ReSOMA:
Research Social platform On Migration and Asylum

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D2.1 - Synthetic Policy Briefs @M8

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### Document History

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## 1 LIST OF ABBREVIATIONS AND DEFINITIONS

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2 INTRODUCTION

Building on the ‘problematization’ in WP1 Discussion Briefs, the WP2 policy option papers for each of the 9 ReSOMA the topics reviewed stakeholders and researchers’ policy recommendations in order to identify the current and proposed policy options that they find salient at the EU level and discuss what kind of evidence is put forward by researchers and stakeholders to support their adoption.

The list below features the 9 topics that CEPS and MPG addressed in the policy options briefs:

<table>
<thead>
<tr>
<th>Topics briefs</th>
<th>ReSOMA area</th>
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<td>- Disembarkation platforms related to safe third country debate</td>
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3 Description of Action

3.1 Policy Briefs’ structure and research questions

The policy briefs specifically discussed the effectiveness of the identified measures. In particular: what is the evidence used by stakeholders and researchers to argue that a specific policy measure is “effective”? How is effectiveness understood or assessed? The Briefs also assessed and compared the notion of effectiveness,
providing a reflection on the underlying assumptions and objectives of proposed policy measures. Three main chapters characterised the final structure of the policy briefs:

Chapter 1. Identifying and mapping key policy options

Taking the key issues and controversies identified in the WP1 Discussion Briefs as a starting point, the Policy briefs reviewed stakeholders and researchers’ policy recommendations for each of the 9 ReSOMA topics. The policy measures analysed came from review of stakeholders and researchers’ policy recommendations. The policy briefs identified the current, proposed and previous EU policies that the researchers and stakeholders consider as salient as well as other alternative policy options that they propose.

Chapter 2. Mapping the patterns of debate on solutions

This chapter examined the patterns of the debate on the policy recommendations and benefitted from the results of WP 1.4 concerning the transnational feedback loops and the surveys carried out in WP 1. It answered the following questions: What is the consensus among the research community and civil society actors on these different policy proposals? Is the given option raised by only one or a few? Or have wide thematic and geographic coalitions emerged? Do the proposed policies currently have the support of key institutional actors (e.g. the Commission, Council and European Parliament)?

Chapter 3. Mapping the evidence brought forward

This chapter mapped the evidences used by the researchers and stakeholders when putting forward their recommendations on specific policies: What does their evidence say? Do researcher/practitioner use impact assessments, statistics, grassroots feedback, best practices, specific country cases? Is it all the same type of evidence? Or is there no evidence for the suggested policies? Is there evidence on different types of impacts/consequences that were identified in WP1? What the implementation of different policies options previously adopted to address the same issue tell us about the effectiveness of the proposed initiatives?

3.2 Lead expert input to the Policy Options Briefs

In order to draft the policy options brief, the CEPS/MPG team working on each topic received crucial inputs by the lead experts on two main research questions:

What are the most relevant policy proposals identified by researchers for each of the 9 Resoma topics?

The experts identified and reviewed for each of the ReSOMA topics, relevant EU policy proposals, instruments or strategies that are recommended by the researchers writing on this topic. These recommendations can be in the discussion/conclusions sections of their analysis or they can be put forward by researchers in policy paper or the press. A review has been provided in particular of the proposals and recommendations included in the following sources: peer-reviewed journals, research projects supported by H2020, studies commissioned by the European Parliament, working papers, policy briefs and other relevant documents published by leading think tanks.

What evidence has been produced by the research community that supports the adoption of the selected policy measures?
The lead experts contributed to review qualitative and quantitative evidence that has been produced by the research community to support the adoption of specific policy measures for each ReSOMA topic (e.g. impact assessments, policy evaluations, statistics, grassroots feedback, best practices, case studies, legal analysis). The review in particular focused on the evidence of implementation of previous and current policies that are linked to the proposals under discussion (e.g. challenges/obstacles in implementation and relevant policy implications that are drawn by researchers).

