ReSOMA:
Research Social platform On Migration and Asylum

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## 1 LIST OF ABBREVIATIONS AND DEFINITIONS

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2 INTRODUCTION

The D3.6 Final Synthetic Reports present viable alternatives and reform path scenarios on asylum, migration and integration. They bring together lessons learnt from both the European and national level consultations (Tasks 3.1. and 3.2). They are based on the findings of different research instruments implemented in the framework of WP3, including the D3.1 Task Force Reports, the D3.3 Social Research Panel Survey and D3.4 Ask the experts analyses.
3 DESCRIPTION OF ACTION

The D3.6 Final synthetic reports present viable alternatives and reform paths scenarios on asylum, migration and integration. They bring together lessons learnt from both EU and national level consultations conducted in the context of WP3, together with “ask the expert” analyses.

The Final Synthetic Reports shed light on the trade-offs that underpin EU policy-making in the policy areas under consideration and outline a set of policy options as emerged during consultation with policy makers and relevant stakeholders at the EU and national levels (in particular civil society organisations). Complementary desk research and Ask-the-expert analyses allowed to integrate the consultation process with additional findings from relevant academic sources.

The D3.6 Final synthetic Reports address three main topics (one for each of ReSOMA thematic areas) which have been identified by CEPS and MPG research team as particularly relevant in light of ReSOMA priorities and considering latest policy developments at the EU and national levels. These three topics have driven research and consultation activities conducted in the framework of WP3:
1. The EU’s role in the implementation of the Global Compact on Refugees (asylum)
2. Crackdown on NGOs and volunteers helping refugees and other migrants (migration)
3. Future EU funding to support the integration of refugees and migrants (integration)

The D3.6 Final synthetic Reports present and discuss the main findings of the following WP3 research and consultation activities:
- The Task Force Consultation “Identifying Priorities and Discussing Policy Options in EU Migration, Asylum and Integration Policy” (D3.1);
- The Social Research Panel Survey collecting feedback from key national stakeholders (NGOs, policy makers and experts) regarding policy options in the areas migration, asylum and integration (D3.3);
- Ask the experts analyses and complementary desk research conducted by CEPS and MPG research team (D3.4).

The submission of three Final Synthetic Reports has experienced a 6-month delay compared to the planned delivery date (31 January 2019). This delay was mainly due to the need for CEPS and MPG researchers to conduct additional research to take stock of latest policy developments on the three topics covered by the Reports and complement the findings gathered through the Task Force Consultation and the Social Research Panel Survey. Specifically, the need to provide a comprehensive analysis of the key issues covered by the Final Synthetic Reports and ensure relevance of these deliverables required additional research efforts from CEPS and MPG researchers, which had not been originally foreseen in the implementation plan of WP3. In order to mitigate the risk of delays in implementation of WP3 during Y2 of the project, consortium partners are currently considering how to revise the implementation process of WP3, including the structure of D3.6 Final Synthetic Reports, to reduce delays experienced during Y1.

3.1 TASK FORCE CONSULTATION (D3.1)

The ReSOMA Task Force Consultation was organised on 21/11/2018 at CEPS venue and aimed to discuss the underlying assumptions and perceived trade-offs that underpin EU decision-making process in the
areas migration, asylum and integration.

The Task Force Consultation ensured a structured and closed-doors dialogue supported by independent research conducted by CEPS and MPG. It was implemented in the form of three parallel Thematic sessions on the three identified topic and allowed for participative, in-depth discussions between a selected group of EU policy actors, representing relevant EU institutions and agencies. The Task Force Consultation saw the participation of a total of 24 participants from relevant EU institutions - including relevant European Commission services, EEAS, Frontex, EASO, EU LISA, representatives from relevant international organizations, UNHCR, IOM, Council of Europe, international organizations and Civil society organizations that are part of the ReSOMA Consortium (ECRE, PICUM and EUROCITIES).

The structured discussion among TF participants was centred on assessing the assumptions, trade-offs and expected added-value of policy options identified in the preliminary research conducted by the CEPS-MPG research team. At the end of the parallel sessions, a Plenary discussion allowed the participants to exchange ideas and perspectives on the key issues and conclusions emerged during the debate on the three above-mentioned topics.

This method provided additional qualitative data and served as an exercise to evaluate the assumptions, feasibility, and consequences of different policy options. Research conducted in the framework of ReSOMA benefitted greatly from this ‘reality check’ among the key institutional actors at the EU level.

3.2 **SOCIAL RESEARCH PANEL SURVEY (D3.3)**

In line with the objectives of WP3, on the basis of the Task Force Synthetic Reports (D3.1), CEPS and MPG devised a Social Research Panel Survey to collect feedback from key national stakeholders (NGOs, policy makers and experts) regarding policy options in the areas migration, asylum and integration.

The D.3.3 Survey addressed two main questions: 1) Are policy priorities currently on the EU agenda present with the same high-level importance also at the national level? 2) What policy priorities are identified as relevant at the national level which are currently not adequately taken into consideration at the EU level?

Specifically, the survey aimed to identify the most significant similarities and discrepancies in policy perceptions on the following two topics identified during the previous phase of WP3:

1) The external dimension of EU asylum policy
2) The effects of anti-smuggling policy on civil society actors in Europe

The D.3.3 Social Research Panel Survey was launched on the ReSOMA platform on 11 February 2019 and was closed on the 28th of March 2019. Targeted dissemination to potential respondents that are relevant for the Survey topics was also ensured through contacts provided by partners of the ReSOMA Consortium (ECRE, PICUM, EUROCITIES, Social Platform).

3.3 **ASK THE EXPERT ANALYSES (D3.4)**

The Ask the expert analyses are based on desk research conducted by ReSOMA lead experts. The contribution of the lead experts in WP3 was defined through consultation with the Consortium. Lead
experts from EUR and ISMU asked to both CEPS and MPG for information on what kind of input they should provide, for instance the sources to be reviewed (academic material or other types of sources), as well as the content and format of their work. CEPS and MPG suggested focusing on both academic materials and reports from international institutions, NGOs, and other entities that are relevant for the three topics addressed in the context of WP3. Lead experts were also invited to focus more in depth on a number of specific aspects related to the three topics in light of their specific expertise and research interests.

4 DISSEMINATION

The Final Synthetic Report – Crackdown on NGOs and volunteers helping refugees and other migrants – was published on the ReSOMA website in June 2019.

The report was disseminated through the ReSOMA Twitter Account. A number of tweets were published to engage the ReSOMA network:

The following Press release was issued on 20 June 2019 to highlight the main findings of the Report:

“Despite drop in migrant arrivals, more europeans are being criminalised for their solidarity, new study shows”, retrievable from: http://www.resoma.eu/node/199

The Report was featured, among others, in Politico.eu, EUObserver, OpenDemocracy, Linkiesta (Italy), El Diario (Spain), Expresso (Portugal) and Helsingin Sanomat (Finland).
The other two D3.6 Final Synthetic Reports – “Implementing the UN Global Compact on Refugees: Which role for the EU?” and “Future EU funding to support the integration of refugees and migrants” (see in annex 1 and 3) will be disseminated in September 2019.

5 ANNEXES

5.1 ANNEX 1 – FINAL SYNTHETIC REPORT ASYLUM

Implementing the UN Global Compact on Refugees: Which role for the EU?

1. INTRODUCTION

This Final Synthetic Report aims to outline and discuss EU (and member states) policy priorities for the implementation of the Global Compact on Refugees (GCR), as identified through consultation with key EU and national stakeholders conducted in the framework of ReSOMA.

The adoption of the GCR and the agenda it lays down to advance responsibility sharing for refugees at the global level have fostered a debate among EU policy makers and relevant stakeholders concerning the role and contribution of the EU and its Member states in the achievement of the Compact's objectives. In this context, a number of proposals have been advanced concerning the contribution that civil society and academia could provide in supporting actions in key priority areas and ensuring independent monitoring and accountability of the GCR implementation.

The consultation process conducted in the framework of ReSOMA included the following main activities:

- The Task Force Consultation “Identifying Priorities and Discussing Policy Options in EU Migration, Asylum and Integration Policy”, which took place on 21 November 2018 at CEPS venue in Brussels. ¹ The TF consultation allowed for a process of structured dialogue

among a selected group of EU policy actors, representing relevant EU institutions and agencies, International organisations and NGOs that are members of the ReSOMA consortium. Specifically, the thematic Session “The external dimension of EU asylum policy” explored the following main questions: a) what have been the impacts of the 2015 ‘European refugee humanitarian crisis’ on EU policy priorities in the field of asylum and refugee protection? b) what has been the role of scientific evidence and data in supporting key policy decisions? c) on which long-term priorities should EU action be based to address identified gaps in EU asylum governance?

- The Social Research Panel Survey on “EU external action in the field of asylum” launched on the ReSOMA website in February 2019 to collect feedback from stakeholders at the national level (NGOs, policy makers and experts) on major policy initiatives in this area adopted or currently discussed at the EU level. The Survey addressed two main questions: 1) are policy priorities currently on the EU agenda present with the same relevance also at the national level? 2) What policy priorities are identified as relevant at the national level which are currently not adequately taken into consideration at the EU level?

- The Transnational feedback meeting “Evidence and the Global Compacts”, organized on the 29th of April 2019 at CEPS venue in Brussels. Participants, including representatives of civil society, international organisations and academia discussed the role of evidence and data in implementing the GCR. The meeting focused on the following main questions: a) how can data and evidence be used for implementing the GCR? b) what forms of collaboration among states, international organizations and other relevant stakeholders are envisaged to foster evidence-based policy responses? c) how to respect in this process the independence of both scholars and civil society and their larger role in upholding the democratic rule of law?

- Extensive Desk research on stakeholders’ positions, policy recommendations and supporting evidence base concerning EU priorities in implementing the GCR, as well as the role of civil society actors and researchers in this process.²

Research and consultation with key stakeholders (including representatives from civil society actors, research and relevant international organisations) at the EU and national level allowed to

identify the following four priority areas on which EU actors and stakeholders should focus when implementing the GCR.

The first identified priority concerns the need to expand resettlement and other complementary pathways for admission of people in need of international protection to Europe. These may include humanitarian admission programmes, private or community sponsorship programmes and humanitarian visas, as well as non-refugee specific complementary pathways based on existing migration avenues, which include family reunification, education and labour opportunities. In line with the GCR objectives, a number of stakeholders have called upon EU and national policy-makers to expand the scope of safe avenues to protection in Europe, in line with a fundamental rights and protection-sensitive approach, and as an expression of solidarity towards those countries mostly affected by the refugee situation as well as towards asylum seekers and refugees themselves.

The second identified priority focuses on the role of EU external funding in providing support to refugee hosting countries in a way that can benefit both the refugees themselves and their host communities and provide long-term solutions to forced displacement situations. The mobilization of EU funding has been a key policy component of the EU response to the so-called ‘refugee crisis’ in 2015. A number of emergency funding mechanisms, notably the EU Trust Fund (EUTF) for Africa, the “Madad” EUTF for Syria, and the Refugee facility for Turkey, have been established to address a range of issues related to both refugee protection and migration management in key third countries in Africa and the Middle East. However, analyses carried out so far have underlined how the priority of increasing the “speed” and flexibility to intervene in emergency contexts that underpinned the adoption of those emergency instruments may have a negative impact on third countries’ ownership, involvement of civil society actors in implementation, as well as democratic accountability by the European Parliament (EP). In view of the adoption of the next Multiannual Financial Framework (MFF) 2021-2027, a number of institutional and non-institutional actors, including the EP and several civil society actors, have recommended that the objective of speeding up project implementation and increasing responsiveness to unforeseen events should not be to the detriment of established standards of democratic accountability.

The third identified policy priority focus on the role of data and evidence in implementing the GCR. While UNHCR and states parties, in consultation with relevant stakeholders, are in the process of drafting a set of indicators for monitoring progress towards achieving the GCR objectives, it is crucial that civil society and academia preserve their space for independent monitoring and accountability of the GCR. Civil society monitoring is crucial to cover issues that may be not encompassed by the official GCR monitoring framework, including in key areas such
as access to protection, reception conditions, and refugees’ access to social and economic rights in their hosting countries.

This Report concludes by underlining, as a fourth cross-cutting priority, the need to ensure consistency of EU policies with the international protection-based framework on which the GCR is based. A number of recent policy developments at the EU level, both internally and in relations with third countries, point to a worrying trend towards restrictive migration and asylum policies driven by a migration management rationale rather than an international protection rationale. This trend risk reducing refugees’ mobility opportunities and negatively impacting on refugee access to protection and durable solutions, undermining the implementation of the GCR both in Europe and abroad.

This Final Synthetic Report proceeds as follows. Section 2 provides an overview of the key objectives of the GCR as well as the structures and arrangements it foresees to foster cooperation among all the actors involved. Section 3 outlines the key policy priorities on which the EU and the member states should focus when implementing the GCR as identified during consultation with key stakeholders. For each of the identified policy priorities, key findings and relevant policy recommendations put forward by consulted stakeholders are outlined.

2. THE EU AND THE GLOBAL COMPACT ON REFUGEES

The Global Compact on Refugees (GCR), endorsed by the UN General Assembly in December 2018, represents the international reference framework for planning and monitoring policy responses to address refugee situations in the future. The main goal of the GCR is to provide a basis for predictable and equitable responsibility-sharing among all UN Member States and other relevant stakeholders. The GCR is international refugee protection and international human rights-driven. It confirms as its point of departure the existing international protection framework, centred on the cardinal principle of non-refoulement, which lies at the core of the 1951 Geneva Convention and its 1967 Protocol, as well as other international human rights instruments.

Art. 7 of the GCR includes four objectives of the Compact as a whole: 1) ease pressures on host countries; 2) enhance refugee self-reliance; 3) expand access to third country solutions; 4) support conditions in countries of origin for return in safety and dignity.

Though non-legally binding, the GCR includes a Programme of Action that advances a set of new structures and arrangements to strengthen responsibility sharing and expand the scope of
durable solutions. A key component of the GCR is the Comprehensive Refugee Response Framework (CRRF), which was already set out in an annex to the 2016 New York Declaration for Refugees and Migrants (part II).

The CRRF specifies key elements for a comprehensive response to any large movement of refugees, which should be applied in particular situations, in close coordination with relevant states, relevant UN agencies and stakeholders. These include rapid and well-supported reception and admissions; support for immediate and on-going needs (e.g. protection, health, education); assistance for local and national institutions and communities receiving refugees; and expanded opportunities for durable solutions (in the form of sustainable return, resettlement and integration in the hosting state). During the last three years, the CRRF has been applied in 15 countries in Africa and Western America (UNHCR, 2018).

The GCR foresees new arrangements to foster solidarity and responsibility sharing among participating states. Specifically, the GCR envisions a Global Refugee Forum to be held periodically at the ministerial level starting in December 2019, whereby states and other actors can make pledges of support to meet the goals of the Compact, including in the form of financial, material and technical assistance, resettlement and other complementary pathways for admission, as well as actions taken by states at the national level to further the Compact objectives (p. 17). In addition, the GCR foresees the activation of so-called Support Platforms, composed of a group of states committed to mobilize contributions in favour of host countries facing large scale and complex refugee situations (par. 22).

The GCR also calls for the establishment of a multi-stakeholders and partnership approach, which foresees the involvement of a broad set of actors – including independent civil society organizations, local communities and refugees themselves – in the design, monitoring and implementation of the actions envisaged by the Compact (par. 33). It also foresees increased collaboration among states, international organizations and other relevant stakeholders to foster evidence-based policy responses through improved collection, analysis and sharing of data and statistics on refugee issues (par. 45). Finally, it also foresees the establishment of a Global academic network (GAN) on refugee, forced displacement, and statelessness issues involving universities, academic alliances, and research institutions, in cooperation with UNHCR. The GAN will aim at facilitating research, training and scholarship opportunities to produce deliverables in support of the GCR objectives (par. 43).

The EU and its member states have taken an active role in the consultation process that led to the adoption of the GCR. The EU Delegation in Geneva repeatedly expressed its commitment to the Refugee Compact and its objectives, while EU member states usually aligned with the common statements delivered by the EU Delegation during subsequent negotiating rounds (Gatti, 2018). As recognized by observers, the GCR raised less controversies and revealed to be
less problematic at the political level compared to the Global Compact on Migration (Karas, 2018). The less controversial character of the GCR compared to the Global Compact on Migration is confirmed by the fact that, among EU member States, only Hungary decided not to be part of it. On the contrary, nine EU Member States decided to withdraw from the Global Compact on Migration (Hungary, the Czech Republic, Poland, Austria, Bulgaria, Italy, Latvia and Romania, Slovakia) (UN News, 2018; Euractiv, 2018).

3. KEY POLICY PRIORITIES FOR IMPLEMENTING THE GCR

Policy priority 1: Resettlement and complementary pathways to protection

The GCR underlines the need to enlarge the scope, size and quality of resettlement and to make available additional pathways to protection in a more systematic, organized and sustainable way. In support of efforts undertaken by states, UNHCR commits to devise a three years’ strategy (2019-2021) to increase the number of resettlement places, involving additional countries in global resettlement efforts and improving the quality of resettlement programmes by fostering good practices and regional arrangements (par. 91).

Besides the expansion of resettlement programmes, the GCR calls for complementary pathways of admission for persons in need of international protection to be offered on a more systematic, organized, sustainable and gender-responsive basis and to ensure they contain appropriate international protection safeguards (par. 94). Complementary pathways aim at creating safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met. UNHCR distinguishes between refugee specific complementary pathways – which include humanitarian admission programmes, private or community sponsorship programmes and humanitarian visas – and non-refugee specific complementary pathways based on existing legal migration avenues, which may include family reunification, education and labour opportunities (UNHCR, 2019).

In line with the objectives included in the GCR, calls have been made to EU and national policy makers to increase the scope of legal avenues for protection in Europe, through resettlement and complementary pathways. Human rights activists and other stakeholders have reiterated the need for the EU to expand its resettlement efforts beyond the 50,000 already pledged by member states over the period 2017-2019 (ECRE, 2019).
In order to move towards a more structured and harmonised approach to resettlement, in July 2016 the Commission tabled a proposal for a Regulation on an EU Resettlement Framework. which aims at reducing current divergences among national resettlement practices by fostering a “collective EU approach to resettlement” (European Commission, 2016a). The EU Resettlement Framework is considered by the Commission as an important step in increasing the level of coordination of resettlement efforts and, potentially, of increasing the number of refugees resettled in Europe. The Commission’s proposal provides a common definition of the notion of resettlement, lays down the factors to be considered for including third countries from where resettlement would occur and a set of common eligibility criteria and grounds for exclusion of applicants. It would also establish annual Union resettlement plans and targeted Union resettlement schemes to be established through Commission ‘implementing acts’.

The proposal on a Union Resettlement Framework has raised several points of controversy of direct relevance when assessing it in light of the GCR (ECRE, 2018a). Article 4 of the proposal on “Regions or third countries from which resettlement is to occur” includes as a relevant factor for determining third countries to be prioritized for resettlement their ‘effective cooperation with the Union in the area of migration and asylum’. Such cooperation would be determined by the EU in light of the efforts undertaken by third countries in reducing the number of irregular migrants to the EU and increasing readmission rates of third country nationals found in an irregular situation in EU Member States, including their willingness to conclude readmission agreements. Third countries to be prioritised for resettlement purposes are also requested to create the conditions for the use of the first country of asylum and safe third country concepts as grounds for accepting expedited and accelerated expulsions of asylum seekers from the EU, an approach that follows the one laid down by the Commission in its accompanying proposal to recast the EU Asylum procedures Directive into a Regulation (European Commission, 2016b; Cortinovis, 2018).

