a government authorisation for carrying out fundamental activities such as advocating or campaigning for immigrant rights. The Hungarian interior minister will also have the power to deny permission to these organisations if the government assesses a "national security risk". The bill imposes a 25% tax on foreign donations to NGOs aimed at "supporting migration". The risk is that the law will "criminalise" CSOs and weaken independent and critical voices. This proposal is not in line with the basic values of the EU and undermines the rule of law and democratic standards, as well as the freedom of assembly and ability of NGOs to effectively work in Hungary (Eötvös Károly Policy Institute et al. 2017). As a result of the hostile political and legal environment in Hungary, the Open Society Foundations are moving their international operations and staff from Hungary.

In this political context, the European Parliament's rapporteur Judith Sargentini (2018) presented a report emphasising that Hungary is posing a "clear risk of a serious breach" to the EU's democratic values (Sargentini 2018). This report recommends triggering an Art. 7(1) TEU procedure and follows the resolution adopted by the European Parliament on 17 May 2017 on the situation in Hungary (European Parliament 2017). The Venice Commission also acknowledged that the new law in Hungary unfairly criminalises organisational activities that are not directly related to the materialisation of illegal migration, including "preparing or distributing informational materials" or "initiating asylum requests for migrants" (Council of Europe, 2018).

4.6 Systemic nature of intimidation and harassment

The increase in the policing of NGOs across the EU is also affecting those citizens and volunteers who spontaneously provide humanitarian assistance for migrants. Local authorities may impose administrative fines to prevent people from giving food or erecting shelters for irregular migrants, and several acts of intimidation have been carried out by police forces against citizens supporting migrants blocked or rejected at the border between Italy and France (Allsopp 2017). A number of volunteers have received restraining orders to prevent them from coming to the places where asylum seekers arrive (Carrera et al. forthcoming).

The examples show that policing does not happen as a one-off exercise but is rather systemic. For example, an organisation providing food for refugees and other migrants in Rome was charged with the occupation of public land, in order to discourage activities. The organisation moved to another location and was followed by the police there as well. On Lesbos island, for example, volunteers who are EU citizens reported having their identity documents checked and receiving parking fines or requests to register car numbers repetitively, not because it was not clear who they

were, but precisely because authorities knew what they were doing (Carrera et al. forthcoming).

Testimonies from Ventimiglia, Athens and Thessaloniki indicate consecutive raids by anti-riot police, sometimes even with the use of tear gas against volunteers. In some instances, volunteers also reported cases of rape (Carrera, Allsopp and Vosyliūtė forthcoming; PICUM 2017). In the central Mediterranean, NGOs providing SAR have been prevented from conducting their operations, threatened by the Libyan coast guard with gunshots and death threats (Flori and Bagnoli 2017). It may be said that the Italian and EU authorities have indirect responsibility for failing to protect NGO vessels from abuses carried out by the Libyan coast guard and navy. Since the maritime missions performed by Italy (Mare Sicuro) and the EU (Eunavfor Med – Sophia, Frontex Trition) have stopped their systematic patrolling of the high seas next to Libyan national waters, Libyan authorities have increasingly harassed and intimidated NGOs (Cuttitta 2018a and 2018b).

5. Potential impacts of policies adopted

EU and international human rights standards

The EU Facilitation Package is not in line with the UN Protocol against the Smuggling of Migrants, supplementing the UN Convention against Transnational Organized Crime, as it does not include an express reference to the requirement of financial gain or other material benefit to define the crime of facilitating the entry, transit and stay of irregular migrants in the EU.

EU law does not oblige the exclusion of humanitarian actors from criminalisation. Even in countries where such exclusions have been made, questions have been raised about what is 'purely humanitarian' and what should not be considered criminal activity.

The hurdles that NGOs are encountering across the EU raise significant legal issues with regard to respect for the rule of law in the member states. CSOs are indeed vital actors for upholding and promoting the values enshrined in Art. 2 TEU, i.e. the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Organisations operating in the Mediterranean now are obliged, for example, to hand over migrant boats or stabilise the situation until those rescued or the vessels are towed back by the Libyan coast guard. The UN High Commissioner for Human Rights concluded that this practice is 'inhuman' and in contradiction of universally accepted human rights standards, such as the right to seek asylum and non-refoulement (*The Guardian* 2017). Similar concerns have been expressed by 29 academics who are leading research in this area.

Political implications

After the adoption of the Code of Conduct in Italy, there have only been a few NGOs that, on a regular basis, keep providing SAR services. The situation is constantly changing and it is difficult to properly assess the exact number of vessels and NGOs operating in the Mediterranean. As of 12 June 2018, there were five NGOs carrying out rescue activities: Sea Watch and Sea Eye with one ship, SOS Méditerranée in partnership with MSF with one ship, and Proactiva Open Arms with two ships. Mission Lifeline expressed the intention to resume its activities and Save the Children may also restart SAR operations during summer 2018. A similar trend has developed in the Aegean, where the majority NGOs performing SAR have either left, or gone through vetting and are integrated in the grid of the Hellenic coast guard, whereas the remaining ones are conducting 'boat spotting' on the shores and informing Greek authorities.

Civil society actors are pushed to 'choose sides' – either to align with the positions of national authorities or to oppose them.

Human and societal costs

The EU legal framework negatively impacts irregular migrants and the organisations and individuals providing assistance to them by growing intimidation and fear of sanctions, as well as on social trust and social cohesion for society as a whole (Carrera et al. 2016: 11; see also Allsopp 2017; Provera 2015).

Reports indicate the increase of anxiety and even post-traumatic stress disorders among the volunteers who went to help during the peak of the humanitarian crisis (Piere and Breniere 2018).

The living conditions and rights of refugees and other migrants, in particular the right to human dignity among undocumented migrants, is likely to deteriorate as civil society actors are not safe in delivering their mandated services.

This hostile environment towards NGOs engaged in SAR has generated an operational gap in SAR, leading to a nine-fold increase in death rates in the central Mediterranean. In 2015, 4 people were reported dead or missing out of 1,000 trying to cross the sea; by March 2018, 37 lives were lost per 1,000 sea crossings (Vosyliūtė 2018).

Economic and fiscal dynamics

NGOs are experiencing a lack of public trust and a decrease in voluntary contributions by citizens, which may undermine their effective involvement in operations in the Mediterranean and, more broadly, their capacity to promote human rights and fundamental European values (Pech and Scheppele 2017).

The civil society actors working under public contracts have been silenced or avoid expressing their criticism because they fear losing public funding or access to their clients.

The upholding of human dignity of undocumented migrants is left to the 'own risks' of NGOs. Only some countries allow the use of funds from the AMIF, ESF or FEAD (Fund for European Aid to the Most Deprived) for undocumented migrants.

The EU as an international actor

The normative power of the EU, especially its international role in protecting human rights and civic society space, may be compromised by the current trend of criminalising NGOs within its member states.

The EU's pressure on strengthening border controls, particularly along the central Mediterranean route and in the Aegean, is exacerbating the peace-building and state-building processes in war-torn countries like Libya, and supporting those regimes and militias that act outside the rule of law and threaten peace and stability in the long run (Lenhe 2018).

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ReSOMA

RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

ReSOMA - Research Social Platform on Migration and Asylum is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

DISCUSSION BRIEF

July 2018

Roberto Cortinovis
Carmine Conte

MIGRATION

Migration-related Conditionality in EU external funding

This project has received funding from the European Union's Horizon 2020 research and innovation program under the grant agreement 770730

ReSOMA Discussion Briefs aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- the social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

Download this document and learn more about the Research Social Platform on Migration and Asylum at: www.resoma.eu

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Discussion Brief

Migration-related Conditionality in EU External Funding*

1. Introduction

The increase in the number of migrants and refugees arriving in Europe in 2015–16, during what has commonly been referred to as the European 'refugee crisis', has put into question the EU's capacity to react in a timely and effective manner. In a context marked by tensions among member states on how to equitably share responsibility for asylum seekers entering Europe, cooperation with third countries has been singled out by EU policy-makers as a crucial priority to reduce migration pressure towards Europe.

The 2015 European agenda on migration expressed the determination to use all leverage and incentives at the disposal of the EU to increase the enforcement rate of return decisions. Following this approach, cooperation was stepped up with African countries, through the Valletta Action Plan in November 2015, and with Turkey, through the launch of a political dialogue that culminated in the adoption of the EU–Turkey Statement in March 2016. Financial incentives are at the core of these initiatives. A €3.3 billion EU Trust Fund (EUTF) to address the root causes of migration and forced displacement was set up in order to advance the Valletta Action Plan, while a dedicated €3 billion EU Facility for Refugees in Turkey was established in the framework of EU cooperation with Ankara.

The conditionality approach that has driven EU strategy towards both Turkey and African countries was formalised in the Commission's Communication on a New Partnership Framework with Third Countries under the European Agenda on Migration, released in June 2016. The Partnership Framework proposed by the Commission, which takes the 2016 EU–Turkey deal as a model, revolves around 'migration compacts' to be offered to selected third countries, which should employ in a coordinated manner all the instruments, tools and leverage available to the EU in different policy areas, including development aid, trade, migration, energy and security. The Communication states that positive and negative incentives should be integrated into the EU's development policy, rewarding those countries that cooperate in managing the flows of irregular migrants and refugees while penalising the others.

The recent trend towards making EU external funding conditional on migration control poses a set of questions regarding the overall coherence of EU external action, as well as the relation between migration objectives and the objectives pursued by the EU in different policy areas, including trade, development and democracy promotion. At the same time, concerns have been raised from several sides about the potential negative impact of the EU migration agenda on human rights protection in third countries. With negotiations on the next Multiannual Financial Framework (2021–27) entering into a crucial stage, migration-related conditionality is also set to remain a major issue on

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the agenda of EU institutions in the future.

2. Scoping the debate

There is widespread agreement in the academic literature that the beginnings of EU cooperation on migration and asylum matters were marked by the imperative of containing movements in European countries. Security-related concerns dominated the agenda of European countries party to the Schengen and Dublin Conventions adopted in the early 1990s. Policies in the area of external border controls, visa policy, return and readmission were considered preconditions to ensure the sustainability of a common area without internal border controls and to respond to growing societal concerns about migration (Guiraudon 2000; Lavenex & Kunz 2008).

In relation to this, some have argued that early formulations of 'root causes' approaches to migration discussed at the EU level since the early 1990s should be viewed as an expression of the same control-oriented paradigm, aimed at alleviating migration pressure from countries of origin. As clearly stated by Chetail, "a preventive approach to migration, combining the improvement of socioeconomic conditions in countries of origin with the fight against irregular migration, constituted the original matrix of the migration-development nexus" (Chetail 2008, p. 188).

In this context, it is no wonder that, following bilateral patterns of cooperation previously developed by member states, EU debates revolved around the issue of conditionality, that is, of incentives and 'bargaining chips' to be offered to third countries in order to secure their cooperation in the management of migration. Following academic theorisation, a distinction should be made here between positive and negative conditionality. Positive conditionality is based on a 'more-for-more' approach, that is, on the provision of benefits subject to the fulfilment of a specific set of conditions by a recipient, while negative conditionality involves the reduction, suspension or termination of benefits if a recipient fails to meet the required conditions. Nevertheless, in real situations the boundaries between these two typologies are blurred, since both 'carrots' and 'sticks' are often used simultaneously as part of negotiating strategies in different policy fields (Koch 2015, p. 98).

A first attempt to make explicit the use of conditionality in EU migration policy was advanced in 1998 by the Austrian Presidency of the EU in its strategy paper on migration and asylum. Among many other controversial measures – including the revision of the 1951 Geneva Convention Relating to the Status of Refugees – the Austrian paper proposed to make development aid to third countries dependent on readmission cooperation, border control and, more broadly, their willingness to cooperate to reduce push factors. The Austrian proposal thus explicitly advanced a negative version of conditionality, foreseeing the use of sanctions (e.g. the suspension of development assistance) against third countries unwilling to cooperate on migration. While the Austrian proposal was ultimately rejected, not least due to its controversial proposals on refugee protection, some of the measures it envisaged have continually resurfaced in EU debates on external migration policy, especially at times of increasing migratory pressure.

Given the importance of securing third countries' cooperation to pursue EU readmission priorities, the 'communitarisation' of migration and asylum policy sanctioned by the Treaty of Amsterdam in 1999 was accompanied by a parallel reflection on how to develop an external dimension of the EU's migration and asylum policy. The Tampere Presidency Conclusions in 1999 stated the ambitious objective of developing "a comprehensive approach to migration", addressing political, human rights and development issues in countries and regions of origin and transit of

migrants, hence focusing on the long-term drivers of migration flows. In parallel, however, the Tampere Conclusions reiterated the priority to conclude EU readmission agreements and to include 'migration clauses' in association and cooperation agreements between the European Community and third countries or groups of countries (Coleman 2009, p. 211). Following Boswell's analysis (2003), it is possible to conclude that the coexistence of a preventive approach (focused on addressing the long-term drivers of migration) and a control-oriented approach (centred on short-term security concerns) has been (and continues to be) a distinctive feature of EU debates on external migration policy.

A few years later, at the 2002 Seville European Council, the Spanish and UK prime ministers relaunched the idea of making development aid dependent on third countries' effort to combat irregular immigration. As in the case of the Austrian proposal mentioned before, the initiative did not find enough support among the other member states but the Seville Conclusions maintained a level of conditionality between migration control and development cooperation. One of the key decisions taken at Seville was to subordinate the conclusion of any future association or cooperation agreement by the EU to the inclusion of readmission clauses covering nationals of third states unlawfully present in a member state and also third country nationals who have transited through the country in question. In addition, the Seville Conclusions also formalised a negative conditionality mechanism, stating that 'insufficient cooperation' by a third country in combating illegal immigration should prevent the establishment of closer relations between that country and the EU. Yet as widely documented, the negative conditionality approach envisaged by the Seville Conclusions has never been translated into practice. A central reason accounting for this circumstance has to do with the fear that the implementation of a "punitive approach" could disrupt broader bilateral relations between the EU (and its member states) and third countries (Coleman 2009, p. 135).

EU attempts to engage third countries in the containment of migration through the use of a conditionality strategy have been subjected to substantial criticism. Already in 2004, for example, ECRE (2004) argued that the EU's prioritisation of measures to combat irregular immigration over improving refugee protection in third countries was leading to a lack of coherence between EU external migration policy on the one hand, and its human rights and development policies and objectives on the other.

The use of EU external funding (notably development funds) in the pursuit of a migration control-related agenda has also met opposition from EU actors holding different interests and priorities. While justice and home affairs officials at the Commission have been keen to accommodate member states' requests to use EU development assistance for supporting cooperation with third countries on border management and readmission, Commission development and external relations officials have generally resisted the subordination of development objectives to what they perceive as attempts to achieve short-term containment of migration flows (Boswell 2003; Lavenex and Kunz 2008).

The dynamics of migration in the Mediterranean have been recognised as important factors in putting into question a narrow approach focusing on containment of flows and in prompting the elaboration of more comprehensive solutions. In 2005, it was the 'shock' provoked by the tragic events at the Spanish enclaves of Ceuta and Melilla that prompted the Global Approach to Migration (GAM), the overarching framework of EU cooperation with countries of origin and transit (Lavenex and Kunz 2008). Again, in 2012, it was the changing geopolitical situation in North Africa and the Middle East following the Arab uprisings that motivated the adoption of a revised Global Approach to Migration and Mobility (GAMM)

(European Commission, 2011).

The aim of the GAMM is to establish balanced and comprehensive partnerships with third countries covering all relevant aspects of migration. The focus on the notion of 'partnership' that lies at the centre of the GAMM has been associated with a shift in EU policy discourse that signals a willingness to establish more comprehensive relations with third countries on migration issues, including by fostering actions aimed at exploiting the positive impact of migration on development processes. At the same time, several contributions have pointed to the 'gap' between the comprehensive narrative advanced in the GAMM and the narrow and conditionality-driven policies emanating from it, as is the case of the EU Mobility Partnerships and regional migration dialogues, such as the Rabat and the Khartoum Processes (Carrera & Hernández i Sagrera 2011; Lavenex and Stucky 2011).

3. EU policy agenda

Since the inception of the refugee crisis, the EU has reinforced its determination to use a more-for-more approach and to deploy all available leverage and incentives to obtain cooperation from third countries on control of migration flows. The more-for-more principle entails tying border control and readmission demands to other areas of cooperation, by rewarding those countries that support the EU's migration agenda.

Cooperation on migration with African countries has been a longstanding priority for both the EU and the member states, in light of persistent concerns over trans-Mediterranean movements from North Africa to southern European countries, such as Italy, Spain and Malta. [6] The last comprehensive dialogue on migration with African countries culminated with the EU–Africa summit held in Valletta in November 2015. The summit resulted in the approval of an action plan covering different priority domains, including the development–migration nexus, legal migration and mobility, international protection and asylum, the fight against irregular migration and human trafficking, readmission and return. The implementation of the Valletta action plan is backed by an "Emergency Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa", currently endowed with a budget of about €3.3 billion (European Council 2015). The budget of the EUTF for Africa draws mainly from the reserve of the European Development Fund, with additional contributions from the Development Cooperation Instrument, the European Neighbourhood Instrument and a limited contribution from the Asylum, Migration and Integration Fund. In spite of the Commission's repeated calls to match the EU's contribution (initially worth €1.8 billion), member states have been reluctant to pour additional money into the EUTF; it was not until 2017 that two member states, namely Italy and Germany, decided to substantially increase their contributions.

In parallel, the EU focused its efforts on increasing cooperation with Turkey. This choice was dictated by the centrality that the Eastern Mediterranean route acquired in the dynamics of migration flows towards Europe: in 2015, over 800,000 refugees and migrants came via the Aegean Sea from Turkey into Greece, accounting for 80% of the people arriving irregularly in Europe by sea that year.[7] Against this background, the EU–Turkey joint action plan of

[6] An increased migratory pressure was experienced especially along the Central Mediterranean Route, which connects North African countries (particularly Libya) to Italy. According data from the International Organization for Migration, around 154,000 arrivals were recorded in 2015 on this route, and in 2016 they stood at 181,000. Arrivals dropped to 119,000 in 2017, showing a decreasing trend that has continued also during the first months of 2018 (13,000) (IOM 2018).

[7] Arrivals by sea to Greece decreased substantially during 2016, when they stood at 176,000, and even further in 2017, when 35,000 arrivals were recorded (IOM 2018).

October 2015 included a commitment on the part of the Turkish government to reduce migration flows along the Eastern Mediterranean route. In exchange, the EU agreed to establish a dedicated €3 billion financial facility to support Turkey's efforts in coping with refugees within its territory.

In March 2016, cooperation was further advanced through the signing of the EU–Turkey Statement, which included additional action points on readmission: the return to Turkey of all new irregular migrants and asylum seekers whose applications are judged unfounded or inadmissible, and a 'one-for-one' mechanism, whereby for every Syrian being returned to Turkey from the Greek Islands, another Syrian will be resettled from Turkey to the EU. In addition, the EU–Turkey Statement provides that once the €3 billion provided under the Facility is almost fully used, the EU will mobilise an additional €3 billion for the Facility (European Council 2016). In March 2018, noting that the operational envelope of the first €3 billion tranche of the Facility had been fully contracted before the end of 2017, the Commission adopted a decision on the allocation of the second €3 billion tranche, mobilising €1 billion from the EU budget and calling on member states to honour their pledged contributions under the aforementioned agreement (Commission 2018a).

In early 2016, responding to increasing pressures from southern member states (particularly Italy) to take actions to address flows along the Central Mediterranean route (linking Libya with Italy), the Commission released a Communication on establishing a new Partnership Framework with third countries under the EU agenda on migration (Commission 2016a). The Partnership Framework proposed by the Commission, which explicitly takes the EU–Turkey deal as a model, states that the EU should employ in a coordinated manner all the instruments, tools and leverage available to the EU in different policy areas, including development aid, trade, migration, energy and security. In particular, the Communication states that "positive and negative incentives" should be integrated into the EU's development policy, rewarding those countries that cooperate in managing the flows of irregular migrants and refugees while penalising the others. The Communication envisages the Partnership framework as being implemented with five priority countries in Africa, namely Ethiopia, Mali, Niger, Nigeria and Senegal. However, according to recent reports, cooperation under the Partnership Framework is now expanding beyond those priority countries to encompass other countries in West and North Africa as well as Asian countries, including through increased cooperation on returns with Bangladesh, Pakistan and Afghanistan (Castillejo 2017).

In early May 2018, the Commission put forward its opening proposal for the next Multiannual Financial Framework (2021–27) to be negotiated by EU institutions in the following two years (European Commission 2018b). Together with a 26% increase in investment for EU external actions, the proposal foresees a major restructuring of the external dimension of the EU budget by bringing together 12 existing financial instruments into a broad neighbourhood, development and international cooperation instrument with worldwide coverage. The EU's external spending architecture would be further simplified via the integration of the European Development Fund into the EU budget. Moreover, the proposal also foresees the establishment of a flexibility cushion to address existing or emerging urgent priorities, including migratory pressures. As observed by some commentators, the Commission's structure for the new Multiannual Financial Framework takes stock of the experience of emergency instruments established during the crisis years (such as the EUTF for Africa and the Facility for Refugees in Turkey) by providing the EU budget with increased flexibility and financial leverage to address complex migration challenges (Hooper 2018).

4. Key issues and controversies

The Communication on the New Partnership Framework was explicit in saying that all areas of external action should be used as leverage to gain cooperation from partner countries. This has led to serious concerns among NGO representatives and also Commission and member state officials involved in foreign and development policy that longstanding EU priorities in these areas could be subordinated to the EU's migration agenda. For instance, the explicit linking of the EUTF for Africa, whose budget is made up in large part of funds from EU development instruments, with the EU's Partnership Framework has been considered an attempt to put development resources at the service of a strategy of conditionality.

Specifically, development actors have stressed the risk of development funding being diverted away from the central objective of EU development policy and poverty eradication, and potentially away from the poorest countries or those with the greatest needs. Along the same line, in a 2016 Resolution on the EU Trust Fund for Africa, the European Parliament warned that the use of resources from the European Development Fund to finance the EUTF for Africa may have an impact on the amount of aid available for African countries that are not covered by this instrument, notably least-developed countries (European Parliament, 2016). Financial support granted particularly to Libyan authorities has come under heavy criticism by NGOs, experts and also the European Parliament, which have denounced the serious human rights violations to which migrants are exposed in Libya (Concord 2017; Castillejo 2015, 2017; European Parliament 2016).