In order to collect, in a timely way, the inputs from the lead expert, MPG and CEPS developed a template which identifies and sums up the different policy options of scholars on the 9 topics:

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<th>What evidence is provided to argue that the proposal is effective?</th>
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<th>Possibly, any other comments and relevant information (e.g. scholars rejecting the proposal etc.)</th>
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To give a concrete example of the lead expert contribution, the template filled out by the expert, Magdalena Lesińska, on migration will now be shown. It collects some key recommendations on the “crackdown on migration-support NGOs”:

| Who (among scholars) is proposing a solution? | Sergio Carrera (Centre for European Policy Studies, CEPS), University of Maastricht), Elspeth Guild (the Centre for European Policy Studies, CEPS; University Nijmegen), Ana Aliverti (University of Warwick), Jennifer Allsopp |
|-----------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------
What is proposed?

To reform the current EU Facilitators’ Package framework.

The Facilitators Package was criticised for its optional character, lack of clarity, coherence with international law and legal certainty. The current EU legal framework should be evaluated in reference to compliance with international, regional and EU human rights standards, and to the implementation of the “humanitarian exception” in the civil and criminal legislation at the national level. In particular, the elaboration of practical guidance to support EU Member States in implementing the Facilitators Package is recommended, where punishment for humanitarian assistance at entry and the provision of non-profit humanitarian assistance should be explicitly excluded to prevent unwarranted criminalisation. There is also a suggestion of implementation of adequate systems to monitor the enforcement and effective practical application of the Facilitators’ Package to reduce the risk of considerable discretion in setting the penalties by national authorities.

What evidence is provided to argue that the proposal is effective?

The Facilitation Directive does not provide a definition of the ‘humanitarian assistance’ concept, leaving considerable discretion to the Member States. In this context, there is a high risk of criminalisation of humanitarian assistance provided by civil society organisations working with irregular migrants at the MS territory and at the external borders. The clarity and legal certainty should be the key guiding principles of the legislative reform. Accurate parameters should ensure greater consistency in the criminal regulation of facilitation across EU Member States and limit unjustified criminalization.

To make the humanitarian exception to assisting irregular migrants mandatory in the EU law should contribute to make the work of city services and civil society organisations easier and safer. The recommended changes should allow to reduce the fear and intimidation of the social organizations in their work with irregular migrants and help to open more national and local funding resources for their assistance activities.

Possibly, any other comments and relevant information (e.g. scholars rejecting the proposal etc.)

Similar recommendations were also proposed by EU Agency for Fundamental Rights (FRA)
Sources:


3.3 Final draft of the policy options paper

MPG and CEPS coordinated the desk research on the 9 topics identified under the WP1 and selected the most effective policy options that can fill the key gaps at EU and national level and improve the quality of the responses to the evolving EU and national agenda. To do so, MPG and CEPS researchers considered the lead experts’ inputs, existing scientific literature and best practices, NGOs and stakeholders’ recommendation.

The policy briefs were also drafted in cooperation with the virtual research working group who replied to specific research questions from MPG, CEPS and lead experts. Consultations with participating experts were in most cases in form of structured bilateral interviews, and where sensible, group conversations. Participants were also encouraged to join the ReSOMA expert community and to actively contribute to the platform.

Finally, the proposed policy options were reviewed and discussed in the ReSOMA transnational feedback meetings which provided an opportunity for expert stakeholders and researchers to reflect on their feasibility and adaptability. Overall, three transnational feedback meetings were organised by MPG and CEPS in cooperation with the ReSoma partners in 2018 and 2019:

- **Migration**: Crackdown of NGOs assisting migrants, 19 November 2018;
- **Integration**: Towards coordinated, complementary and comprehensive integration policies funded from EU programmes, 14 March 2019;
- **Asylum**: Evidence and the Global Compacts (panel of Global Migration and Asylum Conversation: Data, Research and Policy event), 29 April 2019.

The results of the transnational feedback meeting allowed MPG and CEPS to fine-tune the outline policy options, contributing to the Synthetic Policy Briefs/’Policy Options Briefs’ (D 2.7) and the Final Synthetic Report (D 3.6).
4 CONCLUSIONS

The final submission of all the 9 policy options briefs suffered from some delays due to different technical/implementation issues and new research priorities.