Against attempts to link the provision of resettlement places to third countries’ cooperation in the field of migration control, civil society actors have stressed the need to preserve the humanitarian character of resettlement as a protection tool and as an expression of solidarity towards those countries mostly affected by refugee situations (Amnesty International 2016; International Rescue Committee 2018; ECRE 2018a). Several civil society actors that play an active role in the implementation of current resettlement programmes in Europe issued a Joint Comments Paper on 14 November 2016 that raised important concerns about the proposed Union Resettlement Framework. They underlined that “the proposed Framework is overly reactive and focuses unduly on migration control objectives, to the potential detriment of resettlement’s
function as a lifesaving tool and a durable solution”, which lays at the heart of the UN GCR guiding principles.4

The inclusion of a logic of migration control in the EU Resettlement Framework has been one of the key stumbling blocks during trilogue talks between the EU co-legislators during inter-institutional negotiations. While Member states consistently underlined the importance of resettlement as a “strategic instrument to manage migration”, the European Parliament, recalling the position of several stakeholders, underlined that “Determining geographical priorities based on third countries cooperation in the area of migration and leveraging resettlement to reach foreign policy objectives would therefore de facto jeopardise a humanitarian, needs-based and international protection approach” (Council of the European Union, 2018; European Parliament, 2017).

Besides an increase in resettlement pledges, human rights organizations and academics have consistently called for the issuing of humanitarian visas to those in need of protection as a way to remedy the structural lack of safe pathways for asylum seekers to enter the EU territory. Currently, an estimated 90% of those granted international protection in the EU have reached the territory of a member states through irregular means (Van Ballegooij and Navarra 2018). The European Parliament adopted a Resolution in December 2018, recommending the introduction of a new legislative instrument, an EU visa with limited territorial validity, which could be requested at any consulate or embassy of an EU Member State and that would allow asylum seekers to enter the territory of the Member State issuing the visa for the sole purpose of making an application for international protection (European Parliament, 2018).

The Commission, however, dismissed the EP request to present a legislative proposal on an EU humanitarian visa, arguing that it would not be ‘politically feasible’ to create a subjective right for an individual to request admission and to be admitted or an obligation on the Member States to admit a person in need of international protection (European Commission, 2019). According to the Commission, this stems from the fact that the Common European Asylum System (CEAS) is ‘territorially bound’, which means it only covers applications for international protection made in the territory of the Member States and not requests for diplomatic asylum lodged at Member State representations in third countries. This conclusion, however, disregards extraterritorial protection-related obligations under the Charter of Fundamental Rights of the European Union (EUCFR). As argued by legal scholars, the EUCFR (including obligations of non-refoulement)

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applies whenever member states act within the scope of EU law (Art. 51 CFR), with territoriality non being a decisive criterion (Moreno Lax, 2018).

The stance taken by the Commission in reply to the EP request runs counter to the position expressed on this subject by a wide number of stakeholders, including civil society representatives and academics, that took part in the consultation process accompanying the EP initiative on humanitarian visas. As stated in an open letter addressed to the EP by 160 academics ahead of the Plenary vote on the Resolution on Humanitarian visas, which took place on 11 December 2018, the adoption of a set of EU rules on humanitarian visas would be instrumental in introducing a mechanism of safe and legal access to international protection in the Member States, in line with a fundamental rights-based and protection-driven understanding of the CEAS (Moreno-Lax et al., 2018). Related to the previous, a clear and effective procedure for granting access to the territory of EU Member States for people in clear need of protection would also represent a concrete and relevant delivery on the commitment to expand legal pathways to protection included in the Global Compact on Refugees (Carrera and Cortinovis, 2019).

Finally, in line with the commitment laid down in the GCR, attention is increasingly paid by a number or stakeholders on how to create additional non-humanitarian pathways to protection in the EU (European Resettlement Network, 2018a, 2018b). Progress in this area rests largely on member states’ efforts, considered the limited competences assigned to the EU in the area of legal migration. Enabling entry for family members is a straightforward way of offering greater protection to refugee groups in moments of crisis, without designing new channels of entry. In particular, current family reunification criteria could be expanded, by facilitating reunification of extended family members (such as siblings and grown children) (Collett et al. 2016).

Additional pathways to protection could also be created through enhanced opportunities for refugees to arrive safely in the framework of study or education programs. This objective could be pursued first by ensuring that existing academic scholarship and apprenticeship programs take into consideration the specific challenges faced by refugees in accessing those programs, including lack of documentation and academic certificates. Partnership between public institutions, industry and educational institutions at the EU, national and local levels could also be established to design study programs specifically targeted to refugees (UNHCR, 2015). As stated by the UNHCR, the involvement of a broad range of stakeholders, including “States, regional and intergovernmental bodies, civil society, academia and other stakeholders play a critical role to support the establishment and development of protection-sensitive, accessible and scalable systems that incorporate the necessary protection safeguards as well as reduce and remove legal, administrative and practical obstacles preventing refugees from accessing complementary pathways” (UNHCR, 2019).
Stakeholders have underlined a set of considerations and protection safeguards to be considered when designing pathways for refugees based on migration avenues. First, in order to provide added value compared to current responses, pathways in the above-mentioned areas should always be additional – not a substitute – to established humanitarian entry channels and procedures. They should in no way be used as a way of curtailing already established rights and protection. In the case of family reunification, the creation of ad hoc programs to facilitate reunion with extended family members should by no means be considered as an option for restricting the right to reunite with core family members and facilitate family unity as established by EU Family Reunification Directive (Conte, 2018). A protection-sensitive approach should be adopted when exploring possible access by refugees to existing legal entry channels for study and work. As those often provide for the right to stay in the destination country only for a limited period of time, special arrangements may be required to ensure that the rights of refugees and their protection needs are safeguarded. Beneficiaries must in all cases be protected against non-refoulement and be able to apply, without prejudice, for asylum at any time (Carrera and Cortinovis, 2019; Norwegian Refugee Council et al., 2018).

**Policy priority 2: the role of EU external funding**

The GCR puts great attention on the need to strengthen resilience of refugees and their host communities, underlying the need to mainstream displacement issues into the development programmes and policies of host countries. In this context, predictable and adequate funding is identified as a key priority for furthering the objectives of the Compact. While needs-driven humanitarian assistance remains a priority, the Refugee Compact underlines the importance to deploy additional development resources, over and above regular development assistance, provided in ways that can be of direct benefit to refugees and host countries and communities (paragraph 32).

As the world’s leading donor of humanitarian aid and development assistance, the EU and its Member States have a key role to play in addressing forced displacement situations and providing support and assistance to refugees worldwide. In line with the approach laid down in the GCR, the mobilization of predictable and additional funding is crucial to provide emergency assistance to displaced populations and promote the socio-economic support to refugees and their host communities.

Negotiations of the next Multiannual Financial Framework (MFF) 2021-2027 represent a key step for the EU to consolidate and scale up its engagement in global responsibility sharing for refugees and forced migrants. Civil society organizations have underlined the importance for the EU to prepare a collective commitment in view of the first Global Refugee Forum in December 2019, including in the forms of additional financial assistance (ECRE 2019). In line with the multi-
stakeholder and partnership approach advanced by the GCR, EU funding should be used to mobilize a plurality of actors, including independent civil society organizations, local communities and refugees organisations in the design and implementation of actions in support of refugees (Cortinovis, 2019).

When assessing relevant policy options for the next phase of EU external funding, EU policy makers should take stock of the experience of policy responses developed during the past four years, notably the EUTF for Africa, the “Madad” EUTF for Syria and the Refugee Facility for Turkey (Cortinovis, 2019). The creation of these instruments has been motivated by the search for flexibility and the capacity to rapidly intervene in emergency contexts (den Hertog 2016; Cortinovis and Conte, 2018).

However, assessments of EU emergency financial instruments have critically underlined the trade-offs those instruments entail between ‘flexibility’ and ‘speed’ on one side and democratic, legal and financial accountability and the EU’s budgetary integrity on the other (Carrera et al., 2018). In its 2018 audit of the EUTF for Africa, the European Court of Auditors, found that increased flexibility in programming allowed by that instrument has come at the expense of having a strategy that is focused enough to steer action across the three geographical windows around which the EUTF for Africa is structured (the Sahel and Lake Chad, the Horn of Africa and North of Africa) and supports the measuring and reporting on results. Furthermore, the specific “crises” in the three regions that the EUTF seeks to address have not been clearly defined in the EUTF programmatic documents. The ECA also found that the comparative advantage of funding projects through the EUTF for Africa compared to already existing EU instruments was not always clearly motivated. According to the ECA, this circumstance resulted in the selection of projects to be founded through the EUTF for Africa that address similar needs to those of other EU-financed activities and risk duplicating other forms of EU support (European Court of Auditors, 2018).

In light of current negotiations on the next MFF 2021-2027, EU institutions should work together to preserve the integrity of the EU budget, envisaging mechanisms within the EU budget to respond to future emergencies, instead of setting up “extra-budget” instruments such as is the case of EUTFs, which pose challenges in terms of democratic oversight and compliance with the principle of inter-institutional balance (Carrera et al. 2018).

Civil society organizations have also firmly stressed how the mobilization of EU resources in the framework of political “agreements” with third countries driven by an overarching containment approach (such as the 2016 EU-Turkey Statement), do not align with a comprehensive right based framework of cooperation and are not conducive to sustainable solutions to complex refugee situations (Cortinovis and Conte, 2018; Concord, 2018; Carrera and Cortinovis, 2019).
The Commission’s structure for the new MFF 2021-2027 foresees a major restructuring of the external dimension of the EU budget by bringing together 12 existing financial instruments into a broad Neighborhood, Development and International Cooperation Instrument (NDICI) with a volume of EUR 89.2 billion (European Commission, 2018a). One of the major changes foreseen by the Commission’s proposal to simplify the EU’s external spending architecture is the integration of the European Development Fund – currently one of the key financial instruments to provide assistance to African, Caribbean and Pacific Countries – into the EU budget.

Another key aspect of the proposed Regulation is the attempt to ensure flexibility in the provision of EU external funding. The Commission recalls how, as a consequence of the migration and refugee crisis during 2015-2016, problems were encountered to reallocate funds within the instruments under the EU budget as large amounts of funds had been bonded to long-term programs. To address this situation in a structural way, the proposal foresees the introduction of a EUR 4 billion Rapid Response Component with worldwide coverage dedicated to quick response capacity in a number of areas, including strengthening resilience and linking humanitarian and development actions. The Rapid response component would be managed and implemented through simplified procedures, thus allowing for more flexibility and responsiveness. In addition, to further increase the ability of the EU to respond flexibility to unforeseen events, including unexpected migratory pressure, the Commission proposes to create an “emerging challenges and priorities cushion” worth EUR 10 billion.

Preliminary analyses of the Commission proposal stress how the potential gain in predictability and accountability stemming from the integration of the European Development Fund into the EU budget could be offset by the large amount of unallocated money foreseen by the “flexibility cushion”. ECRE, in particular, stresses the need to clearly specify the criteria and procedures that would trigger the use of the unallocated reserve, taking into consideration factors such as the level of need among refugees and host communities and the potential of EU funding to improve the rights of displaced persons (ECRE, 2018b).

References to the need to address the “root causes of irregular migration” included in the new EU external funding instrument, seems to reflect a narrowly understood and conceptually flawed approach to the complex links between development processes and migration phenomena (Cortinovis and Conte, 2018; Castillejo, 2015: ECRE 2018b). Against the subordination of EU external action to the imperative of containing migration movements towards Europe, research points to the role that migration and mobility channels hold for enabling access to protection and, more broadly, to provide sustainable solutions for refugees and forced migrants (Long 2015). Negotiations among EU actors on the next MFF, should center on increasing the transparency, accountability, efficiency of the EU funding landscape, while ensuring coherence of EU external migration and refugee policy with humanitarian and development principles enshrined in EU
Treaties. Furthermore, as reflected in the GCR guiding principles, the use of funding to support refugees and host communities and provide durable solutions, should go hand in hand with the commitment to open legal pathways for refugees and to ensure access to protection in Europe.

**Policy priority 3: the role of evidence and data in monitoring the GCR**

The GCR underlines the need to collect and utilize reliable, comparable and timely data as a basis for evidence-based policies. It also envisages the involvement of a broad set of actors – including independent civil society organisations, local communities and refugee organisations – in ensuring monitoring and accountability towards the achievement of the Compacts’ objectives. In line with the commitment included in the Compact (par. 102), UNHCR, in consultation with relevant stakeholders, took a leading role in the process of developing a set of indicators ahead of the first Global Refugee Forum in December 2019.

Stakeholders consulted in the framework of ReSOMA welcomed UNHCR’s efforts as an important step in designing a robust monitoring framework and ensuring accountability towards achieving the Compact’s objectives. They stressed that developing an evidence-based framework for monitoring progress based on a set of common indicators is of paramount importance for ensuring successful implementation in light of the non-binding nature of the Compact. As an example, experience in East Africa over the past years underlines the potential of data and evidence in implementing the Comprehensive Refugee Response Framework (CRRF) – as underlined by the experience of the Regional Durable Solutions Secretariat.

Some key lessons from the Sustainable Development Goals (SDG) should be taken into account for the development of GCR indicators. In line with the SDG agenda, the GCR monitoring framework should propose concrete, time-bound and refugee-specific targets to achieve both the SDGs and GCR objectives. The GCR provides a great opportunity to build on some of the progress made under the SDG agenda and fill some of the existing gaps in data collection. To ensure that outcomes for refugees are fully captured by data collected, the GCR monitoring framework should provide guidance on how each country could develop national targets for refugees in the medium term in line with SDG targets set for their own populations. Data collected towards national targets could then be aggregated across all countries to show global progress.

While recognizing the importance to monitor progress of the GCR by means of a set of commonly agreed indicators, consulted stakeholders also reiterated the role of civil society in ensuring independent monitoring and accountability of policies. Civil society and academia (including in the framework of the Global Academic Network on refugees, forced displacement, and

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5 This section is based on the outcome of the ReSOMA transnational feedback meeting “Evidence and the global compacts”, Brussels, 29th of April 2019.

6 See [https://regionaldss.org/index.php/who-we-are/about-redss/](https://regionaldss.org/index.php/who-we-are/about-redss/)
statelessness issues envisaged by the GCR) should ensure that relevant issues not covered by the official indicators are addressed by independent monitoring and evaluation, particularly in areas such as access to protection, reception conditions, and refugees’ access to social and economic rights in their hosting countries. These are sensitive issues on which member states are reluctant to allow for a thorough monitoring of their policies and legal frameworks.

Monitoring of the GCR should focus on the respect of international and EU human rights standards. It should be taken into consideration in this regard that a number of international and regional monitoring mechanisms are already in place both at the international and regional level to ensure member states’ compliance with human rights and international refugee law standards, such as the United Nations Universal Periodic Review (UPR) process, which involves a review of the human rights records of all UN Member States, other Treaty-specific UN human rights bodies and Special Procedures, as well as other monitoring bodies within the context of the Council of Europe. Those monitoring bodies and processes continue to represent indispensable instruments providing robust evidence on states’ compliance with human rights and refugee protection, which should be taken into account when assessing the faithful implementation of the GCR.

Consulted stakeholders underlined the need to shift from outputs monitoring towards better assessments of impacts. The current focus on quantitative data should be complemented with at least an equal focus on qualitative and context-specific data to shed light on the impacts of policy initiatives and implementing measures undertaken in the framework of the Compact or falling within its scope of application. While quantitative data often focus only on a limited number of issues and aspects, which does not allow to link these interventions with actual changes on the ground, increased use of qualitative evidence would allow to expand available understanding of broader societal phenomena related to migration and refugee mobility.

Expanding the network of stakeholders feeding evidence and data on implemented policies would also allow to shed light on aspects that are not accounted for in currently available evidence. Refugee and migrant community organisations, refugee-led organisations, women migrant and refugee organizations, as well as individual experts with refugee and migrant background should be better involved in relevant policy debates and reform processes on key issues of concern for them and their communities.

**Policy priority 4: ensuring consistency between EU policies and the GCR human rights and international protection-based framework**

A cross-cutting issue emerged during the consultation process is the need to ensure compliance with relevant international protection and fundamental rights standards when implementing the GCR. Stakeholders have underlined how some recent policy developments at the EU level stand at odds with the international protection-based framework that underlies the GCR. The process
of implementation of the GCR should serve as an opportunity to shed light on gaps and contested issues in existing migration and asylum policies implemented by the EU and its Member States (Carrera and Cortinovis, 2019).

European states concerned about preventing asylum seekers from arriving and obtaining asylum in their territory have sought to engage third countries to conduct migration management on behalf of the EU and its member states. Recent examples of EU cooperation with third countries inspired by a logic of containment are the 2016 EU-Turkey Statement, the 2017 Memorandum of understanding between Italy-Libya as well a number of informal arrangements covering migration control and readmission concluded with a number of countries in Africa and the Middle East (Carrera and Cortinovis, 2019). Policy initiatives which aim to prevent or restrict mobility of migrants and refugees in the regions of origin, including through the provision of financial incentives to hosting countries in exchange for their efforts in the field of migration management, negatively impact on refugee’s access to protection and durable solutions.

In the framework of the reform of the CEAS launched in 2016, the European Commission called for an expanded use of border procedures and for the mandatory use of inadmissibility procedures based on “safe country” concepts (European Commission, 2016b). In September 2018, the Commission also released a proposal for a Recast Return Procedures directive, which includes a mandatory border procedure exclusively applicable to third-country country nationals whose application for international protection has been rejected. The border procedure foresees extended period of detention, reduced time limits for appeal (European Commission, 2018b).

These policy proposals have been met with concern by researchers and civil society organisations, which have underlined how border procedures and other accelerated procedures prevent a thorough assessment of individual asylum claims and thus entail higher risks of breaches of the non-refoulement principle. In addition, the proposed border procedure would entail systematic long-term detention of individuals involved (ECRE, 2018c). This approach, however, runs against EU and international law standards, which require that administrative detention or custody for migrants should be used as an exceptional measure of last resort, for the shortest period of time, and only if justified by a legitimate purpose (FRA, 2019).

While instrumental to the containment of applicants for international protection and migrants at the EU external borders, the experience with the hotspots approach implemented in Italy and Greece during the last four years, underlines a number of relevant fundamental rights issues associated with the use of accelerated border procedures. These include gaps in information provided to applicants, lack of legal assistance, under-identification of vulnerable persons, restricted freedom of movement, quasi detention practices, and degrading reception conditions (ECRE, 2016; Danish Refugee Council, 2019).
More broadly, measures that aim at restricting access to asylum in Europe and deflecting protection obligations to third countries, stands in contradiction with the responsibility-sharing rationale of the GCR and also with the protection-based principles on which the CEAS is based (Cortinovis and Carrera, 2019). Civil society actors and the research community have a crucial role to play in monitoring and assessing the role and contribution of the EU and its member states in ways that are loyal not only to the GCR principles and objectives, but also to their international human rights and refugee law obligations, as well as the fundamental rights principles laid down in the EU founding Treaties and Member State constitutional traditions.

References


5.2 ANNEX 2 – FINAL SYNTHETIC REPORT MIGRATION

ReSOMA Final Synthetic Report

Crackdown on NGOs and volunteers helping refugees and other migrants

This report synthesises previous ReSOMA briefs concerning the crackdown on NGOs and volunteers helping refugees and other migrants. Section 1 captures the main issues and controversies in the debate on the policing of humanitarianism and the potential impacts of EU and national anti-migrant smuggling policies on civil society actors. This section has drawn on academic research in this area, and in particular on CEPS expertise in this field. Section 2 provides an overview of the possible policy options to address this phenomenon taking stock of the ongoing policy debate on solutions and alternatives. Section 3 aims to identify and quantify criminal cases of individuals, volunteers and NGOs providing humanitarian assistance to migrants in the European Union. This monitoring exercise has been carried out by MPG through ReSOMA’s collaborative and participatory process involving experts from NGOs, researchers and other stakeholders. Section 4 provides overall summary conclusions and recommendations to end the crackdown on NGOs and to prevent further policing of civil society. The final section proposes approaches to returning responsibility to EU actors, to be further explored by the ReSOMA platform, with a focus on good governance, human rights defenders, and the protection of humanitarian space inside the EU.

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SECTION 1

POLITICAL AND LEGAL TRENDS LIMITING CIVIL SOCIETY SPACE

Introduction

The crackdown on NGOs assisting refugees and other migrants is a multi-faceted phenomenon characterised by the increased policing of civil society actors assisting refugees and other migrants (Carrera et al., 2018a; Carrera et al., 2018b; Carrera et al., 2019). 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 (Youngs and Echague, 2017; Szuleka, 2018; Carrera et al., 2018a; Carrera et al., 2018b).