Another key issue regarding the EU's conditionality strategy concerns its effectiveness. An expanding literature points to the limited success of incentives (including increased financial assistance) to ensure third country cooperation on readmission and return. This is because for countries of origin the costs associated with readmission are not only linked with the concrete implementation of the agreement and its consequences, but also with broader domestic and regional political dynamics, including the politicisation of readmission issues at the domestic level (Wolff 2014). Indeed, readmission cannot be isolated from the broader framework of relations with third countries, which include other strategic issue areas like energy and trade as well as other diplomatic and geopolitical concerns. In this context, exerting pressures on uncooperative third countries may even turn out to be a counterproductive endeavour from a strategic point of view, as it may disrupt cooperation on other, perhaps more crucial, matters (Cassarino and Giuffré 2017).

In addition, there is a set of administrative and procedural obstacles precluding the successful implementation of readmission agreements, such as identification of the nationality of the person to be readmitted, and the subsequent issuing of travel documents by the relevant authorities of the requested state. More fundamentally, the need to ensure the respect of fundamental rights of migrants during return procedures has been singled out as one of the main reasons why readmission agreements (at both the EU and national levels) have not worked as expected by their proponents (Carrera 2016; Cortinovis 2018).

Emergency instruments such as the EUTF for Africa and the EU–Turkey Facility imply a re-labelling and reorganisation of the EU budget and its funding instruments. This reconfiguration of the funding landscape has been motivated by the search for flexibility and the capacity to rapidly intervene in emergency contexts (den Hertog 2016). Furthermore, practitioners have recognised that effective responses to crises can benefit from flexible, strategic, multi-year funding that breaks down the silos of humanitarian responses and long-term development assistance (European Commission 2016b). That notwithstanding, EU funding instruments have specific and delineated

legal mandates and objectives that should be complied with even when resources from such instruments are channelled through EUTFs (Castillejo 2015). The primary objective of development aid, in particular, should be poverty reduction and, in the long term, poverty eradication.

As the vast majority of funding for the EUTF for Africa comes from development instruments, most EUTF projects must be in line with those objectives. As argued among others by Oxfam (2017, p. 16), the fungible nature of EUTFs, which gather resources from different EU financial instruments, makes it difficult to ascertain compliance with the rules established as the legal basis of those instruments, including criteria related to the use of official development assistance. The same concern was shared by the European Parliament, noting the lack of clarity regarding the use of resources channeled through the EUTF for Africa. It added that a clear, transparent and communicable distinction should be made within the EUTF between the funding envelopes for development activities on the one hand, and those for activities related to migration management, border controls and all other activities on the other (European Parliament 2016).

The accountability issues mentioned above are compounded by the fact that the European Parliament has no official role in monitoring EUTFs and thus limited opportunity to provide input or supervise how European resources are spent. The insufficient level of democratic oversight allowed for by extra-budget tools (such as EUTFs) coupled with the development of 'extra-Treaty' arrangements, e.g. the EU–Turkey Statement or Valletta Declaration, has been associated with a trend towards increased bilateralism and intergovernmentalism in EU migration and asylum policy. Yet this trend poses a set of challenges from an EU rule of law perspective, since the EU's role and competencies in those areas were supposed to be consolidated and expanded under the Lisbon Treaty, especially when securing democratic control by the European Parliament and its role as "co-owner" of EU policy in these domains (Carrera et al. 2018, p. 74). In this regard, it has been observed that the approach of mixing funds and adopting flexible ways of operating can also be manipulated to promote internal political agendas if it lacks sufficient accountability, supervision and consultation mechanisms (Oxfam 2017, p. 25).

Accountability and rule of law issues that have been raised in relation to the expanding EU external migration agenda are coupled with deeply rooted concerns regarding the potential impact of those initiatives on human rights protection in third countries. The European Ombudsman has concluded in relation to the EU–Turkey Statement and subsequent funding via the Facility for Refugees in Turkey that fundamental rights need to be respected when implementing political agreements with third countries. In addition, according to the Ombudsman, the establishment of large-scale financial instruments such as EUTFs should be subject to a proper *ex ante* and ongoing/regular impact assessment, including on fundamental rights – a concern shared by the European Parliament (Carrera et al. 2018, p. 76).

A critical assessment of recent EU initiatives from a human rights perspective has also been given by NGOs involved in the provision of humanitarian and development assistance. The Migration Partnership Framework was described by Oxfam as "an attempt to outsource the EU's obligation to respect human rights" (Oxfam 2016). In this regard, a joint statement of more than a hundred NGOs released in June 2016 expressed deep concerns about the direction taken by EU external migration policy, and specifically about attempts to make deterrence and return the main objective of the EU's relations with third countries (ACT Alliance EU et al. 2016). According to the statement, the new Partnership Framework with third countries risks cementing a shift towards a foreign policy that serves a single objective, to curb migration, at the expense of European credibility and leverage in defence of

fundamental values and human rights.

5. Potential impacts of policies adopted in this area

EU and international human rights standards

Several concerns have been expressed that the conditionality approach that lies at the heart of the Migration Partnership Framework risks producing a negative impact on human rights principles.

For a start, a strategy geared towards containment inevitably restricts the protection space for those in need of protection, especially in the almost complete absence of legal pathways to access asylum in Europe. This circumstance has a clear repercussion on the right to asylum enshrined in Art. 18 of the Charter of Fundamental Rights of the EU. Second, there are broader concerns that cooperation with third countries displaying a poor human rights record may further impact on the protection of fundamental rights of migrants residing in or transiting those countries. Among the cases recently brought to the attention of public debate is cooperation with the governments of Libya and Sudan, and the funding of initiatives in those countries through the EUTF for Africa.

In light of the above-mentioned concerns, EU external spending on migration should be subject to a comprehensive human rights assessment, as requested, in particular, by the European Court of Auditors and the European Ombudsman.

EU rule of law and better regulation principles

There have been concerns that the proliferation of emergency instruments, such as EUTFs, may have negative consequences on the unity and integrity of the EU budget. The 'emergency' atmosphere that dominated EU policy-making during the refugee crisis has also implied that the new instruments have been adopted following political pressures, without a comprehensive assessment of their added value. Doubts have been raised, for example, on the appropriateness to establish an EU emergency Trust Fund to achieve a long-term objective such as addressing "root causes" of migration in Africa.

The fact that these financial instruments are increasingly linked to 'extra-treaty' political agreements based on a logic of conditionality brings intergovernmental dynamics and democratic accountability deficits back to EU cooperation, as they exclude the EP from the decision-making process. The 2009 Lisbon Treaty, however, had precisely sought to reinforce coherence and democratic accountability in the EU.

In addition, the 'conditionality' approach poses a set of issues as regards its compatibility with the objectives of EU development policy. Art. 208(1) of the Treaty on the Functioning of the European Union unequivocally sets out that "Union development cooperation shall have as its primary objective the reduction and, in the long term, the eradication of poverty". This EU constitutional objective should constitute the leading factor informing EU migration and development policies. While pursuing the legitimate objective of increasing the flexibility and effectiveness of EU external funding, negotiations on the next Multiannual Financial Framework should focus on ensuring full compliance with the EU legal principles.

EU international relations

The reorientation of EU external priorities to respond to migration concerns has the potential to produce an impact on EU cooperation with third countries. The principle of policy coherence on

development is at the core of EU development policy and it is also enshrined in EU Treaties. Through this principle, the EU aims to take account of development objectives in all of its policies that are likely to affect developing countries.

The EU and its member states are currently the world's largest aid donor, providing over 50% of all global development aid. In light of this, the use of development cooperation as leverage to foster third countries' collaboration on returns and readmission implies a redefinition of the EU development agenda, with the possible inclusion of objectives and strategies that are driven by a migration-control rationale instead of a genuine development rationale.

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DISCUSSION BRIEF

July 2018

Roberto Cortinovis

MIGRATION

EU Return Policy

ReSOMA Discussion Briefs aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

In 2018, an overall of nine Discussion Briefs (three each for asylum, migration and integration) were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- the social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

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Discussion Brief

EU Return Policy*

1. Introduction

The European 'refugee crisis' that emerged in 2015 gave new political impetus to the EU's return agenda. Increasing the return rates of irregular migrants was framed as a top priority at the EU level to respond to the crisis and to restore public trust in the EU's asylum system. In September 2015, the Commission published a Communication on an EU action plan on return that presented a set of immediate and mid-term measures to be taken in order to enhance the effectiveness of the EU return system. Moreover, in 2017, the Commission decided to issue a renewed action plan, emphasising the urgency of taking more resolute action to bring measurable results in returning irregular migrants.

Significant new competences in return procedures have also been granted to the European Border and Coast Guard Agency (EBCG) launched in 2016. The EBCG has been granted the power to conduct joint return operations and be involved in national return procedures, including cooperation with third countries. Also in this case, the motivation for expanding the Agency's mandate on returns was to ensure more 'effective' expulsion procedures in the EU, so that the number of return decisions of irregular immigrants was better matched by the enforced expulsion orders.

In parallel, cooperation with countries on readmission has intensified by means of a number of informal and non-binding cooperation formats (e.g. instruments or tools not formally qualifying as EU readmission agreements), such as standard operating procedures, joint ways forward on migration issues and joint declarations. According to the European Commission, the use of informal instruments should be the preferred option to achieve fast and operational returns when the swift conclusion of a formal readmission agreement is not possible. In addition, cooperation with key third countries on readmission should be accompanied by the collective mobilisation of all the incentives and leverage available at the EU level, including in areas such as visa policy, trade and development.

2. Scoping the debate

Efforts aimed at addressing irregular migration, and specifically initiatives on return and readmission, had been the object of cooperation between European states even before a formal competence in this field was granted to the European Community in the 1997 Treaty of Amsterdam. The literature has underlined the role played by intergovernmental fora established during the 1970s and 1980s, such as the Ad Hoc Group on Immigration and the Schengen group, in laying the ground for the future institutionalisation of EU policies to tackle irregular migration (Guiraudon 2000).

Specifically, the project of abolishing internal border controls among the member states pursued in the context of the Schengen project from the mid-1980s onwards, was associated in EU policy

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debates with the need to adopt 'flanking measures' to ensure the security of the Schengen space, including on return and readmission. At the same time, a coordinated effort among European states on readmission was also considered a precondition for reducing the number of asylum seekers arriving in the member states: in particular, the adoption of the Dublin Convention in 1990 (the predecessor of the Dublin Regulation) was accompanied by attempts to establish readmission obligations with neighbouring countries considered to be 'safe' for asylum seekers (Hathaway 1993; Lavenex 1999).

One of the first instruments introduced to foster a common approach on readmission was the inclusion of readmission clauses in trade and cooperation agreements signed between the Community and third countries. As stated by Coleman (2009), the Council introduced a policy of incorporating readmission clauses into Community and mixed agreements in 1995, predating a formal Community competence on readmission. The idea behind the use of readmission clauses was to exploit the Community's external powers in fields such as trade and development, and the significant accompanying budgets, to forward member state interests in readmission. The main problem associated with readmission clauses, however, is that they are simply political commitments that do not impose legally binding obligations on the parties. The need to exert stronger leverage in relations with third countries was one of the main reasons for conferring power to the Community to enter into formal readmission agreements with third countries, as decided at the 1999 Tampere European Council.

Readmission agreements are concluded to facilitate the removal or expulsion of persons who do not or no longer fulfil the conditions for entry into, presence or residence in a destination country. Persons to be readmitted, or removed, under such agreements are a country's own nationals and, under certain conditions, third country nationals or stateless persons who have passed, or transited, through the territory of the requested country or otherwise been granted permission to stay there (Coleman 2009). Since 2002, the EU has concluded 17 readmission agreements.[8] At the same time, conferring on the EU a formal competence to enter into readmission agreements with third countries has not prevented member states from continuing their bilateral readmission relations, by means of a variety of both formal and informal cooperation formats (Cassarino 2010a).

The development of an EU common readmission policy has encountered a number of obstacles at both the negotiation and implementation stages (Coleman 2009; Carrera 2016). Some important countries of origin and transit (such as Morocco, Algeria and China) have persistently refused to enter into a formal readmission agreement with the EU, while agreements with other countries (including Russia, Ukraine and Turkey) could only be concluded after a lengthy negotiation process. While policy debates at the EU level have focused predominantly on the issue of incentives to be offered to third countries in order to encourage them to cooperate (e.g. relaxed visa requirements, legal migration channels or increased financial assistance), scholars have pointed to a set of administrative and procedural obstacles that have precluded the successful implementation of readmission agreements.

The inclusion of a clause on third country nationals in EU readmission agreements has proved to be highly sensitive during negotiations with third countries. The readmission of own nationals,

[8] EU readmission agreements have been concluded with the following: Hong Kong SAR (2004), Macao SAR (2004), Sri Lanka (2005), Albania (2006), Russia (2007), Ukraine (2008), FYROM (2008), Bosnia & Herzegovina (2008), Montenegro (2008), Serbia (2008), Moldova (2008), Pakistan (2010), Georgia (2011), Armenia (2014), Azerbaijan (2014), Turkey (2014) and Cape Verde (2014).

especially by those countries not geographically adjacent to the EU, has constituted an equally crucial component of persistent frictions among various states and EU actors. More specifically, the swift identification or 'identity determination', as well as the issuance of travel documents, continue to be major obstacles to practical implementation of EU readmission agreements (Carrera, 2016). In addition, the need to ensure respect of fundamental rights enshrined in EU law during return procedures has been singled out as an explanation for why readmission agreements (at both the EU and national levels) have not worked as expected by their proponents (Carrera 2016).

Besides developing a web of readmission agreements with the major countries of origin and destination of migration, at the end of 2008, the EU established a set of common standards on the return of irregular migrants through the adoption of the Returns Directive (Council of the European Union and European Parliament 2008). This directive provides common standards and procedures to be applied by member states when returning irregular migrants, including on the use of coercion and detention, re-entry bans, and on the guarantees and rights of migrants involved in a removal procedure. The Returns Directive introduced the core legal principle of the EU's policies on irregular migration, i.e. that member states are obliged to issue a return decision to any third country national staying illegally on their territory, unless they are willing to offer the individual a residence permit for humanitarian, compassionate or other reasons. The same directive also sets out safeguards to protect the rights of returnees and enable return to be carried out in a humane and proportionate manner.

At the time of its approval, the Returns Directive was strongly criticised by various non-governmental organisations, such as Amnesty International, ECRE and PICUM, Members of the European Parliament, the Council of Europe and the United Nations Human Rights Council, besides several academics (Amnesty International, 2008; ECRE 2009; PICUM 2015; Baldaccini 2010; Acosta Arcarazo 2011). The most debated aspects concern the duration of detention of third country nationals under a repatriation order (up to a maximum of 18 months), detention of children 'as a measure of last resort', and the imposition of lengthy re-entry bans on migrants who have been subject to forced removals. Furthermore, while the Returns Directive does contain fundamental rights guarantees for migrants in the process of return (in Arts 14-18), these provisions are often not applied in practice by most member states (PICUM 2015).

Significant discrepancies in the implementation of the Returns Directive have also been recognised by the European Commission. An implementation report published in 2014 revealed that a number of implementation gaps remained in several member states, such as in relation to detention conditions and an absence of independent systems monitoring forced returns. In addition, the report stressed the need for improvement in many member states regarding a more systematic use of alternatives to detention and the promotion of voluntary departure (European Commission 2014).

Another important development in EU return policy is the increasing role played in this field by Frontex, established in 2004 to foster operational cooperation among member states in the management of their external borders. Among the tasks assigned to Frontex is that of ensuring the coordination or the organisation of joint return operations of member states, including through chartering aircraft for such operations. Over the years, Frontex has helped EU countries to return an increasing number of third country nationals. According to the figures made available by the Agency, in 2017 the number of people removed with support by Frontex (renamed the European Border and Coast Guard Agency after a legislative reform adopted in 2016) surpassed 13,000 (Frontex

2018).

In parallel with its increasing role in removal operations, Frontex has come under scrutiny regarding the respect of fundamental rights in the context of such operations. Scholars have pointed to the legal and practical difficulties in ascertaining the respective roles of national authorities of the host member state and officials deployed by Frontex, elaborating how such difficulties disperse human rights accountability among different actors (Fink 2016). An inquiry conducted by the European Ombudsman in 2014 identified some of the main shortcomings in the procedures regulating joint return operations coordinated by Frontex, including the lack of appropriate monitoring mechanisms and of effective procedures on the lodging and handling of individual complaints by removed foreigners (European Ombudsman 2014).

3. EU policy agenda

The European agenda on migration adopted by the European Commission in May 2015 acknowledged that the EU expulsion system is 'ineffective' in view of the rates of successful returns of third country nationals given a removal order. In order to remedy this situation, the agenda called for ensuring that third countries fulfil their international obligation to readmit their own nationals residing irregularly in Europe, particularly through the adoption and implementation of readmission agreements (European Commission 2015a).

In September 2015, the Commission published a Communication on an EU action plan on return that presented a set of immediate and mid-term measures to be taken in order to improve the EU return system. In that circumstance, the Commission described systematic return, either voluntary or forced, as one of the privileged instruments to address irregular migration. The Communication argued that "fewer people that do not need international protection might risk their lives and waste their money to reach the EU if they know they will be returned home swiftly". The *Return Handbook*, adopted together with the action plan, provided guidelines, best practices and recommendations for carrying out returns in an effective way and in compliance with rights and safeguards as guaranteed by the relevant EU legislation (European Commission 2015b).

In 2017, however, in light of the unsatisfactory results of initiatives taken during the previous two years, especially for increasing return rates, the Commission decided to give new impetus to EU return policies by issuing a renewed action plan on return as well as a revised version of the *Return Handbook* (European Commission 2017a). The renewed action plan stems from the assumption that since the adoption of the previous action plan in 2015, the challenges that need to be addressed on irregular migration have become even more pressing, bringing return to the forefront of the EU migration agenda. The Commission provided some key figures to justify the need for increased efforts at the EU level: the rate of returns to third countries remained more or less static between 2014 and 2015 (even falling slightly from 36.6% to 36.4% respectively). Considering that around 2.6 million asylum applications where lodged in the EU in 2015–16 alone and that the first-instance recognition rate stood at 57% in the first three quarters of 2016, the Commission concluded that member states might have more than 1 million people to return in the following period.

In order to increase the effectiveness of EU return policy, a set of policies have been adopted that make full use of the legal, operational and financial instruments available at the EU level. Great relevance has been attached to cooperation with third countries on readmission, while the role of the EBCG in returns has also been significantly strengthened.

On the internal side, a key priority addressed by the Commission was increasing the 'effectiveness' of member states' administrative systems and return procedures. The 2017 Recommendation on making returns more effective when implementing the Returns Directive, released in conjunction with the renewed action plan, provides guidance to the member states on how to achieve more effective return procedures by making full use of the flexibility allowed for in the Returns Directive. Specifically, the Recommendation exhorts member states to systematically issue a return decision to third country nationals who are staying illegally on their territory and to promptly request the authorities of third countries to verify the identity of the illegally staying third country national and deliver a valid travel document. The Recommendation also calls on member states to make full use of the maximum duration period of detention included in the Returns Directive, noting that detention can be an essential element for enhancing the effectiveness of the EU's return system. Deadlines for lodging appeals against decisions related to return should also be reduced, as long deadlines can have a detrimental effect on return procedures (European Commission 2017b).

Enhanced sharing of information to enforce returns has been another key priority on the EU agenda. Specifically, the Commission is already working to create an enabling environment for the implementation of returns across the European Union, through systematic exchange of information. During 2016, the Commission put forward several proposals to further develop existing information systems (the Schengen Information System and EURODAC) and to set up new systems (an Entry–Exit System and a European Travel Information and Authorisation System) that will contribute to addressing some of the information gaps currently hampering return procedures (European Commission 2017a).

Significant new competences in returns have also been granted to the EBCG, launched in 2016 with the objective of increasing the mandate and operational capacity of Frontex. The EBCG has been given the task of organising, promoting and coordinating return-related activities of member states, as well as providing technical and operational assistance to member states facing particular challenges when implementing the obligation to return third country nationals. The Agency has been given the mandate to constitute pools of forced return monitors, forced return escorts and return specialists for deployment during return operations. A growing number of return operations have been supported by the EBCG: since mid-October 2017, it has supported 135 return operations covering 5,000 people. The main countries involved have been in the Western Balkans, as well as Tunisia, Georgia and Pakistan, while the largest number of operations have involved Germany, Italy, France, Belgium and Austria (European Commission 2017a).

In parallel, cooperation with third countries has been intensified by means of a number of non-legally binding, tailor-made informal arrangements linked to readmission. According to the Commission, this choice is dictated by the recognition that finalisation of negotiations on standard readmission agreements remains at a standstill and that the negotiations launched in 2016 have not progressed as expected, as in the cases of Morocco, Algeria, Nigeria, Jordan and Tunisia. With countries for which the conclusion of a formal readmission agreement is not considered viable, the Commission has focused on improving practical cooperation on return and readmission through operational tools, such as standard operating procedures, joint migration declarations, common agendas on migration and mobility, and joint ways forward (Cassarino and Giuffré 2017).

The 2015 action plan on return also stated that EU external policies, including in fields like trade and development, should be mobilised to stimulate the

partner country's willingness to cooperate, thus increasing the EU's leverage on readmission. This approach was translated into the Partnership Framework with third countries launched in June 2016. The Partnership Framework aims at achieving cooperation on return and readmission with key countries of origin, with an initial focus on Ethiopia, Senegal, Mali, Nigeria and Niger. This objective should be achieved by mobilising in a coordinated manner all the instruments, tools and leverage available to the EU in different policy areas, including development aid, trade, migration, energy and security (European Commission 2016).

4. Key issues and controversies

Scholars have described readmission agreements as characterised by "unbalanced reciprocities", pointing to the fact that these agreements involve different costs and benefits for the countries of origin and destination (Cassarino 2010a, 2010b). In fact, while formulated in a reciprocal manner, readmission agreements do not present mutual, but rather opposing interests. They address a key concern for countries of destination (the removal of unauthorised migrants), but they can place substantial economic and even political burdens on countries of origin. This is especially the case if the economy of a country of origin is dependent on the remittances of its expatriates living abroad, or when migration acts as a safety valve to relieve pressure on the domestic labour market.