First of all, the delays concerning WP1 directly and inevitably affected the implementation of WP2. The identification of topics during Y1 started quite late (between the end of M1 and the beginning of M2) due to the set-up of the project and its launch, causing some delays in the following activities. Such delays have resulted in the belated submission of a number of WP1 deliverables, in particular the discussion policy briefs D1.3 that were submitted at M10 (instead of M5).

As a result, MPG and CEPS researchers had to start the evaluation of the most effective policy responses under WP2 at a later stage. In this regard, MPG and CEPS started to work during the summer of 2018 (July and August) to define the methodology and the structure of the next WP2 policy briefs. MPG and CEPS developed a specific template for the policy option briefs and instructions for the lead experts who were called to draft an input paper in order to provide a more in-depth analysis of the most relevant developments at EU/national level. Due to specific research reasons, the final inputs by the lead experts could not be provided to MPG and CEPS before the end of October. As of November 2018, MPG and CEPS could start to analyse these inputs and include them into the papers.

At the same time, the delay in implementing WP2 stems from longer and more demanding work than anticipated. On 17.09.2018, a new implementation plan was discussed to align the upcoming ReSOMA activities with the most pressing policy debates and provide the policy option briefs related to these developments. The most important policy issues included 1) the increased efforts at externalisation (June European Council decisions, 'disembarkation platforms' etc.), 2) the continued crackdown on NGOs, and 3) the 2021-27 MFF negotiations, in particular related to internal funding. The implementation plan prioritised these three major developments and proposed to dedicate to them the WP2 Transnational Thematic Feedback and the WP3 Task Force meetings.

The overlapping between the production of the nine policy options and the simultaneous preparation of the transnational feedback meetings (WP2) and task forces (WP3) represented a further obstacle for timely implementing the deliverable D2.1. However, against this context, three POBs were successfully drafted (“Crackdown on NGOs assisting refugees and migrants”, “Hardship of Family reunion for Beneficiaries of international protection” and “Internal integration funding/MFF proposals related to cities as service providers”) and were submitted for the SG approval on the 31.01.2019.

With regard to other asylum and migration topics under its responsibility, CEPS, based on the advice provided by ReSOMA partners and with the agreement of ISMU, decided to produce a POB on the topic “EU priorities in implementing the Global Compact on Refugees”. This choice was motivated by the adoption of the Global Compact on Refugees by the UN General Assembly in December 2018, which had fostered a debate among NGOs, policy makers and experts on the role of the EU in supporting the implementation of the Refugee Compact. The delays in submitting some asylum topics are in practice due to the collective decision of aligning the content of the policy option briefs to crucial ongoing policy developments at EU level. One of the main ReSOMA objective is indeed to effectively feed into the policy debate, by delivering deliver good quality material in a quick and flexible way that allows for seizing every single opportunity that comes at EU level.

At the 10th SG Meeting (16/01/2019), it became clear that the delays incurred in drafting the POBs and organising WP2 meetings would make it impossible to fulfil the deadlines from the implementation plan and
the partners worked together to make activities end no later than M14. CEPS and MPG decided to accelerate the drafting of the remaining POBs and reduce the considerable delays occurred by reviewing the structure of the POBs and preparing papers that could be published more quickly. As of January 2019, two briefs on integration had to be drafted: the POB on Internal funding related to the Undocumented and the POB on Internal funding related to Mainstreaming; as for the POBs on asylum, CEPS had to finalise the POB on the Global Compact (1/2), focusing on the internal dimension related to EU responsibility sharing, the POB on the Global Compact (2/2), focusing on the external dimension related to (external) funding and the POB on Disembarkation platforms, relating to the Safe third country debate.

At this stage, it took CEPS more time that expected to draft the 2.1 POB on Safe Third Country because of the focus on disembarkation platforms. CEPS had to address the lack of available data by involving a number of interviews (EASO, Frontex, staff of the Romanian Presidency, the Director General of DG Home, members of the LIBE Committee). The 2.1 POB on Return also took stock of relevant policy updates (e.g. Juncker’s statement on the recast of the Return Directive) and required further work.