Sometimes political and operational priorities to tackle migrant smuggling have also 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 et al., 2018a; Carrera et al., 2018b; Carrera et al., 2019). Civil society actors have filled the gaps left by EU agencies and national governments 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.

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, 2018).

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7 This section is extracted from the Discussion Policy Brief ‘Crackdown on NGOs and volunteers helping refugees and other migrants’, L. Vosylūtė and C. Conte, July 2018
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., 2018a; Carrera et al., 2018b; PICUM, 2017; FRA, 2018). In addition, multiple restrictions have been adopted against civil society organisations (CSOs) in the Member States that do not constitute criminalisation, but which have other pervasive and chilling effects, leading to “shrinking civil society space” (Youngs and Echague, 2017).

2. Scoping the debate

2.1 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 et al., 2018; Szuleka, 2018; Fekete et al., 2017; PICUM, 2017; Heller and Pezzani, 2017; Gkliati, 2016; Carrera and Guild, 2016). 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 re-framed civil society activities as a “pull factor” (Carrera et al., 2019). 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., 2018a; Carrera et al., 2018b).

2.2 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, ‘débits de solidarité’ 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., 2019; 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).

3. Key issues and controversies

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


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 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 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 Directive 2002/90 also 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 criminalisation 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 above-mentioned member states (Carrera et al., 2019). 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., 2019; UNODC, 2017).

3.2 Escalation from suspicion to disciplinary actions 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 et al, 2018b). 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.

3.3 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.

3.4 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.

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.

3.5 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., 2019).

4. Potential impacts of policies adopted

The ongoing criminalisation of solidarity may negatively affect the humanitarian work of NGOs and volunteers helping refugees and migrants. The political and legal trends limiting civil society space in the Member States also raise concerns with regard to the respect for fundamental freedoms, human rights and rule of law.

- **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 and transit of irregular migrants in the EU.

- **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. 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).

- **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 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.
SECTION 2

POLICY OPTIONS ADDRESSING THE CRACKDOWN ON NGOS AND VOLUNTEERS

1. Introduction

International and regional organisations, including human rights bodies and other standard setting institutions, European institutions and agencies, national policymakers, civil society, private businesses and other stakeholders have been putting forward various policy alternatives to prevent or discourage the criminalisation of solidarity with refugees and other migrants. Some of these proposals aim to reform the EU legal framework delineated by the Facilitators Package (Bozeat et al., 2016, Carrera et al., 2016) while others also suggest addressing the broader phenomenon of ‘policing humanitarianism’ (Carrera et al., 2019) and tackling the underlying reasons for migrant smuggling (Zangh, Sanchez and Achilli, 2018, Carrera et al., 2018a; Carrera et al., 2018b, Fekete, 2018).

2. Identifying and mapping key policy options

To address the ongoing criminalisation of solidarity various policy proposals have been put forward by diverse civil society actors, such as PICUM, Social Platform, ECRE, the Red Cross EU office, Amnesty International, Médecins sans Frontières (MSF), FEANTSA, CIVICUS, Human Rights Watch, Frontline Defenders, and many others. For example, the European Citizens’ Initiative "We are welcoming Europe" has mobilised more than 170 civil society organisations calling for the decriminalisation of humanitarian assistance. Some suggestions have also come from international and regional human rights bodies or even from the European institutions and agencies (FRA, 2014; UNODC, 2017; FRA, 2018; European Parliament, 2018a; Council of Europe, Venice Commission 2018; Council of Europe, Commissioner for Human Rights, 2018; United Nations Human Rights Committee, 2018).

As summarised in earlier ReSOMA discussion briefs (Vosyliūtė and Conte 2018; Vosyliūtė and Joki, 2018; Wolffhardt, 2018), academia and think tanks have been increasingly interested in the issue of the criminalisation of migration and the criminalisation of solidarity (see for example, Fekete, 2018).

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8 This section is extracted from the Policy Option Brief ‘Crackdown on NGOs and volunteers helping refugees and other migrants’, L. Vosyliūtė and C. Conte, March 2019
In this report we further develop four proposals that are not mutually exclusive and could be seen as complementary:

- legislative revision of the Facilitators Package that requires ‘financial gain or other material benefit’ to trigger investigation into the crime of facilitation of entry/transit and ‘unjust enrichment’ for a stay in the EU;
- legislative revision of Article 1(2) of the Facilitation Directive to make the ‘humanitarian exemption’ clause mandatory;
- implementation of ‘firewalls’ between civil society and law enforcement;
- independent monitoring of implementation of the Facilitators Package including via a designated observatory on criminalisation of civil society.

2.1 The criterion of ‘financial gain or other material benefit’

The UN Protocol against the Smuggling of Migrants by Land, Sea and Air sets an international standard in the area (UN General Assembly, 2000). Article 6 of the UN Protocol provides the international threshold to criminalise the behaviour as ‘migrant smuggling’ when it is done for profit motives. The element of financial gain in this context is the crucial indicator of criminal intent on the side of smugglers (UNODC, 2004; UNODC, 2017). The European Union Agency for Fundamental Rights (FRA) underlines that all EU Member States, except Ireland, have ratified the UN Protocol against the Smuggling of Migrants (FRA, 2018).

2.2 The exemption on grounds of humanitarian assistance

The United Nations Office on Drugs and Crime (UNDOC) clarifies that the Protocol against the Smuggling of Migrants does not require states to criminalise 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).

As the EU Facilitators Package does not contain a ‘financial and material benefit requirement’ various international and regional bodies (United Nations Human Rights Committee, 2018; UNODC, 2017; Council of Europe, Venice Commission, 2018; Council of Europe, Commissioner for Human Rights, 2018), EU institutions and agencies (European Union Agency for Fundamental Rights 2014 and 2018, European Parliament 2018a) have therefore also recommended the
introduction of an obligatory provision under EU law that expressly exempts humanitarian assistance by civil society organisations or individuals from criminalisation.

This policy option is complementary to the first one and widely supported among civil society stakeholders (see for example, PICUM, 2017; Social Platform, 2016; Red Cross EU Office, 2017). It is also one of the calls of the European Citizens’ Initiative “We are welcoming Europe, let us help!” that is supported by more than 170 civil society organisations, and also by a separate Civic Space Watch initiative. Various forms of mobilisation calling for humanitarian exemption have come about as a reaction to concrete prosecutions – for example, the petition submitted to the European Parliament’s Committee on Petitions by Paula Schmid Porras on behalf of PROEM-AID (Schmid Porras, 2017). This petition recommends revising Article 1(2) and specifying that Member States “shall not impose sanctions” on those who provide humanitarian assistance to undocumented migrants on non-profit grounds (see, for instance, Schmid Porras, 2017; Social Platform, 2016).

2.3 Implementing firewalls

Civil society actors and researchers also call on the EU institutions to develop guidelines and funding schemes for implementing ‘firewalls’ between civil society and law enforcement which guarantees safe humanitarian assistance and access to justice (Carrera et al., 2018a; Carrera et al., 2018b; Vosyliūtė and Joki, 2018; Carrera et al., 2019). This policy option is supported among civil society and social partners, for example PICUM (2017), FEANTSA (2017), Social Platform (2016) and ETUC (2016).

The concept of ‘firewalls’ was first proposed with the aim of de-coupling the provision of public services, and fundamental rights mandates, from immigration law enforcement (Crépeau and Hastie, 2015). ‘Firewalls’ seek to prevent immigration enforcement authorities from accessing information concerning the immigration status of individuals who seek assistance (for example police or hospital, assistance) or services (shelters, NGOs) (Crépeau and Hastie, 2015).

2.4 The independent monitoring of implementation of the Facilitators Package

The evidence brought by civil society and researchers suggests the need for systematic and independent monitoring of the respect of the human rights of migrants, the protection of civil society free space and the enforcement of the Facilitators Package and/or broader immigration policies in compliance with fundamental rights.

An initial study for the European Parliament’s LIBE committee has suggested better monitoring systems (Carrera et al., 2016: 11):

“Member States should be obliged to put in place adequate systems to monitor and independently evaluate the enforcement of the Facilitators Package, and allow for quantitative
and qualitative assessment of its implementation when it comes to the number of prosecutions and convictions, as well as their effects.”

The study proposed that all EU Member States should therefore collect and record annually the following data: “the number of people arrested for facilitation, the number of judicial proceedings initiated; the number of convictions along with information about sentencing determination; and reasons for discontinuing a case/investigation” as well as the effects of such investigations (Carrera et al., 2016: 65).

### 2.5 How to ensure funding and protection of free space for civil society to assist refugees and other migrants?

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., 2018b). 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).

Starting with its Communication on the scope and structure of the 2021–27 MFF (European Commission, 2018b and 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).

Funding rules developed by several Member States for National Programmes of AMIF and also for other EU funds may give excessive discretionary powers on the side of national authorities on how these funds are used (Westerby, 2018a). The same report highlights how “political priorities can influence the content and scope of AMIF CfPs (Calls for Proposals)” (Westerby, 2018a: 9). For example: CfPs in the Czech Republic have tended to address government priorities related to security concerns; in Slovakia and Estonia the calls for proposals were highly “detailed and prescriptive” and were seen more as tenders by civil society organisations; in Bulgaria, due to the suspension of national integration policies there was “very slow overall implementation” of this priority area and therefore organisations working in this field could not count on AMIF funding (Westerby, 2018a: 29).

To overcome these pressures, research and stakeholders propose that where the rule of law is backsliding, the European Commission should firstly monitor the rule of law situation in EU Member States and stop EU funding to such governments, and secondly, instead, provide more direct funding possibilities for civil society.

2.6 Suspension of funding for governments violating the rule of law in the area of migration and asylum

Researchers warn that rule of law backsliding has the effect of shrinking space for NGOs and in particular those who assist refugees and migrants (Westerby, 2018a; Szuleka, 2018; Carrera et al., 2018a and 2018b). In some countries, NGOs experience increasing difficulties in promoting European values and are targeted by the governing majority and other fundamental democratic actors, such as the judiciary or independent media.

Recent studies on using EU funds in the area of migration and asylum (Šelih, Bond and Dolan, 2017; Szuleka, 2017; Westerby, 2018a and 2018b; Carrera et al., 2018a and 2018b) have therefore recommended tying funding for governments to their respect of the rule of law and the values embodied under Article 2 of the TEU such as human dignity, freedom, democracy, equality and respect for human rights. The broader rule of law debate proposes the establishment of an EU Rule of Law Mechanism, to be instead operated by an independent committee of experts, with inputs from international and regional human rights bodies, European agencies and civil society (Bárd et al., 2016).

Another proposal has suggested the establishment of a regular rule of law assessment in the Member States to be carried out by the EU’s Fundamental Rights Agency, with input from the Council of Europe and civil society (Šelih, Bond and Dolan, 2017). In both cases, if the assessment shows breaches of the rule of law, the allocation of funds could be suspended until the state has
put in place policy reforms in line with the values of the EU treaties (Bárd et al., 2016; Šelih, Bond and Dolan, 2017).

2.7 Direct financial support for NGOs and the monitoring of funding

Researchers have proposed that the European Union should provide more direct funding schemes for civil society in the area of migration and asylum across the EU (Szuleka, 2018; Westerby, 2018a; Carrera et al., 2019). For example, they have proposed a "new financial mechanism designed to provide financial support for civil society organisations working for human rights protection, rule of law and democracy" (Szuleka, 2018). The fund should not be dependent on national authorities and should cover those costs related to the activities undermined by the rule of law backsliding or political pressures such as monitoring, advocacy or strategic litigation. The European Parliament and Commission have been discussing the establishment of the European Values Fund and Strategic Litigation fund (European Commission, 2018a-j). Furthermore, via current and future AMIF National Programmes the EU “should empower civil society organisations to carry out their complementary role, including by allocating and distributing reasonable minimum percentages of programme funding to civil society organisations in the asylum and integration priority areas” (Westerby, 2018a).

3. Mapping the debate on solutions at EU level

3.1 Revising the Facilitators Package, adopting guidelines and ensuring monitoring

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. 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., 2019). 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 empirical 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., 2019).

The complete revision of the Facilitators Package in the post-Lisbon framework, and not the mere rewording of it, is needed as “with the Treaty of Lisbon entering into force, and in particular, after its Protocol 36 on ‘Transitional Provisions’ (Title VII, Article 10), came to an end in December 2014, the Commission had new possibilities to inject ‘more EU’ within the former ‘third pillar’ legislation, meaning that new legislation in criminal matters would move beyond ‘minimum approximation’ towards ‘more harmonisation’. (Carrera, Hernanz and Parkin, 2013, in Carrera et al., 2018:12).

In light of an increasing criminalisation of humanitarian actors, the European Parliament (2018a) adopted a resolution on 5 July 2018 to end the criminalisation and punishment of organisations and individuals who assist migrants in need. The European Parliament (2018a) expressed “concern at the unintended consequences of the Facilitators Package on citizens providing humanitarian assistance to migrants and on the social cohesion of the receiving society as a whole”. The resolution sets out that acts of humanitarian assistance should not be criminalised, as required by the international standards of the UN Protocol against the Smuggling of Migrants. It expressly emphasises that organisations and individuals who assist migrants play a crucial role in supporting national competent authorities and ensuring that humanitarian assistance is provided to migrants in need.

Nevertheless, the unit responsible within the European Commission’s Directorate-General for Migration and Home Affairs continues to argue in line with its REFIT conclusions (European Commission, 2017) that there is not enough evidence to reform the Facilitation Package, or that reported cases are not sufficiently related to the transposition of the Facilitators Package, but are related to the wider political context and it is therefore argued that a change of the Directive would not prevent the criminalisation of civil society actors (European Parliament, Committee of Civil Liberties Justice and Home Affairs, 2018).
3.1.1 Adoption of guidelines

In addition, the legislative reform needed to come with accompanying practical guidance on what is (not) a crime on migrant smuggling in compliance with the EU Charter of Fundamental Rights and international law. Clear guidelines could also help to develop more rigorous monitoring and increasing financial and political accountability are also considered as necessary steps to tackle the criminalisation of solidarity (Carrera et al., 2018b).

The European Parliament (2018a) has urged the “Commission to adopt guidelines for Member States, which clarify those forms of facilitation that should not be criminalised, in order to ensure clarity and uniformity in the implementation of the current acquis, including Article 1(1)(b) and 1(2) of the Facilitation Directive”, thus covering not only the facilitation of entry and transit(Article 1(1) (a) of the Directive) but also the facilitation of residence and stay; and the humanitarian exemption clause.

The Commission seems to be supportive of this policy option. For example, European Commission in response to the letter from Race International Institute, noted 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” (European Commission, 2018).

By contrast, the policy recommendation to put firewalls in place between civil society and law enforcement does not seem to find strong political support in the European Commission with the exception of Directorate-General for Regional and Urban Policy (DG REGIO) (2018). As mentioned in the Discussion Brief on “Social Inclusion of Undocumented Migrants” (Vosyliūtė and Joki, 2018), the Council of Europe, European Commission against Racism and Intolerance (ECRI) (2016) recommended European governments to implement firewalls between the service providers and immigration controls. The ECRI recommendations urge governments to “ensure that no public or private bodies providing services in the fields of education, health care, housing, social security and assistance, labour protection and justice are under reporting duties for immigration control and enforcement purposes” (ECRI, 2016).

3.1.2 Independent monitoring of implementation of the Facilitators Package

The European Parliament has called for “adequate systems to monitor the enforcement and effective practical application of the Facilitators Package, by collecting and recording annually information about the number of people arrested for facilitation at the border and inland, the number of judicial proceedings initiated, the number of convictions, along with information on
how sentences are determined, and reasons for discontinuing an investigation" (European Parliament, 2018a). This could set a blueprint on what kind of monitoring the European Commission should do, although it is different from the independent observatory that should be set up by academia and civil society.

In the closed-door meeting with academics and civil society stakeholders in May 2018, the European Commission proposed developing an inter-governmental observatory of cases of criminalisation within the infrastructure of the European Migration Network (EMN), where usually national Ministries of Interior or their selected agencies represent Member States.

3.2 Access to funding for NGOs assisting refugees and other migrants

The policy option to allocate minimum funding directly to CSOs has been explicitly supported by the European Parliament (2018b) and some MEPs have been active in following up a proposal to set up a strategic litigation fund (Youngs and Echague, 2017). However, the negotiation process for agreement on the new MFF was still ongoing at the time of writing this policy options brief.

3.3 Rule of Law Mechanism and funding conditionality

The policy option proposed linking and strengthening EU funds and the respect of rule of law is widely supported by the European Parliament (2018b) and the Commission (2018a; 2018b; 2018c).

In 2018, the European Commission (2018a) adopted the proposal for a regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States. Moreover, the Commission’s Reflection Paper on the Future of EU Finances, published on 28 June 2017, sets out that: “respect for the rule of law is important for European citizens, but also for business initiative, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union (European Commission, 2017b). There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget” (Halmai, 2018). The budget commissioner, Günther Öttinger, has also declared that EU funds could be dependent on the respect for the rule of law in the 2021-2027 EU budget (Maurice, 2017).

The European Parliament has stated in a resolution (2018b) that “recent developments in Hungary have led to a serious deterioration in the rule of law, democracy and fundamental rights, which is testing the EU’s ability to defend its founding values”. The resolution therefore called for: “the European Commission to strictly monitor the use of EU funds by the Hungarian Government”. In addition, on 17 January 2019, the European Parliament voted in favour of the Commission’s proposal to cut funds to EU countries that do not comply with the rule of law (Bayer, 2019).
SECTION 3

IDENTIFICATION AND MONITORING OF CASES⁹

1. Introduction

This section reports data and information concerning cases of the so-called criminalisation of solidarity. Based on a monitoring exercise, this section relies on recent studies of the criminalisation of humanitarian assistance in Europe that examine cases of individuals prosecuted under anti-smuggling and immigration laws in the Member States (Open Democracy, 2019; Fekete et al., 2019; Carrera et al., 2018b; FRA, 2018).

This section begins the process of monitoring cases of criminalisation of solidarity in accordance with the main recommendations of the European Parliament (2018). The European Parliament released on 5 July 2018 a resolution calling on the European Commission to draft guidelines for Member States to prevent humanitarian assistance from being criminalised. More specifically, the guidelines requested to put in place a dedicated monitoring system on:

“the enforcement and effective practical application of the Facilitators Package, by collecting and recording annually information about the number of people arrested for facilitation at the border and inland, the number of judicial proceedings initiated, the number of convictions, along with information on how sentences are determined, and reasons for discontinuing an investigation”.

The identification and monitoring of cases is a first step towards the implementation of the policy option proposing a better monitoring framework of the EU Facilitators Package. NGOs (PICUM, 2017) and researchers (Vosyliūtė and Conte, 2019; Carrera et al., 2018; Carrera et al., 2016) have also been recommending the creation of an independent observatory to systematically monitor the respect of the fundamental rights of migrants and EU citizens that would be linked to the proposed EU Rule of Law Mechanism (Bárd et al., 2016).

⁹ This section was written by Carmine Conte (MPG) in May 2019
2. Methodology

Unlike previous reports, the present work only focuses on formal investigations and prosecutions carried out by national judicial authorities under anti-smuggling laws. The identification and monitoring of cases is strictly based on grounds falling under the material scope of the Facilitation Directive (facilitation of entry and transit, residence and stay). The legal terminology of “facilitating” the entrance of third-country citizens is however highly vague and its interpretation is left up to national judges who might extend the scope of application to a wide degree (Carrera et al., 2019; Carrera et al., 2018a; Carrera et al., 2018b). For instance, in the case of the ERCI volunteers Sarah Mardini and Sean Binder who were criminalised in Greece for providing humanitarian assistance to migrants, the gathering and transferring of information regarding refugee boats was considered as facilitating human smuggling.

Other forms of policing civil society including suspicion, disciplining, harassment and intimidation are beyond the scope of this monitoring exercise, although it is recognised that they are “unintended consequences of the Facilitators Package” (Carrera et al., 2018). This report also excludes other judicial cases based on terrorism-related offences or defamation as they are not related to the direct provision of humanitarian assistance to migrants and the material scope of the Facilitation Directive.