The asymmetric costs and benefits of readmission agreements for countries of destination and for those of origin and transit explains why the issue of incentives has played such a relevant role in debates on EU readmission policy. Attempts to increase cooperation on readmission with third countries have been linked with an array of incentives, first of all visa facilitation agreements, but also trade concessions, legal migration quotas and increased development aid (Cassarino 2010a; Coleman 2009; Trauner and Kruse 2008). In the last few years, in light of the relevance readmission has acquired on the EU agenda, EU institutions have repeatedly stressed the need to advance an incentive-based approach to readmission, mobilising all the leverage available in different policy areas, including visas, trade and development.

This approach has nonetheless encountered criticism from different sides (Cortinovis and Conte 2018). Representatives of the development constituency have denounced the risk associated with 'emergency' external funding instruments (such as the EU Trust Fund for Africa and the Refugee Facility for Turkey) of diverting development assistance to achieve migration-control objectives (Concord 2017; Oxfam 2017). In this regard, a joint statement on behalf of more than a hundred NGOs released in June 2016 expressed deep concerns about the direction taken by EU external migration policy, and specifically about attempts to make deterrence and return the main objectives of the EU's relations with third countries (ACT Alliance EU et al. 2016). According to the statement, the new Partnership Framework with third countries launched in 2016 risks cementing a shift towards a foreign policy that serves a single objective, to curb migration, at the expense of European credibility and leverage in defence of fundamental values and human rights.

In spite of the central role they play in EU policy discussions, in many circumstances incentives are not able to offset the fragile balance of costs and benefits that characterise readmission agreements. This is because the costs for countries of origin are not only linked with the concrete implementation of the agreement and its consequences, but also with broader domestic and regional political dynamics, including the politicisation of readmission issues at the domestic level (Cassarino 2010b; Wolff 2014). Moreover, readmission cannot be isolated from the broader framework of relations with third countries, which include other strategic issues such as energy, trade, and diplomatic and geopolitical concerns. In

this context, exerting pressure on uncooperative third countries may even turn out to be a counterproductive endeavour from a strategic point of view, as it may disrupt cooperation on other, perhaps more crucial, areas (Cassarino and Giuffré 2017).

Other contributions have pointed to how procedural obstacles play an important role in explaining the lack of effective implementation of readmission agreements. A major point of controversy related to the implementation of these agreements is the process of identification of the nationality of the person to be readmitted (and the subsequent issuing of travel documents by the relevant authorities of the requested state). While EU readmission agreements include a number of rules and lists of documents used for determining nationality, these rules do not constitute irrefutable or complete proof of the nationality of the person, a circumstance that has given rise to disagreements between the EU and third countries over the legality of decisions determining the legal identity of persons to be readmitted (Carrera 2016). Another key reason irregular migrants cannot easily be expelled is the obligation of EU member states to guarantee their rights and entitlements as fundamental human rights' holders, stemming from the EU legal system. Readmission agreements are subject to the rights and guarantees included in EU migration and asylum law, such as those enshrined in the Returns Directive as well as in relevant jurisprudence of the Court of Justice of the European Union (CJEU) (Carrera 2016; Cortinovis 2018).

In light of the above, the recent drive for flexible arrangements on readmission at the EU level may be motivated by the attempt to facilitate negotiations with third countries, especially those unwilling or lacking interest in concluding a formal and publicly visible readmission agreement. Specifically, informal arrangements on readmission may be addressed to relevant authorities in a third country that are willing to cooperate in identity determination and/or the issuing of travel documents. The EU Partnership Framework expressly recognises the strategy to pursue informal arrangements on readmission by stating that "the paramount priority is to achieve fast and operational returns, and not necessarily formal readmission agreements" (European Commission 2016). In order to achieve this goal, "special relationships that Member States may have with third countries, reflecting political, historic and cultural ties fostered through decades of contacts, should also be exploited to the full" (European Commission 2016, p. 8).

The use of informal arrangements on readmission with third countries has been the object of criticism by both academics and human rights advocates. The trend towards 'informalisation' of readmission policy has been considered an instance of 'venue shopping', that is, as an attempt by EU actors to search for new fields of collaboration in an attempt to avoid compliance with rule of law standards included in EU legislation and judicial oversight by the CJEU (Carrera 2016; Slominski and Trauner 2018). In addition, informal arrangements avoid democratic accountability by the European Parliament, as those agreements do not fall within the scope of Art. 218 of the Treaty on the Functioning of the European Union, which regulates the adoption of international agreements in accordance with the ordinary legislative procedure. Finally, EU readmission arrangements, and notably their implementation, pose challenges regarding their compliance with the EU Charter of Fundamental Rights. In fact, while some of these arrangements include references that the contracting parties commit to comply with the human rights of the people expelled, no systematic and effective procedure is in place to monitor and safeguard compliance in their implementation in the third country concerned (Cassarino 2010b; Carrera 2016; Cassarino and Giuffré 2017).

5. Potential impacts of policies adopted in this area

EU and international human rights standards

Return and readmission policies are subject to the rights and guarantees foreseen by EU immigration and asylum legislation, such as those enshrined in the EU Returns Directive, as well as the jurisprudence developed by the CJEU. These standards ultimately recognise the need for irregular migrants to have access to fair and effective remedies and good administration in relation to removal orders. These include the fundamental right to appeal against a removal order before independent national authorities with the power to suspend the enforcement of expulsion. The emphasis of current EU policies on increasing the effectiveness of return, including through the use of informal and non-binding readmission arrangements, raises a set of issues concerning the impact of those measures on relevant EU standards in a number of areas, including respect of fair and legal remedy procedures, identification and re-documentation of migrants, and the effective protection of personal data.

EU rule of law and better regulation principles

EU readmission policy takes place in a context marked by the predominance of member states' bilateral patterns of cooperation on readmission, based on both standard readmission agreements and non-standard arrangements. This circumstance raises the question of the added value of EU readmission policy, especially in light of the difficulties experienced in the negotiation and implementation of the formal readmission agreements concluded so far. The recent move towards the use of informal and non-binding arrangements on readmission at the EU level responds to the objective of increasing return rates, a top priority on the EU agenda in the last few years. However, this process of 'informalisation' contrasts with the process of 'Europeanisation' of readmission policy sanctioned by the Treaty of Lisbon. The preference for informal agreements has a substantial impact on the EU's democratic rule of law, since it excludes the European Parliament from the decision-making process on readmission.

EU international relations

Readmission should be considered only one aspect of the broader bilateral framework of cooperation between the EU and a third country. In the last few years, migration-related concerns have acquired the status of a top priority at the EU level, prompting a reorientation of EU external action towards the objective of containing migration. Yet as already noted by several observers, this trend may impact on the overall coherence of EU external action, as well as on the effectiveness of EU external policies in a number of areas, including democracy promotion, human rights protection and sustainable development

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ReSOMA

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ReSOMA - Research Social Platform on Migration and Asylum is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

DISCUSSION BRIEF

July 2018

Lina Vosyliūtė
Anne-Linde Joki

INTEGRATION

The social inclusion of undocumented migrants

ReSOMA Discussion Briefs aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- the social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

Download this document and learn more about the Research Social Platform on Migration and Asylum at: www.resoma.eu

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Discussion Brief

The social inclusion of undocumented migrants*

1. Introduction

Undocumented migrants are one of the most socially marginalised groups in Europe. There are many ways that people can fall into an irregular situation. Migrants and asylum seekers can go "in and out" of irregularity as laws and policies change (Vespe et al. 2017). A third country national in an irregular situation may have become undocumented by entering the country irregularly or/and have their asylum application rejected or not yet filed; they may also reside in the country irregularly as a consequence of overstaying their short-term residence visas or loss of employment contract. Falling into irregularity can occur when migrant workers are unable to change employer or sector and may face bureaucratic obstacles to prolong their visas. Undocumented migrants are often employed in sectors where undeclared work is predominant. Migrants can also become undocumented due to the inability of reunifying with family members.

This discussion brief provides an overview of the most relevant pieces of EU legislation and funding that explicitly mention the social inclusion of undocumented migrants. Local public service providers and civil society organisations retain a degree of dependency on national and EU funding in order to remain operational. National policies and funding schemes often implicitly and/or explicitly exclude basic service provision to migrants in an irregular situation. EU stakeholders and researchers consistently find that the gap in basic service provisions accessible to all migrants is widening across the EU.

Despite international, regional and EU human rights standards, many undocumented migrants across Europe often cannot access public healthcare, education, adequate housing and accommodation, labour protections and essential social security. In these cases, public services providers have to prove that migrants are residing regularly, before assisting them, as required by national laws addressing irregular migration in many EU Member States (Carrera et al 2016). There is a lack of 'firewall' – a formalised separation between basic service provision and immigration control, whether in law, or in practice, directly impacts the work of social services providers at the local and regional level when fulfilling their commitments and responsibilities to protect the fundamental rights of migrants in irregular situation (Crepeau and Hastie, 2015).

*By Lina Vosyliūtė(CEPS) & Anne-Linde Joki (MPG)

2. Scoping the debate

The definition

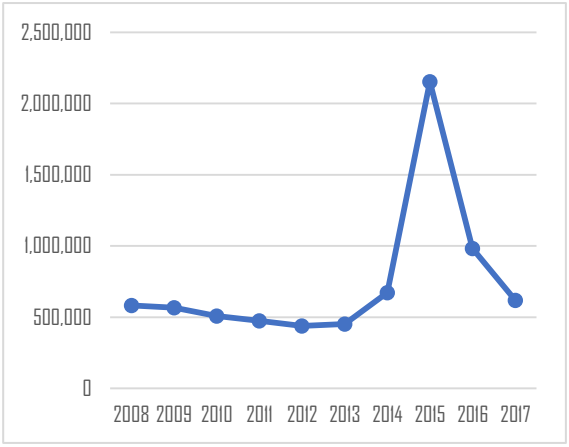
There is no single uncontested notion of 'undocumented migrants'. For the purposes of this paper 'undocumented migrants' are third country nationals who are currently living and/or working in the EU without valid residence permit. It does not necessarily mean that such migrants do not have actual passport or ID, although it might be the case for some. Thus, the term is used inter-cheangably with 'migrants in an irregular situation' and encompases failed asylum seekers and people who cannot return or be removed. Some people cannot be expelled for reasons unrelated to their documentation, for example because of humanitarian considerations (FRA 2011).

'Undocumented migrants' places a clear emphasis on the lack of administrative procedures, as opposed to the term of 'illegal migrants', which makes illegality into an essential characteristic of person. The Council of Europe and United Nations as well as some EU institutions have reiterated that 'no one is illegal' as this terminology would perpetuate the criminalisation of migration, hate speech and hate crimes against those in an irregular situation (Guild, 2010; FRA 2011; ECRI 2016; UN High Commissioner for Human Rights 2017a).

Scale of the topic

At EU level, it is impossible to verify the real number of migrants in an irregular situation. Eurostat collects annual statistics that relies on information from national authorities about third country nationals found to be irregularly present in the EU Member States. These numbers do not capture the reality on the ground, as majority of migrants in an irregular situation are not identified by the authorities (Eurostat, 2018). According to the Eurostat, the number of identified persons in an irregular situation peaked in 2015 and accounted for 2,16 million detections. As of 2017, the number was estimated at 620,000 (see Figure 1 below).

Figure 1. Number of third country nationals found to be in an irregular situation in the EU (28)



Source: Eurostat, 2018 [migr_eipre].

The European Border and Coast Guard Agency (Frontex) also collects data on irregular crossings and detections of persons staying irregularly. Frontex statistics do not correspond to actual persons coming/staying as some of the persons have been double counted when moving and living within the EU.

According to the findings of the Clandestino project in 2008, there were between 1.6 and 3.8 million undocumented migrants in the European Union (Triandafyllidou 2009). In 2012, it was similarly estimated that approximately 6% to 12% of all third country nationals residing in the European Union were

undocumented migrants (Biffl & Altenburg, 2012). Carrera and Guild (2016) argue that the production of these estimates "fuels calls for further criminalisation of irregular migration to 'deal' with what is presented as a problem because of the size". Civil society organisations and trade unions have used these numbers to make their case about the individual and societal costs of excluding undocumented migrants (PICUM, 2015:7; ETUC 2016a&b).

Exclusionary policies

Policies regulating undocumented migrants' entitlements to basic services differ widely among EU Member States, in spite of the many international and European instruments that should ensure a uniform approach to undocumented migrants' access to basic rights. National regulations place various restrictions on access to services for undocumented migrants. For example on healthcare entitlements, the MIPEX study finds that few Member States grant undocumented migrants the same level of access as nationals, while the majority of them limit coverage for the undocumented to 'emergency care' (Buttigieg, 2016). Even in cases of emergency care, the precise definition of 'emergency' and the associated conditions vary greatly.

EU-level research on the topic concludes that these rights restrictions seem intended to have a deterrence effect. Countries severely limit entitlements to rights, such as health, in the hope of encouraging undocumented migrants to leave the country and deterring others from coming, as a form of migration control (Buttigieg 2016; FRA 2015; FRA 2011; Biffl & Altenburg 2012). By making life more difficult for those already present, these measures aim to deter potential candidates and prompt voluntary returns to countries of origin or third countries while protecting the public resources (Da Lomba 2004; Atak & Crepeau 2018). European Union Fundamental Rights Agency (FRA) (2015) and academic research (Biffl & Altenburg 2012) confirm that such practices do not have any deterring effect and that they are counterproductive for the rights of undocumented, for the public heath, and public budget.

The main researchers on this topic argue that these practices are part of the '**securitisation of migration control'**, understood as policies to exclude irregular migrants or other unwanted foreign nationals through entry restrictions, border control, detention and deportation (Guild 2010; Atak & Crepeau 2018). Drawing on the securitization theory (Buzan & Weaver 1998), 'security' does not need to be something tangible but it is already carried out in the intangible speech act, itself. Weaver (1995) explains that by "uttering security, a state representative moves a particular development into a specific area, and thereby claims a special right to use whatever means are necessary to block it". Huymans (2006) explores further the connection between the securitization theory and EU policies and suggests that today the idea of a migration security threat is legitimised by the sovereign states of the EU and used to justify extraordinary measures disregarding fundamental rights and criminal justice checks and balances that claim to deal with exceptional threats posed by immigration. As a consequence, the 'security' framework that has been established in the name of freedom has a tendency to lead to

violations of human rights (Bigo, 2005; Carrera &Merlino 2009; Guild 2010; Mitsilegas & Holliday 2018). International and regional bodies, as well as civil society, repeatedly express their concern that undocumented migrants are framed and treated first and foremost as a security threat rather than as rights bearers (Brilantes et al. 2017; UN High Commissioner on Human Rights 2017 a &2017 b; ECRI 2016; Muižnieks 2015; PICUM 2015; PICUM, 2018; ETUC 2016a&b).

According to the European Commission's Directorate-General for Regional and Urban Policy, one of the consequences has been the restriction of their access to basic services and rights (European Commission 2018d). Irregular migrants are excluded from the regular labour market and public services. For example, public services are obliged to require potential clients to provide social security number (linked to a residence permit) as a pre-condition for funding and as a form of internal border control (Atak & Crepeau 2018; Cholewinski 2018). Exclusion from basic social rights rest upon and convey the idea that irregular migrants themselves are primarily responsible for their precarious situation. Such policies tend to overlook the major drivers observed by migration researchers: the impact of national and international policies (i.e. absence of bilateral agreements for seasonal work and other legal migration channels), macro-economic factors that give rise to irregular migration, such as the demand for a cheap and flexible workforce within informal labor markets combined with extreme poverty, corruption, violation of human rights and/ or conflict in countries of origin (Da Lomba 2004; Atak &Crepeau 2018). Empiric evidence points to frequent cases of migrants immigrating regularly and subsequently becoming irregular due to stringent rules, changes in the law or refusals to renew residence or work permits (Vankova forthcoming; Vankova 2017; Cholewinski 2018; Vespe et al 2017).

Therefore, the UN Secretary General has highlighted that "there is a spectrum of irregular migration". The binary conceptualisation of the issue is missing the complexity and in-between statuses of undocumented migrants (UN Secretary General 2017: para 10).

Mitigating role of civil society and local authorities

Efforts of internal border control lead to the unintended consequence of pushing irregular migrants further underground. Academics find that marginalisation and criminalisation can lead to a larger number of victims of discrimination, abuse and exploitation (Mitsilegas and Holliday 2018; O'Donnella et al. 2016; Guild 2010). For example, UNODC (2013) and several academic reports warn that the increasing vulnerability of migrants in an irregular situation can itself present an opportunity for human traffickers or other organised criminal groups. This nexus is widely acknowledged by academic research (Mitsilegas and Holliday 2018; McAdam 2013; Guild, 2010).

The national efforts to trace, arrest, detain or expel irregular migrants have given rise to frictions between the national and local levels of governance (see ReSOMA Discussion Brief on cities as providers of services to migrant populations). For example, Spencer (2017)

observes that national exclusionary approaches contrast with local authorities´ more nuanced concerns for social cohesion and responsibility for service delivery for all residents.

The topic of the social exclusion of the undocumented has mostly been raised by international and regional human rights bodies, trade unions and civil society organisations and local authorities. These actors find themselves confronted on a daily basis with obstacles for irregular migrants to access basic social services or seek justice for violations waged against them (Levoy & Geddie 2009; PICUM 2015; ETUC 2016 a & b; ECRI 2016; Social Platform 2018). Civil society organisations receiving funding from local government play an important role for undocumented migrants to access these basic services (Social Platform 2018). Local authorities often have to step in to provide for undocumented migrants, in particular vulnerable groups. Nevertheless, few policies or funds have been developed for this purpose (Van Meeteren 2008; Levoy & Geddie 2009;). Some local authorities aim to include and serve undocumented migrants where the local interest is at stake. A case study from the Netherlands indicates the tendency for local authorities to tolerate law-abiding undocumented migrants in a local context (Leerkes, Varsanyi & Engbersen, 2012). This tendency comes into conflict with national immigration enforcement officials who may try to identify or intercept undocumented migrants by obliging public service providers and even civil society to fulfil their mandate (Crepeau and Hastie 2015; also see ReSOMA brief on Crackdown on Civil Society).

Undocumented migrants' health care, education and training, legal services, and housing are rarely funded from the national budget. This situation presents another major challenge. A Joint UNHCR/ECRE study of all EU Member States finds that EU funds, such as ESF and AMIF, are channelled through national authorities (for example AMIF often is disbursed by Minsitries of Interior) and rarely made accessible to municipalities and NGOs that provide basic services to migrants, let alone undocumented migrants (Westerby 2018).

Where local policies and funding are absent, the distance between official policies and social reality is managed through the intervention of civil society actors – compassionate citizens and volunteers, NGOs, religious organisations, trade unions, and social movements (Ambrosini 2017). Civil society actors often step in to fill in a gap in a basic service provision. EU would support such actors in third-countries where "national authorities are overhelmed, unable or unwilling to act" as layed out by the European High Level Consensus on Humanitarian Aid (2017), however it is not the case for the on-going systemic neglect in the EU Member States (UN High Commissioner on Human Rights 2017 a &2017 b; ECRI 2016; Muižnieks 2015). This concerns for instance language courses, legal aid, basic health services, clothing, food and soup kitchens and shelters (Biffl & Altenburg, 2012; LeVoy & Geddie 2009). However, this situation places a strain on NGOs across Europe who are making an effort to fill the gaps and failures of the mainstream system. Such civil society actors often suffer from a general shortage of human,

technical, and financial resources (LeVoy & Geddie 2009; Social Platform 2018; Carrera et al. 2018). Civil society organisations provide low threshold access to basic services and at the same time are less likely to undertake mandate of law enforcement, in particular, border controls, than for example, national or local public institutions (Crepeau & Hastie, 2015). As a result, undocumented migrants often find it easier to trust medical staff of civil society actors, because of their independent mandate and protection of their clients (Biffl & Altenburg 2012). In most occasions, such NGOs usually do not explicitly include help for undocumented migrants, but help them irrespective of their status. As resources are typically limited, the decision to provide care can be challenging (FRA 215; FRA 2011; Levoy & Geddie 2009; Van Meeteren 2008). In some cases, services could potentially threaten their own existence if it became known that they were supporting a group which they were not supposed to support (Carrera et al. forthcoming). Limited resources also mean that NGOs frequently have to rely on volunteer staff, which sometimes affects the quality of the services provided. NGOs working in many EU Member States face additional pressure from public authorities under recent legal provisions that explicitly criminalise civil society's provision of humanitarian assistance to undocumented migrants (Biffl & Altenburg 2012; Crepeau and Hastie 2015; also see ReSOMA brief on Crackdown on Civil Society).

From the perspective of migrants' rights, it is problematic when public servants are asked to become auxiliaries of immigration enforcement (Guild & Basaran 2018; Carrera et al 2018; Carrera et al 2016; Guild 2010). In order to protect clients of public services, in some countries, 'firewalls' have been established to ensure that immigration enforcement authorities are not able to access information concerning the immigration status of individuals who seek assistance or services and that such institutions do not have an obligation to inquire or share information about their clients' immigration status (Crepeau and Hastie 2015). The European Commission against Racism and Intolerance (ECRI) has issued a set of policy recommendations to European governments on the establishment of firewalls to prevent denying human rights through sharing personal data and calls on States to comply with their specific obligations in relation to irregularly present migrants in ensuring that their rights are respected in the areas of education, health care, housing, social security and assistance, labour protection and justice (ECRI 2016).

Human rights obligations

The tension between states' interests to fight irregular immigration and basic human rights of undocumented migrants represents a major misconception. Indeed, the sovereign state has the legitimate interest to control its borders, and to know who is entering into its territory, including via administrative penalties of those entering irregularly into their territories and fight against organised criminal groups involved in human trafficking, production of forged documents. The EU legal framework clearly requires respect of the EU's founding principles, such as non-discrimination, proportionality and fundamental rights – such as right to life, right to human dignity, right to

asylum, right to health, right to work, education, etc. (Guild 2010; Council of Europe 2011; Carrera et al 2016; Crepeau and Atak, 2018).