The POB on Undocumented was instead delayed because of the new repartition of work between CEPS and MPG and the necessity to react to events and developments shaping the European integration debate. At the beginning of WP1, this topic was initially shared between CEPS and MPG, while it was later decided to allocate this topic exclusively to MPG under WP2 and WP3 because its expertise on integration. This decision however resulted in more demanding work for MPG that was called to work on 5 topics out of 9 under WP2. Moreover, this ReSOMA brief addresses a crucial policy option driving effort at improving the EU’s response to migration and integration challenges in the next 2021 to 2027 multiannual financial framework (MFF). It highlights the corresponding proposals advanced by EU-level stakeholder organisations and traces the patterns of debate and support that the proposals garner, with a special focus on the European Parliament and the state of negotiations as of June 2019. In this case, the delay mainly depended on the importance of timely following the most pressing policy trends in order to feed the EU policy debate. The POB on document has been successfully submitted to the Steering Committee for feedback and quality review on the 16.07.2019.

It may be said that different factors contributed to reshape the timeframes and the deadlines for the implementation of the policy options briefs D2.1. In primis, the overall delays affecting the identification of topics at the beginning of the project and the implementation of WP1 had an impact on the entire WP2 planning. Secondly, the simultaneous interplay between different tasks under WP2 and WP3 further slowed down the draft and the review of the most effective policy options. Thirdly, the goal of the project to timely react to EU policy debate on asylum, migration and integration gave MPG and CEPS the possibility to focus on specific pressing issues and respond to the evolving EU policy agenda. In this regard, MPG and CEPS proposed to postpone some deadlines in order to gather update evidences and contribute to the relevant debate. The policy options brief D2.1 have been also successfully discussed during the transnational feedback meetings and underwent a reality check that enabled CEPS and MPG to fine-tune the outline policy options and improve their efficiency.
5 ANNEXES

1. Draft of Policy Option Brief on “Hardship of family reunion for beneficiaries of international protection”;

2. Draft of Policy Option Brief on “The EU’s Role in Implementing the UN Global Compact on Refugees: Contained Mobility vs. International Protection”;

3. Draft of Policy Option Brief on “Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing away from responsibility?”

4. Draft of Policy Option Brief on “Crackdown on NGOs assisting refugees and other migrants”

5. Draft of Policy Option Brief on “Contributing to global responsibility-sharing for refugees: the role of EU external funding”

6. Draft of Policy Option Brief on “Increasing Efficiency and Effectiveness of Return Policy: Coerciveness or Migrants’ Agency?”

7. Draft of Policy Option Brief on “Comprehensive, longer-term support for the integration of migrants: Options for the 2021 to 2027 MFF”

8. Draft of Policy Option Brief on “High levels of EU support for migrant integration, implemented by civil society and local authorities: Options for the 2021 to 2027 MFF”

9. Draft of Policy Option Brief on “Supporting the social inclusion of the undocumented: Options for the 2021 to 2027 MFF”.
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Policy Option Brief

Asylum Topic n°1:

Hardship of family reunion for beneficiaries of international protection*

Author: MPG

1. INTRODUCTION

Researchers and stakeholders have identified several controversies and barriers that undermine the right to family life and the principle of family unity of beneficiaries of international protection. As a consequence, different policy options and recommendations have been proposed to fill the key gaps at EU and national level and improve the quality of the responses to the evolving policy agenda. This policy brief will map the most important policy options proposed by academics (Groenendijk; Costello; Storgaard; Czech; Rohan and Klaassen) and relevant stakeholders such as UNHCR, UNICEF, ECRE, Red Cross and COFACE.

In November 2011, the European Commission published the Green Paper on the right to family reunification of third-country nationals living in the EU under Directive 2003/86. As a follow-up, the Commission promoted a public consultation which involved all stakeholders including intergovernmental and nongovernmental organisations, academia, social partners, civil society organisations and individuals (European Commission, 2012).

Several organisations (Caritas Europe, Christian Group, Council of Europe Committee on Migration, COFACE, ECRE, ENAR, EWL, ILGA-Europe, Red Cross EU office, Save the Children) emphasise the importance of providing “guidance on the Directive, for better enforcement of existing provisions, including infringement procedures” (European Commission, 2012).

UNHCR welcomes the adoption of more favourable rules for refugees in the Family Reunification Directive, but also recognises that many legal and procedural obstacles are contributing to separate refugees and beneficiaries of subsidiary protection from their closest family members in the Member States (UNHCR, 2012). According to the UNHCR, the Directive enshrines adequate provisions to ensure family reunification, but the Members States often fail to implement them in compliance with EU law.