The scope of this section is therefore to take into account criminal prosecutions based on grounds of facilitating the entry, transit and residence of migrants in the Member States that affect EU citizens, third-country nationals and NGOs, regardless of the final outcome of the proceedings. By doing so, it seeks to systematise and update the existing research on the topic and provide an initial overview of those investigations and formal prosecutions since the adoption of the Facilitation Directive. This overview also considers some criminal proceedings based on ‘multiple grounds’. This category aims to include cases based on those grounds not included under the Facilitation Directive, such as money laundering, membership of a criminal organisation and sabotage, which have been sometimes made by judicial authorities against volunteers and individuals trying to assist migrants. Only when these grounds overlap with accusations based on the facilitation entry/transit or stay/residence, the relevant case has been validated for this data collection.

To this end, this exercise collected cases of formal prosecution and investigations on the following grounds:

i. Crimes based on facilitation of entry and transit;

ii. Crimes based on facilitation of stay and residence;
iii. Crimes on multiple grounds (e.g.: facilitation of entry and membership of a criminal organisation)

The case monitoring has been carried out through ReSOMA’s collaborative and participatory process involving several experts from NGOs, researchers and stakeholders. A ReSOMA transnational thematic feedback meeting brought together most expert stakeholders and researchers on criminalisation to review the policy options proposed to address issue, and to reflect on their feasibility and adaptability (cf. Section 2, Vosyliūtė and Conte, 2019). For instance, lawyers of NGOs and volunteers criminalised in Belgium, Italy and Greece have been in contact to better assess and validate cases of criminalisation of solidarity: Markella Papadouli (Europe Litigation Coordinator of the AIRE Centre), Alexis Deswaef (lawyer of Anouk Van Gestel, Belgian journalist prosecuted for hosting migrants), Paula Schmid Porras (lawyer who submitted a petition to PETI on behalf of PROEM-AID and Spanish firefighters), Zacharias Kesses and Haris Petsikos (lawyers of two volunteers criminalised in Greece, Sean Binder and Sarah Mardini), Nicola Canestrini and Alessandro Gamberini (lawyers of IUVENTA’s crew members). NGOs including Are You Syrious? (AYS), Borderline Europe, Médecins Sans Frontières (MSF), Solidarity at Sea IUVENTA, Social Platform and PICUM also collaborated in the process of collecting and examining these cases, along with the main researchers (Sergio Carrera, CEPS/EUI - Lina Vosyliūtė, CEPS) and academics (Dr Jennifer Allsopp, SOAS University of London).

In addition, cases have been collected through the inputs of the national stakeholders working to promote the European Citizens’ Initiative (ECI) “We are a welcoming Europe – let us help” and the experts who responded to the ReSOMA survey on the effects of anti-smuggling policy on civil society actors in Europe. The ECI mobilised more than 200 civil society organisations in Europe calling for ending criminalisation of humanitarian assistance and engaged citizens across Europe to reclaim the right to help migrants and refugees. The ReSOMA survey addressed 111 experts (higher education workers, social and legal professionals) on migration and the crackdown on migration-support NGOs who are part of the ReSOMA database.

Building on these findings, further desk research and media monitoring contributed to complete the identification and classification of the cases collected. In particular, this exercise was based on the case monitoring already carried out by Open Democracy (Nabert et al., 2019), the Institute of Race Relations (Fekete et al., 2019; Fekete et al., 2017) and the update 2018 study of CEPS on the Facilitation Directive requested by the PETI committee (Carrera et al., 2018b).

Open Democracy published an article which “compiles a list of more than 250 people across 14 countries who have been arrested, charged or investigated under a range of laws over the last five years for supporting migrants” (Nabert et al., 2019). The dataset captures not only the most shocking cases of criminalisation, but also many insidious cases of intimidation and harassment.
on many other grounds. To give a few examples, cases of individuals investigated for disrupting migrant deportations and documenting or challenging abuse against migrants have been included in Open Democracy’s analysis. These types of cases fall beyond the scope of this monitoring exercise and therefore have not been counted. Only cases related to the facilitation of entry or stay of migrants have been considered and validated for the purpose of this section.

The Institute of Race Relations (IRR) published a comprehensive report which focuses on the shrinking of space for humanitarian activism at Europe’s borders (Fekete et al., 2017). The report includes 26 case studies, involving 45 individuals prosecuted under anti-smuggling and/or immigration laws since September 2015. Most of the cases collected by the IRR have been validated and included in this section as falling under the scope of this monitoring exercise, except for case studies identified outside the EU 28 Member States. In the update study on ‘crimes of solidarity’, IRR looked at 17 cases involving 99 people who have been investigated and/or prosecuted in 2018 and the first three months of 2019 (Fekete et al., 2019). It is worth noting that new offences have been added to the charge sheet, such as endangering maritime and airport security (Fekete et al., 2019). These crimes have not been considered relevant for the purpose of this monitoring exercise because they fall beyond the material scope of the Facilitation Directive. By contrast, when these cases overlap with the grounds of “facilitating the entry/transit or stay/residence”, they have been included in our analysis. For instance, the case of Sean Binder and Sarah Mardini who have been accused not only of smuggling, but also of espionage, forgery and membership of a criminal organisation, has been included in our monitoring exercise.

This section also builds on the cases of persecution examined by the CEPS study “Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update” (Carrera et al., 2018b). It takes stock of and analyses the latest developments since 2016 (Carrera et al., 2016). To do so, the concept of ‘policing humanitarianism’ is used “to describe not only cases of formal prosecution and sentencing in criminal justice procedures, but also wider dynamics of suspicion, intimidation, harassment and disciplinary actions in five selected Member States – Belgium, France, Greece, Hungary and Italy” (Carrera et al., 2018). Our monitoring exercise is instead limited to cases of formal prosecutions and take into account only investigations and prosecution based on the grounds of the Facilitation Directive.

To sum up, the collection of cases is based on:

I. the reports of EU agencies, researchers and NGOs (Open Democracy, 2019; Fekete et al., 2019; Carrera et al., 2018b; FRA, 2018; Fekete et al., 2017);

II. media and journal articles;
III. the ReSOMA survey on the effects of anti-smuggling policy on civil society actors in Europe (36 respondents);

IV. the ReSOMA transnational feedback meetings;

V. the national stakeholders’ inputs of the European Citizens’ Initiative (ECI) “We are a welcoming Europe – let us help!”;

This wide variety of sources collected a significant number of cases of criminalisation of solidarity in EU Member States. The section mainly focuses on the findings referring to the period 2015-April 2019 when most of cases have been identified. This collection of cases includes NGOs, volunteers and individuals who have been formally criminalised for helping and assisting migrants. The broad category of ‘individuals’ aims to consider not only volunteers and humanitarian actors, but also ordinary citizens seeking to reunite with their family members or facilitating migrants to cross the border without gaining financial benefit of unjust enrichment.

The main findings regarding the formal cases of prosecution against NGOs’ volunteers and individuals collected so far will now be presented.

3. Preliminary main findings on prosecutions

The cases identified in this section represent a wide scale of different experiences and challenges with regard to the divergent implementation of anti-smuggling policies that can be found in the Union. Cases emerged in at least 11 countries: Belgium, Croatia, Denmark, France, Germany, Greece, Italy, the Netherlands, Spain, Sweden and the United Kingdom. These countries are at the forefront of migration flows, although in different ways. It may be said that Croatia, Greece, Italy and Spain more recently developed into destinations for people seeking international protection and represent the external borders of Europe. Belgium, Denmark, France, Germany, the Netherlands, Sweden and the UK are instead countries of final destination which have often adopted restrictive policies in terms of internal border managements. This monitoring exercise revealed a lack of data on cases of criminalisation of solidarity in Eastern European countries and the need of further research in this area.

The fundamental finding of this section is that cases involving individuals, volunteers and NGOs helping migrants seem to have greatly increased since the ‘refugee crisis’ in 2015, despite the lower numbers of arrivals of migrants in the EU in the last years. Most experts and stakeholders consulted through the ReSOMA platform also confirmed that criminalisation of humanitarian assistance escalated in the Member States since 2015.
Moreover, the results of this monitoring exercise demonstrate that **cases at national level are linked to the divergent implementation of EU law**, as a result of the lack of a binding ‘humanitarian exemption’ and a ‘financial gain’ requirement to trigger the crime of facilitating the entry of migrants under the Facilitation Directive. The first ReSOMA Discussion Policy Brief shows that the criminal prosecution of individuals and NGOs providing humanitarian assistance to migrants is mainly related to the implementation and interpretation of the Facilitation Directive at national level (cf. Section 1, Vosyliūtė and Conte, 2018). Criminal cases have therefore the effect of discouraging individuals and NGOs from pursuing their mission and assisting migrants (Carrera et al., 2018).

- **When did criminalisation of solidarity happen?**

  The number of cases exponentially increased after **2015** when only 8 cases were taking place. The peak of cases has been recorded in **2018** with a total of 24 cases involving 104 individuals in seven Member States, while in the first quarter of 2019 there are still 15 cases ongoing with 79 individuals and volunteers involved in six countries. By contrast, in **2016** and **2017**, 39 different cases with 96 individuals have been registered. The average duration of the cases of criminalisation of solidarity is **2 years** in the Member States.

- **How many cases?**

  This research has identified at least **49 cases of investigation and criminal prosecution** in 11 Member States: Belgium, Croatia, Denmark, France, Germany, Greece, Italy, the Netherlands, Spain, Sweden and the UK. The identification and monitoring exercise finds that:

  I. **37 cases** are based **on the facilitation of entry or transit of migrants**;
II. 6 cases on the facilitation of residence or stay;

III. 6 cases are based on multiple grounds, in 5 cases, the charges on human smuggling are aggravated by the simultaneous accusation on other grounds such as money laundering, membership of a criminal organisation, sabotage or improper use of documentation. In 1 case, the accusations are based on both the facilitation of entry and residence of migrants.

How many individuals?

This monitoring exercise finds that at least of 158 of individuals between 2015 and 2019 have been investigated or formally prosecuted on grounds of smuggling and other grounds not included under the Facilitation Directive, such as money laundering, membership of a criminal organisation and sabotage. Out of this group, 83 individuals are exclusively investigated or prosecuted on grounds of facilitating the entry or transit of migrants, while 18 persons for facilitating the stay or residence. 57 persons are prosecuted simultaneously on both the grounds of the facilitation of entry and stay of migrants and other grounds including membership of a criminal organisation, sabotage or waste management contracts.
How many NGOs have been involved?

This initial case monitoring has identified at least **16 NGOs and associations** which have been affected by the formal criminalisation or investigation of their volunteers: Association nationale d’assistance aux frontières pour les étrangers (Anafé), Are you Syrious (AYS), Calais Action, Calais Solidarité, Jugend Rettet, Habitat et Citoyenneté, Open Arms, Médecins Sans Frontières (MSF), Mediterranea Saving Humans, Plateforme pour le Service Citoyen, PROEM-AID, Team Humanity, Emergency Response Centre International’s (ERCI), Roya Citoyenne, Sea Watch, Walking and Borders NGO.

The majority of NGOs’ members has been accused in France, Greece and Italy, contributing to a general climate of mistrust and suspicion towards civil society. Most of the NGOs performing SAR were forced to stop their humanitarian activities and still cannot guarantee a permanent presence at the sea (Carrera et al., 2018). For instance, in May 2017, the rescue ship IUVENTA was...
withdrawn from the SAR zone by the Coast Guard Maritime Rescue Coordination Centre (MRCC) in Rome despite an urgent need for intervention while multiple migrant boats were in distress. Notwithstanding a counter investigation and two appeals submitted against the seizure of the vessel, the IUVENTA remains impounded in the port of Trapani as confirmed by the Italy's Supreme Court in April 2018.

- **Where happened and on which grounds? Trends in each country**

In **Belgium**, 4 individuals have been criminalised for hosting migrants at their home with the formal accusation of human smuggling and membership of a criminal international organisation (Carrera et al., 2018). The Court finally acquitted the defendants accepting the defence that they acted out of humanitarian reasons. This judgment has been recently appealed. This case also involved 8 other migrants who were accused of being part of a criminal organisation for assisting others in organising their travel. One defendant was ordered to be arrested and others seven people, who are undocumented migrants, were given suspended sentences of between 12 and 42 months.

In **Croatia**, 1 volunteer of the NGO “Are You Syrious” was convicted for committing a misdemeanour act defined by Article 43 of the Foreigners Act that prohibits providing assistance to a third-country national (Fekete et al., 2019; Open Democracy, 2019; Carrera et al., 2018). The charges stated that he has helped third-country nationals in illegally crossing the Croatian-Serbian border. In early September 2018, the volunteer was sentenced for “unconscious negligence” when helping the family to cross the border illegally. The amendments to the Foreigners Act adopted at the beginning of 2017 state that only humanitarian organisations should not be sanctioned because of helping migrants. However, other organisations and individuals/volunteers still risk being prosecuted and convicted.

In **Denmark**, 4 cases involving 9 individuals took place as a response to the increasing flows of asylum seekers who moved across Denmark to Sweden. Three cases are based on the grounds of facilitating the entry of migrants, while the other one is related to facilitation of illegal residence. Most of the charges are under section 59(8) of the Danish Alien Act, which criminalises ‘assisting an alien with travelling into or through the country or … with an unlawful stay in the country’. Three individuals were charged with facilitating illegal transit, convicted and fined (Fekete et al., 2017). By contrast, the other two cases involving 5 persons were dismissed because of the lack of evidences.

In **France**, 31 individuals have been investigated or prosecuted on grounds of facilitating the entry, transit and residence of migrants. Among these, several convictions have been eventually issued. For instance, an English volunteer, despite the smuggling charges against him were dropped, was sentenced for the less grievous crime of endangerment and received a suspended
fine. In one case related to the conviction of an individual for smuggling migrants across the Franco-Italian border, the Constitutional Council ruled “the principle of fraternity confers the freedom to help others, for humanitarian purposes, regardless of the legality of their presence on national territory”. The Court referred to the assistance to the transit of an irregularly migrant motivated by humanitarian purpose (ECRE, 2018). However, in December 2018, 7 people have been finally convicted for facilitating the entry into France of refugees during a demonstration in the spring (Fekete et al., 2019). 5 persons were sentenced to 6 months, 1 person was sentenced to 12 months of imprisonment, 1 person to 12 months of imprisonment. On March 13, 2019, 7 volunteers of the association ‘Roya Citoyenne’ were taken into custody and accused of facilitating the entry and stay of people in an irregular situation into France (Open Democracy, 2019).

In Germany, 6 individuals have been prosecuted for facilitating the illegal entry of migrants. 5 pastors in Rhineland-Palatinate hosting refugees from Sudan were searched and charged for aiding and abetting illegal residence (Open Democracy, 2019). A German MP has been accused of facilitating the illegal entry of a migrant, but the charge was dropped due to a lack of evidence (Fekete et al., 2017).

In Greece, 53 people have been criminalised for helping migrants. In March 2017, a German pensioner has been convicted to a prison sentence of 3,5 years for migrant smuggling (FRA, 2018). A French citizen was arrested in August 2015 while trying to smuggle out his Syrian family in Greece. He was sentenced to seven years in prison by the court of first instance and he has now been acquitted by the Greek Tribunal of Patras in March 2019. 2 young volunteers are still under investigation on grounds of human smuggling, money laundering and sabotage. They were accused of joining the NGO Emergency Response Centre International (ERCI), described as a criminal organisation with a perpetual action group of more than three persons, with internal and hierarchical structure, acting with intent of facilitating entry of refugees flows from Turkey to the Northeast Aegean Islands (Lesvos and Samos) with illegal methods and procedures. ERCI was accused of money laundering because, despite its non-profit status, it accepted donations of physical objects and payments by private individuals or other collective bodies. In addition, they were accused of not disclosing information regarding the departures of the refugees to the relevant Greek authorities (sabotage). This investigation started in 2018 and involves a total of 37 individuals. In April 2019, the prosecutor decided to press extra charges including fraud.

In Italy, 38 individuals and NGO volunteers have been investigated or prosecuted on grounds of abetting illegal migration or colluding with smugglers. To give a few examples, the mayor of Riace has been charged by the preliminary investigative judge with aiding and abetting clandestine immigration and illegal acts in relation to waste management contract. Four ongoing investigations involve several members of NGOs, such as Mediterranea, MSF, Jugend Rettet and Open Arms. However, in May 2019, the prosecutor of Catania requested the dismissal of the case involving Open Arms for accusations related to abetting illegal immigration. In two other cases
Involving a French volunteer and the crew members of the boat Golfo Azzuro (NGO Proactiva Open Arms), the humanitarian exception has been expressly recognised by Italian courts to acquit the defendants.

In the Netherlands, 1 individual and 1 NGO have now been sued for wrongful death, incitement and facilitation of entry of migrants (Article 197a Penal Code). The National Public Prosecutor’s Office announced that the case was ‘being processed’.

In Spain, 1 individual has been accused of abetting illegal migration by the National Police’s Central Squad of Illegal Immigration Networks and False Documents. In 2017 the prosecutor of the Audencia Nacional closed the case because of lack of evidences, but the files were sent to the Moroccan judicial authorities. In 2019, the charges have been dropped in Morocco (Fekete et al., 2019). In addition, a freelance photographer was arrested and accused of smuggling immigrants across the border from Morocco into Melilla, but immediately released.

In Sweden, 4 individuals have been charged for facilitating the entry of migrants. A journalist and two other Sveriges Television (SVT) employees were arrested and charged with facilitating illegal entry after helping a 15-year-old Syrian from Greece to Sweden in spring 2014 (Fekete et al., 2017).

In the UK, 1 volunteer of a migrant support group was arrested and convicted for smuggling an Albanian woman and her two sons to the UK. This person was charged with attempting to facilitate illegal immigration. The Court gave a 14-month suspended sentence despite the humanitarian motive (Fekete et al., 2017).
How many convictions?

This initial case monitoring has already identified 17 cases leading to the conviction of 30 citizens acting on humanitarian or family reunification purposes in 6 Member States on grounds of migrant smuggling before a court of first or second instance. It is worth noting that most of the convictions have been handed down in France with the involvement of at least 19 people including human rights defenders, volunteers and ordinary citizens.

1) In Croatia, a volunteer of Are You Syrious (AYS) was charged for providing humanitarian assistance to a third-country national and helping him in illegally crossing the Croatian-Serbian border (Carrera et al., 2018).

2) In Denmark, 3 private citizens who acted for humanitarian reasons and helped asylum seekers to cross the border have been sentenced on grounds of human smuggling (Fekete et al., 2017).

3) In France, a citizen was arrested and sentenced to seven years in prison for smuggling out his Syrian family in Greece.

4) In France, an academic acting on humanitarian purposes, was handed a prison sentence for aiding Eritrean migrants to enter into Italy from France.

5) A French farmer was convicted in 2017 and given a suspended fine for assisting entry of migrants across the Italian/French border. He acted on humanitarian grounds and provided migrants with food, shelter and protection.

6) In 2017, a former English soldier volunteering at Calais, initially accused of human smuggling, was found guilty of endangering a child in France. He hid a four-year-old Afghan child in his van to reunite him with their relatives in the UK. His conduct was motivated by humanitarian purposes.

7) In 2018, the so-called Briançon seven, human rights defenders, were sentenced on grounds of assisting the entry into the territory of a person in an irregular situation (Carrera et al., 2018). They participated in a demonstration and crossed the Italian/French border with illegal migrants. They acted on humanitarian grounds.

8) A volunteer member of ‘Anafé’, the “Association nationale d’assistance aux frontières pour les étrangers”, has been sentenced by the Aix-en-Provence Court of Appeal to a fine of 3,000 euros for “helping the entry of a foreigner into France” (Open Democracy, 2019).

9) A 19-year-old French citizen was convicted in October 2017 and given a three-month suspended prison sentence. In 2019, the Aix-en-Provence Court of Appeal reduced the sentence to two months (Open Democracy, 2019).
10) 4 members of the ‘Roya Citoyenne’ collective were condemned to a fine of 800 euro for the offences of entry and residence person in an irregular situation. They helped six young migrants find shelter in the winter (Open Democracy, 2019).