Member States are bound by international and regional human rights documents that recognise that any human beings irrespective of their migratory background and residence status are entitled to the set of basic human rights, including provisions of social assistance, healthcare, access to justice, remuneration for the employment. Those rights derive not only from International and European human rights instruments, such as Universal Declaration of Human Rights of 1948, International Covenant of Civic and Political Rights and International Covenant of the Economic, Social and Cultural Rights, ILO conventions (for example ILO Convention No. 97 on migrant workers), Constitution of the World Health Organisation, but also from, the principles of equality and non-discrimination enshrined in the EU's Treaties, EU's Fundamental Rights Charter, national constitutions and the jurisprudence of national and European courts.

The regional documents, such as the European Social Charter and the European Convention of Human Rights (ECHR) use the term 'everyone' *that is in the jurisdiction* of States, referring to the requirement of regular residence only for a few specific rights. Council of Europe (2011) has also elaborated on the Guidelines setting out European human rights standards applicable to migrants in an irregular situation.

European Social Charter and its revised version presents another important set of standards for the EU and its Member States in the area of labour rights, social assistance and protection, healthcare, that are applicable to undocumented migrants. High Commissioner for Human Rights, Niels Muižnieks (2015) has reiterated that:

"It is easy to understand that the prohibition of torture protects all people but we should also be aware of the fact that basic social rights are also universal, because their enjoyment constitutes a prerequisite for human dignity. Therefore, member states of the Council of Europe should stand by their obligations to protect the basic social rights of everyone under their jurisdiction, and this includes irregular migrants."

The European Committee of Social rights on several occasions has clarified that basic provisions, entailing positive duties of contracting member states to provide food, emergency shelter, basic social and medical assistance - are applicable to undocumented migrants. Whereas others could be constrained to those contributing to the social protection schemes like for example unemployment benefits.

European Committee of Social Rights, in the collective complaint against Netherlands and France(Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013; European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands, Complaint No. 86/2012; International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003; Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008) confirmed that shelter must be provided even when immigrants have been requested to leave the country, as the

right to shelter is closely connected to the human dignity of every person, regardless of their residence status.

The European Committee of Social Rights has also stated that foreign nationals, irrespective of their residence status, are entitled to urgent medical assistance and such basic social assistance as is necessary to cope with an immediate state of need (accommodation, food, emergency care and clothing). And in the collective complaint from Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, the European Committee of Social Rights has reiterated that undocumented children should above all be treated as children and that the state positive obligations extend further to the possibilities to access education and other rights.

The UN Guiding Principles on Extreme Poverty and Human Rights, adopted by the UN Human Rights Council on 27 September 2012, stress that social rights are even more important in situations of economic and political crises (Sepulveda Carmona 2012). Similarly, the Secretary General of the Council of Europe has reiterated that: "It [social rights] is a means of combating social exclusion and poverty by enforcing the principle of the interdependence of human rights, which commands an international consensus; it plays a part in the social reintegration of the most vulnerable persons in society and people who, for various reasons, have become marginalised." (Secretary General of the Council of Europe 2016: para. 39)

More broadly, the European Social Charter gives a guidance to the EU in building a European Social Pilllar. For example, Secretary General of the Council of Europe (2016: para 40) called the EU to base European Social Pillar on the full application of the Revised European Social Charter and the mandatory acceptance of the competence of the collective complaints to all EU Member States. So far only Portugal and France have adopted the Revised European Social Charter without derrogations (Council of Europe 2018:pa), while 14 out of 28 EU member states have accepted the 1995 Protocol establishing a system of collective complaints to the European Committee for Social Rights.

The EU Charter of Fundamental Rights and Freedoms uses the word 'everyone' when protecting rights related with dignity and freedoms, with the exemption of the right to choose profession and to be employed. The Charter guarantees the right to human dignity, education, fair and just working conditions, healthcare and the right to an effective remedy and to a fair trial, despite the migration status. As noted by Desmond (2016), the status of the ECHR in the EU legal order has gained importance, with the Court of Justice of the European Union (CJEU) holding that the ECHR is an integral part of the general principles of law whose observance the Court ensures (CJEU 2006), and the Charter suggesting the use of the European Convention on Human Rights (ECHR) as a minimum standard of protection (Article 53 para. 3). AS the European Court of Human Rights has clarified in its caselaw - a number of ECHR standards are applicable to migrants in an irregular situation (CoE 2011).

Guild and Peers (2006) has argued that "EC Treaty [now **Treaty of the EU**] were designed and worded with the intention that its

provisions would in principle apply to all persons within its scope and jurisdiction, including third country nationals". The Court of Justice of the European Union (CJEU) has clarified in the Tumer case, concerning the employee who is a third-country national and who does not hold a valid residence permit. Tumer has complained about the refusal to grant an insolvency benefit due to his residence status (Case C-311/13) that, as a matter of principle, the social security and other provisions not explicitly excluded for migrants in irregular situation, should be seen as included (CJEU, 2013).

3. EU policy agenda

Focus on combatting irregular migration

Current EU policies mirror the objectives of Member States policies and address undocumented migrants mainly from the perspective of fight against irregular migration. The increased enforcement of returns and fight against migrant smuggling is recognised among the key objectives in the European Agenda on Migration and Europen Security Agenda (European Commission 2015a and 2015b respectively). Consequently, a vast array of EU legislation, policy and funding instruments, as well as operational cooperation tools via European Justice and Home Affairs agencies, such as Frontex and Europol, were made available to support these goals. Analysis of these policies by academia suggests that the fundamental rights of undocumented migrants are often seen or framed as obstacles for the efficiency on the side of border agencies and law enforcement operations (Carrera et al. forthcoming).

The Return Directive (2008/115/EC) is one of the most important pieces of legislation adopted in the field of irregular migration at the EU level. The Directive expresses a preference for voluntary return over forced return. Nevertheless, migration legal scholars have criticised this directive for leaving wide margin of discretion to Member States, for instance in granting an abridged period for voluntary departure, and thereby undermining the harmonisation at EU level (Desmond 2016). Even the EU Agency for Fundamental Rights (FRA) has argued that increasing efforts to enforce returns of migrants in an irregular situation and to speed up asylum procedures have created an environment in which Member States resort to restrictive measures, including deprivation of liberty (FRA 2016: 163 -165).

The European Commission (2015c) has adopted an EU Action Plan on Return, that included efforts focusing on making better use of asylum-related tools for return purposes. In addition, the Frontex's mandate was expanded, in 2016 as to coordinate pre-removal orders, joint returns operations, forced returns operations, making it EU's returns agency (Carrera & den Hertog 2016; also see ReSOMA brief on EU Return policy).

Two years after, in light of the unsatisfactory results achieved, in 2017 the European Commission (2017a) decided to issue a renewed Action Plan alongside a Recommendation on making returns more effective when implementing the the Returns Directive (European Commission (2017b).

The UN High Commissioner for Human Rights Office, in a joint statement with other UN

agencies and 90 migrant rights' defenders (PICUM 2017 b), were concerned that such plan "encourages Member States to undertake 'swift returns' of people with reduced procedural safeguards and through the increased use of detention" (UN High Commissioner for Human Rights Office, 2017a).

Despite these warnings from international organisations and civil society, on 12 of September, 2018 President of the European Commission, has announced the recast of the Returns Directive (European Commission 2018e and 2018 f) that aims further speeding up of the returns by narrowing the procedural and human rights safeguards.

The EU's **Facilitation Directive** (2002/90) that is 'Defining the facilitation of unauthorised entry, transit and residence' envisages a set of measures in the field of border control and to address irregular migration. For example, Member States are required to ascertain migration status before foreigners are offered public services, except when necessary for humanitarian reasons (Article 4 of the Directive 2002/90). In addition, the **Facilitation Directive** (2002/90/EC) leaves a wide discretion to Member States to prosecute acts of civil society actors or professionals without material or other financial benefit or unjust enrichement and lead towards increasingly hostile environment to refugees and migrants and in particular to those in irregular situations (Vosyliūtė & Conte, 2018).

All EU Member States have agreed and therefore are bound to respect international and regional human rights standards and therefore and have positive obligations, such as to save lives and to uphold the right to dignity of undocumented migrants (Guild 2010). Thus, while member states have legitimate interest to uphold their border controls it must be done in line with international, regional human rights standards and EU's own legal framework, as legitimate aim does not justify illegitimate means – namely infringements on fundamental rights. International human rights law provides that a number of rights including human dignity, non-discrimination and fair trials and others are non-derrogable, even in the cases of emergencies.

Indeed, the European Commission has made clear that policies funded by the EU in light of Better Regulation Guideliness should be seen ineffective if fundamental rights are put 'up for balancing excercises' when in fact they should be guiding principles, conditions and outcomes (Eurpean Commission 2017 c). For example, Schengen Borders Code (Regulation (EU) 2016/399) refers as well as abovementioned Returns Directive (2008/115/EC) and Facilitation directive (2002/90) in a number of occasions to the fundamental rights safeguards.

EU instruments relevant for the social inclusion of undocumented

The EU has a patchwork of legislation, policy and funding instruments that aim to contribute to the inclusion of the undocumented. EU legislators have recognised that the very status of irregular migrants makes them particularly vulnerable to becoming victims of labour exploitation and victims of other crimes and have established appropriate fundamental rights safeguards in

EU law.

To counter the unregulated employment of migrants, the EU approved the **Employer Sanctions Directive** (2009/52/EC) responding to the perception that the demand for irregular migration is created by employers. This Directive contains several important human rights safeguards: the availability and accessibility of complaint mechanisms (Article 13.1); the recuperation of outstanding wages (Article 6.1, 6.2 and 6.3); and access to residence permits (Article 13.4). It requires Member States to implement procedures to facilitate and process complaints from undocumented migrants. Despite these clear rights guarantees, the main concern of migration legal scholars (Guild & Basaran, 2018; Arango, & Baldwin-Edwards 2014; Costello & Freedland 2014; Dewhurst, 2011) and civil society (for example, Knockaert 2017) is that the Directive's primary focus on immigration control renders many of these safeguards ineffective, undermining the objective to reduce exploitative working conditions.

For example, under the Employer Sanctions Directive, Member States are obliged both to put in place effective mechanisms for irregularly employed migrants to lodge complaints against their employers, either directly or via third parties, and to provide procedures for the granting of residence permits of limited duration in situations of particularly exploitative employment conditions (Articles 6 & 13). In practice, monitoring by the European Commission (2014: 7) has observed that "Member States' transposition efforts have often resulted in weak or non-existing mechanisms to facilitate the enforcement of the irregular migrants' rights" (European Commission 2014). In some Member States no specific provisions exists in national law on how to make a complaint (PICUM 2017a). In most, no possibility exists for undocumented migrant workers to complain through third parties, such as NGOs, trade unions, or migrant workers' organizations (PICUM 2017a).

Given the Directive's primary focus on immigration control, the available academic assessments of the Directive find that it did manage to improve enforcement of the international and regional labour law standards readily applicable to undocumented migrant workers (Dewhurst, 201; Arango, & Baldwin-Edwards 2014; Costello & Freedland 2014; Dewhurst 2014; Cholewinski 2018).

The **Victims of Crime Directive** adopted in 2012 establishes minimum standards for the rights, support and protection of victims of crime. Article 1 of the Directive states that its objective is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. Crucially, it provides that the rights set out in the Directive apply to victims regardless of their residence status. The current Directive does not explicitly require an effective complaints mechanism for undocumented migrants. This shortcoming has been highlighted by the researchers and NGOs writing on the topic (Cholewinski 2018; PICUM 2017a). In addition, the 'lack of firewall' for undocumented can prevent victims of crimes (including gender-based violence) from filing complaints at the police and accessing access shelters and other assistance foreseen under this directive (Atak & Crepeau 2018).

Overall, the EU's main goals for socio-economic inclusion—the Europe 2020 strategy--presented some of avenues for addressing the needs for various disadvantaged groups in the area of employment, education, as well as, addressing the issue of poverty. PICUM—the main civil society actor on this topic acknowledged the importance that the undocumented were covered in the Europe 2020 strategy among the most deprived groups:

"The inclusion of migrants irrespective of their migration status in the broader implementation of the Europe 2020 Strategy is crucial as migrants face an increased and disproportionate risk of poverty and social exclusion, human rights violations and discrimination" (PICUM 2015).

The PICUM (2015) report noted that despite this acknowledgement, realities on the ground for undocumented has not changed much since the beginning of the Europe 2020 strategy.

EU Funding programmes

The EU has extremely limited funding instruments available to support the inclusion of undocumented migrants.

Only **FEAD—the Fund for European Aid to the Most Deprived**—explicitly includes the undocumented. For the 2014-2020 period over €3.8 billion was earmarked for the FEAD. EU Member States were expected to contribute at least 15% in national co-financing to their national programme (European Commission 2018d).

Comparatively small in scale, FEAD represents a comprehensive EU programme line designed to help people take first steps out of poverty and social exclusion by addressing their most basic needs. Implemented under 'shared management' through national programmes, Member States can provide material assistance to the most deprived (like food, clothing and other essential items for personal use) in the context of social inclusion measures; or provide non-material assistance to help people integrate better into society. Defining as end recipients of FEAD (Regulation 223/2014, Art. 2.2):

"persons, whether individuals, families, households or groups composed of such persons, whose need for assistance has been established according to the objective criteria set by the national competent authorities in consultation with relevant stakeholders".

In principle, therefore, the FEAD Regulation allowed co-funding for measures supporting the undocumented. However, Member States have wide discretion in the implementation of their national programmes, in terms of priorities, the definition of target groups and actual funding decisions, such as whether or not to include the undocumented. Only Germany explicitly mentioned support to vulnerable EU citizens and 'improving the access of immigrating children to offers of early education and social inclusion' (European Commission 2015e). Migrants in an irregular situation were not explicitly mentioned in any of the Member States Operational Programmes and related performance indicators. No clear overview exists of the actual uptake of FEAD in terms of undocumented migrants (European Commission 2015d).

Other relevant EU funding programmes exclude irregular migrants in their eligibility rules. **The European Social Funds (ESF)** targets persons with legal labour market access, thus excluding persons without the right to work (European Commission 2015d). The same holds true for the other major EU financial instruments on social inclusion, such as the **Youth Employment Initiative (YEI)** and the **Employment and Social Innovation fund (EaSI)**.

The **Asylum, Migration and Integration Fund's (AMIF)** focus on integration only includes third country nationals with regular residence. Strict eligibility rules excluding the undocumented have led to complaints from organisations and projects working on social inclusion because their target groups often include persons with diverse, often fluid, residence status. The EU social NGOs have therefore made the joint statement that the requirement in EU funding to report immigration status "represents not only an additional burden on civil society, but also compromises the establishment of a trustful relation between service providers and users, justifies the division of families and leads to many errors" (Social Platform 2018:11). Similarly, "restrictions [that undocumented migrants] may have faced in accessing education and health care services not only result in an abuse of their human right to education and health, but also result in wasted potential and can have harmful long-term health impacts" (PICUM 2015: 2).

The European Commission's Directorate-General for Regional and Urban Policy (DG REGIO) (2018d) has made an effort to promote and demonstrate the use of EU funds for social inclusion, healthcare and legal services. The DG REGIO toolkit highlights that EU funds such as FEAD, ESF, AMIF as well as European Regional Development Fund (ERDF) and European Agricultural and Rural Development Fund (EARDF) "should be used to ensure access to basic mainstream services for vulnerable groups" (European Commission 2018d: 26).

DG REGIO has proposed that:

"Taking into account the barriers arising in legal circumstances, the services described below [shelter and housing, healthcare and legal services] can be delegated to external non-governmental stakeholders. In this way, the services may be made available for vulnerable groups in a flexible way" (European Commission 2018d: 26).

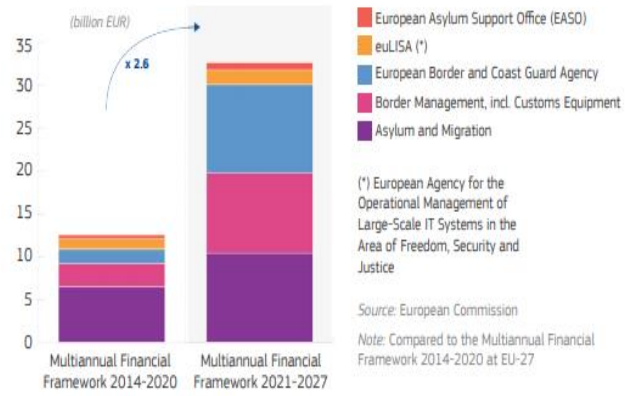
Given the limited EU funds under the current budget until 2020, the upcoming 2021 to 2027 Multiannual Financial Framework (MFF) offers a major opportunity for change. The proposals for the future MFF were published by the Commission in May and June 2018 and currently are now under negotiation by the Parliament and Member States.

The proposal for an extended European Social Funds Plus (ESF+) mentions migrants explicitly along Roma as 'marginalised groups suffering from social exclusion' (European Commission 2018 a). While the Asylum and Migration Fund (AMF)(replacing today's AMIF) would address short term integration needs of migrants, ESF+ aims to address the long-term integration needs (European Commission 2018a: 50). However the ESF+ proposal was framed as complement to AMIF's definition of

integration, thereby excluding the very narrow opportunities to fund services covering undocumented - 'in light of the persistent need to enhance efforts to address the management of the migration flows in the Union as a whole' (European Commission 2018a: 19, recital (20)).

The predominance of Ministries of Interior-thinking in ESF+ would mean that a broader range of funds would focus less on social inclusion and more on 'efforts to counter irregular migration and to ensure the effective return and readmission of irregular migrants to their home countries' (European Commission 2018 c and f). The 2.6 times increase in migration funding also indicates that of the funding priority will be preventing irregular migration, as indicates increased funding for European Border and Coast Guard and Border Management authorities (see figure 2).

Figure 2. Comparison of old and new Multiannual Financial Framework allocations



Source: European Commission 2018c.

In addition to this, the merger of FEAD into ESF+, as proposed by the Commission, may actually increase the obstacles for social inclusion of the undocumented (European Commission 2018). While FEAD's volume broadly is to be maintained under Chapter 3 of ESF+ and the hitherto definition of most deprived target groups within national programmes is kept in the proposal, a key point for discussions of the tabled regulation in Council and Parliament (and with stakeholders) will be whether the current 'low threshold' approach to FEAD will be upheld, or whether the potential use of EU co-funding for inclusion measures to the benefit of undocumented will become further reduced (Social Platform 2018).

One possible opening for funding on the social inclusion and upholding human dignity of the undocumented is the new funding programme 'Rights and Values'. This fund aims at "protecting and promoting rights and values as enshrined in the EU Treaties and in the EU Charter of Fundamental Rights, including by supporting civil society organisations, in order to sustain open, democratic and inclusive societies" (European Commission 2018b). The programme would aim to 'combat and prevent racism, xenophobia, hate speech and violent extremism' and 'the promotion of inclusion' (European Commission 2018b).

4. Key issues and controversies

Social exclusion of undocumented resulting from criminalisation of migration and lack of 'firewalls'

Safeguards are essential to uphold undocumented migrants' access to dignity and fundamental rights. The EU's Fundamental Agency finds that the danger of detection and removal, real or perceived, discourages

undocumented migrants from approaching medical facilities, sending their children to school, registering their children's births or attending religious services (FRA 2011). 'Firewalls' provide such safeguards, by establishing a clear separation in law and practice between accessing services and any proceedings related to immigration. This firewall includes protection from fines and other administrative sanctions, prosecution for immigration-related criminal offences, arrest, detention and deportation (Crepeau & Hastie 2015).

Scholars have been consistently concerned with the lack of safeguards for the rights of undocumented migrants in the policies designed to fight irregular migration, namely, externalising EU's borders in cooperation with third countries, fighting migrant smuggling and trying to return those who are found to reside in the EU irregularly (Guild 2010; Costello and Freedland 2014; Desmond 2016; Carrera et al 2018; Atak & Crepeau 2018; Cholewinski 2018; Guild & Basaran 2018). They observe that this trend has intensified as a reaction to so called 'European Humanitarian Refugee Crisis', which has led to the adoption of operational measures aimed at reducing numbers of arrivals, preventing and controlling such migration without having due regard to the protection of the human rights of migrants, criminal law checks and balances, and principles of the EU law (Mitsilegas and Holiday 2018; Carrera et al 2018 forthcoming).

Various UN and Council of Europe human rights bodies have linked the restrictive policies on irregular migration with the increasing xenophobic and anti-migrant rethoric, rise of populism and even the rule of law challenges (Brilantes et al. 2017; UN High Commissioner on Human Rights 2017 a &2017 b; ECRI 2016).

The UN High Commissioner's for Human Rights mission to the border zones of the EU has criticised such increasingly restrictive trends:

"[EU and neighbouring] States appeared to prioritize an emergency and security-focused approach in their migration responses, reflected in restrictive laws and policies, such as the criminalization of irregular entry and/or stay, the increased use of detention practices or swift return procedures, all of which had far-reaching impacts on migrants' safety, health and ultimately, their dignity" (UN High Commissioner for Human Rights Office, 2017b).

UN and regional human rights mechanisms have observed gradual restrictions to a wide array of public services, including welfare, public housing, education, and (most) health care, as an additional instrument of migration policy, with the central aim of excluding undocumented migrants from such services (UN High Commissioner of Human Rights 2017a and 2017b; Brillantes et al. 2017; ECRI 2016).

Academia and civil society working on this topic have also criticised the call for 'more security' in practice often, in the end, means 'less rights for undocumented'. (Guild 2010; Costello and Freedland 2014; Carrera et al 2016; Desmond 2016; Carrera et al 2018; Atak & Crepeau 2018; Cholewinski 2018; Guild & Basaran 2018, PICUM 2015; Social Platform 2018). This 'securitisation' approach actually

brings insecurity not only to migrants who fall in an irregular situation, but also to those who assist them and thus means less rights for all – migrants and EU citizens alike (see also a ReSOMA Discussion Brief on Crack Down on Civil Society).

The effect on lack of access to social rights is recognised by some of the European Commission services, such as DG Regio:

"Non-EU migrants have identified the lack of legal status as affecting integration more than employment status. Access to basic mainstream services by these vulnerable groups may be limited due to legal boundaries, as well as discriminating treatments."' (European Commission, 2018d: 26).

While the recognition of the fundamental rights of undocumented migrants is reflected in EU's legal principles and legislation, in practice, undocumented migrants are very rarely able to exercise these rights, making them rather theoretical than real (Cholewinski 2018; Dewhurst, 2014).