11) An Italian woman was sentenced by the Court of Appeal of Aix-En-Provence to six months in prison for helping eight migrants to cross the border from Ventimiglia to Menton (Open Democracy, 2019).

12) A British volunteer of ‘Calais Action’ and ‘Calais Solidarité’ was sentenced by the Rouen Court of Appeal to one year in prison, including nine months suspended, for trying to smuggle a Syrian teenager into England (Open Democracy, 2019).

13) A 72-year-old woman, activist of the association ‘Habitat’, was sentenced on December 2015 to 1500 euros fine by the court of Grasse for facilitating the stay and circulation of two Eritreans in an irregular situation.

14) In Greece, on November 2016, a Spanish unionist, received by a court in Athens a suspended sentence of 17 months' imprisonment. She tried for humanitarian reasons to help a 17-year-old Kurdish refugee leave Greece.

15) In Sweden, 3 individuals working for the SVT were found guilty of facilitating illegal entry of a 15-year-old Syrian from Greece to Sweden in 2014 (Fekete et al., 2017). They received suspended sentences despite the court accepted that the motive was humanitarian. In December 2018, the Supreme Court reduced the sentence from two months' imprisonment to one month.

16) A person was convicted in 2016 on grounds of facilitating illegal entry of a family with two children from Denmark to Sweden. This person was motivated by humanitarian reasons (Fekete et al., 2017).

17) In the UK, a volunteer trying to smuggle an Albanian woman and her two sons to the UK was charged with attempting to facilitate illegal immigration. The volunteer was convicted in March 2017, although the judge accepted that she acted for humanitarian reasons (Fekete et al., 2017).
Key findings

Have cases of criminalisation solidarity been increasing since the 2015?

✓ Yes, this data collection confirms that since the emergence of the “refugee crisis”, there has been an escalation of judicial prosecutions and investigations against individuals on grounds related to the Facilitation Directive in the Member States, especially in France, Italy and Greece.

✓ The increase in the number of cases has continued despite the nearly 90% decrease of irregular arrivals in the EU in 2018.

✓ Target of criminalisation are mostly volunteers, human rights defenders, crew members of boats involved in search and rescue operations, but also ordinary citizens, family members, journalists, mayors and religious leaders.

Are these cases related to the legal gaps identified under the Facilitation Directive?

✓ Yes, the wide majority of investigation and formal prosecution is related to the facilitation of entry or transit of migrants in the Member States, while a few cases are related to the facilitation of stay or residence and other grounds.

✓ The citizens or volunteers involved in these cases primarily acted on humanitarian grounds or without the intent to gain a financial profit. As broadly discussed in the ReSOMA briefs, EU law recognises to Member States a wide margin of appreciation to decide what is the base crime of migrant smuggling (Carrera et al., 2018; Vosyliūtė and Conte, 2018). Against this background, it may be argued that the gaps concerning the EU legal framework contribute to facilitate the development of this phenomenon.
SECTION 4

CONCLUSIONS AND RECOMMENDATIONS

Crackdown on NGO’s assisting refugees and other migrants: lessons learned and policy recommendations

The initial ReSOMA Discussion Brief on the Crackdown on NGOs assisting refugees and other migrants has elaborated on the existing research substantiating the trends and controversies of increasing policing and criminalisation of civil society actors that are assisting refugees and asylum seekers at the EU’s borders and in the spaces of transit and/or residence (Vosyliūtė and Conte, 2018; see Section 1 of this report for the summary of findings).

The subsequent Policy Options Brief has further mapped the debate at the European level and evaluated the policy alternatives against the evidence provided by academia, civil society, European institutions and agencies, international and regional human rights bodies and standard setting institutions (Vosyliūtė and Conte 2019, see Section 2 of this report for the summary findings). The Policy Options Brief was enriched with insights from the ReSOMA Transnational feedback meeting (ReSOMA, 2018), and Task Force (ReSOMA, 2019). On the basis of this analysis the following key policy options were analysed:

1. Revision of the Facilitators Package introducing ‘financial or other material benefit’ requirement so as to narrow the definition of the crime of migrant smuggling;
2. Mandatory exemption of humanitarian actors from prosecution in the Facilitators Package and related guidelines;
3. Better separation of law enforcement and civil society mandates by introducing the principle of ‘firewalls’;
4. Improving monitoring of implementation of the Facilitators Package including by establishing an independent observatory, that could be linked with the proposed Rule of Law Mechanism;

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10 This section was written by Lina Vosyliūtė (CEPS) in May 2019
5. Strengthening civil society across the EU via dedicated EU funding, with particular measures in those countries experiencing rule of law backsliding, as foreseen in the European Values Mechanism.

One of the policy options for better monitoring has been further explored by carrying out a quantitative overview of increasing criminal prosecutions of humanitarian actors (Conte, 2019, see Section 3 for the full version of this paper). The dedicated quantitative overview indicates that the number of civil society employees and volunteers being subjected to criminal prosecutions has increased tenfold – from 10 accused persons in 2015 to 104 persons in 2018. As of May 2019, 79 volunteers had already been accused or prosecuted for migrant smuggling, and the numbers are likely to increase further. This constant increase in the number of prosecutions of civil society actors occurred during a period when detections of irregular migrants decreased almost four times from 2.2 million in 2015 to 0.6 million in 2017 (Eurostat [migr_eipre], 2019), as a significant share of them were recognised as people in need of international or subsidiary protection, while others, though not satisfying the criteria for protection, cannot be returned in line with principle of non-refoulement.

This section summarises the lessons learned during the first year of the ReSOMA project on the crackdown on NGOs. Subsequently, it puts forward policy approaches to be explored further in order to return responsibility to EU level institutions and agencies. In addition to the general obligation to promote fundamental rights, the brief calls for a deeper analysis of EU citizens’ right to good governance, on EU responsibilities for human rights defenders and on the protection of humanitarian space inside the EU. Finally, the section suggests policy recommendations to be followed up by EU and national policymakers, EU and national law enforcement agencies, international organisations, civil society and other stakeholders.

Lessons learned from academic research

Academia has framed the issue as ‘policing humanitarianism’, ‘criminalisation of solidarity’, ‘shrinking civil society spaces’, ‘blaming the rescuers’ and finally ‘humanitarian smuggling’, as they have focused on distinctive aspects of the phenomenon to which we broadly refer in the ReSOMA project as the ‘crackdown on NGOs (and individuals) that are assisting refugees and other migrants’. An increasing number of academics are focusing on these issues and providing a complementary narrative, which helps to understand the complexity of the phenomenon better. Such complementary narratives are hinting at a wide range of underlying mechanisms that can be and should be tackled to prevent the crackdown on NGOs.

‘Policing humanitarianism’ (Carrera et al., 2019; Carrera et al., 2018a; Carrera et al., 2018b; Carrera et al., 2017; Carrera et al., 2016) has provided an insight into broader modes of policing, starting from suspicion and escalating via intimidation and harassment, through disciplinary
actions to fully fledged criminal prosecutions on the grounds of migrant smuggling. This helps to explain how criminal justice tools and in particular, preventive policing methods are misused to track and infringe upon free civil society space. The EU Facilitators Package, that is framed as both a criminal justice and migration management tool has therefore not resolved these tensions, but simply left a broad margin of appreciation to Member States. This legislative act and national implementation has been subsequently weaponised against civil society actors that assist refugees and other migrants.

The ‘policing humanitarianism’ approach helps to analyse roles and responsibilities with, as a starting point, both European and national ‘political masters’ – European and national agencies that coordinate coast guards, border guards, police officers, prosecutors and independent judges. This approach explores potential avenues for improving **democratic accountability and oversight institutions** and calls for analysis of the **right of EU citizens to good administration** as well as a clear separation of criminal justice, migration management and civil society mandates, not only reactively – when criminalisation happens, but also proactively, when signs of ‘policing’ start to become visible. This approach argues, that once civil society actors are criminalised, it is often too late to reverse a process that leads to mistrust in civil society, in criminal justice systems and a broader polarisation of societies.

‘Criminalisation of solidarity’ or ‘Délits de solidarité’ (Allsopp, 2012; Ryngbeck, 2015; Allsopp, 2017; Fekete, 2009; Fekete et al., 2017; Fekete, 2018; Fekete et al., 2019) links the attacks against NGOs with structural racism against migrants and the broader phenomenon of ‘criminalisation of migration’ (Provera, 2015). The authors pay attention to racist and xenophobic rhetoric and attitudes promoted by high level politicians and state agencies. Subsequent creation of the ‘hostile environment’ as a political communication method to keep the migrants out by denying their human rights and thus in turn, punishing those who attempt to act ‘in solidarity’. Civil society, and also local authorities and private business are discouraged from providing very basic services, starting from shelter and food and ending with those who attempt to uphold the right to life – search and rescue or anti-deportation activists. Such analysis calls for the protection of **human rights defenders** and basing long-term solutions on EU legal principles, such as non-discrimination and equality. It also highlights the need to assess how concepts of ‘nationalism’ and ‘borders’ are handled in political communication.

Another narrative is that of ‘shrinking civil society space’, in particular in the context of the rule of law backsliding, such as the situations in Hungary and Poland and beyond (Szuleka, 2018; Youngs and Echague, 2017). This approach helps to understand how critical civil society is being silenced through funding, access to clients, and/or openly attacked by high level politicians. Civil society actors are labelled as ‘enemies of the state’ for challenging human rights violations perpetrated by national authorities against refugees and migrants. Such pressures and attacks aim to limit more generally the critical civil society role in safeguarding the rule of law and
democratic institutions that are acting in line with fundamental rights. This approach hints at the need to resolve the Copenhagen Dilemma, the EU’s and international organisations’ capabilities to monitor and interfere in a timely manner when there are signs of rule of law backsliding and to uphold civil society spaces (Bárd et al., 2016; Bárd and Carrera, 2017).

‘Blaming the rescuers’ or ‘blame-shifting’ to SAR NGOs has analysed the very particular case of civil society saving lives at sea, which has been re-framed as ‘pull factor’, as a ‘migrant taxi’, as conniving with the migrant smuggling business model and even as ‘migrant smugglers’ (Heller and Pezzani, 2017; Gkliati, 2016; Vosyliūtė, 2018; Carrera, 2018a).

Research on ‘humanitarian smuggling’ (Landry, 2016; Landry, 2017) and critical analysis of ‘migrant smuggling’ (Sanchez and Achilli, 2019; Reitano et al., 2018; Zhang et al., 2018; Micallef, 2017; Carrera and Guild, 2016) have revealed more complex and nuanced aspects of migrant smuggling, taking into consideration the personal and socio-economic situations of those labelled as smugglers. This narrative challenges the oversimplified narrative of ‘ruthless smugglers’ that need to be thwarted at any cost. The analysis brought forward cases where family members have facilitated irregular entries of their children, spouses, as well as where friends and other individuals were acting out of compassion. This approach requires a thorough rethinking of what is (not) criminal in the ‘area of migrant smuggling’ and suggests that limited law enforcement resources could be more focussed on issues of high criminality through accepting that grey areas should be excluded.

**Lessons learned from stakeholder responses**

European citizens have mobilised in showing solidarity with those who are accused of a similar kind of solidarity with refugees and other migrants. They have used their right to petition (Schmid Porras, 2017) and the European Citizens Initiative – “We are Welcoming Europe” calling on EU legislators to resolve the legal uncertainty in the current EU Facilitators Package. Petitioner, Paula Schmid Porras, who was also a lawyer for the PROEM-AID volunteers, has been calling for the mandatory exemption of humanitarian actors from criminalisation, which is currently under a ‘may’ clause and is optional for Member States (Schmid Porras, 2017). The European Citizens Initiative “We are Welcoming Europe” – that brought together more than 170 civil society organisations around its three calls for action – stated that “no one should be prosecuted or fined for offering humanitarian help or shelter”. While the ECI has been closed, the Petition remains open before the European Parliament’s Petitions Committee (European Parliament, 2018d). Moreover, the European Parliament has called on the European Commission to clarify the Facilitators Package and to prevent further criminalisation of humanitarian actors (European Parliament, 2018a). The LIBE Committee attempted to follow up on this call on several occasions, but did not receive any reassuring answers from the Commission (European Parliament, 2018c).
The EU’s Fundamental Rights Agency also raised concerns regarding the legal certainty and potential effects of this legislation (FRA, 2014; FRA, 2018). Similarly, UNODC (2017), recommended clarifying the basis for criminal intent, namely by stipulating material or other financial benefit. PICUM (2017), Social Platform (2016), Red Cross (2017) and others have expressed their concerns over the worsening situation of civil society actors defending human rights or providing humanitarian assistance. And many independent monitoring efforts have been launched by various civil society organisations: CIVICUS (2016), Civic Space Watch, PICUM’s website of testimonies (PICUM, 2017), International Race Relations Calendar Against Racism, and, most recently, the monitoring started by Open Democracy (2019). These complementary efforts have shown that the trend of criminalisation is on the increase and deserves serious legal, policy and operational responses. In addition, civil society, independent researchers, journalists and relevant agencies need to rely on EU funding in order to ensure the longevity of such monitoring efforts. The outcomes of such monitoring need to feed into a more robust overview having ‘teeth’ on how fundamental rights are protected within the EU via the proposed EU Rule of Law Mechanism (Bárd et al., 2016, Bárd and Carrera, 2017; Carrera et al., 2018b).

**Which approaches need to be explored further at EU level?**

The lessons learned from academic research as well as civil society mobilisations and the contributions of international organisations illustrate the complexity of the phenomenon of ‘crackdown on NGOs’. There are multiple underlying reasons behind it, stemming from national political agendas as well as from European political and operational priorities. Although, there is no single ‘silver bullet’ to resolve the ‘crackdown on NGOs’ at the EU level, EU institutions and agencies have to assume their responsibilities for impacts on fundamental rights in the areas of their competence. Legal, political, and operational approaches in the area of ‘migrant smuggling’ as well as the way the EU Facilitators Package is being interpreted and applied have been led by EU institutions and agencies.

The vagueness and legal uncertainty stemming from the EU Facilitators Package was one of the tools that enabled misguided prosecutions of civil society across the EU. A quantitative overview provides the evidence that from 2015 until May 2019, there were at least 49 cases where 158 individuals were accused on the grounds of facilitation of entry and/or stay (Conte, 2019). Saving lives and upholding human dignity by providing food, shelter, and access to justice, at the borders or zones of transit were slowly relabelled as facilitation of entry or/and stay (Carrera et al., 2018a; Carrera et al., 2018b; Carrera et al., 2019).

While in all these areas the EU is acting on the basis of the principle of subsidiarity in the implementation and monitoring of Directives, operational care often falls within and between the competence of EU institutions and national actors. Such an ‘in between’ situation often leads to
‘shifting the responsibility’ for inconvenient issues to national or local level, including for EU citizens’ rights, human rights defenders and humanitarian actors filling in the gaps in protection.

ReSOMA research brings up three key areas where the EU should resume responsibility and adopt measures to keep civil society space free from interference during anti-migrant smuggling operations, and within the wider context of asylum, migration management and border controls:

- **First**, legal certainty on what is (not) a crime of migrant smuggling should be enshrined in the EU citizens’ right to good administration – therefore the EU should not only change the legislation and provide accompanying guidelines, but also ensure rigorous monitoring of Member State inaction. This could be further supported by inputs from independent monitoring mechanisms;

- **Second**, the EU should step up responsibility to protect human rights defenders acting within the Member States, in particular when they are challenging EU or Member State policies and operations on the grounds of fundamental rights non-compliance;

- **Third**, the EU should recognise that humanitarian gaps emerge when it or its Member States are “overwhelmed, unable or unwilling to act” in meeting the basic needs of refugees and other migrants. Therefore, despite political priorities, humanitarian actors should be free from interference or risk of prosecution in filling in such gaps, until the EU and national authorities build the capability and/or find the political will to save lives and uphold human dignity.

The big picture requires EU institutions to step up to their responsibility for defending fundamental rights and the rule of law and ensuring transparent and democratic accountability for its policies and operations in tackling irregular migration, in light of the EU citizen’s right to good governance and the obligation to respect, protect and promote human rights defenders, and to uphold humanitarian principles of neutrality and impartiality.

Moreover, EU funding should be used to strengthen critical and ‘watchdog’ civil society actors, in particular in the context of rule of law backsliding. At the same time, EU funding should not be channelled to governments and political parties that are acting in contravention of EU founding values.

The EU institutions should find the strength to rise above the forces of populism and right wing extremism, and to agree on a holistic and long-term strategy on migration. Such a long-term strategy should be based on the Tampere principles of fairness, solidarity, responsibility sharing and loyal cooperation, that are needed to address deficiencies within the Common European
Asylum System and the remaining gaps and barriers in the area of legal migration in light of implementing the Global Compact on Migration and Global Compact on Refugees.

**Detailed recommendations to EU level policy makers:**

On basis of the lessons learned and also on the basis of recommendations from various stakeholders the following policy options were analysed:

**Facilitators Package:**

1. Revisions needed:
   - Introduction of a ‘financial or other material benefit’ requirement for facilitation of entry and transit and ‘unjust enrichment’ for the facilitation of stay so as to narrow the definition of what is a crime of migrant smuggling in these situations. This change would bring EU legislation in line with UN standards in the area of migrant smuggling.
   - A mandatory exemption of humanitarian actors from prosecution under the Facilitators Package so as to clarify that the work of civil society in saving lives and providing other basic services upholding human dignity and other fundamental rights should never be criminalised.
   - Family members, friends and individual citizens acting out of compassion without any profit or unjust enrichment should also be exempted from criminalisation.
   - The Facilitators Package (Directive and old type of Framework Decision) needs to be translated into a single legislative act as in the case of human trafficking Directive and it should explicitly include fundamental rights clauses, including the protection of human rights defenders and the right of civil society and EU citizens to assist refugees and other migrants.
2. The legislative change needs to be accompanied by guidelines for the EU and national level judiciaries and prosecutors as well as law enforcement personnel, border and coast guards on how to respect, protect and promote the rights of human rights defenders, humanitarian actors, and individuals acting out of compassion. It should also provide guidance for law enforcement and judicial actors on how to approach and assess such cases on the basis of ‘harm’ and ‘public interest’ principles, as well as how to assess ‘financial or other material benefit’ and ‘unjust enrichment’.
3. Better separation of law enforcement and civil society mandates by introducing the principle of ‘firewalls’. This means that civil society actors should not be asked to gather and share personal and other data regarding the status of their clients when assisting refugees and other migrants. The mandate of various humanitarian actors also should not be instrumentalised in criminal investigations as it is against the principles of impartiality and neutrality.

4. The European Commission should improve monitoring of implementation of a revised Facilitators Package including through the Commission’s own policy guidance and operational tools.

5. The Commission’s own monitoring of this area and the FRA overview should be coupled with that of an independent observatory consisting of civil society and academia. Such an independent observatory could not only provide a statistical overview but also offer robust academic analysis of the phenomenon in different countries.

6. Various improved monitoring efforts, and in particular this independent observatory, should be linked with the proposed, broader EU Rule of Law Mechanism, that still needs to be set up following calls from the Parliament to the EU Commission, in light of developments in Hungary, Poland and other Member States. Strengthening the oversight of EU Rule of Law, democratic institutions and fundamental rights via an independent and mandatory Rule of Law Mechanism is essential for ensuring civil society space, human rights defenders and humanitarian actors remain free from interference.

7. Strengthening independent civil society across the EU with the help of EU funding. Dedicated EU Rights and Values Programme should be aimed at strengthening the mandate of civil society in upholding fundamental rights in the area of migration and asylum. A dedicated litigation fund should make protection of human rights defenders and humanitarian actors a strategic priority. The EU should channel direct funding to civil society in the countries with rule of law backsliding, as foreseen in the European Values Mechanism.

8. The European Commission should start infringement procedures against Member States that are not correctly transposing the revised Facilitators Package or end up criminalising humanitarian actors. This should also be considered as a strong indicator of a worsening situation regarding EU founding values in the Member State concerned.
9. When there are strong signs that Member States are undertaking ‘misguided prosecutions’ against humanitarian actors, human rights defenders or other civil society actors for their acts of compassion and solidarity, the European Parliament should launch a parliamentary inquiry to investigate such claims on a political level and to halt such prosecutions.