Access to healthcare

International and EU law guarantees access to health for everyone including undocumented migrants. Article 168 TFEU provides for a "high level of human health protection and Union action complementing national policies". In light of the Turmer judgment (Case C-311/13), this Article should be interpreted as including undocumented migrants. At the same time, public health service providers can and are requested to verify the residence status of migrants and to report them to relevant border control authorities on the basis of Facilitation Directive or other returns and irregular migration control measures. Civil society are also caught up in these reporting requirements (Carrera et al. 2018; Carrera et al. forthcoming; see also a ReSOMA Discussion Brief on Crack Down on Civil Society).

Restrictions of access to healthcare for the undocumented are usually justified as a perceived 'pull factor'. The Fundamental Rights Agency addressed such "often voiced concern" and concluded on the basis of the Swedish government inquiry that (FRA, 2011: 7):

"the availability of health and medical services drives neither such migrants' decisions to enter a particular country nor their decision to leave it".

Researchers regularly report the consequence of healthcare restrictions and reporting requirements is to drive undocumented migrants further underground, which undermines access to healthcare, social trust in public services, and public health (Da Lomba 2004; O'Donnella et al. 2016; Sholz 2016; Carrera et al. 2018).

Research funded by the European Commission's Directorate-General on Health and Food Safety (DG SANCO) indicate that procedural requirements and restrictions further undermine access to healthcare (Biffl & Altenburg, 2012). The research commissioned by the EU Agency for Fundamental Rights (2011) distinguished five challenges or barriers in providing healthcare services including emergency services:

"the costs of care and complex reimbursement procedures; unawareness of entitlements by health providers and beneficiaries; fear of

detection due to information passed on to the police; discretionary power of public and healthcare authorities; and quality and continuity of care" (FRA 2011: 7).

When legal and procedural restrictions are combined, right to health becomes more theoretical rather than practical.

Subsequent study by the Fundamental Rights Agency (2015) suggests that investing in the health of undocumented migrants is not only morally right but also economically sound, showing "powerful indication that governments would save money by providing access to primary healthcare to migrants in an irregular situation in the case of hypertension and prenatal care" (FRA 2015).

The importance of access to healthcare has been reiterated at EU level l (Sholz 2016), with the Luxembourg Presidency Conclusions and two European Parliament's resolutions on vulnerable migrants in accessing the healthcare (European Parliament 2013) and on migrant women (European Parliament 2014). At the same time, the legal and procedural barriers for healthcare access for the undocumented have remained or even increased, as discussed in Section 3 of this discussion brief (O'Donnella et al. 2016; Carrera et al. 2018).

Examples from the UK and Spain illustrate the challenges when firewalls are erased and undocumented migrants are excluded from public heathcare. This restrictionist trend has been confirmed by the UN High Commissioner of Human Rights (2017b). The field missions at the EU's borders in 2017 have heard from migrants in transit about the impact of having to live clandestine lives both - exerbating their health condition and preventing from accessing the health professionals (UN High Commissioner of Human Rights 2017b: 13):

"Problems included being subjected to violence from certain police authorities because migrants were too afraid to report their conduct, and not being able to access adequate medical care (particularly for chronic illnesses) in informal settlements or along their journey".

UK: Home Office and NHS data sharing agreement

In January 2017, the UK's Home Office and UK's National Health Service (NHS) signed a data sharing agreement (Memorandum of Understanding 2018), setting out how patient data may be shared for tracing immigration offenders, for example those that have missed appointments with the Home Office (Bulman 2018). NHS doctors, Members of the Parliament and civil society organisations heavily criticised this agreement as part of the hostile environment policy towards undocumented migrants and asylum seekers (Carrera et al 2018; Bulman 2017 & 2018; Matthews-King 2018a & 2018b). UK's civil society organisations Liberty and Migrant Rights Network filed a case against Home Office considering the data-sharing agreement as against the public interest—violating patients' confidentiality, discriminatory towards non-British citizens, and promoting racial profiling (Bulman 2017; Bulman 2018; Matthews-King 2018a). Under significant pressure, in May 2018, the UK government "pledged to only seek patient data – which is handed to the Home Office by NHS Digital on request – in the event of

serious crimes" (Matthews-King 2018). Nevertheless, civil society and doctors remained critical as the precise changes in the data-sharing agreement remain vague (Matthews-King 2018).

Spain: Public healthcare reform in disharmonies between national and regional priorities

In 2012, the **Spanish** government introduced a public healthcare reform excluding undocumented migrants from public healthcare (the Royal Decree 16/2012). Previously, Spain had been considered among the countries (along Portugal, Italy, France and the Netherlands) where undocumented migrants had well-developed access to health care (Biffl & Altenburg 2012: 120). Spanish civil society organisations challenged the new legislation as they were "concerned that the Royal Decree 16/2012 contravenes international human rights norms and standards, and is regressive with regard to the right to health" (CESR et al. 2016). The Spanish constitutional court upheld policy, even though government's statistics in 2016 showed that "since the RDL came into effect on 1 September 2012, more than 748,000 people have been left without a health card and have been excluded from the National Health System" (CESR et al. 2016). The academic research published in March 2018 explored the devastating effects of the the Royal Decree 16/2012 and has concluded that:

"during its first three years of implementation, the restriction increased the mortality rate of undocumented immigrants by 15%, suggesting that health insurance coverage has a large effect on the health status of vulnerable populations with few alternatives of accessing health care" (Mestres et al. 2018).

In June 2017, the regional government of Catalonia re-established universal public healthcare coverage. By June 2018, the Royal Decree 16/2012 was reversed and Spanish government re-instated the healthcare provision for all migrants, including the undocumented.

Access to labour rights

Restrictive policies and funds for the labour rights of undocumented workers have been repeatedly raised by European Trade Unions Confederation (ETUC). ETUC is concerned that the exclusion of undocumented migrant workers from protection of labour law is "feeding the informal economy deprives the state of tax revenues" (ETUC, 2016 a).

Trade union actors have consistently defended the importance of universal access to labour and social rights, including for the undocumented:

"Standing up for undocumented workers is a duty for trade unions, because it is in the interests of all workers. All workers should be able to contribute to and benefit from the country's health and other public services, pensions and benefits. All workers should have enforceable rights to the right pay, working hours and conditions" (ETUC 2016b).

Scholars have documented how national laws prevent undocumented and thus undeclared migrant workers from contributing to (income) tax, health care, pension and other social

benefits systems (Costello & Friedland 2014; Guild & Basaran 2018). Without this social safety net, such system makes undocumented workers highly vulnerable to labour exploitation and access to other rights (Crepeau and Atak 2018). Some employers, who are deliberately avoiding tax and obligations to uphold labour rights and conditions, such as minimum pay, are profiting from this situation. As a result, academic assessments of the Employers Sanction Directive find that the right to back pay for undocumented migrants remains more theoretical than practical based on the current state of implementation across the EU (Dewhurst, 2011; Costello & Friedland 2014; Dewhurst, 2014; Cholewinski 2018).

The preamble of the Employers' Sanctions Directive (2009/52/EC), states that "undocumented migrants may often be afraid to approach the relevant State authorities and services if they fall victim to crime or require other basic services". For the same reason, they may be slow to seek redress through official channels if they are underpaid, unpaid or otherwise exploited or abused by their employers (Crepau & Hastie 2015; Cholewinski 2018). Research among grass-roots NGOs by PICUM confirms that undocumented workers are prevented from filing a complaint due to a lack of clear separation between labour inspection and immigration control (PICUM 2017a; Knockaert 2017). For example, the police frequently accompany labour inspectors during workplace inspections in order to report all persons found without residence status (PICUM 2017a). Scholars and practitioners on the topic find that such practices undermine the objectives of a complaints mechanism and enable exploitation by preventing the reporting of violations and claims (Dewhurst 2014; Crepeau & Hastie 2015; Cholewinski 2018). Alternatives are lacking for undocumented migrants to file confidential complaints, for example via third parties – civil society organisations or trade unions (Knockaert 2017; PICUM 2017a).

Access to justice

Article 47 of the EU Charter of Fundamental Rights states that all victims, including undocumented migrants, have the right to effective access to justice. The Fundamental Rights Agency highlights that "access to victims support services is of crucial importance to crime victims' ability to exercise their right to effective access to justice" (FRA 2014:11). Given the importance of access to victims' support, the Victims' Directive (2012/29/EU) obliges EU Member States to ensure that:

"victims, in accordance with their needs, have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings".

Such services include emotional and psychological support and advice on legal, financial and practical issues, and addressing risks of further victimisation (FRA 2014:11).

In 19 of the 28 EU Member States, these victims support services are available irrespective of their nationality, country of origin or migration status (FRA 2014: 80). However, practical barriers emerged from interviews with national experts and practitioners conducted by the Fundamental

Rights Agency:

"while most EU Member States have adopted adequate legislation on victims' rights, legislation at both the national and EU levels has had a limited impact on actual victim support practices. […] While some groups of victims are prioritised, others – for example migrants and particularly undocumented migrants – are in a disadvantaged position regarding access to effective support services and protection incriminal proceedings" (FRA 2014: 74).

Previous research by FRA indicated that undocumented migrants regularly face the risk and fear of deportation on every encounter with state authorities, in particular, the police (FRA 2011). Similarly, scholars on thise topic raise these concerns about the safety of undocumented victims of crime in their interactions with relevant authorities (Carrera & Merlino 2009; Guild 2010; Crepeau&Hastie 2015; Crepeau & Atak 2018; Carrera et al. 2018).

Just as for health or labour rights, access to justice requires a 'firewall' to protect information gathered through the victim support process (Crepeau&Hastie 2015). Civil society has called for a victim-centred approachto improve effectiveness of the Victims' Directive (2012/29/EU)(Smith & LeVoy 2015). This victim-centred approach includes action targeting negative bias or attitudes towards undocumented migrants among police (Guild 2010; FRA 2011; FRA 2014). Academic and NGO sources highlight that framing undocumented migrants as criminals is misleading and undermining their access to justice (Carrera& Merlino 2009; Guild 2010; Carrera et al 2018)

PICUM notes that "the very language often used to refer to undocumented migrants – "illegal" –wrongly implies that they are not entitled to legal protection" (Smith & LeVoy 2015:4). Therefore, current political discources scapegoating 'undocumented migrants' are excerbating their vulnerability (FRA 2018; ECRI 2016) and lead to confusion between short-term political priorities and the goals of criminal justice system – upholding fundamental rights, as well as rule of law principles (Muižnieks 2015; UN High Commissioner on Human Rights 2017 a & b;).

5. Potential impacts of policies adopted

This chapter briefly summarises the key impacts of current EU and Member States policies that have been elaborated in detail in preceding chapters.

EU and international human rights standards

- Legal and practical barriers for undocumented migrants to access their rights to human dignity, labour rights, heath services and medical assistance, access to justice for the victims of crime and other areas of life under international and European law
- Exclusion of undocumented migrants from basic rights undermines the EU's legal principles, such as Fundamental Rights, the Rule of Law, and the Better Regulation Guidelines upholding 'fundamental rights' as a criteria for effectiveness and efficiency.

- Crackdown on civil society and actors providing basic services undermining their mandate and operations. This criminalisation of solidarity constitutes indirect form of 'criminalisation of migration'. Increased demands and political pressure on border and coast-guards, police officers and prosecutors undermines their mandates and professional ethics to uphold fundamental rights (Carrera et al. forthcoming; see also ReSOMA Discussion Brief on Returns and ReSOMA Discussion Brief on Crackdown on civil society).
- 'Criminalisation of migration and solidarity' is often a result of and can further increase populist and xenophobic rhetoric with broader democratic and rule of law consequences on fundamental rights of all, including other minority groups, in terms of the right to free speech & right to association (see ReSOMA Discussion Brief on Crackdown on civil society; ECRI 2016; UN High Commisioner of Human Rights Office 2017a; Brillantes et al. 2017; Carrera et al. 2016; Carrera et al. 2018).

Political implications

- Legal exclusion of undocumented from social rights and protection contributes to increasingly restrictive policies in the area of migration and asylum in the EU. Increasing national restrictions further the financial exclusion of undocumented as, for example, AMIF funds are distributed at national level via Interior Ministries.
- Little-to-no impact of "Europe 2020" strategy on fight against poverty among the undocumented (PICUM 2015; Social Platform 2018).
- Merging FEAD into ESF+ may lead to an increase in the threshold for co-funding of services provided to undocumented (European Commission 2018; Social Platform 2018).

Inclusiveness of European societies

- The denial or intimidation of migrants in irregular situations in accessing healthcare and preventive health care services poses a public health challenge as well as an immediate danger to the migrants concerned (FRA 2015; Biffl &Altenburg, 2012).
- Lack of safe procedures to report crimes and labour violations due to the lack of firewall principle is undermining access to justice and the fight against other serious crimes, including hate crimes (FRA 2011; FRA 2014; Crepeau & Hastie 2014; Crepeau & Atak 2018).
- Lack of timely access to labour rights for undocumented migrants increases risks of labour exploitation, servitude, slavery and human trafficking (UNODC 2012).

Economic and fiscal dynamics

- Costs of excluding undeclared migrant workers from contributing to the (income)

tax, health care, pension and other social benefits systems (ETUC 216 a&2016 b).
- Costs of overqualification and lack of recognition and of undeclared migrant workers.
- Costs of labour exploitation of undocumented migrant workers.
- Costs of failing to address crime, due to lack of trust to and inefficiency to support undocumented victims (FRA 2011).
- Healthcare costs for preventative primary and prenatal care for undocumented migrants are much lower than emergency care (FRA 2015).

The EU as an international actor

- Lowered scrutiny for EU Member States at international and regional human rights mechanisms for not upholding the human dignity of undocumented migrants, for example by the High Commissioner of Human Rights (2017a & b), at the Human Rights Council – Universal Periodic Review Process and other special procedures.
- Diminished EU's standing in scrutinising third countries, for example, regarding their policies targeting human rights defenders, political opponents and their standards for labour rights, good governance, economic and social policies--In other words, the very issues often contributing to so called 'push factors'.

Migration trends and dynamics

- Hostile environment towards undocumented migrants being used as migration management tools contrary to international and regional human rights as well as EU legal framework (ECRI 2016; Brillantes et al 2017; UN High Commissioner of Human Rights 2017 a & 2017b).
- No evidence that access to basic services is a 'pull' factor to migrate (Carrera et al. 2018; Carrera et al forthcoming, Guild and Basaran 2018; FRA 2014).
- Depriving undocumented from dignity and rights leads towards increased vulnerability in terms of their health conditions, labour exploitation, exposure to crime, which may decrease opportunities for voluntary return and successful re-integration (Costello & Friedland 2014; Brillantes et al 2017; Guild & Basaran 2018).

- Restrictive regular and labour migration rules increase chances of falling into irregularity and undermine opportunities for a circular migration beneficial to migrants and their countries of origin and destination (Vankova 2017; Vankova forthcoming)

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RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

ReSOMA - Research Social Platform on Migration and Asylum is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

DISCUSSION BRIEF

July 2018

Alexander Wolffhardt

INTEGRATION

Sustaining mainstreaming of immigrant integration

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ReSOMA Discussion Briefs aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- the social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

Download this document and learn more about the Research Social Platform on Migration and Asylum at: www.resoma.eu

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Discussion Brief

Sustaining mainstreaming of immigrant integration*

1 Introduction

Mainstreaming refers to the systematic implementation of policies and measures in all areas relevant for immigrant integration – be it housing, education, qualification, social services or health. All authorities and organisations providing public services, across all levels of government, become responsible for contributing to immigrant integration and for adapting their activities to the requirements of a diverse society. While services and measures may address specific needs of migrants in justified contexts, mainstreaming avoids group-oriented integration policies outside general public policies. It requires a common policy framework aimed at embedding immigrant integration as a general policy priority, cross-sectoral planning and implementation, efficient coordination and shared commitment. Comprehensive integration action plans or -strategies are typical instruments to achieve its objectives.

On European level, the Commission encourages mainstreaming by promoting it as a Common Basic Principle for Immigrant Integration, and through the inclusion of integration-related objectives in a range of EU policies and funding programmes. Under the impression of the 2015/16 arrivals, the 2016 Action Plan on the integration of third country nationals of the European Commission and its ongoing implementation has marked a new high point of efforts at mainstreaming the response across EU policy fields. With the current preparations and negotiations on the 2021 to 2027 funding and programme framework, elections to the European Parliament and a new incoming Commission in 2019, key decisions about the priority of immigrant integration on the EU agenda are due in the near future.

2. Scoping the debate

Patchy overall picture across Member States. Responsibility for mainstreaming overwhelmingly rests with Member State governments. Ultimately, the national level of government disposes of the widest-ranging influence on relevant policies and of the means to coordinate across different policy fields. The commitment of central government is thus crucially important if immigrant integration is to be broad-based and become an integral part of policy-making and implementation, service delivery and organisational culture across a wide range of fields.

However, EU Member States differ widely in their policies and efforts at mainstreaming. This variegation reflects different migration histories and degrees of migration-related

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population change, but also political attitudes and different traditions of dealing with ethnicity- or citizenship-related issues. Evidence for a 2015 FRA report (FRA 2015, FRANET 2015) suggests that while 20 EU Member States (except BG, CY, FR, HU, IE, LT, PL, RO) have a national-level integration policy, most of these are time-limited strategy documents or action plans, not laws, and are revised in many cases only to comply with the requirements for EU AMIF funding. Nearly half of the EU Member States (both 'old' and 'new') only adopted an integration policy after 2004. A recent survey for the European Court of Auditors found that no fewer than 22 Member States revised their integration policies since 2014, and that 16 Member States had modified the focus of target groups as response to the increase in arrivals. Of 24 assessed EU countries, around 80% have developed integration measures in the areas of education and social inclusion, while less than 65% have measures in the fields of employment, health and housing. In the vocational training field, only 50% of the countries report activities to further integration (ECA 2018).

Multiple manifestations of mainstreaming. Generally, the notion of a whole-of-government response to migration challenges is most established in countries with a longer tradition of immigration, mainly in north-western Europe. Examples of countries with comprehensive integration policies, including specific commitments made by several ministries, are Germany (2007), Spain (2011), Finland (2012), Portugal (2007), and Sweden. Most explicitly, mainstreaming has been pursued in Scandinavia and the Netherlands, where integration ministries have pushed for supporting newcomers largely through generic policies. Ireland represents the example of a more recent destination country adopting a mainstreamed approach relatively early on (2008). In some countries, comprehensive national action plans emerged from deliberative, including multi-level, development processes, as in Austria (2010), Germany (2007) and Portugal (2007) (FRA 2015, FRANET 2015, Huddleston et al. 2015).

Where efforts at mainstreaming are made, they tend to be labelled according to country-specific discourse. Thus, 'mainstreaming of integration' may also come along in the guise of e.g. 'diversity' or 'equality' policies, 'diversity management', 'interculturalism', 'intercultural opening of services', or simply as comprehensive integration policy. Where policies aim to avoid migrant-related objectives altogether, 'proxy' policies defined in territorial or social cohesion terms may pursue the same substantive objectives as such more explicit policies – that is, the adaptation of general policies and public services to the needs of a diversifying society (Scholten & van Breugel 2018, Kasli & Scholten 2018a,b).

Volatile developments and lack of knowledge on impact. However, recent research in five Member States (Benton et al. 2015, Collett & Petrovic 2014) has highlighted the fragility and contestation of the mainstreaming agenda. While austerity measures have led to the decentralization of integration policy responsibilities in the UK and France, in the Netherlands the government retracted to a considerable extent from the notion of integration as being a public responsibility. In addition, politicization

of migration through the rise of populist and anti-immigrant sentiments has contributed to a renunciation of group-specific approaches. The 2015/16 peak of arrivals provided a new impetus in the most affected countries, with Austria, Finland, Germany, Italy, the Netherlands and Sweden all reinforcing the mainstreaming of generic services, especially in the labour market and education fields. While some of these changes were primarily aimed at increasing the short-term ability of the systems to absorb the sudden increase of numbers, policy attention clearly has shifted now to the fine-tuning of integration strategies (OECD 2017, 2018, Kasli & Scholten 2018a,b).

Overall, the prevalence of mainstreaming across EU Member States can only be assessed from the 'input' side, that is, the existence of national integration policy frameworks and the reality of mainstreaming efforts seen in various policy domains. No systematic and comparable impact assessments exist, however, that would evaluate the results and effectiveness of mainstreaming in terms of better integration and social cohesion outcomes across countries.

Mainstreaming on local and regional level. Notwithstanding the pivotal role of national government action, mainstreaming on the local and regional level is essential for comprehensive implementation. In all Member States municipalities have responsibilities for delivering basic services to the population. Depending on the specific constitutional context, local and regional levels of government play major roles in providing key housing, educational, health and other social services. Indeed, in a number of countries a major impetus for the mainstreaming agenda has come from below, when cities or regions adopted such policies early on and inspired the development of comprehensive integration policy frameworks on national level. A main reason for this is that local authorities tend to have a specific, 'urban' approach to migrant integration, marked by pragmatism in the day-to-day provision of e.g. housing, access to care, income and education, and managing the relationships between receiving and newly arriving communities (EUROCITIES 2014, 2016, 2017a,b, Penninx et al. 2014a,b, ReSOMA Discussion Brief on cities as providers of services to migrant populations).

Transnational agenda. International actors, such as the European Union, OECD and the Council of Europe, but also policy networks involving cities and regions, have increasingly promoted and supported mainstreaming of migrant integration. EUROCITIES continues to play a proactive role in endorsing the approach through a series of (EU-funded) peer-learning and policy development projects, culminating in the Integrating Cities Charter that has been signed by 37 cities since its launch in 2010. Solidarity Cities, the initiative on the management of refugee reception at local level includes 14 European cities.

The Intercultural Cities (ICC) Programme, emerging from a joint initiative of the Council of Europe and the European Commission in 2008, is promoting its Intercultural Integration Model with a strong emphasis on interculturally adapted public services. Until 2017, a total of 85 municipalities have signed up to the model by undergoing the

assessment associated with the ICC Index tool, providing another indicator how widespread local level efforts at mainstreaming integration are across Europe.

Cornerstone of EU approach to immigrant integration. The EU Commission embraced mainstreaming early on and made its advancement a cornerstone of the EU policy framework on the integration of third-country nationals, as it emerged from 2004 onwards. The Common Basic Principles for Immigrant Integration Policy in the EU (CBPs), proposed by the Commission and adopted by the Justice and Home Affairs Council, form the foundations of EU initiatives in the field of integration. Devised as a steering instrument to foster a common understanding of integration across all Member States, CBP 10 states that "mainstreaming integration policies and measures in all relevant policy portfolios and levels of government and public services is an important consideration in public policy formation and implementation" (CEU 2004).

The EU Handbook on Integration for policy-makers and practitioners highlighted mainstreaming in its 2007 edition, resulting from a Europe-wide stakeholder dialogue and development process (EC 2007). In 2011, the EU Integration Agenda put an emphasis on the management of integration as a shared responsibility (EC 2011). Actual influence of the EU principles and policy guidance instruments on integration policy-making seems strongest in Member States that are more recent destination countries and where the EU approach helped to instigate first efforts at mainstreaming (Pawlak 2015, Jozwiak 2018 et al.).

Mainstreaming in EU funding and policy coordination. Over the years growing EU funding opportunities to support the integration of third country nationals (INTI, EIF, AMIF) have given ample room to initiatives and projects that fostered mainstreaming. EU Structural Funds, in particular ERDF-sourced programmes in urban contexts and the ESF, have increasingly contributed to immigrant integration. In the 2014 to 2020 programme period, at least 20% of ESF spending in Member States has been earmarked for social inclusion, combating poverty and any discrimination, making it a potential source for integration-related funding. Across its other funding priorities as well, focusing mainly on employment and qualification measures, the ESF has provided ample opportunities to support immigrant integration.

From 2011 on, the European Semester emerged as an annual policy coordination instrument where the Commission assesses Member States progress towards the EU's overall objectives on growth, employment and social inclusion, as set out in the Europe 2020 strategy. Targets on the employment rate, early-school leaving, risk of poverty and social exclusion represent the policy hooks around which integration issues can be raised by the Commission. While country reports mention relevant challenges and analyse outcomes, Country-Specific Recommendations (CSRs) relating to integration are rarely made to governments until now (e.g. in 2017 to Austria, Belgium and France). Also, because recommendations are not binding and are negotiated between Commission and Member States, the mechanism has had limited impact on the design of national integration policies

(Benton et al. 2015, ESN 2016).

'Soft' European governance in integration field. Overall, EU efforts to support the integration of third-country nationals, based on Art. 79.4 TFEU which confirms integration as national competence, never went beyond 'soft steering', such as promotion of the common principles, funding programmes and tools for benchmarking, comparison and know-how transfer. Up to now, availability of EU financial means for integration in various policy fields has never been linked to the explicit existence of mainstreaming agendas in the Member States, or even made dependant on implementation through a mainstreamed policy framework. Nevertheless, with their programming and partnership principles, cross-cutting impact on various policy fields and multiannual spending perspectives, EU programmes remain a significant potential lever for introducing, or strengthening, mainstreaming objectives in Member States.

3. EU policy agenda

3.1. The EU crisis response: 2016 Action Plan and related efforts

With the 2015/16 arrivals and the related efforts at migration management at European level, mainstreaming of integration found new prominence on the EU policy agenda. Building on the 2015 European Agenda on Migration which had set out the goals of the current Commission, the 2016 Action Plan on the Integration of Third Country Nationals was presented as a common policy framework helping Member States to further develop their integration policies. As such it was strongly couched in language calling for the mainstreaming of migrant integration, as "an integral part of inclusive social, education, labour market, health and equality policies", pointing out that "integration policies work best when they are designed to ensure coherent systems that facilitate participation and empowerment to everyone in society" (EC 2016a).

In this way considered an impetus for mainstreamed and more comprehensive national policies, the policy priorities of the EU Action Plan included (among others) education, vocational training, employment, access to accommodation and health, participation and social inclusion. As a manifestation of Commission policy-making, the more than 50 concrete measures to be implemented from 2016 on represented a new level of attention given to migrant integration across EU policy fields, and of related coordination across Commission services. Resulting from this concentrated effort at mobilising the existing instruments, funding programmes (such as Erasmus+, COSME, EaSI, REC, Creative Europe, Horizon 2020) have been used to underline this ambition with a number of dedicated calls for projects over the last two years.

In addition, the Commission has pushed for stronger multi-level and cross-stakeholder coordination, including the establishment of the European Integration Network (EIN, replacing with a stronger mutual learning mandate the previous Commission network with National Contact Points representing Member States governments). Inclusion of migrants and refugees was made an early priority of the Urban Agenda for the EU, a new multi-level format to render EU policies more

responsive to the needs of the local level, and for strengthened participation of cities in EU policy-making based on topical partnerships and action plans (EC 2017c). Intensified efforts at horizontal coordination with social partner organisations culminated in the signing and launch of the 2017 tripartite European Partnership for Integration, as well as the evolution of the annual European Integration Forum (a stakeholder dialogue event co-organised with the EESC) into a broader European Migration Forum.

3.2. The post-2021 agenda: MFF proposals

The response to the 2015/16 arrivals and the experiences gathered in this period directly fed into the Commission's policy planning process for the upcoming Multiannual Financial Framework (MFF), i.e. the 2021 and 2027 programme and funding period. A comprehensive spending review to underpin the future shape and priorities of the EU long-term budget assessed, among others, the coherence of all instruments with the main political objectives and values of the EU, as well as potentials for streamlining and synergies in cross-cutting issues. While it concluded that horizontal mainstreaming as formal EU budgeting tool (that uses quantitative targets) also in future should be limited to climate and environmental goals, the review suggests continuing to pursue other cross-cutting themes through programme design with specific objectives, targets, eligibility criteria or appropriate conditionalities. It further finds that "more than mainstreaming or earmarking of funds, the coherence of policies has emerged as the most important element to support efficiently the policy objectives." With more streamlined, less overlapping and better integrated programmes the Commission aims for stronger performance and greater economics of scale when delivering EU policy goals (EC 2017a, 2018b).

The spending review prominently informed the eventual Commission proposals for the 2021 to 2027 MFF, also taking into account numerous stakeholder consultations, audit findings, and assessments of conditionalities applied in Structural Funds (EC 2016b, 2017b, ECA 2018b, HLG 2017). The European Parliament actively contributed to the debate on the future MFF, with a March 2018 resolution emphasizing spending levels appropriate to the Union's increased tasks including a comprehensive asylum, migration and integration policy. The EP position included a dedicated AMIF instrument, complemented by contributions to the integration of refugees and migrants under other policies, especially the Structural Funds, but also cultural, educational, youth and sports programmes (EP 2018a).

Released in May and June 2018, key changes put forward in the Commission proposals for the 2021 to 2027 MFF include, with a view on immigrant integration and mainstreaming (EC 2018c-f):

- Structural Funds will continue to be spent and programmed across all, including higher developed, EU regions, ensuring that all Member States are covered by a more integrated governance of EU programme spending and overall EU social and economic policy coordination;
- The merging of the ESF, YEI (Youth Employment Initiative), FEAD, EaSI and Health Programme into one fund, the

ESF+, aligned with the European Pillar of Social Rights. At least 25% of national ESF+ funds will have to be earmarked for social inclusion and fighting poverty; with at least 2% dedicated to measures targeting the most deprived.

- The European Social Fund is to become, as ESF+, the major EU funding source for medium and long-term integration, with a newly established programme priority ('specific objective') that includes the promotion of the socio-economic integration of third country nationals. Member States will have to address the objective as part of the overall 25% allocation of national ESF+ funds to the social inclusion policy area.
- Simultaneously, the restructuring of AMIF to an Asylum and Migration Fund (AMF), to fund early integration measures for newly arrived third-country nationals; with a reinforced partnership principle and a financial scope of national programmes of euro 6.25 bn more than doubled compared to the 2014-2020 period.
- A stronger alignment of the ESF+ (and ERDF) with the European Semester to support reforms and increase the funds' leverage, and to better coordinate the programme framework with newly emerging EU level policy initiatives. Policy challenges of Member States identified in the European Semester process are to inform programming of the funds at the start and mid-term of the 2021 to 2027 period.
- The abolition of the option for Member States to programme and implement the ESF on regional level, which will affect 8 Member States (including the 5 largest post-Brexit) which made use of the provision in the 2014 to 2020 period. The intended stronger use of ESF+ as an instrument to support EU-inspired national reform policies may be a major reasoning behind this change.
- Synergies between integration funding under ESF+ and the EU Social Open Method of Coordination as well as the EU Education and Training strategic framework, to which the European Social Fund contributes;
- Increased use of conditionalities in the Structural Funds ('enabling conditions' replacing previous 'ex-ante conditionalities'), i.e. the existence of adequate regulatory and policy frameworks in Member States before funding is released, to ensure that performance of all co-financed operations is in line with EU policy objectives;
- A general focus on labour market integration, and related to that, issues of qualification, training and skill recognition that has already underpinned the 2016 Action Plan; visible e.g. in the proposed advancement of the mainly employment-oriented European Social Fund to the main funding instrument for medium- and long-term integration; as well as specific AMIF support to assessment of skills and qualifications acquired in a third country.

4. Key issues and controversies

4.1. Sticking points in the European dimension

Varying commitment and denial of mainstreaming as policy priority among Member States. In essence, mainstreaming is

the notion of integration as a two-way process – involving both the receiving society and migrants – translated into the domains of general policies and policy-making, public institutions and public services. As such it needs to be built on political leadership which acknowledges migration as a major factor shaping society, and the resulting needs for adaptation and reform.

In the political reality of Member States, however, this very notion is widely contested, and mainstreaming may not make it to government policy agendas due to constraining public attitudes, dominance of a denying political discourse or electoral considerations. What is still at stake in many of EU Member States, is whether broad-scale integration efforts and mainstreaming are necessary at all – or even, whether they are desirable in view of perceived pull effects attracting people to the country. And it remains a fact that where sustained mainstreaming is seen, it tends to correlate with wide-ranging and decade-long population changes and the resulting pressure on policies and institutions to come up with adequate responses. Mainstreaming as a policy solution may come rather easy under conditions of 'superdiversity', but is destined to prove difficult and a long-term challenge in newer countries of immigration (e.g. Crul 2016, Kasli & Scholten 2018b).

In this vein, it is not a surprise that the establishment of immigrant integration as an EU policy goal worth of a spending priority that would deduct available EU funds from other objectives is contested as well. As proposed by the Commission, in the 2021 to 2027 MFF Member States will be asked to allocate part of ESF+ funding to the integration of third country-nationals, while the ESF+ budget with euro 88.7 bn (at 2018 prices) would roughly stay the same as the combined ESF and FEAD budget with euro 87.7 bn in the 2014 to 2020 period (at current prices; CPMR 2018, EC 2018d, ECRE 2018, EUROCITIES 2018b, EP 2018b, EPRS 2018). As opposed to this de-facto stagnation of available ESF means, AMF funds are planned to sharply increase, but it remains to be seen what the spending shares dedicated to early integration in national AMF programmes will be.

Focal points of current European debate:

- *Provisions in the future ESF+ Regulation on thematic concentration of means that ask Member States to allocate part of the 25% earmarked for social inclusion in national programmes to socio-economic integration of third-country nationals (EC 2018d, Art. 7.3).*
- *Lack of earmarking of national AMF allocations to the specific objective supporting integration of third-country nationals in the EC proposal; and reliance on mutually agreed needs assessment between the Commission (possibly supported by the Asylum Agency) and the Member State to ensure that AMF means are actually spent on early integration under national AMF programmes (EC 2018f, Art. 3.2.b, Art. 8.2.a, Annexes I. and II.).*
- *Support from AMF for mainstreaming-related actions promoting equality in the access and provision of public and private services to third-country nationals, including adapting them to the needs of the target group, and actual meaning of such*

support in the context of 'early integration' (EC 2018f, Annex III.3.h).

Contested necessity of more binding European governance in integration field. At this juncture – where EU policy-makers draw lessons from the 2015/16 period, try to move from crisis management to long-term integration and prepare for the 2021 to 2027 EU programme cycle – one question is at the core of debate: Whether EU policies can, or should, go beyond the existing 'soft' governance aimed at inspiring, enabling and facilitating mainstreaming in Member States, and move towards a more binding framework.

As proposed by the Commission, mainstreaming of integration in the 2021 to 2027 MFF would become more strongly entwined with overall EU economic and social governance, i.e. the European Semester and national reform programme process. More flexible and cyclical governance of the ESF+, oriented at newly emerging needs, would be part of this shift, providing a new EU lever to influence Member State policy priorities. Annual Country-Specific Recommendations (CSRs) in the European Semester cycle, (increasingly also referring to migrant integration), will be taken into account in programming at least at the beginning of the period and at the mid-term review (assessing progress after five years; EC 2018d).

The main rationale for such a more binding frame, from an EU-wide perspective, is to level out the existing differences among Member States in terms of their capacity and commitment to integrate migrants and refugees, and to respond with efficient policies. With stronger incentives, migration- and integration related conditionalities in EU funding programmes, and under peer pressure, the hope is that also more reluctant governments would develop and implement comprehensive, broad-based integration policies. Not the least, the increased urgency stems from the fact that effective integration across the entire EU is intrinsically linked to the issue of responsibility-sharing in the asylum field: More opportunities for beneficiaries of international protection to successfully integrate, resulting from efforts at mainstreaming, will reduce incentives for secondary movements between Member States with weak integration frameworks and those with well-established policies.

However, given the political attitudes among some Member State governments (but also the legal constraints of the EU mandate in the integration policy field), any plans for a more binding EU governance framework for integration are set to be contested. For example, a clear two thirds-majority among the national representatives in the European Integration Network (EIN) recently considered that the current Commission competences in the integration field should not expand (ECA 2018a).

Focal points of current European debate:

- *Provisions of the future Common Provisions Regulation (CPR) asking for the consideration of CSRs in Fund-specific programming (EC 2018c, Art.9 on Partnership Agreement & Art. 14 on mid-term review); provisions of the future ESF+ Regulation requiring concentration of means at challenges identified in the*

European Semester and CSRs (EC 2018d, Art.7).

- *Need seen by stakeholders for more explicit integration-related 'thematic enabling conditions' including migrant target groups in new CPR governing the programming of ESF+ and ERDF in Member States (EC 2018c, Art. 11, Annex IV); thus amending the Commission proposal of 29 May 2018 (which speaks of migrants and disadvantaged backgrounds only in the contexts of social inclusion and education/training).*
- *Higher number of integration-related Country-Specific Recommendations and use of re-programming requests by the Commission to steer Member States reactions to economic and social challenges (in future based on Art. 15 CPR); and applicability of such requests in cases that go beyond 'sound economic governance' and relate to broader social inclusion issues like integration (EC 2014).*

ESF+ as main EU integration fund: incentive for mainstreaming in Member States or empty claim? On the face of it, the intention to render the European Social Fund the major EU funding source for medium- and long-term integration makes much sense. With its cross-cutting objectives, including access to employment and self-employment, training, education, lifelong learning, equal access to services, social inclusion and poverty relief, the ESF represents a significant tool to potentially support mainstreaming integration across Member State policy portfolios.

Another obvious advantage is the fund's broad definition of target groups (based on Art. 162 TFEU), where everyone with legal access to the labour market includes third-county nationals (in a number of states even asylum seekers) in the same way as nationals with a migration background or migrants from other EU countries. Locating the topic under the remit of social affairs and inclusion policies also allows for a more comprehensive approach than closely linking integration to admission and migration management policies under home affairs portfolios (cf. ECRE 2018). Most important, the ESF is already widely used to support migrant integration, and on the ground often represents the most obvious and for many actors most accessible EU funding source. Abundant evidence exists that especially in the main destination countries of the 2015/16 arrivals ESF programmes have been tapped with good results for e.g. labour market insertion, skill validation and training measures for migrants and refugees (EC 2015, 2017d, Rietig 2016).

However, to what extent precisely the ESF is used for migrant integration in the implementation practice of Member States, is unknown (ECA 2018a). Only in the upcoming programme period output indicators on 'third country nationals' and 'participants with a foreign background' (disentangled from other target groups) will be introduced according to the proposed ESF+ Regulation.

Crucially, it is not clear at all from the Commission proposal how it will be ensured that ESF+ will actually support medium- and long-term integration on a broad basis across all Member States: The fund's general objective expressly does not refer to migrant integration, only to equal opportunities, access to the labour market, fair working conditions, social protection and inclusion and health

protection (EC 2018d, Art. 3). Socio-economic integration of third-country nationals is being introduced as part of the specific objective that also includes marginalised communities such as the Roma (Art. 4.1.viii), and the tabled proposal further suggests that Member States do have to programme this objective by taking into account third-country nationals (Art. 7 on thematic concentration). However, no ring-fencing of means is foreseen for this specific objective, which is only part of the sub-set of social inclusion objectives (Art. 4.1.vii to xi) for which at least 25% of national allocations will have to be dedicated.

Evidence from the current period shows that Member States have the tendency to spend, among these social inclusion objectives, the biggest shares (with more than 80%) on the 'active inclusion' and 'access to services' goals (AEIDL 2018, EAPN 2016). At any case, it can be assumed that Member States willing to tap the ESF+ for integration purposes would do so across all specific objectives anyway, in line with current practice. Member States not wishing to use ESF+ means for migrant target groups, on the other hand, would get away with dedicating only token amounts within the social inclusion objectives, according to the proposed provisions on objectives and thematic concentration. In this light, the proposed mechanism to take into account Country-Specific Recommendations emerging from the European Semester in the initial and mid-term programming phase may not have much effect on unwilling governments either, as long as these recommendations have to be agreed by the Member States.

Overall then, the claim that ESF+ will become the EU's foremost funding source for medium- and long-term integration stands on shaky grounds. If AMF national programmes in practice turn out to concentrate on early integration in a strict sense, the threat is of a major future funding gap for medium/long-term integration in such Member States which at the same time chose not to concentrate ESF+ resources on migrant target groups.

Focal points of current European debate:

- *Provisions in the proposed future ESF+ Regulation on general and specific objectives (EC 2018d, Art. 3 & 4) and thematic concentration of means that ask Member States to allocate part of the 25% earmarked for social inclusion in national programmes to socio-economic integration of third-country nationals (Art. 7.3).*
- *Future mandates and complementarity of the ESF+ and the AMF in the integration field, with the authorities responsible for AMF implementation required to cooperate and establish coordination mechanisms with the authorities managing the ESF+ and of the ERDF (EC 2018f, Rec.14).*

Sustained mainstreaming across EU policy areas. The ability of the Union to influence Member State policies also hinges on its own capacity to mainstream migrant integration across EU policy domains. In the 2016 Action Plan, the Commission pledged to "continue to mainstream the priority of immigrant integration, non-discrimination and inclusion into all relevant policy actions and areas" (EC 2016a). An open question is whether the momentum achieved in the wake of the 2015/16 arrivals can be maintained under the upcoming Commission taking office in 2019. Beyond the envisaged strengthening of

integration responsibilities under the remit of EU employment and social policy as well as the structural funds, it remains to be seen whether integration-related priorities continue to be reflected in policies, actions and funding in the e.g. entrepreneurship, education, health and culture domains. As a possible harbinger of a future trend, of the 52 measures included in the Action Plan 23 had not been completed as of December 2017 (ECA 2018a).

Another question arising in this context is the possible future role of the EU-level stakeholder consultation mechanisms – foremost the European Migration Forum (EMF), the newly created European Migrants Advisory Board (Urban Agenda 2017), the tripartite European Partnership for Integration and the European Integration Network (EIN) – in contributing to mainstreaming efforts across EU policy domains. The partnership-based approach to multi-level governance as embodied in the Urban Agenda for the EU could also have a role in future strengthening of integration as a priority across EU policies and programmes.

Ultimately, an EU-level partnership principle still needs to materialise and become formalised: In the same way as required by the Commission when Member States implement EU programmes and are to involve civil society, social partners and other equality stakeholders in a structured way.

Focal points of current European debate:

- *Completion of the 2016 Action Plan on the integration of third country nationals and possible future update(s).*
- *Designation of the European Social Fund plus to become the major EU funding source for medium- and long-term integration (EC 2018d).*
- *In the 2021 to 2027 Erasmus programme, based on a duplication of funds: stronger outreach to people from all social backgrounds including migrants, through increased and more flexible formats for school pupils, vocational and adult learners, apprentices and youth; and a small scale partnership action for grassroots organisations (EC 2018h).*
- *Ensuring that under the new Single Market Programme (replacing i.a. COSME) provisions are made for inclusive entrepreneurship support policies to encourage and strengthen migrant entrepreneurship (EC 2018i).*
- *Definition of a role for EU stakeholder participation formats in future efforts at mainstreaming integration across EU polices and programmes, including the EMF, EIN, Urban Agenda, European Partnership for Integration and European Migrants Advisory Board.*

4.2. Sticking points concerning all levels of government

Comprehensive governance frameworks. In terms of governance arrangements, mainstreaming of immigrant integration is highly demanding. By definition, it is a cross-cutting goal asking for horizontal coordination, development of skills in diversity management across government portfolios and public services, and vertical multi-level cooperation with regions and municipalities. A particular challenge is maintaining strong cross-governmental coordination mechanisms, while concrete policies are developed across various policy fields.

Coordination must be efficient to guarantee even implementation and sustained high levels of attention in different domains.

In addition, if mainstreaming is to be sustainable in the long term, evaluation, ongoing monitoring and informed renewal of policy frameworks are essential. Beyond the realm of public policy-making and administrative action, the involvement of civil society (including migrants themselves) and social partner organisations takes mainstreaming to another level, and can significantly increase the reach, impact and effectiveness of policies. Such an involvement, however, requires transparent and open, inclusive and empowering development frameworks – something that has shown to be difficult to achieve where tested, and not even seriously tried in many Member States (Benton et al. 2015, Collett & Petrovic 2014).

Leadership for agenda-setting and organising change. Building an agenda for integration mainstreaming, driving this agenda forward and mustering the political will necessary for implementation, even in the face of competing priorities or resistance, is a key issue in many countries. It relates to the capacity of committed actors to organise and facilitate processes of change and to coordinate the drivers across institutions and levels of government. Fora for networking and exchange, formal or informal policy platforms and structured dialogue processes have proven their value for reaching 'beyond the converted', engaging the public and building durable alliances.

A key challenge is to capitalise from the fact that local and regional authorities often are early adapters and can fertilise agenda-building, while governments have the means to potentially steer and initiate country-wide change and support sub-national levels in implementing mainstreaming. Social partners, welfare organisations and civil society platforms in general can play a crucial agenda-setting role, as they often combine sufficient resources and country-wide organisation with freedom from electoral considerations (that may hamper the commitment of politicians). Achieving and sustaining a dynamic for change, however, is notoriously difficult in the absence of a positive narrative of migration and where the political undercurrent is not supportive of immigration and international protection.