10. The EU needs to ensure coherence between external and internal action and apply the tools produced for third countries internally. For example, the text of “Ensuring Protection - EU Guidelines on Human Rights Defenders” should be updated in line with the UN, CoE, OSCE standards and guidelines and made applicable to the protection of human rights within the EU.

11. The European Commission needs to appoint a High Level Special Representative for the status of Human Rights Defenders within Member States and acting upon the outcomes of the proposed EU Rule of Law Mechanism as well as submissions from independent dedicated monitoring bodies.

12. An EU High Level Consensus on Humanitarian Aid needs to be applied within the EU so as to keep the operational space for humanitarian actors free from interference.

13. The EU needs to address the remaining gaps in the humanitarian protection of refugees and other migrants on the high seas by replacing the Mare Nostrum operation with an EU proactive search and rescue mission.

14. The EU and its Member States need to address the underlying reasons for migrant smuggling, namely the lack of channels for orderly, safe and legal migration and also refugees and asylum seekers while respecting the basic rights of refugees and other migrants who arrived via spontaneous and irregular arrivals. The Global Compact on Migration and Global Compact on Refugees provides a new impetus for the EU to create a holistic and long-term migration and asylum policy.

15. EU agencies, and in particular Frontex, are increasingly becoming operational in investigating crimes of migrant smuggling and conducting border control surveillance. However, in the absence of a holistic approach on asylum and migration, gaps in humanitarian protection have emerged and civil society is upholding rights of refugees and other migrants. EU agencies therefore need to explicitly commit to respecting, protecting and promoting the right to defend human rights. For this purpose, the role of the Fundamental Rights Officer at Frontex needs to be strengthened as well as the mandate of the Frontex Civil
Society Consultative forum. Similar accountability mechanisms need to be thought through in case Europol becomes more operational on the ground.

16. When EU agencies and/or national authorities and administrations misuse EU policies, tools, funding and operational measures to instigate suspicion, harassment, intimidation of civil society actors, the EU officials directly responsible must take measures to denounce such actions and to prevent the stigmatisation and marginalisation of human rights defenders, humanitarian and other civil society actors.

17. The EU and its agencies must respect, protect and promote fundamental rights in their respective areas of work. Fundamental rights must not be side-lined as a concern of DG Justice or the EU’s Agency for Fundamental Rights, but mainstreamed and promoted across the different DGs and their agencies active in the area of Justice and Home Affairs.

18. When the EU institutions fail to provide good administration in this area, the European Ombudsperson should be given the competence to oversee such instances of maladministration at the EU institutions and agencies.

19. The European Court of Auditors should be given responsibility over EU institutions and operations for financial accountability and whether EU money are spent efficiently and effectively – in line with overarching EU legal principles, fundamental rights and specific objectives, notably whether EU anti-smuggling measures and operations are reducing migrant smuggling.

20. Finally, the European Court of Justice should be able to make judgments on the legality, necessity and proportionality of legal, policy and operational measures that infringe fundamental rights.
EXPLANATORY NOTE ON THE APPROACHES TO BE FURTHERED AT THE EU LEVEL

Crackdown on NGOs assisting refugees and other migrants from the perspective of the Right to Good Administration, Obligation to Protect Human Rights and to Respect Humanitarian Assistance

- The EU citizen’s rights approach: EU legislators are accountable for the legal uncertainty in the EU Facilitators Package in light of the right to good administration

As yet unexplored is the “Right to good administration”, one of the key rights of EU citizens vis-à-vis EU institutions, as enshrined in the Article 41 of the Fundamental Rights Charter. It obliges EU institutions to act and legislate within the remit of law and foresees remedies for any wrongdoings. This right to good administration also includes (Article 41 para. 2): “the right of every person to be heard, before any individual measure which would affect him or her adversely is taken”. Potentially, this would also include the right of civil society that is negatively affected by the Facilitation Directive and related migration laws to be heard and their account to be taken seriously. Moreover, the right to good administration also contains remedies, namely that (Article 42, para. 3) “Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties”. The Commission’s REFIT of the Facilitators Package and subsequent exchanges with the European Parliament has disregarded the acute need to revise the legislation and to monitor its implementation despite a considerable amount of readily available evidence that the Facilitators Package is enabling criminalisation of civil society actors (Bozeat et al., 2014; Carrera et al., 2016; Carrera and Guild, 2016) and further evidence submitted to the Commission, or readily available (Fekete et al., 2017; Carrera et al., 2018bb; FRA, 2018; Fekete et al., 2019; Carrera et al., 2019).

Inter-Institutional Agreement on Better Law-Making between the Council, Commission and Parliament (2016, Article 2) contains the commitment to observe general principles of Union law, such as democratic legitimacy, subsidiarity and proportionality, and legal certainty in their law-making processes. Moreover, when it comes to EU legislation, the European Parliament, Council of the European Union and European Commission have agreed on the high quality required of law making (2016, Article 3):

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11 This section was written by Lina Vosyliūtė (CEPS)
“Union legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement.”

The right to good administration is further operationalised within the EU Better Regulation Guidelines. These guidelines oblige the Commission to follow various procedural steps in the law making, such as commissioning impact assessments, evaluations to consider any negative individual, societal and economic impacts of EU legislation and to improve EU-level legislation. It should be stressed that from the perspective of EU law, efficiency entails compliance with EU fundamental rights standards. The Better Regulation Guidelines, thus recommends the Commission conduct various types of impact assessments, evaluations, REFITs, to double check that legislation does remain effective and efficient.

- **Human rights defenders approach: EU institutions should respect, and create protection mechanisms for, human rights defenders within the EU and ensure a safe and enabling environment conducive to upholding fundamental rights**

In 2018, human rights defenders within the EU were listed for the first time among the European Parliament’s Sakharov Prize nominees. They were 11 civil society organisations that conducted Search and Rescue in the Central Mediterranean and the Aegean (European Parliament, 2018f). This was an unprecedented message that people upholding EU fundamental rights values may be at risk of politically motivated persecutions not only in third countries, but also in Member States, when they are disregarding EU legal principles.

Regional and international organisations, such as the Council of Europe, Commissioner for Human Rights (2018), UN Special Rapporteur on the situation of Human Rights Defenders and other UN experts (i.e. UN OHCHR, 2019) on human rights have raised a number of concerns about the worsening general human rights situation within the EU with human rights defenders being at risk of judicial and fiscal harassment and even physical attacks. FRA (2018) also raised concerns about the situation of civil society within the EU, referring to international documents protecting human rights defenders.

However, issues of ‘human rights defenders’ at the EU level have so far been perceived as concerning only countries outside of the EU, and thus placed under EU’s European External Action Service. The EU has appointed a Special Representative for Human Rights, developed a number of tools such as the Specialised Human Rights Guidelines, including “Ensuring Protection - EU Guidelines on Human Rights Defenders” (EEAS, 2008), Human Rights and Democracy Country

The Council of Europe and OSCE have also developed a number of tools. The 1998 Declaration on human rights defenders is readily applicable to Member States and the EU institutions. The OSCE Guidelines on the Protection of Human Rights Defenders (OSCE ODIHR, 2014) proposes a threefold approach: firstly, states must respect human rights defenders and refrain from actions that interfere with their work; secondly, states must protect human rights defenders from interferences by third parties, and thirdly, that states have the obligation to promote human rights and create a conducive “legal, administrative and institutional framework” for work in the area of human rights (OSCE, 2014, para. 10). For example, the OSCE guidelines insists explicitly that: “Any legal provisions that directly or indirectly lead to the criminalisation of activities that are protected under international standards should be immediately amended or repealed” (OSCE, 2014, para. 24). Particular attention is paid to “legal provisions with vague and ambiguous definitions, which lend themselves to broad interpretation and are or could be abused to prosecute human rights defenders for their work” (OSCE, 2014, para. 25). Moreover, the guidelines stress that “laws, administrative procedures and regulations must not be used to intimidate, persecute and retaliate” against human rights defenders (OSCE, 2014, para. 26). And if it were to occur, states and international bodies should address the impunity and provide effective remedies – judicial independence is a prerequisite, as well as the “existence of independent and effective mechanisms to investigate complaints against the police and other state officials” (OSCE, 2014, para. 13). As EU institutions and agencies are increasingly becoming operational in spaces where civil society is upholding the rights of refugees and other migrants, such an approach should be followed not only in overseeing Member States but also the actions of the EU level institutions and agencies themselves.

From the perspective of human rights defenders, once a criminal prosecution starts or other disciplinary sanctions are enacted, it is already too late and a lot of damage has been done to the defenders, their organisations and the individuals whose rights they are trying to uphold. As research on the policing of humanitarianism shows, the very climate of suspicion and intimidation has a chilling effect and has discouraged or prevented some civil society actors from operating, while others continue to face legal battles and are undergoing fears regarding their future (Carrera et al., 2019; Carrera et al., 2018a; Carrera et al., 2018b). Therefore, EU institutions and agencies, just like states and their institutions are under obligation when stigmatisation and marginalisation is occurring to, for example, “take proactive steps to counter smear campaigns and the stigmatisation of human rights defenders” (OSCE, 2014, para. 37), and more generally to “combat advocacy of hatred and other forms of intolerance (OSCE, 2014, para. 38).

In the area of migration and asylum, and in particular in combatting irregular migration, fundamental rights protections and a number of safeguards have been eroded (Carrera, 2019;
Vosyliūtė and Joki, 2018). A number of instances indicate the side-lining instead of mainstreaming of responsibilities for the protection of fundamental rights. And this very situation of fundamental rights is the main reason behind the action of human rights defenders. The “full enjoyment of other rights and freedoms is instrumental to establishing the right to defend human rights” and therefore the EU “should put in place practical measures aimed at creating safe and conducive environments that enable and empower human rights defenders to pursue their activities freely and without undue limitations” (OSCE, 2014 para. 41). Among such concrete measures, the lack of a ‘principle of firewalls’ should be highlighted, as civil society and other basic service providers are frequently requested to share the personal data of their clients, to disclose migrants in an irregular situation and/or to otherwise fear for sanctions when upholding human dignity of migrants in irregular situation (Carrera, 2019; Vosyliūtė and Joki, 2018).

- **Gaps in addressing humanitarian needs should be filled by the EU and its Member States in cooperation with civil society, but when such gaps remain unaddressed civil society should be respected and protected in providing humanitarian aid and assistance**

Local and other European citizens were the first responders to the ‘European Humanitarian Refugee Crisis’ in 2015 – they filled in the gap in basic services for upholding human dignity. However, the approach to volunteers and NGOs has shifted in the countries at the EU’s external borders, as well as in those of transit and residence. Suspicion, intimidation, and disciplinary actions against civil society organisations assisting refugees and other migrants have escalated and led to their criminalisation on the grounds of migrant smuggling in 11 Member States – Belgium, Croatia, Denmark, France, Germany, Greece, Hungary, Italy, Malta, Sweden, Spain, the Netherlands, and the UK (Carrera et al., 2019; Carrera et al., 2018b; Conte, 2019).

These prosecutions took place despite the obligations under International Maritime Law, and also despite the fact that some Member States have opted into the humanitarian exemption clauses in the Facilitators Package. The Commission in its REFIT and subsequent exchanges at the European Parliament continued to argue that humanitarian assistance is subject to national interpretation (Carrera et al., 2018b).

However, a High Level European Consensus on humanitarian aid should provide a definition that ‘humanitarian aid’ is a “needs-based emergency response aimed at preserving life, preventing and alleviating human suffering and maintaining human dignity wherever the need arises, if governments and local actors are overwhelmed, unable or unwilling to act” (Council and the Member States, 2008). However, while this approach is applied outside the EU, there is no understanding as yet that humanitarian crises can also occur inside the Union and that humanitarian actors will be obliged to act despite the reactions of their respective governments.
Therefore, there is a need to bring internal and external coherence in the EU’s action on what is considered ‘humanitarian aid’ at the EU level in order to protect such actors from criminalisation within the EU.

Another requirement is to address the underlying disincentives for Member States stemming from the ‘first entry rule’. Thus, a thorough reform of the Common European Asylum System, based on fairness, loyal cooperation and solidarity, needs to be accomplished. This would further allow for setting up a European Search and Rescue mission and sharing disembarked migrants among all Member States (see also ReSOMA Policy Options Brief on Disembarkations – Cortinovis, 2019).

The critical research on migrant smuggling shows how the very ‘migrant smuggling’ industry is linked to the EU’s policies – carriers’ sanctions, Facilitators Package, hefty visa requirements. The very absence of safe, legal and orderly alternatives often leaves migrant smugglers as the only way to escape conflicts and to exercise the right to asylum, join family members or leave poverty and find a job. Finally, it shows how in some cases EU measures aimed at incentivising anti-migrant smuggling in third countries of origin and transit have led to more consolidated and increasingly criminal networks that have been displacing small scale actors and various amateurs, such as bus drivers, ship owners, community-based smugglers. For example in Libya, the phenomenon shifted from migrant smuggling towards human trafficking (Reitano et al., 2018).

This angle of analysis requires a broader outlook and critical evaluation of EU migration and asylum policies. It also provides an opportunity to reflect on safe, legal and orderly alternatives for both refugees and other migrants as reflected within the Global Compact on Migration and Global Compact on Refugees.
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5.3 ANNEX 3 – FINAL SYNTHETIC REPORT INTEGRATION

Future EU funding to support the integration of refugees and migrants

1. INTRODUCTION

1.1. Overview

Funding support through EU programmes and their objectives is the EU’s main lever to promote the integration of migrants and refugees. Next to the soft law embodied in policy guidelines like the Common Basic Principles of immigrant integration, it is the amounts, binding provisions and concrete spending rules of instruments such as the Asylum-, Migration and Integration Fund (AMIF) or the structural funds including the European Social Fund (ESF) that define EU policy and a joint European approach in the integration domain. In a number of Member States, EU funds are even the sole or nearly only source of support for integration measures and policies, rendering them crucially important for the outlook and opportunities of migrants and refugees in many places across Europe. Against this background, the proposals and negotiations on the upcoming Multiannual Financial Framework (MFF), i.e. the 2021 to 2027 EU programme and funding period, have become the focal point of the EU integration debate since 2018. Local level integration actors including cities and civil society organisations are key stakeholders in these policy debates, whose outcomes will be decisive for the availability of means both for early and longer-term integration, and on local level as much as for mainstreaming integration across all relevant policy areas.

This report synthesizes previous ReSOMA briefs in the area of integration that have focused on the unfolding MFF debate. Following an overview of the 2018 Commission proposals which set out scope and structure of the future EU instruments (chapter 1.2), it presents twelve policy debates related to the ‘what’ and the ‘how’ of EU support for integration and their stickiness points from a local level and civil society perspective (chapter 2). Partly referring to the discourse responding to recent policy trends and how they became incorporated in the Commission proposals, partly referring to long-standing debates between stakeholders and EU institutions, the chapter offers an abridged version of key topics of debate as identified in the previous
ReSOMA Discussion Briefs on ‘Cities as providers of services to migrant populations’, ‘Sustaining mainstreaming of immigrant integration’ and ‘The social inclusion of undocumented migrants’.

Against the background of these conversations and controversies, stakeholders came forward with numerous proposals to improve and amend the Commission proposals to better address their concerns. The European Parliament in 2018 has been the key arena of decision-making towards the 2021 to 2027 MFF, with MEPs able to amend the proposed legislation based on the concerns driving the policy controversies and offering stakeholders the opportunity to advocate for their own proposals. Chapter 3 shows how the suggestions for alternative solutions brought forward converge around four major policy options for the future of EU spending on integration:

- **Adequate funding** – to ensure sufficient and flexible spending on integration according to changing needs across all Member States
- **Meaningful needs assessment** – to base AM(I)F national programming and Partnership Agreements on structured and standalone assessment of needs and challenges
- **Mainstreamed, longer-term policies** – to promote comprehensive integration policies with a long-term orientation and mainstreaming them on Member State and EU level
- **Broader participation** – to ensure funds can be accessed by civil society and local/regional authorities, and that these actors are fully involved in the funds’ governance

For each of these options main proposals are listed as voiced by stakeholder organisations in the field, including the ReSOMA partners ECRE, EUROCITIES, PICUM and Social Platform. The chapter also shows, in each of the options, how the European Parliament has amended the Commission proposals, thus illustrating the uptake by Parliament of solutions advocated for by stakeholders. References to the previous ReSOMA Policy Options Briefs on ‘High levels of EU support for migrant integration, implemented by civil society and local authorities’ and ‘Comprehensive and mainstreamed, longer-term support for the integration of migrants’ point to more in-depth information on the evidence base supporting these proposals, the details of the various stakeholders positions and a mapping of the EP amendments.

Chapter 4.1 sheds light on the state of play as of spring 2019, with the EP positions on the key EU instruments all decided before the EP elections and clarified at time when MFF negotiations are gearing up in the intergovernmental Council arena. Compromises among Member States and with the European Parliament are expected to be reached in late 2019/early 2020. Next to highlighting current debate among governments, the chapter stresses the importance of the preparations taking place already now on Member State level in terms of programming and priority setting. How the national AM(I)F and ESF+ programmes are shaping up even now, in advance of final EU-level decisions on the scope of the instruments, is crucially important for the future availability of EU means for integration support and the possibilities of key actors to benefit
from programmes. Across all levels, governments, the Commission, European Parliament and integration stakeholder are called upon to act accordingly, to ensure full exploitation of the new instruments’ potential for integration support, complementarity in programme planning, comprehensive compliance with the partnership principle and a need-based approach to the services funded.

Drawing the consequence from the lack of realtime evidence on the actual uptake of EU instruments supporting integration and on the practice of partnership-led implementation, the Synthetic Report culminates in a proposal for a new, independent EU-wide quality monitoring mechanism (chapter 4.2). Led by civil society and local level stakeholders across the EU, the mechanism would provide for ongoing, regular monitoring of how the partnership principle is observed, national programmes are implemented, different funds are used, and of the quality of coordination and coherence among the instruments. Quality assessment of content and effectiveness of projects funded would improve the evidence base for future AM(I)F midterm reviews and allocation decisions for the second tranches of the fund. The new mechanism would thus aim to generate the necessary knowledge for pushing towards

- compliance with the partnership principle,
- purposeful use of AM(I)F and structural (ESF+) funds to support integration,
- coordination and collaboration among the implementing authorities,
- robust mid-term review procedures.

This recommendation to set up a new, enhanced quality monitoring mechanism not only responds to a core gap identified in activities and analyses of stakeholders, but also builds on ReSOMA’s dialogue with local level and civil society experts, policymakers and researchers. In a very concrete way ReSOMA suggests the contours of a transnational mechanism that brings together implementation monitoring, qualitative evaluation, empowerment and capacity building of stakeholders, as well as EU-wide benchmarking and mutual exchange.

1.2. The post-2021 agenda: MFF proposals of the European Commission

Commission preparations for the 2021 to 2027 Multiannual Financial Framework were informed by the experiences since the peak of arrivals in 2015/16, a comprehensive spending review and positions voiced by the European Parliament, Member State governments and various stakeholders. (EC 2017a, 2018a, ECA 2018b, EP 2018a). The eventual Commission proposals for the 2021 to 2027 MFF, published in May and June 2018 (EC 2018b-f), include the following key changes relevant for the integration of migrants and refugees:

- 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+, a 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 with 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 ESF to a major 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 (CPR) that will cover all funds under shared management (by Member States and the Commission, implying national programmes implemented on Member State level), including AMF, ESF+, and ERDF;

• Harmonisation across funds of the provisions on the so-called partnership principle (which stipulates the participation of stakeholders such as NGOs or local and regional authorities in the programme and implementation of the instruments) through the CPR, implying a strengthening of the partnership principle in the AMF and alignment with the standards achieved under the Structural 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.

• 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.

• 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’), 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.