Financial and other capability gaps. Seriously shifting to a mainstreaming approach means to invest – in change and reform of policies, provision of public services, organisational cultures and the overall functioning of public institutions in a diverse society. It requires investments e.g. for building new capacities in administrations, change management, development of intercultural competencies of staff, new recruitment strategies reflecting the altered population, and new efforts at monitoring and assessing the impact of policies. What is necessary is a public sector able to reform and take on new responsibilities, and related incentives for change.

In practice, however, these requirements of a policy approach that does not come for free contrasts with sustained pressures on public services for cost-cutting, efficiency and shrinking of the public sector. The actual decrease of the ability of public

administrations and services to embark on broad-based integration has been exacerbated by austerity policies, related to the EU response to the financial and sovereign debt crisis, in exactly such Member States where needs for more mainstreamed policies are especially urgent.

A pattern repeatedly seen – and representing a real pitfall for credible efforts at mainstreaming – is to misuse the concept as an excuse for decreased investment in targeted measures, while generic policies remain largely unreformed, leaving migrants with less support rather than more. Misconceived this way, mainstreaming can turn out to cover up assimilationist strategies (Kasli & Scholten 2018a,b). In addition, without further non-material investments in terms of conceptual leadership, expertise and long-term commitment, administrative inertia can prove a serious stumbling block for the implementation of a mainstreaming agenda.

Ambiguities of mainstreaming. In itself, the concept of mainstreaming is not void of controversies and different interpretations. As coherent the general principle is of designing public policies and services that accommodate diversity, as difficult it is often to find the appropriate balance on the ground. In particular, migrant-specific targeting within mainstreamed services needs careful policy design: On the one hand, the shift to mainstreaming is generally associated with the goal to avoid stigmatisation and the 'reduction' of a socially diverse population with immigrant background to one 'target group' with pre-assumed deficiencies; and to facilitate the emergence of a new sense of belonging in diverse societies. On the other hand, keeping a clear eye for the specific needs related to migration experiences calls for the continued existence of measures designed to support migrants as part of generic policies, especially for newcomers and groups in a vulnerable position.

Sometimes, such questions of interpreting the mainstreaming principle become linked to an urge to avoid targeting migrants altogether, be it due to political discourse that stresses universal values (as can be seen in France), be it because policy-makers prefer to present measures as addressing socio-economic disadvantages in general, using such 'proxy policies' to avoid political backlash (Kasli & Scholten 2018a, Scholten et al. 2017).

Another example for the fluidity of the mainstreaming concept are diverging approaches to how to achieve a more diverse public sector. While in some countries explicit recruitment strategies to employ and promote more staff with immigrant background are in place (including targets and legal underpinnings), in many places more indirect means are considered appropriate, like outreach to migrant communities, encouragement, highlighting of role models and mentoring, collaboration with educational institutions and a stress on intercultural/language skills. Overall, mainstreaming is not a one-size-fits all approach, and under different demographic, discursive, administrative and political frame conditions necessarily takes various shapes across different countries and levels of government (Kasli & Scholten 2018b).

5. Potential impacts of policies adopted

Inclusiveness of European societies

- Mainstreaming is the core strategy of adaptation in diversifying societies and the only sustainable way of enabling countries to deal with constant immigration, maintain social cohesion and strengthen the absorption capacities of education, health, housing, etc. systems.

Institutional, operational and political implications

- Generally and across all levels, mainstreaming entails the empowerment of actors inside and outside governments to deal with challenges of integration. Potentially it stabilises integration policy agendas and provides a modernisation impetus for public administrations with regard to new governance arrangements. New (power) balances among responsible government portfolios and coordinating authorities are frequent consequences.
- Strengthening integration as an overall EU policy goal implies stronger recognition on behalf of Member States of an active EU role in this policy domain. In particular, a more binding governance framework linked to the European Semester would imply a stronger role for the European Commission.
- The levelling out of discrepancies among Member States with regard to integration capacities (eventually, through mainstreaming) is a precondition for the mid- and long-term success of any EU-wide asylum policy based on notions of distribution, relocation and responsibility sharing.

Economic and fiscal consequences

- Short-term investments in the development and implementation of mainstreamed policies can be offset by long-term gains concerning higher efficiency of public services and increased social cohesion; especially mainstreaming in the labour market, qualification and education fields and resulting employment outcomes can improve the overall migration balance sheet.

Migratory consequences

- More even capacities of Member States to accomplish integration resulting from broad-based policies and mainstreaming efforts will reduce incentives for secondary movements from Member States with less developed integration policies to those with sophisticated policies.
- Better integration outcomes resulting from mainstreaming means improved conditions for EU Member States to globally attract human capital, as public policies and services competently dealing

with needs of immigrants are relevant criteria for mobility decisions of e.g. highly-skilled and specialised labour migrants and students.

The EU as an international actor

- A visible and credible EU-wide mainstreaming approach would be an opportunity for the Union and its Member States to position themselves as leaders in questions of long-term integration, especially among OECD countries and with a view to the Global Compact on Migration.

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ReSOMA

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ReSOMA - Research Social Platform on Migration and Asylum is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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DISCUSSION BRIEF

July 2018

Alexander Wolffhardt

INTEGRATION

Cities as providers of services to migrant populations

This project has received funding from the European Union's Horizon 2020 research and innovation program under the grant agreement 770730

ReSOMA Discussion Briefs aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- the social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

Download this document and learn more about the Research Social Platform on Migration and Asylum at: www.resoma.eu

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Discussion Brief

Cities as providers of services to migrant populations*

1. Introduction

Cities are where integration measures and public services are provided to a vast majority of migrants and refugees in the EU. Whether services are available, accessible, affordable, of high quality and respond to needs across all relevant issue areas, is a key determinant for long-term integration. However, the ability of local authorities to deliver services depends on their national contexts, such as cities' legal competencies in different policy fields, the strength of the welfare state, efficient coordination with the national or regional levels of government, and cities' financial capacities.

In this context, EU policies and programmes offer multiple opportunities to improve or widen the scope of services provided by cities. Next to targeted means under the EU migration and integration framework, migrants may gain from programmes linked to EU cohesion, social inclusion and other policies, as they are implemented in Member States.

The 2015/16 arrivals brought to the fore issues like direct access to funds for cities receiving high number of migrants and refugees, priorities for integration, eligibility criteria and timely reaction to newly arising needs. Moreover, EU law directly impacts on the de-facto access immigrants have to key services, such as EU directives on the reception and status of beneficiaries of international protection, or the anti-discrimination framework.

Currently, the Urban Agenda for the EU is a major joint initiative of the Commission, Member States and cities to render EU policies responsive to the needs of the local level, and for strengthened participation of cities in EU policy-making. In addition, decisions on the 2021 to 2027 financial and programme framework will determine the availability of EU means to support the provision of services and integration measures on city level.

2. Scoping the debate

Cities, key independent actors in the integration field. Cities have a central and peculiar role in immigrant integration. Local authorities are among the first points of contact with the arrival state, providing a range of basic services necessary for settling down.

*By Alexander Wolffhardt (Migration Policy Group)

Housing, early childhood education, care for the elderly, policies to combat poverty or social exclusion and local economic development are public services that play a key role in integration trajectories and for which many cities have direct responsibilities. While the specific constitutional and policy context of Member States defines the possibilities and boundaries of urban-level action, all cities have a wide playing field to improve integration prospects and make use of the fact that municipalities are the level of government closest to the citizens: They can adapt their own services to the needs of immigrants, coordinate among local branches of services overseen by higher levels of government to better align access (typically education, vocational training, employment and health), and develop their own language learning and orientation activities.

In particular, cities can play a key communication and leadership role for community building among newcomers and citizens, and for influencing the social climate in which reception and integration take place. Indeed, cities have often played a forerunner role in their countries in the integration policy field. Well-known examples of cities that historically have introduced their own integration policies to compensate for the lack of a national policy include Birmingham, Bradford, Berlin, Frankfurt, Basel, Zurich and Vienna. More recently, it is no coincidence that disproportionately high numbers of cities in Greece, Italy, Poland or Spain (including e.g. Athens, Barcelona, Gdansk, Thessaloniki, Turin and Warsaw) have been developing their own frameworks to compensate for patchy policies on national level (Ambrosini 2017, Camponio & Borkert 2010, CLIP 2009, 2010, Dekker et al. 2015, De Graauw & Vermeulen 2016, EUROCITIES 2016, 2017a,d, Glick-Schiller & Caglar 2009, OECD 2018a-d, Penninx 2014a,b, Schmidtke 2014).

Multi-level dynamics shaping cities' activities. Nevertheless, the national context remains decisive for cities' actual capacities to implement effective integration measures and their room of manoeuvre (Jorgensen 2012, Kasli & Scholten 2018a,b, Martinelli 2014). Key socio-economic policy domains like education, health or employment are governed through intricate arrangements involving various levels of government in most countries. Cities may have full autonomy, shared competencies, discretion in implementation, stakeholder status, or no leeway at all.

Quite often polices are regulated and financed from the national level, while service delivery is managed by regional or local authorities. Educational institutions (e.g. the Netherlands), social housing (e.g. Austria) and labour market services (e.g. Sweden) are the policy areas most prone to decentralization, but strong variation persists across Europe. In several countries generic, migrant-specific national integration polices that focus on language and 'citizenship' acquisition are implemented – according to national rules – also at the local level.

A recent development has been a shift to employment services as key actors for co-ordination and implementation of integration measures (e.g. in Sweden and Germany; OECD 2017, 2018e, Rietig 2016, Brännström et al.

2018), with strong regional/local governance implications. Overall, the interconnectedness of cities with higher levels of government will only increase the more migrant integration is recognized as a task across these socio-economic policies.

Elevated role of cities during and after the 2015/16 arrivals. The 2015/16 arrivals confirmed in numerous cases that cities tend to have a specific and pragmatic 'urban' approach to migration and integration, marked by hands-on solutions, flexibility when faced with newly emerging needs and inclusive policy objectives in the long term. The crisis response illustrated municipal and civic capabilities to independently organize e.g. accommodation, health care and education solutions, even in the near-absence of a national response (EUROCITIES 2016, 2017a,d, ESPON 2015, FRA 2018, OECD 2018a). More recently, cities in countries like Greece, Poland, Spain, Austria or Italy have ended up in outright opposition to their national governments, which they accuse of neglecting integration objectives, or even pursuing 'negative integration' and cuts in welfare spending for recently arrived in order to deter future arrivals. Resulting from the development of the last years, for a number of cities it has become a political stance to pursue a pro-active integration agenda and to position themselves (both nationally and within European networks like 'Solidarity Cities' or 'Arrival Cities') as cities of sanctuary. In the most outspoken cases, cities have even pledged to receive relocated asylum seekers where national governments remained lukewarm, as for example Barcelona or Gdansk.

On the other hand, national governments insist on their prerogative in integration policy-making and managing migration, and their responsibility to devise admission and residence policies. Furthermore, tensions regularly arise in circumstances where national policies require cities to implement certain policies or measures – be it compulsory language courses or refugee housing – without allocating adequate funding. Thus, cities' relationship with central governments easily becomes conflictual, as the local level must bear consequences of policy decisions taken on higher levels. In 2015/16 as well, municipalities eventually had to deal with the outcome of longstanding national (and EU) policies on asylum and borders.

EU funding for local level integration measures. EU instruments and policies have had an important role in helping cities to provide services to immigrant populations. Even before the launch of a formal EU integration policy framework with the 1999 Amsterdam treaty, cities made use of e.g. the EQUAL programme, ESF or the URBAN Community Initiative to address integration-related issues.

Today, cities are extensively drawing on EU programmes, with AMIF funds dedicated to the integration of legally residing third country nationals and Structural Funds (in particular ESF and ERDF) constituting the main sources. With at least 20% of AMIF national programmes earmarked for integration and at least 20% of ESF spending foreseen for social inclusion, combating poverty and any

discrimination (next to the ESF's main thrust of supporting employment), Member States potentially have important levers for fostering immigrant integration at the local level at their disposal in the 2014 to 2020 programme period.

Beyond these major funding sources, a range of EU programmes are relevant for the integration of refugees and migrants on local level, including FEAD, Erasmus+, EaSI, REC, Europe for Citizens, and COSME (EC 2015, 2018h, Urban Agenda 2018). That said, the relative importance of EU funding for migrant integration varies strongly among Member States. While in traditional destination countries EU support is rather supplementary to wide-ranging national spending on integration, in many other Member States the EU incentive is a key component of integration support, with at least six countries not using national funds at all. (ECA 2018a).

Recognition of local level role in EU integration policies. The emerging EU integration policy framework has acknowledged the role of cities as key integration actors at an early stage. The 2004 Common Basic Principles for Immigrant Integration Policy in the EU (CBPs), agreed by all Member States, stress the local level with regard to the participation of immigrants in the democratic process and policy-making (CBP 9), as well as the mainstreaming of integration in all relevant policy portfolios and public services (CBP 10; CEU 2004).

The 2007 edition of the EU Handbook on Integration for policy-makers and practitioners included sections on housing in the urban context and local integration structures (EC 2007). The European Agenda for the Integration of Third-Country Nationals, a Commission communication adopted in 2011, highlighted more action on local level as one of its three main focal points, aiming for an integrated approach to disadvantaged urban neighbourhoods, improved multi-level coordination in the integration field and EU financial support to local action (EC 2011).

To support local authorities in their endeavours and strengthen capacities for mutual learning and knowledge exchange, the Commission has contributed conceptually and financially to projects like the Intercultural Cities (ICC) network launched together with the CoE in 2008, or the Integrating Cities network started in 2006 with its Charter from 2010 now signed by 37 cities.

Generally, the EU integration agenda, driven by the Commission service that is today's DG Migration and Home Affairs, has considered local authorities obvious partners for advancing comprehensive policies across the EU. As the involvement of the local level with EU policies and funds in the migrant integration field grew, however, debates and controversies emerged as well. Concerning EU funding instruments recurrent problems from a city perspective have included e.g. lack of access to the funds, mismatch of EU objectives with cities' needs, little or no involvement in Member States programme planning and implementation processes, heavy administrative burdens or limited flexibility of programmes. Cities have also questioned the impact of EU policies on their ability to provide integration-relevant services of general

economic interests, like public housing, or to invest in social infrastructures, especially due to the cuts on public budgets affecting the local authorites.

3. EU policy agenda

3.1. Since 2016: EU Action Plan & Urban Agenda Partnership

Published in June 2016, the Action Plan on the Integration of Third Country Nationals represented a major response of the European Commission to the high numbers of arrivals seen since 2015 (EC 2016a). Across EU policy fields and their related funding instruments, more than 50 specific EU actions were presented to be implemented in 2016/17. They aim at fostering integration through measures in the education, employment and vocational training, accommodation and health, participation and social inclusion, as well as pre-departure/pre-arrival fields. While many of the activities have a clear local-level implication, the Action Plan stressed the importance of multi-level coordination and the inclusion of urban authorities for achieving effective implementation in Member States. In particular, the Commission encouraged an integrated approach that combines the provision of housing with equitable access to employment, healthcare and social services.

In addition, the renewed stress on the role of the local level was to be reflected in the European Integration Network (EIN), replacing the existing Network of the National Contact Points on Integration which mostly had included national level organisations. By opening up for regional/local authorities and civil society organisations, the network became more inclusive and got a stronger mandate for mutual learning, such as study visits, peer reviews and workshops on specific aspects.

Likewise mentioned in the Commission Action Plan, the Urban Agenda Partnership on Inclusion of Migrants and Refugees has been operational since 2016. Conceived as a new approach to improving cities' role in EU multi-level governance, the Urban Agenda for the EU is organised around topical partnerships that each bring together selected cities, urban stakeholder organisations, Commission services and selected national governments (EC 2017b). Not the least due to the urgency of the matter, the Partnership on Inclusion of Migrants and Refugees was launched as one of the new format's piloting partnerships, led by the City of Amsterdam. In a deliberative process including expert outreach events in 2017, key bottlenecks were defined and 8 actions adopted that aim for 'better regulation, better funding and better knowledge' for implementation in 2018/19. They include measures such as a joint position on the future of integration-related EU funding, to feed into Commission considerations in 2018, a newly-established European Migrants Advisory Board, and recommendations for the integration of unaccompanied minors (Urban Agenda 2017).

3.2. The post-2021 agenda: MFF proposals

Experiences since 2015 and local level issues with EU funding instruments in a period of newly arising needs for the integration of refugees and migrants have informed

Commission preparations for the upcoming Multiannual Financial Framework (MFF), i.e. the 2021 to 2027 EU programme and funding period. A comprehensive spending review to help design the future long-term budget and its priorities analysed, among others, potentials for streamlining and synergies, simplification of rules, more flexibility for unforeseen developments, as well as improved performance and measurement of EU programmes. Specifically, it highlighted the need to increase synergies in supporting integration objectives through the Structural Funds on the one hand and the AMIF on the other hand (EC 2017a, 2018b, ECA 2018b).

Contributing to the debate on the future MFF, the European Parliament in a March 2018 resolution emphasized simplification, harmonisation of rules and reduction of administrative burdens; and spending levels appropriate to the Union's increased tasks including a comprehensive asylum, migration and integration policy. The EP position included a dedicated AMIF instrument, complemented by contributions to the integration of refugees and migrants under other policies (especially the Structural Funds), but also cultural, educational, youth and sports programmes. In addition, the EP asked the Commission to assess whether the role of European cities within the European asylum policy could be strenghtend (EP 2018a).

The eventual Commission proposals for the 2021 to 2027 MFF, published in May and June 2018 (EC 2018c-g), include the following key changes relevant for the integration of migrants and refugees on the local level:

- Structural Funds will continue to be spent and programmed across all, including higher developed, EU regions; ensuring that all Member States are covered by ERDF- and ESF-sourced programmes that offer funding opportunities for migrant integration.
- The merging of the ESF, YEI (Youth Employment Initiative), FEAD, EaSI and Health Programme into one fund, the ESF+, with the goal of a more comprehensive, less fragmented overall instrument in the social policy area aligned with the European Pillar of Social Rights, including higher responsiveness to unexpected challenges. At least 25% of national ESF+ would have to be earmarked for social inclusion and fighting poverty; with at least 2% dedicated to measures targeting the most deprived.
- The European Social Fund is to become, as ESF+, the major EU funding source for medium and long-term integration, with a newly established programme priority ('specific objective') that includes the promotion of the socio-economic integration of third country nationals. Member States will have to address the objective as part of the overall 25% allocation of national ESF+ funds to the social inclusion policy area.
- The abolition of the option for Member States to programme and implement the ESF on regional level, which will affect 8 Member States (including the 5 largest post-Brexit) that made use of the provision in the 2014 to 2020 period. The intended stronger use of ESF+ as an instrument to support EU-inspired national reform

policies may be a major reasoning behind this change.

- Simultaneously, the restructuring of AMIF to an Asylum and Migration Fund (AMF), to fund early integration measures for newly arrived third-country nationals; with a reinforced partnership principle and a financial scope of national programmes of euro 6.25 bn more than doubled compared to the 2014-2020 period.
- Higher flexibility in the AMF to increase its ability to react to unexpected developments, by allocating only 50% upfront to Member States and other parts subsequently to specific priorities as part of a Thematic Facility (proposed at euro 4.17 bn, representing 40% of overall funds), and by allocating the remaining 10% to national programmes after a mid-term re-calculation based on recent migration statistics.
- Explicit provisions to use the AMF Thematic Facility (biannually programmed by the Commission) to support early integration measures implemented by local and regional authorities or civil society organisations, relevant for its 'Union actions' strand and components regarding emergency assistance, 'solidarity and responsibility efforts' (related to a reformed Dublin regulation) and resettlement; and coming with an increased co-financing rate of 90%.
- A general focus on labour market integration, and related to that, issues of qualification, training and skill recognition that has already underpinned the 2016 Action Plan; visible e.g. in the advancement of the mainly employment-oriented European Social Fund to the main funding instrument for medium- and long-term integration, as well as specific AMF support to assessment of skills and qualifications acquired in a third country.
- Simplification of implementation and financial management rules, through a Common Provisions Regulation that will cover all funds under shared management (of Member States and the Commission), including AMF, ESF+, and ERDF, also harmonising the provisions on the partnership principle; in addition to the currently negotiated 'omnibus' Financial Regulation covering all EU funds.
- The inclusion of reception of migrants in the allocation criteria of Structural Funds on the regional level (for the ERDF and ESF+), contributing to a shift of funds from central European to southern Member States and creating a long-term incentive to accept the sharing of responsibilities in the asylum field.

4. Key issues and controversies

4.1. Sticking points in the multi-level context

Ability to set policy priorities on urban level and direct access to EU funds. Cities see a need to set their own priorities. Often invoking the subsidiarity principle, they strive for a regulatory and funding environment that allows for autonomous policy responses, in line with their responsibilities vis-à-vis migrant populations. In the EU programme context, distinct local priorities and antagonisms in the local-central government relationship lead to the call by cities for direct access to EU funds

(often channelled through urban interest organisations like EUROCITIES or CEMR), as cities usually access EU funds through Member State authorities:

- In the case of AMIF, in the 2014 to 2020 period cities in many Member States have not been able to act as co-beneficiaries from AMIF emergency support, and national AMIF funds may not be readily available to meet the needs of cities due to the National Programmes' specific priorities and calls. In some Member States, cities have reported to be widely excluded from AMIF funds as a consequence. In Greece for example, the absence of national calls under AMIF in 2017 has de facto excluded cities from the access to funding. Cities therefore have been asking to become directly eligible for Emergency Assistance and/or automatically receive a certain share of available funding for integration based on objective criteria (ECRE & UNHCR 2017, EUROCITIES 2015, 2016, 2017 b,c, HLG 2017, Urban Agenda 2018, Social Platform 2018).
- In the case of ESF, the current programme period has seen improvements insofar as Member States were encouraged to use the EU Structural Funds for so-called 'integrated actions for sustainable urban development', leading to an estimated third of the new urban strategies to include ESF funding. This and the requirement to use part of the national ERDF allocation for these integrated actions led to more frequent direct responsibility of cities in the management of ESF funds. Notwithstanding these developments, cities continue to point out that OPs and calls leave key local challenges not addressed, that target groups and indicators do not match the local reality, or that coordination gaps exist at the ESF/ERDF nexus (EUROCITIES 2018a, HLG 2017, Urban Agenda 2018, Social Platform 2018).