2. KEY TOPICS OF DEBATE: 12 CONTROVERSIES AROUND THE WHAT AND THE HOW OF EU SUPPORT FOR MIGRANT INTEGRATION

Varying commitment and denial of migrant integration as policy priority among Member States. The EU integration framework calls for concentrated efforts at enabling and supporting the inclusion of migrants and refugees in European societies. Policy principles promoted by the EU and funding to support their implementation build on the recognition that integration is a process of mutual adaptation of the receiving society and migrants; and that migration is a major factor shaping society, resulting in needs for adjustment and reform of general policies and
policy-making, public institutions and public services. In the political reality of Member States, however, this very notion is widely contested, and longer-term integration 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 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.

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 would roughly stay the same as the combined ESF and FEAD budget in the 2014 to 2020 period (CPMR 2018b, EC 2018d, ECRE 2018a, 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 integration in national programmes will be.

**ESF+ as main EU integration fund: incentive for mainstreaming in Member States or empty claim?** With its cross-cutting objectives, including access to employment, training, education, equal access to services, social inclusion and poverty relief, the ESF represents a significant tool to potentially support medium- and long-term integration. Another obvious advantage is the fund’s broad definition of target groups (based on Art. 162 TFEU), where all persons enjoying legal access to the labour market include third-country nationals 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 2018a). Most important, the ESF is already widely used to support migrant integration in a number of Member States, and on the ground often represents the most obvious and for many actors most accessible EU funding source 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 widely unknown (Ahad and Schmidt 2019, Beirens and Ahad 2019, 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 integration on a broad basis across all Member States: The fund’s general objective expressly does not refer to migrant integration (EC 2018d, Art. 3). Socio-economic integration of third-country nationals is being introduced as part of the specific objective that includes other marginalised communities.
(Art. 4.1.viii). Although the Commission suggests that Member States have to programme this objective by taking into account third-country nationals (Art. 7 on thematic concentration), 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.

At any case, it can be assumed that Member States willing to tap the ESF+ for integration purposes would do so anyway, in line with current practice. Member States not wishing to use ESF+ means for migrant target groups, on the other hand, could get away with dedicating only token amounts within the social inclusion objectives, according to the proposed provisions on objectives and thematic concentration. The same risk regards regional governments, as a large share of ESF operational programmes are drafted and implemented at regional level. In this light, the proposed mechanism to take into account Country-Specific Recommendations may not have much effect on unwilling governments either, as long as these recommendations have to be agreed by the Member States (ESN 2016, 2017). 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.

**Priority for early integration and availability of supporting EU funding.** One of the most contested policy debates revolves around early integration, and at what point public support measures are to kick in. Nowhere is this debate as pronounced as in the refugee integration area. In particular cities pursue – and support in national and EU policy debates – ‘integration from day one’, striving for the provision of language support, education, recognition of skills, 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, including long delays before the accession to rights to labour market. 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.

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, not least in the debates on integration-related support from EU funds. A sticking point is the precise definition, scope and overall framing of ‘early integration’, as funded from AMF in particular, and the availability of EU instruments which support a broad range of essential early integration measures that are effective starting points for long-term integration (EC 2018e).

**EU-funded support for the social inclusion of the undocumented.** The EU has extremely limited funding instruments openly available to support the inclusion of undocumented migrants. Only FEAD—the Fund for European Aid to the Most Deprived—in principle allowed co-funding for measures supporting the undocumented. Comparatively small in scale, FEAD is designed to help people take first steps out of poverty and social exclusion by addressing their most basic needs. Implemented through national programmes, Member States can provide material assistance in the context of social inclusion measures or non-material assistance to help people integrate better into society. However, Member States have wide discretion in 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. 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. Other EU funding programmes exclude irregular migrants in their eligibility rules. The ESF as a matter of principle targets persons with legal labour market access, thus excluding persons without the right to work (EC 2015). People not holding a regular residence status are very rarely included in programmes, and only in certain Member States. 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). In practice, national reporting and auditing requirements on listing final recipients often decide on whether e.g. ESF actions aimed at access to services or provision of information may benefit persons without regular residence status. AMIF’s 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, as their target groups often include persons with diverse, often fluid, residence status. The EU social NGOs have therefore stressed in a 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 2018a:11). The merger of FEAD into ESF+, as proposed by the Commission, on the one hand could theoretically allow the access of these to social services (as basic health assistance), but on the other hand further threatens to increase the obstacles for social inclusion of the undocumented (EC 2018d). While the hitherto definition of most deprived target groups within national programmes is kept in the proposal, a key point of debate is 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 2018a).

**Capacity of EU instruments to support and encourage policy innovation.** During and in the wake of the 2015/16 arrivals, the local level has become a 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 led to new 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). EU funding instruments and Commission engagement have played a certain role in these new types of local integration initiatives, e.g. through integration-specific calls under the Urban Innovation Action (UIA) instrument and measures included in the 2016 EU Action Plan on the integration of third country nationals (EC 2016).

Nevertheless, the capacity of EU instruments to 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 and 2019, EUROCITIES 2016, 2017 b,c, Urban Agenda 2018a, Social Platform 2018a). A key question thus has been how in future more civil society-driven projects enabled by EU funds can take place, with lower thresholds for small-scale projects and funding instruments geared towards non-public/non-profit project carriers.

**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, EU programmes have been geared towards an empowering and enabling
approach, helping individuals to participate in the labour market. Typical policy goals have been human capital development, vocational training and life-long learning. Critics of this approach 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.

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 2018a). In national integration debates, such controversy reverberates, too. Member States political discourse often concentrates 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 ESF+ instrument, its priorities and underlying intervention logic, and then set their priorities in national implementation programmes.

**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. In countries most affected by the financial and sovereign debt crisis over the last decade, EU-agreed austerity policies have led to considerable spending cuts, decline in social investments and limited capacities to address social cohesion issues including migrant integration, while at the same time problems and needs multiplied. 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, local level stakeholders 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.

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.

**Ability to set policy priorities on urban level and direct access to EU funds.** Cities frequently 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 lead to the call for direct access to EU funds, 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 local stakeholders 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. Local authorities 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 and 2019, EUROCITIES 2015, 2016, 2017 b,c, HLG 2017, Urban Agenda 2018, Social Platform 2018a).

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 Operational Programmes and calls leave key local challenges not addressed, that target groups and indicators do not match the local reality, and that coordination gaps exist at the ESF/ERDF nexus (EUROCITIES 2018a, HLG 2017, Urban Agenda 2018, Social Platform 2018a).

**Stronger role for civil society and local authorities in the governance of EU funds implementation.** A focal point of stakeholder 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 it refers to the close involvement of civil society, local governments and other relevant actors 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), although it its implementation is not binding.

Notwithstanding this improvement, in practice only a handful of countries have fully involved local and regional authorities and civil society organisations in the process in all stages. Under the AMIF, the partnership principle is even less established. Reflecting the intergovernmental
roots of EU policies in the migration policy domain, the principle has never been more than a recommendation to Member States and cities and civil society stakeholders report ignorance for their concerns in AMIF national programming in a number of countries (CEMR 2015, CPMR 2018a,b, ECRE & UNHCR 2017 and 2019, EPRS 2017, ESF Transnational Platform/AEIbD 2018b, Fondazione Brodolini et al. 2016, Social Platform 2016, Sweco et al. 2016, Urban Agenda 2018).

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. Requirements in the proposed future Common Provisions Regulation (CPR), equally referring to ERDF, ESF+ and AMF include a binding provision to carry out partnership organisation in accordance with the 2014 Code of Conduct (EC 2018c). Welcomed by stakeholders, this was bound to be controversial with governments that have preferred to keep civil society and other stakeholders at arm lengths’ when implementing national AMIF programmes. Stakeholder also pointed out inconsistencies in terminology between the ECCP and the new proposals (e.g. concerning the role of Monitoring Committees in programme reporting and reviews), and in how the ECCP refers to the specific funds and programmes to which it applies (ECRE & UNHCR 2018b).

**Coherent, simplified and flexible EU instruments in line with local needs.** Drawing from different EU funding sources for the integration of migrants and refugees (AMIF, ESF, FEAD, ERDF, EaSI, Erasmus+, REC), local authorities, civil society stakeholders and 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 actors with limited administrative resources struggle to navigate EU funding processes without guidance on how to best leverage resources and which funds to apply for.

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. The divergent definition of target groups in various programmes leads to especially grave problems when colliding with realities. For example, AMIF interventions can only focus on third-country nationals, whereas under ESF in principle a much wider population of citizens with migration background (including newly arrived EU citizens or second-generation nationals) are able to benefit. However, the definition of the ESF target group has been very diversified across Member States, creating confusion and difficulties in comparing the quality of measures provided and the number of recipients served. Moreover, programmes to foster inclusion and social cohesion typically include the receiving community, meaning that eligibility rules need to accommodate all citizens (Ahad and Schmidt 2019, EC 2015, 2018e, ECA 2018b). Stakeholders have therefore consistently called for simplification, less administrative burden, better harmonisation of rules,
flexibility and possibilities to blend funding from different funds (EUROCITIES 2017b,c, Urban Agenda 2018).

**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 (incl. ERDF and ESF+) to include, next to regional per-capita GDP, the reception of migrants has proven to be highly controversial. To better reflect needs and challenges on regional 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 (EC 2018c, Annex XXII). This would entail a re-channelling of funds among Member States and create an incentive (of sorts) in the long term to accept and accommodate more immigration, but also provide resources to better include those who have accepted to accommodate more asylum seekers in the past. However, this provision lacks a direct link with the fulfillment of the integration-related objective viii of ESF+. In other words, increase in allocation to the regions which have welcomed a higher number of third country nationals, will not grant per se more investments in integration. For cities in the potentially negatively affected countries, frequently committed to a more 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. Municipalities, together with civil society stakeholders, feel threatened to be taken hostage by the anti-immigration stance of their governments and to lose out in urgently needed investments 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, Bendel et al. 2019). 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.

**Contested necessity of more binding European governance in integration field.** An overriding question with regard to the EU’s role in the integration field is 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+ 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) are proposed to be taken into account at least at the beginning...
of the programming period and for the mid-term review (assessing progress after five years; EC 2018d).

The main rationale for such a more binding frame, from a Commission 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, conditionalities related to migration and integration in funding programmes and under peer pressure, the hope is that also more reluctant governments would develop and implement comprehensive, broad-based integration policies. However, given the contested nature of the policy objectives underlying the EU’s system of social and economic governance, political attitudes among some Member State governments, as well as 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.

3. FROM DEBATE TO PROPOSALS: POLICY OPTIONS PROMOTED BY STAKEHOLDERS AND THE EUROPEAN PARLIAMENT

3.1 Policy option adequate funding – to ensure sufficient and flexible spending on integration according to changing needs across all Member States

Advancing this policy option is informed by lacking, or patchy, public spending on migrant and refugee integration seen in many Member States. Across Europe, the attention given to integration policies varies dramatically. Comparably high levels of financial support provided in wealthier and/or long-standing destination countries contrast with much lower levels in more recent destination countries or Member States where public finances have been under strain. In most countries, however, policy gaps related to specific and sectoral challenges exist, together with a lack of national spending in such areas. In this overall context, EU funds represent a key mechanism to instigate and leverage higher spending on migrant and refugee integration according to actual needs. In addition, they provide an opportunity to strengthen the principle of early integration ‘from day one’, in line with the EU policy approach.

Proposals put forward by stakeholder organisations start from the fact that traditionally EU funding dedicated to integration has been comparatively low (i.e. mostly under AMIF in the current programme period). In addition, there is a sense that existing spending levels need to be defended and reinforced in view of recent EU priorities focused on migration management and -control. Proposals are also driven by growing reluctance in some Member States to create
favourable conditions for migrants and refugees in general, and the varying propensity of Member States to let migrants and refugees benefit from various EU programmes (structural funds, education programmes etc.). Pushing for adequate levels of EU integration funding is therefore not only about maintaining and expanding what is available from EU programmes, but also about making sure, through programme rules, that Member States eventually take up the potentially available means.

Stakeholder proposals

Specific stakeholder proposals put forward as reaction to the Commission proposals and relevant for this policy option include:

- At least 30% of national AMF programmes under shared management to be allocated to, and actually spend, on integration and legal migration actions;
- allocation of AMF funds to Member States solely based on numbers of third-country nationals who arrived (and not on returns), to match the needs in the asylum and integration areas;
- 50% of the AMF to be managed by the European Commission under the Thematic Facility, to increase the Commission’s possibilities to address integration needs in Member States;
- the possibility to reabsorb AMF funds and spend them under the Thematic Facility in case a Member State underspends the funding allocated to its national programme;
- explicit inclusion in the scope of AMF of the early identification of victims of violence and torture, and support to specialized civil society organisations through the Thematic Facility;
- publication of the annual AMF performance reports as well as mid-term evaluations, to increase the transparency on how funds are used and facilitate monitoring;
- at least 30% of national ESF+ programmes under shared management to be spent on social inclusion and reducing poverty, including for integration of third-country nationals;
- socio-economic integration of third-country nationals as a distinct specific objective of ESF+, to ensure attention to the target group;
- at least 4% of national ESF+ programmes to be spend on the two specific objectives addressing social inclusion of the most deprived and material deprivation;
- European Social Charter and Sustainable Development Goals as additional references for ESF+, to ensure its scope includes asylum seekers and persons with an irregular status.
Support in the European Parliament

In the European Parliament, as co-legislator of the future EU funds in the 2021 to 2027 MFF, a wide range of stakeholder positions have been taken up in the ongoing negotiations. The legislative resolution on the AMF regulation resulting from the plenary vote of 13 March 2019, based on the report of the Civil Liberties, Justice and Home Affairs (LIBE) Committee, addresses most of the above-mentioned concerns and will be the Parliament’s starting point in the upcoming negotiations with Council and Commission. Notably, it proposes to amend the integration objective of the fund, deleting the focus on early integration foreseen by the Commission, and stipulates to maintain the fund’s hitherto name, ‘Asylum, Migration and Integration Fund (AMIF)’ (EP 2018 e,f, 2019a). With a view to proposals put forward by stakeholders, Parliament has settled on:

- A minimum allocation of 10% of funds to integration and legal migration each in national AMF programmes (however not including a requirement on actual minimum spending); together with a minimum allocation under the Thematic Facility of 10% each to integration and legal migration spending;
- deletion of provision that 40% of national AMF means are to be allocated to Member States according to criteria related countering irregular migration including returns;
- strengthened provisions concerning vulnerable groups, through adding protection measures for vulnerable persons to the measures implemented through the fund; and adding to the scope of AMF support the early identification of vulnerable persons as well as the provision of psycho-social and rehabilitation services;
- increased transparency on how funds are used and facilitated monitoring of programme implementation through publication of actions, beneficiaries and annual performance reports and detailed provisions on mid-term and retrospective evaluation reports.

Concerning the ESF+ regulation, the amendments adopted by the European Parliament on 16 January 2019, based on the report of the Employment and Social Affairs Committee, embodies Parliament’s eventual stances on the proposals put forward by stakeholders (EP 2018c,d, 2019b):
At least 27% of national ESF+ programmes under shared management to be spent on social inclusion and reducing poverty, including for integration of third-country nationals;
socio-economic integration of third-country nationals to become a separate specific objective of ESF+ in the social inclusion policy area;
at least 3% of national ESF+ programmes to be spend on the two specific objectives addressing social inclusion of the most deprived and/or material deprivation;
sustainable Development Goals as additional reference for ESF+, to ensure its scope includes asylum seekers and persons with an irregular status.

for details on the EP amendments to the Commission proposals cf. chapter 3.1 (Annex) of the Policy Options Brief on ‘High levels of EU support for migrant integration, implemented by civil society and local authorities’

3.2 Meaningful needs assessment – to base AM(I)F national programming and Partnership Agreements on structured and standalone assessment of needs and challenges

Advancing this policy option is informed by the frequent under-use of AMIF for integration purposes, neglecting needs in Member States and overtly focusing on migration management. It aims to forego flawed needs assessments at the beginning of the programming phase that fail to capture the full range of needed support action in the process of formulating Partnership Agreements (PAs) and national programmes. Pursuing this option seems even more urgent, as previous standards in priority-setting for asylum and migration funds are questioned under the future AM(I)F. As proposed by the Commission (and not fundamentally amended by the European Parliament), provisions on needs assessment are not very detailed and would give considerable leeway to Member States in deciding their spending priorities.

Alternative proposals put forward by stakeholder organisations react to these setbacks for evidence-based policymaking (ECRE & UNHCR 2018a: 51-56). While the current AMIF has foreseen a formal, high-level Policy Dialogue between Member States and the Commission to establish strategic priorities for national programming, the AMF proposal makes no reference to such a process. Instead, the proposed regulation tasks Member States with preparing Partnership Agreements, to be approved by the Commission. Without a formal Policy Dialogue process also the current levels of transparency (e.g. the Commission duty to present the outcome of Policy Dialogues to the European Parliament) will decrease. With regard to the PAs, there is no requirement foreseen asking for a standalone assessment of needs and challenges that would
serve as justification for particular policy objectives in these basic documents of national programmes. In contrast, the 2014 to 2020 AMIF requires programming to be based on an assessment of needs present in Member States at a particular date, where possible supported by statistical data. With regard to the national programmes, no guidance on assessment of challenges is foreseen either on which to base national programming; leaving Member States with a lack of clarity on the overall approach to be used. In addition, the templates for PAs and national programmes do not require Member States to draw on specific types of data or evidence to justify policy choices. Stakeholders point out the danger that politically motivated priority-setting takes precedence in this context. Last not least, the AM(I)F proposal newly introduces an association of EU agencies (EASO/EUAA and Frontex/EBCG) to the process of national programme development, but without any requirement of their input and subsequent programme amendments to be made public or open to the scrutiny of national Monitoring Committees.

**Stakeholder proposals**

Specific stakeholder proposals (ECRE & UNHCR 2018b) put forward as reaction to the Commission proposals and relevant for this policy option include:

- Standalone assessment of needs and challenges relevant to implementation of shared management funds (following an amended Partnership Agreement template) as a basis for programming, in the form of a baseline situation including statistical and qualitative data from independent sources;
- Commission approval of PAs and National Programmes based on an assessment of how far selected priorities and objectives address the needs and challenges identified in the needs assessment;
- Scrutiny of EU agency programming inputs by national Monitoring Committees, and a process by which agency input can be challenged if thought to extend beyond their areas of competence;
- Reinstatment of the formal, high-level Policy Dialogue process previously seen under AMIF for the future AM(I)F, together with a strengthening of the scrutiny role of the European Parliament.

**Support in the European Parliament**

In the ongoing legislative process structured needs assessment in programming has not featured prominently in the amendments put forward by MEPs and in positions of the European Parliament. Amendments to the Common Provisions Regulation, adopted by the European Parliament in February 2019 (EP 2019c) with regard to preparation, content and approval of PAs
and national programmes (Art. 7 to 9 and 16 to 18) concerned mainly the partnership principle (c.f 3.4 below) and time limits. Vaguely, the EP added an “integrated approach to address the demographic challenges and/ or specific needs of regions and areas” as element of PAs and to be set out in national programmes (EP 2019c). Concerning the AM(I)F, MEPs’ efforts at amending the Commission proposal with regard to programming (Art. 13 AMF regulation) mostly focused on adding the EU Agency for Fundamental Rights to the EU agencies that are to be associated at an early stage to the development of programmes (EP 2018 e,f, 2019a).

3.3 Policy option mainstreamed, longer-term policies – to promote comprehensive integration policies with a long-term orientation and mainstreaming them on Member State and EU level

Advancing this policy option is informed by the overtly short-term character of integration policies and the weak consideration of integration objectives across relevant policy areas in many Member States. EU funding programmes have the potential to improve the quality of integration policies in terms of their long-term orientation and of mainstreaming them into all areas which impact on the integration outlook and well-being of migrants and refugees – such as housing, employment, education and health. On Member State level, the policy option stresses EU support for ongoing, seamless and well-integrated measures aimed at enabling the inclusion of migrants and refugees in all walks of life, with no funding gaps emerging along the integration pathway. On EU level, the policy option relates to a stronger emphasis on social inclusion goals in overall EU economic and social governance, and how these goals translate into specific objectives of EU programmes conceived to facilitate integration.