In both cases, Commission proposals for the 2021 to 2027 MFF go some way in addressing the positions taken by cities and foresee a mechanism under the AMF for direct access as part of the voluminously funded Thematic Facility managed by the Commission (EC 2018f). ESF/ERDF-sourced initiatives for socio-economic development coordinated at urban level are to be further strengthened, in particular through a dedicated 'specific objective' earmarking 6% (versus 5% in the current period) of spending in all ERDF programmes for this purpose (EC 2018d,e). Given the history of reluctance on behalf of many Member State governments to cede actual control of EU funds to the local and regional levels, however, these proposals will be contested during the upcoming negotiations.

Focal points of current European debate:

- *Use of the future AMF Thematic Facility to support local and regional authorities, (with an increased co-financing rate of 90%) in their efforts at promoting early integration measures for the social and economic inclusion of third-country nationals, thus preparing their participation in and their acceptance by the receiving society; in the*

context of AMF Union actions, emergency assistance, 'solidarity and responsibility efforts' in a reformed Dublin system, and resettlement (EC 2018f, Art. 9.1, 9.6 & 12.3, Annex II.2.b, Annex IV and Rec.17).

- *Obligatory allocation of 6% of national ERDF means to policy objective 5 of sustainable and integrated urban development, by using EU territorial tools like community-led local development and integrated territorial investments (EC 2018e, Art. 8 & 9, EC 2018c, Art.22-27).*
- *Proposed concentration requirements of the ERDF social policy objective 4 (including integration of migrants), limiting the available share of EU funding for this purpose in regional-level ERDF programmes to 9% to 29% depending on Member State wealth (EC 2018e, Art. 3).*

Stronger role for cities in governance of EU funds implementation. A focal point of cities' and regions' efforts at stronger involvement in planning/implementing EU programmes is the so-called partnership principle. With a long-standing tradition in the Structural Funds programmes, dating back to the 1990s, it refers to the close involvement of local governments and other relevant stakeholders in the preparation, implementation, monitoring and evaluation of Partnership Agreements and Operational Programmes. A 'European Code of Conduct on the Partnership Principle (ECCP)', adopted as EU Delegated Act in 2014, has further strengthened the principle by clearly defining the objectives and criteria Member States have to observe (EC 2014).

Notwithstanding this improvement, analysis (CEMR 2015, CPMR 2018a, EPRS 2017, Social Platform 2016) has shown that in practice only a handful of countries (including DK, FI, NL) have fully involved local and regional authorities in the process in all stages and that the situation differs greatly from one Member State to the other. Under the AMIF (and previously INTI/EIF), the partnership principle is even less established. Reflecting the intergovernmental roots of EU migration policies in this policy domain, the principle has never been more than a recommendation to Member States and cities report ignorance for their concerns in AMIF national programming in a number of countries (Urban Agenda 2018, ECRE & UNHCR 2017).

As proposed by the Commission, in the 2021 to 2027 programme period the AMF will become part of the newly harmonised rulebook across all funds under shared management funds, implying a strengthening of the partnership principle and alignment with the standards achieved under the Structural Funds (EC 2018c). Welcomed by local and regional stakeholders, this is bound to be controversial with governments that have preferred to keep local authorities and other stakeholders at arm lengths' when implementing national AMIF programmes.

Focal points of current European debate:

- *Requirements in the future Common Provisions Regulation (CPR), equally referring to ERDF, ESF+ and AMF, on the inclusion of urban authorities in the partnership and multi-level governance of programmes, including a binding provision to carry out partnership*

organisation in accordance with the 2014 Code of Conduct (EC 2018c, Art. 6).

4.2. Sticking points regarding the potentials and impact of EU funding instruments

Capacity of EU instruments to support and encourage policy innovation on local level. During and in the wake of the 2015/16 arrivals, cities have again proven to be the testing ground for new, innovative approaches and policies related to immigrant integration. A large share of this innovation has been civil-society driven, resulting from the wave of voluntarism seen during this time, or emerged from social entrepreneurship. This innovation has taken the form of new, in many cases tech-based solutions to providing integrated support services, e.g. with regard to language learning, social mentorship, training and labour market insertion (EUROCITIES 2016, 2017b,d, EWSI 2016, FRA 2018, Jeffrey 2018, OECD 2018°).

For local authorities (but also traditional civil society organisations) this has meant challenges in terms of creating, working with, and sustaining new partnerships with these new actors in the integration field. Where successful, such 'public/civil society/social enterprises partnerships' have leveraged faster integration trajectories and helped cities to manage the inflow. EU funding instruments and Commission engagement have played a certain role in this new local integration governance, e.g. through integration-specific calls under the Urban Innovation Action (UIA) instrument, a ready-to-be-used EU Skills Profile Tool (i.e. online qualification assessment), and other measures included in the 2016 Action Plan.

Nevertheless, the capacity of EU instruments to empower cities and foster community involvement and local innovation is widely questioned. For small-scale projects carried by civil society organisations or voluntary initiatives, EU funds are difficult to access or outright unattractive due to financial requirements and complex programme rules. Community building efforts, early integration initiatives or school-related activities have numerous EU options (from AMIF to Erasmus+, Europe for Citizens, as well as the Rights, Equality and Citizenship programmes), but in reality often fail to access funds (ECRE & UNHCR 2017, EUROCITIES 2016, 2017 b,c, Urban Agenda 2018, Social Platform 2018).

In the context of the ongoing EU programme performance and simplification debate and proposals for the 2012 to 2027 MFF, a key question is whether in future cities can gain from more civil society-driven projects enabled by EU funds, with lower thresholds for small-scale projects and funding instruments geared towards non-public/non-profit project carriers.

Focal points of current European debate:

- *Scope of future support from AMF for cooperation between governmental and non-governmental bodies in an integrated manner, e.g. for coordinated integration-support centres, and across all integration-related AMF support areas (EC 2018f, Annex III.3.d.-k., in particular III.3.i).*
- *Expansion of today's Urban Innovative Action instrument (under Commission management) to a European Urban*

Initiative (EC 2018e, Art. 10), also to support the Urban Agenda of the EU.

- *Simplification, expansion of scope and improvement of innovation-related Structural Funds instruments and better access for cities/local actors: Inclusion of today's EaSI programme in ESF+ as Employment and Social Innovation strand (EC 2018d, Art. 23-25); territorial development tools to be used under ERDF and ESF+ programmes including community-led local development and Local Action Groups (EC 2018c Art. 22-27, EC 2018e Art. 8-9); support of innovative actions in national ESF+ programmes (Local Action Groups/community-led local development and upscaling of innovative approaches; EC 2018d, Art. 13).*

Coherent, simplified and flexible EU instruments in line with cities' needs. Drawing from different EU funding sources relevant for the integration of migrants and refugees (AMIF, ESF, FEAD, ERDF, EaSI, Erasmus+, REC), local authorities and other stakeholders/potential beneficiaries in cities are faced with overlapping priorities, target groups and policy objectives. Partly this is a result of lacking adjustment among EU instruments, partly it is a mirror of unaligned priorities at local, regional or national levels as the programmes are implemented within Member States. In particular cities with fewer administrative resources struggle to navigate EU funding processes without guidance on which funds to apply for, and how to best leverage resources to do so.

Technical differences in deadlines and eligibility, reporting and financial accountability rules across the different EU funds can create major obstacles and render EU funds unattractive for many actors. The divergent definition of target groups in various programmes leads to especially grave problems when colliding with urban realities. For example, AMIF interventions can only focus on third-country nationals, whereas under ESF a much wider population of citizens with migration background, including newly arrived EU citizens or second-generation nationals, are able to benefit. Moreover, programmes to foster inclusion and social cohesion at city-level typically include the receiving community, meaning that eligibility rules need to accommodate all citizens at city-level (EC 2015, 2018h, ECA 2018b).

Cities have therefore consistently called for simplification, less administrative burden, better harmonisation of rules, flexibility and possibilities to blend funding from different funds; to reflect urban complexity and fully live up to the objective of integration being a 'two-way process' as enshrined in the EU's Common Basic Principles (EUROCITIES 2017b,c, Urban Agenda 2018).

While the Commission has given much attention to these concerns (among others, through a High-Level Working Group on Simplification for post 2020 and the Spending Review; EC 2018b, HLG 2017), changes proposed in the Commission proposals for the 2012 to 2027 MFF are set to undergo a highly critical review by stakeholders and protracted negotiations in Parliament and Council.

Focal points of current European debate:

- *Proposed Common Provisions Regulation (CPR) covering most EU programmes under shared management including AMF, ISF and BMVI next to the Structural Funds ESF+, ERDF, CF and EMFF (EC 2018c).*
- *Possibility of cumulative, complementary and combined funding from AMF and any other Union programme, including Funds under shared management such as ESF+ and ERDF (EC 2018f, Art. 27).*
- *Provisions in the proposed CPR on joint and complementary funding from ERDF and ESF+ to operations eligible under both funds, with a limit of 10% for each priority of a programme (EC 2018c, Art. 20); and on transfer of up to 5% of programme allocations to other funds on Member State request (Art. 21).*
- *By way of streamlining EU instruments, the inclusion of today's FEAD as an ESF+ strand on support for addressing material deprivation, including provision of basic material assistance; and access to this support for all target groups including undocumented (EC 2018d, Art. 16-22).*
- *New Financial Regulation ('omnibus regulation') laying down the principles and procedures governing the implementation and control of the EU budget, to create a single, simpler and more flexible set of rules. Tabled as Commission proposal in 2016, the new regulation is likely to be adopted in July 2018 (EC 2016b).*

Reception of migrants, an indicator on which to lose or to gain from EU Structural Funds? The envisaged broadening of regional allocation criteria of Structural Funds (i.e. ERDF and ESF+ under the Investments for Jobs and Growth goal) to include, next to regional per-capita GDP, the reception of migrants has proven to be highly controversial already before presented in detail. To better reflect needs and challenges on regional (i.e. NUTS 2) level, the Commission proposes to take into account net migration from outside the EU since 2013 as one in a set of additional indicators when calculating available amounts in the 2021 to 2027 MFF (the other factors being unemployment, youth unemployment, low education and greenhouse gas emissions; EC 2018c, Annex XXII).

If agreed, this would entail that main beneficiary states of Structural Funds in central Europe that have chosen to resist and not implement EU relocation decisions (while still having low shares of immigrant populations) are poised to receive less funding. Such provisions effectively will lead to a re-channelling of funds from central European to southern European arrival states and create an incentive (of sorts) in the long term to accept and accommodate more immigration.

For cities in the potentially affected countries, often committed to a more pro-active and inclusive approach to integration than their national governments, these proposed conditionalities are a double-edged sword: While underlining their political stance of more openness, eventually less cohesion funding would be available on local level. Cities feel threatened to be taken hostage by the anti-immigration stance of their governments and to lose out in urgently needed investments, including on migrant integration under ESF+ and EFRE, that depend on EU co-funding.

In view of these potential effects, the Commission proposals are also far away from the idea of a new EU instrument offering direct financial support to cities in return for receiving refugees and asylum seekers, floated among others by the European Parliament in early 2018 (EP 2018a, Knaus & Schwan 2018). Under such an incentive scheme, possibly linked to resettlement programmes, municipalities would apply directly to receive means for the integration of refugees whom they wish to welcome. Given considerable support among stakeholders and MEPs for the concept, continued discussion is likely also after publication of the Commission MFF proposals.

Focal points of current European debate:

- *Regional allocation methods for ERDF and ESF+ funds as defined in proposed Common Provisions Regulation (EC 2018c, Art. 12 & Annex XXII).*
- *European Parliament request to the Commission to "assess whether the role of European cities (…) could be strengthened by introducing an incentive scheme that offers financial support for refugee accommodation and economic development directly to cities" (EP 2018a, D.99).*

4.3. Sticking points concerning the substance of EU policies

Priority for early integration and availability of supporting EU funding. Ultimately, the technicalities and intricacies of EU programme architecture reflect key overall policy debates around the integration of refugees and migrants. One of the most contested of these controversies revolves around early integration, and at what point public support measures are to kick in. Backed by extensive evidence (e.g. OECD 2018a), many cities pursue – and support in national and EU policy debates – 'integration from day one', striving for the provision of services like language support, education, recognition of skills, training, labour market insertion and, generally, interaction with the receiving society as quickly as possible after arrival.

As an early intervention approach, such policies aim to avoid the demotivation and deprivation seen by people who are left in a social and legal limbo, possibly for years, after arrival. They accept higher costs in the short term for preventive measures which invest in the ability of migrants to adapt and integrate quickly, rather than postpone costs to later, reactive interventions to deal with the results of 'failed' integration. In addition, such policies are sensitive to questions of proximity and acknowledge that successful integration has to do with opportunities on local labour markets and availability of social infrastructures, e.g. in the (early) education, health and care sectors. Policies like these are inclusive in that they implicitly accept the provision of measures and public services also to people with unresolved residence status, including such who are unlikely to benefit from international protection.

This policy mindset, however, conflicts with the policy approach stressed by many national governments, suspicious of early integration as creating additional pull effects, and which in the asylum field draws a clear line between a pre-integration reception phase (however

long procedures last) and the provision of integration support only to recognised beneficiaries of international protection. For the sake of speedier procedures, administrative efficiency and lower costs – and often better control of asylum seekers' movements, control of civil-society based (legal) support for asylum seekers, and deterrence effects – this alternative policy approach typically aims for centralised accommodation in large reception centres. Widely shared criticism point to resulting rudimentary education and language support, isolation from the receiving society, higher crime rates, contempt for human dignity, stigmatisation of asylum seekers, demotivation and delayed start of integration processes.

The conflict between these contrary policy approaches and visions for the reception phase are played out on EU level as well, in particular around the debates on the 2012-2027 MFF and integration-related support from EU funds. A sticking point in upcoming negotiations will be the precise definition, comprehensive scope and overall framing of 'early integration' as funded from AMF (and opposed to the medium- to long-term integration to be funded under ESF+). What is at stake here is the character of AMF as an EU instrument that, in the implementation reality of Member States, supports a broad range of essential and high quality early integration measures that are effective starting points for long-term integration (EC 2018f).

Focal points of current European debate:

- *Lack of earmarking of national AMF allocations to the specific objective supporting the integration of third-country nationals in the EC proposal; and reliance on mutually agreed needs assessment between the Commission (possibly supported by the Asylum Agency) and the Member State to ensure that AMF means are actually spent on early integration under national AMF programmes (EC 2018f, Art. 3.2.b, Art. 8.2.a, Annexes I. and II.).*
- *Range of AMF support on early integration measures for the social and economic inclusion of third-country nationals; inter alia including assessment of skills and qualifications, assistance in change of status and family unification, tailored support in accordance with needs, programmes focusing on education, language and civic orientation; access to and provision of services, actions promoting acceptance by the receiving society and intercultural dialogue (EC 2018f, Annex II.2.b, Annex III.3.d.-k.).*
- *Effective, outcome-focused performance indicator to assess spending, relating to the number of participants reporting that measures were beneficial for their early integration (EC 2018f, Annex V).*
- *Inclusion of asylum seekers in the target groups of AMF-supported early integration; i.e. the scope of support provided under the programme strand related to strengthening the CEAS, where the proposal speaks only about "assistance and support services consistent with the status and needs of persons concerned" (EC 2018f, Art 3.1, Annex III.1.e), while the legislative justification indeed speaks about "asylum*

> *applicants likely to be in need of international protection (…) first reception measures (…) and training" (Legislative Financial Statement 1.4.4) and "early integration of legally staying third country nationals" considering the "high levels of migration flows to the Union in the last years" and invoking the priority areas identified in the 2016 Action Plan (Rec. 12).*

Comprehensive social policies versus competitiveness paradigm. A long-standing controversy around the intervention logic of EU instruments in the social policy domain – and one that will gain importance as the ESF is poised to become a major funding source for migrant integration – refers to the underlying cohesion philosophy. Ever since the EU adopted overall economic and social development strategies focused on improved competitiveness and the knowledge economy in 2000, EU programmes have been geared towards an empowering and enabling approach, helping individuals to participate in the labour market and with a focus on human capital development, vocational training and life-long learning.

Critics of this approach (some of them from a vocal, anti-neoliberal vantage point) have been pointing out that a focus on labour market activation alone is not sufficient to tackle complex cohesion challenges, including material deprivation, poverty, precarious and atypical employment, lack of affordable housing and discrimination.

Cities and their interest organisations have mostly shared this critique, e.g. pointing out that it is cities where such problems arise first and are felt hardest, or that only a minimum of 20% of ESF means in the current programme period is ring-fenced for broader 'social cohesion' objectives. Analysis of actual programming and use of ESF shows that around 25.6% of the total ESF budget is allocated to social inclusion, combating poverty and any discrimination (with only eight Member States allocating more than 30% of their ESF budget to social inclusion; and the bulk of it going to the broad 'active inclusion' priority accounting for 16,1% of invested ESF means across all Member States; AEIDL 2018).

A concern stressed by many stakeholders is that if the future ESF+ does not overcome the binary focus on employment/unemployment, it will be of limited use as an integration support instrument (EAPN 2016, ESN 2017, EUROCITIES 2014, 2018a, Social Platform 2020). The Commission ESF+ proposal (EC 2018d), however, rather points to a continuation of the existing approach, with 'specific objectives' mirroring the current 'investment priorities' (even though fewer in number). In fact, the future minimum share of 25% for social inclusion – now including integration of third-country nationals – is close to today's implementation reality (AEIDL 2018), and moreover incorporating a 2% minimum allocation to address material deprivation, representing the inclusion of today's FEAD in the future ESF+.

In national integration debates, such controversy reverberates, too, and Member States political discourse often focuses on the balance between providing access to welfare provisions (like social assistance/income

support) and a 'demanding' approach that sees the integration effort and responsibility for labour market success or language acquisition primarily on the side of the migrant. Policy preferences of national governments in such debates are relevant in the European context, as governments will first decide on the future ESN+ instrument, its priorities and underlying intervention logic, and then set their priorities in national implementation programmes.

Focal points of current European debate:

- *Provisions in the proposed ESF+ regulation on specific objectives (EC 2018d, Art. 4) and thematic concentration including a minimum share of 25% of national ESF+ allocations to be spend on social inclusion.*

EU policies to support, not constrain, urban level social investments and integration efforts. In its most critical variant, debate on the EU's role in facilitating migrant integration and the provision of adequate public services on the local level has focused on the constraints emanating from various EU policies. For cities in countries most affected by the financial and sovereign debt crisis since 2008, EU-agreed austerity policies have led to considerable spending cuts, decline in social investments and limitations in their ability to address social cohesion issues, while at the same time problems and needs multiplied. Most strongly witnessed in Members States like Greece, Spain and Portugal, austerity policies severely curtailed local authorities' capacity to deal with issues of migrant integration, as well. Faced with shrinking budgets, municipalities have had strong incentives to concentrate their efforts to those parts of the population to which they are directly democratically accountable, possibly prioritising native citizens over migrants.

EU economic crisis responses and their local impact aside, social housing represents another long-standing policy controversy between cities and the EU with implications for migrant integration. Pointing to the role of public housing for combatting spatial segregation on local level and socially mixed neighbourhoods, cities and their interest organisations have consistently pushed for the availability of Structural Funds for housing stock refurbishment and social infrastructures, and generally for considering social housing as a service of general economic interest (SGEI) with limited applicability of EU competition and state aid rules. As result of longstanding debate, the Commission is more inclined than in the past to accept the public policy objectives of providing housing to economically deprived and socially disadvantaged groups and acknowledges Member States' discretionary competence when defining the scope and the organisation of social housing (e.g. Housing Europe 2017).

Against this history of cities' discontent with certain EU policies, it is not surprising to see urban representatives call for a general turn of EU economic strategy to more public spending and investment-based policies; and in particular ample possibilities to support social investments under the EU funding instruments in the 2021 to 2017 MFF (Fransen et al. 2018, Jeffrey 2018). Being able to leverage EU co-funding for new schools, childcare services, vocational and skills centres, and enlargement

or refurbishment of public housing stock is seen by many cities as inherently linked to their capacity to address challenges of migrant integration.

Focal points of current European debate:

- *Social investment and skills policy window in the proposed InvestEU Fund, dedicating appr. 10% of the EU guarantees to mobilise public and private investments in e.g. education and training-related services, social housing, health, care and integration of vulnerable people incl. third-country nationals; to leverage an estimated euro 65 bn. in social investment (EC 2018g, Art. 3.1.c, 7.1.d).*
- *Possibility for Member States to channel up to 5% of ERDF or ESF+ funding into the InvestEU budget guarantee (EC 2018g, Art.9; EC 2018c, Art.10).*

5. Potential impacts of policies adopted

Inclusiveness of European societies

- The empowerment of cities to deal with local challenges related to integration through European policies and funding programmes directly impacts on the inclusiveness of urban societies.
- Improved EU policies and instruments supporting comprehensive, integrated urban development based on territorial strategies and strengthened social infrastructures can benefit migrants and the receiving society and thus increase social cohesion.
- The provision of high-quality early integration measures and obstacle-free access to public and other services can lead to better and faster integration outcomes and avoid social policy intervention costs at a later stage.

Institutional, operational and political implications

- Strengthening of the partnership principle and stronger involvement of the local level in EU programme planning and -implementation can lead to improved multi-level coordination and a potentially less dominant role of national governments in the EU integration policy domain.

- Higher relevance of certain EU funds in the integration policy field, in particular the European Social Funds, implies a stronger role for organisations (ministries, managing authorities, established beneficiaries) associated with these programmes in Member States.
- An increased number of beneficiaries of EU programmes due to simplified rules and requirements, especially in the civil society and social sectors, will mean more players and stakeholders for EU policies and the related funds.

Economic and fiscal consequences

- More funding opportunities for cities and better access to funds would mean increased fiscal leeway for cities to develop, implement and support integration-related measures; in particular where few national funding for integration is available.
- Legislative decisions on EU-level and programming decisions on Member State level will decide on the actual availability of ESF+ funds for medium and long-term integration support for labour market inclusion and broader social cohesion goals.
- The inclusion of migration-related criteria in the allocation of Structural Funds would contribute to a re-channelling of EU support from East Central European to Southern Member States, to the detriment of investments on local level.

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