Proposals put forward by stakeholder organisations address the fact that EU integration funding up to now focuses on short term needs related to the arrival and reception context in many Member States, with comparatively little funding used for e.g. long-term labour market integration. Moreover, governments have wide discretion on whether EU funds implemented on national level become available for longer-term integration measures or would in any way contribute to mainstreaming of migrant integration across policies. As a result, measures that receive EU support often are peacemeal, poorly integrated into coherent, longer-term strategies and not linked to an all-of-government and all-of-society response to immigration. What is more, policies aimed at longer-term and more comprehensive integration are under threat where governments perceive them as creating pull factors or being unpopular with the own citizens.

Stakeholder proposals

Specific stakeholder proposals put forward as reaction to the Commission proposals and relevant for this policy option include:
• A proper balance among social and macroeconomic objectives in the European Semester process, to ensure adequate investment for social inclusion and poverty reduction;
• more regular monitoring through the social aspects of the European Semester of how Member States implement enabling conditions, including the application of the EU Charter of Fundamental Rights;
• mainstreaming of integration support across the ESF+, with third country nationals as recipients of measures under all the specific objectives and an enhanced equality clause;
• strong coordination on EU level and between Managing Authorities in Member States of the actions and priorities implemented under AMF, ESF+ and ERDF shared management, to the point of establishing cross-Fund national integration Monitoring Committees;
• priorities of the European Action Plan on the integration of third country nationals to be addressed in national operational programmes for ESF+ implementation;
• ongoing, effective support for early and long-term integration and foregoing of possible funding gaps due to the way Member States implement AMF and ESF+.

⇒ for details on the various stakeholder positions cf. chapter 3 (Annex) of the Policy Options Brief on ‘Comprehensive and mainstreamed, longer-term support for the integration of migrants’
⇒ for in-depth information on the evidence base supporting stakeholder proposals cf. chapter 2.3 of the same Policy Options Brief
Support in the European Parliament

In the European Parliament a number of the concerns brought forward by stakeholder organisations have been taken up. With regard to the ESF+ regulation, amendments adopted by Parliament in the plenary vote on 16 January 2019 (based on the Report of the Employment and Social Affairs Committee) reflect Parliament’s eventual positions on the legislative proposals tabled by the Commission (EP 2018 c,d, 2019b). With a view to the stakeholder proposals, these amendments refer to:

- The inclusion of challenges identified in the Social Scoreboard under the European Semester in the provisions on thematic concentration of national ESF+ spending;
- additional general objectives of the ESF+ stressing inclusive societies, the quality of employment, education and training, integration and social cohesion, eradication of poverty, non-discrimination and access to basic services, among others;
- additional specific objectives of the ESF+, among others related to the inclusiveness of education and training systems, services for access to housing, and access to equal social protection, including for disadvantaged groups and the most deprived people;
- highlighting of integration challenges as the context in which the ESF+ will be implemented, and acquisition of language skills, reduction of segregation and non-discriminatory education systems, among others, as goals of the fund;
- compulsory inclusion of Managing Authorities in coordination mechanisms with other EU funds, in order to deliver integrated approaches; with specific reference to coordination of ESF+ with the AMF but also ERDF and the Rights and Values programme;
- inclusion of the EU Action Plan on the integration of third country nationals in the Union initiatives whose implementation is to be supported from ESF+;
- a separate specific objective of ESF+ solely dedicated to the promotion of long-term socio-economic integration of third country nationals, including migrants;
- clarification of the scope of integration measures supported from ESF+ as focusing on legally residing third-country nationals or on those in the process of acquiring legal residence, including beneficiaries of international protection.

Amendments to the Common Provisions Regulation, adopted by the European Parliament on 13 February 2019 based on the report of the Committee on Regional Development (EP 2019c), refer to:

- Inclusion of the overall policy objectives of the Structural Funds (including implementation of the European Pillar of Social Rights) in the needs assessment
leading to Partnership Agreements between Commission and Member States, thus going beyond Country-Specific Recommendations;

- progress in support of the European Pillar of Social Rights, territorial needs and demographic challenges to be taken into account in reporting of Structural Funds' implementation, mid-term reviews and adjustments following mid-term reviews;

- arrangements for implementation of the European Pillar of Social Rights as horizontal enabling condition, applicable to all specific ESF+ objectives;

- provision that enabling conditions are also seen as prerequisite for inclusive and non-discriminatory (and not only effective and efficient) use of EU support;

- access to non-segregated education and training as part of the national strategic policy framework for the education and training system which is required as thematic enabling condition;

- a concrete action plan to combat segregation through access to quality services for migrants and refugees as part of the ‘national strategic policy framework for social inclusion and poverty reduction’ which is required as thematic enabling condition.

Amendments to the AMF regulation in the EP legislative resolution of 13 March 2019, based on the report of the Civil Liberties, Justice and Home Affairs (LIBE) Committee, further address some of the above-mentioned stakeholder concerns (EP 2018e,f, 2019a):

- Stress on the complementarity, coordination and coherence among AMF and the Structural Funds when implementing the specific objective related to integration and social inclusion of third-country nationals, as well as in the annual performance reports of Member States;

- scope of AM(I)F defined as supporting integration measures for third-country nationals and actions supporting Member States’ capacities in the field of integration that are generally implemented in the early stages of integration, complemented by interventions to promote the social and economic inclusion of third-country nationals financed under the structural funds.

⇒ for details on the EP amendments to the Commission proposals cf. chapter 3 (Annex) of the Policy Options Brief on ‘Comprehensive and mainstreamed, longer-term support for the integration of migrants’
3.4 Policy option broader participation – to ensure funds can be accessed by civil society and local/ regional authorities, and that these actors are fully involved in the funds’ governance

Advancing this policy option is informed by the ambition of local actors, both public and societal, to autonomously pursue integration priorities in line with the needs on the ground. The local level is where success or failure of integration processes is determined, with key public services such as housing and early childhood education, but also policies to combat poverty or social exclusion widely in the hand of municipalities. Civil society, local and regional authorities are uniquely placed to offer early integration support, pursue community building among newcomers and citizens, and shape the social climate in which reception and integration take place. However, local integration actors often do not have enough leeway to fully exploit their potential due to various constraints that often are related to lack of funding. EU programmes, their funds as much as their concepts and objectives, can be crucial to galvanize effective and lasting integration strategies on local level, pursued by public bodies and NGOs. Cities, regions and civil society thus are key stakeholders and potential beneficiaries of EU funding instruments for the integration of migrants and refugees.

Proposals put forward by stakeholder organisations respond to a reality that by far does not live up to the actual role of civil society and local/regional authorities in migrant integration. While NGOs are widely recognised as main beneficiaries of EU funding in the integration area, their participation in EU programmes is often hampered by specific funding rules developed by Member States for programmes implemented on national level (under ‘shared management’). Other barriers to participation relate to EU rules, including on co-financing and administrative burdens that are problematic especially for smaller organisations. In what concerns municipalities, they have been grossly underrepresented as beneficiaries of recent EU integration funding in spite of their decisive role in handling the 2015/16 peak in arrivals. Moreover, they have experienced serious obstacles in accessing EU funds resulting from national implementation structures and -decisions. In the governance of the relevant programmes, the voice of local and regional authorities, civil society and social partners is underrepresented or even absent, leading to little involvement of these actors in programme planning, implementation and monitoring.

What is more, the payment of technical assistance resources to Member States can be critical for the capacity of organisations and entities to access national programme resources and/or effectively implement actions for which they have already received funding. As proposed by the Commission, common rules for the shared management Funds will introduce a flat rate mechanism for the payment of technical assistance resources to Member States, in which these funds are paid in the form of a 2.5-6% top up of each interim payment. The payment of technical assistance is thus linked to progress in implementation, with Member States implementing
programmes more slowly receiving less resources to build the capacity of programme partners. Linking technical assistance to progress in implementation in the manner set out in the new proposals therefore risks withholding support from the contexts and partners amongst which the need for it is most acute.

**Stakeholder proposals**

Specific stakeholder proposals put forward as reaction to the Commission proposals and relevant for this policy option include:

- A new EU funding instrument offering direct financial support to cities in return for receiving refugees and asylum seekers, linked to resettlement and/or EU relocation programmes;
- reasonable minimum allocations for local authorities and civil society organisations across all priorities within national AMF programmes under shared management;
- a maximum EU co-financing rate of 80% for national AMF programmes and encouragement of matching national funds, with Member States required to provide a minimum of 50% of the national co-financing contribution from national resources and a recommendation to provide 100% grant funding wherever possible;
- the extension of the proposed 90% co-financing rate for integration actions led by civil society and local/regional authorities across all AMF objectives;
- removal of the flat rate mechanism for the payment of technical assistance and of the link between implementation progress and payment of technical assistance; instead payments to be undertaken as for other programme priorities/objectives based on reporting of eligible expenditure;
- earmarking for local authorities and civil society of a significant part of funding from the AMF Thematic Facility, to support integration and reception actions implemented locally;
- a strong and mandatory Partnership Principle in all relevant funds, to ensure meaningful multi-stakeholder and multi-level programming, implementation, monitoring and evaluation;
- an EU-level Partnership Principle, applied to the AMF Thematic Facility and with regular stakeholder consultations on the planning and implementation of activities;
- inclusion of civil society stakeholders in the ESF+ Committee, to reflect their key role in the design and delivery of the fund, in line with the idea of an EU-level Partnership Principle.
Support in the European Parliament

In the ongoing legislative process, most of the stakeholder positions have been taken up by Members of the LIBE Committee. The EP’s legislative resolution on the AMF regulation of March 2019 stipulates (EP 2018e,f, 2019a):

- Establishment and development of regional/local integration strategies, as well as capacity building of integration services provided by local authorities added to the fund’s scope of support; however, no provisions on minimum allocations of national AMF programmes to civil society organisations and local/regional authorities;
- encouragement of Member States to provide matching national co-financing to EU-funding of at a maximum 75% of eligible expenditure;
- a minimum allocation of between 5% of the AMF Thematic Facility to local and regional authorities implementing integration actions;
- enshrining of a strong partnership principle in the regulation in addition to the provisions of the Common Provisions Regulation, with partnerships to include local and regional authorities as well as NGOs, human rights institutions and equality bodies;
- the Commission to regularly engage with civil society organisations in the development and implementation of work programmes of the Thematic Facility; and to consult concerning actions eligible for higher co-financing and the further development the monitoring and evaluation framework.

With regard to the ESF+ regulation, the amendments adopted by the European Parliament also reflect key proposals put forward by stakeholders (EP 2018c,d, 2019b):

- Enshrining of a far-reaching partnership principle in the ESF+ regulation, asking for meaningful participation of social partners, civil society organisations, equality bodies, national human rights institutions and other relevant or representative organisations;
- appointment to the ESF+ Committee of Member State representatives of civil society, equality bodies or other independent human right institutions, as well as of a Union level civil society representative;
allocation of 2% of the ESF+ funds in shared management to the support and capacity building of partners (as civil society organisations, etc).

for details on the EP amendments to the Commission proposals cf. chapter 3.2 (Annex) of the Policy Options Brief on ‘High levels of EU support for migrant integration, implemented by civil society and local authorities’

4. WAY FORWARD: SUSTAINED EFFORTS AND QUALITATIVE MONITORING

4.1 Needs for action at a critical juncture

Preparations for the upcoming Multiannual Financial Framework have reached a critical stage as of spring 2019. While Commission, Council and Parliament start engaging in the final stages of negotiations, there are still some persisting disagreements on the overall architecture and governance of the funds. Among others, Member States are still divided about the scope of integration objectives and the extent of Member States’ obligation to use EU funds for integration purposes. Both with regard to AM(I)F and ESF+, these controversies crystallise in debates on required minimum allocations to integration objectives in national programmes. To ensure that the integration of migrants and refugees remains a core objective of the proposed AM(I)F regulation, stakeholders continue to point out that the suggested weighting key for the allocation of AMF funding to the Member States for their national programmes should be revised, so that allocation based on integration and legal migration indicators (weighting 30% as proposed by the Commission and unchanged in the EP position) is not overtaken by allocation based on return indicators (weighting 40% as proposed by the Commission and unchanged in the EP position). They also continue to insist that minimum allocation requirements for the integration objective in national programmes should be included to ensure that Member States adequately invest in these areas.

With regard to the ESF+ as well, Member State positions are still wide apart, ranging from ideas for mandatory integration spending going even beyond the EP position, as floated by e.g. Finland, the Netherlands and Sweden, to questioning the very existence of an ESF+ strand targeting the most deprived (ex-FEAD), as voiced by some net contributor Member States. Intense Council debate also has taken place about the inclusion of AM(I)F in the Common Provisions Regulation
and implications for the partnership principle. Governments reluctant to give civil society and local/regional authority stakeholders a say in programme development and implementation have been pressing hard to remove AM(I)F from the binding provisions foreseen in the proposed CPR. Not the least, strong linkages exist between the debates on internal and external funding. In particular, Member States are divided about the respective priorities and objectives of the NDCI fund and the articulation of the external dimension of the three JHA funds.

At the same time, on national level, Member States are gearing up planning and operational preparations for the implementation of the new generation of EU instruments. Already now, governments discuss priorities, define objectives and start drafting Partnership Agreements. Within the next one-and-half year, in each Member State the groundwork will be laid and key decisions be taken on how much, where and how EU funding will be available for the integration of migrants and refugees far into the next decade. The challenge is fourfold:

- to fully exploit the potential for increased use of AM(I)F, ESF+ and other instruments for the integration of migrants and refugees, and in particular to ensure the use of ESF+ in Member States which up to now have made only little or no use at all of ESF+ for this purpose – following the policy option described in chapter 3.1;
- to promote a need-based approach to the services funded through AM(I)F and ESF+, avoiding the establishment of barriers to certain target groups on the basis of their residence status (e.g. through unnecessary reporting indicators which would dissuade people with irregular status from accessing services) – following the policy option described in chapter 3.2.
- to ensure complementarity and coherence in programme planning with a view to long-term integration support and avoiding funding gaps – following the policy option described in chapter 3.3. One way to achieve this is proper coordination among the implementation structures of the various funds within Member States, ideally involving joint monitoring committees on integration assessing proposals for more than one fund. In line with good practices in some countries that could be scaled up and extended to the rest of the Union, another way to ensure complementarity and coherence is to install a single ministerial authority responsible for the integration priority across funds;
- to ensure comprehensive compliance with the partnership principle and same high consultation standards in AM(I)F and ESF+; for local and regional authorities, civil society organisations and refugees/migrant-led organisations to have a say in the national and operational programmes, as well as in their monitoring and evaluation – following the policy option described in chapter 3.4;
To meet these challenges, at this juncture all key actors need to commit and follow up on a specific course of action:

- The Commission, to make every effort to promote the enhanced opportunities under the next MFF to Member State authorities and integration stakeholders, inform Managing Authorities, facilitate joint and coordinated programme planning, push for full implementation of the partnership principle and encourage meaningful involvement of civil society and local and regional authorities in the needs assessments that inform Member States’ programming;

- Member States, to explore and embrace the opportunities provided by the future instruments, to anticipate ways for strategic, long-term use of the funds in order to leverage objectives of national integration policies, to tackle cross-ministerial and cross-fund coordination challenges in the preparation, implementation, monitoring and evaluation of programmes, to acknowledge the potential for more efficient and better embedded policies that comes with structured involvement of local/regional and civil society actors, and to allow for early and meaningful participation of stakeholders in decisions on the strategic orientation of the national programmes;

- The European Parliament, in the upcoming trilogue negotiations in autumn 2019 to hold to the improvements in terms of stronger partnership provisions and coordination among the funds achieved in the first reading; among them the high consultation standards introduced in the AM(I)F and ESF+ regulations independent from the CPR provisions, EU-level partnership consultations, as well as mandatory coordination among the Managing Authorities of AM(I)F and the Structural Funds;

- Integration stakeholders in civil society and on local/regional levels to devote their full attention to the developments, actively contribute to national debates, point out efficient ways of using the funds for comprehensive and long-term integration support and insist on meaningful and regular involvement in needs assessments, programme development, implementation and evaluation. A joint, transnational initiative can help to better play this role.

4.2 Towards a stakeholder initiative for a sustainable, comprehensive evidence base supporting partnership-led programme implementation

Currently, in many Member States integration stakeholders in civil society and on local level lack resources to advocate in a timely and sustained manner for purposeful use of EU funds for
migrant integration, and to push for meaningful participation in programme development and implementation. Realtime evidence is lacking on the Europe-wide uptake of EU instruments for migrant integration and the state of play concerning partnership-led implementation. Today, assessments of the partnership principle and how funds are used are done on an ad-hoc basis, mostly in form of one-off surveys conducted through stakeholder membership organisations or as retrospective analyses of the programme planning and evaluation reports produced by Member States and the Commission. As things stand, it is difficult to obtain, and keep up to date, comprehensive knowledge about the state of programme implementation and the consultation standards applied across Member States.

To fill this gap, an EU-wide mechanism should be developed for ongoing, regular monitoring of how stakeholders are involved and different funds are used, and of the quality of coordination and coherence among the instruments, including the empowerment of partners through capacity building and resources to participate in monitoring committees. Transnationally networked, this initiative would provide the improved evidence base for pushing towards compliance with the partnership principle, purposeful use of AM(I)F and structural (ESF+) funds to support integration, and coordination and collaboration among the implementing authorities. Moreover, it would contribute to a qualitative monitoring of programme implementation, where e.g. AM(I)F mid-term reviews would also be based on content and effectiveness of the projects.

By this it would resemble a proposal floated by the Dutch government in the ongoing negotiations, to amend the mid-term review as foreseen in the draft AM(I)F regulation with a view to strengthening its role and added value for the allocation of the second tranche of funding. The allocation should not solely be determined by the degree of Member States’ under-spending but instead be based on a qualitative analysis of Member States’ efforts, in combination with an updated analysis of the actual needs of Member States. With limited chances to win wider support among governments, this proposal can nevertheless inspire a stakeholder-led EU-wide mechanism fulfilling the function of qualitative monitoring.

If established across Member States, such a mechanism could become a powerful instrument. It would ensure that robust mid-term review procedures are in place and would provide a source of information for stakeholders and other EU actors on how funding instruments are utilised to support integration. It would enable integration stakeholders to move to a more proactive involvement, better fulfil their watchdog function in regard to the partnership principle and feed into advocacy for better use of EU funds for integration of migrants and refugees. In practice, such an initiative could entail four major components:

- **Implementation monitoring component**, with annual ‘barometer reports’ on the quality of partnership-led implementation, coherence and coordination among funds as well
as conclusions about their effective use; based on a monitoring and assessment tool with a few core questions or indicators for regular analysis (possibly implemented through a survey among stakeholders with a revised European Code of Conduct on Partnership as benchmark, supplemented by qualitative interviews, reflection and validation roundtables);

- **Financial and material empowerment and capacity building component**, providing adequate resources and with national meetings to inform civil society and local/regional level stakeholders about their role in partnership-based needs assessment and programming as well as the potentials of the funds to support integration; employing coordinators in each Member State as multipliers and drivers of a sustained and continuous conversation;

- **Qualitative evaluation component**, gathering evidence on quality, impact and long-term effectiveness of funded activities, leading to conclusions about the funds’ utilisation to comprehensively support integration in a long-term perspective, and producing evidence for the mid-term review process;

- **Transnational benchmarking and mutual exchange component**, with EU-wide benchmarking of compliance with the partnership principle and of proper use of funds; including regular European platform meetings for EU-level agenda-setting and recommendations for EU actors, as well as mutual exchange and information on good practices.

As an initiative independent from the Commission and Member State authorities, the mechanism would be based on the collaboration of integration stakeholders including civil society organisations, refugees/migrant-led organisations and local and regional authorities. It would need to build on the commitment among stakeholder organisations to coordinate and manage the process in Member States; possibly supported by a European network node. Discussions among the potential carriers of such an initiative are in order to clarify its funding, project partnership and operational implementation perspectives. If implemented as self-sustained civil society and local level network, sponsorship questions need to be solved. If implemented through EU funding, a legislative initiative would be necessary to provide a mandate and the resources that would ensure full independence.
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