UNICEF instead underlines that the main legal instrument at EU level, the Family Reunification Directive 2003/86, is not a “straightforward document” as it includes exceptions to the general rule
and gives Member States a considerable level of discretion (UNICEF, 2016). UNICEF recommends revising the Directive and further harmonising the right to family reunification by adopting clear rules and reducing the wide margin of discretion of the Member States.

2. IDENTIFYING AND MAPPING KEY POLICY OPTIONS

2.1 Differential treatment between refugees and beneficiaries of subsidiary protection

As beneficiaries of subsidiary protection do not expressly fall under the protection of the Directive, several Member States exclude them from the scope of legislation on family reunification or apply stricter rules compared to refugees. UNHCR therefore recommends that all Member States provide beneficiaries of subsidiary protection access to family reunification under the same favourable rules as those applied to refugees (UNHCR, 2012). The humanitarian needs of beneficiaries of subsidiary protection are very similar to those of refugees and the differential treatment between the two categories should not be allowed under national law.

Most of the organisations (Care for Europe, Caritas Europe, Christian Group, COMECE, Council of Europe, ENAR, International Commission of Jurists, ILGA-Europe, IOM, TDHIF) participating in the public consultation promoted by the Commission in 2012 state that beneficiaries of subsidiary protection should expressly fall under the scope of the Directive and be subject to the same provisions as refugees (European Commission, 2012).

Moreover, ECRE and Red Cross jointly recommend Member States to not discriminate on the basis of different protection statuses when ensuring the right to family reunification (ECRE & Red Cross, 2014).

UNICEF proposes to expand family reunification rights for persons under subsidiary protection. Humanitarian and protection needs are similar for refugee children and for children granted subsidiary protection. Thus, children with subsidiary status and refugee children should benefit on equal grounds from favourable entitlements to family reunification. In fact, all children should grow up in a family environment and be entitled to family reunification, when in their best interests (UNICEF, 2016).

Scholars also point out that beneficiaries of subsidiary protection should enjoy the same favourable conditions granted to refugees because of the similar push factors at the basis of their decision to leave their country of origin (Storgaard, 2016; Czech, 2016; Rohan, 2014). In this regard, according to the European Court of Human Rights, the difference in treatment needs to be reasonably justified, otherwise there would be a violation of Article 14 of the ECHR which prohibits discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The Court’s approach has recently shifted from a wide recognition for national prerogatives to a strong focus on the human rights of migrants (D’Odorico, 2018). Researchers propose to promote further EU harmonisation by
requiring Member States to provide objective and reasonable justifications in case of different treatments (Storgaard, 2016; Czech, 2016; Rohan, 2014).

2.2 Proving impossibility and hardship for non “refugees”

UNHCR recognises that where legislation does not provide for “a broad, flexible family definition, the practice of numerous States that permits family reunification on humanitarian and compassionate grounds or grounds of undue hardship could usefully be replicated in other States and, where this possibility exists, it could be used more regularly” (Nicholson, 2017). UNHCR emphasises that this practice has not a systematic application, but it is often discretionary and exceptional. However, it represents a fundamental tool to both protect very vulnerable individuals and enable States to comply with their international human rights obligations to respect the right to family life and family unity and the best interests of the child (Nicholson, 2017).

For instance, in Finland, persons with subsidiary, humanitarian or temporary protection must meet sufficient resources requirements when seeking to reunite with their family members. However, exceptions are allowed in exceptional cases, where there is a “pressing need or if the best interest of the child requires it”. Similarly, in Germany, beyond the core family, the law enshrines a provision granting wide margin of discretion to the authorities that permits the entry and stay of other categories of family members in order to avoid undue hardship. This clause applies in cases of dependency resulting from disabilities or severe illness, where no other person can sufficiently support the individual and further assistance can only be provided in Germany (UNHCR, 2017).

In March 2017, UNHCR observed that in practice almost no use had been made of this prerogative in Germany. It therefore recommended that the “use of this provision be routinely considered for subsidiary protection beneficiaries who would otherwise be excluded from family reunification and that the conditions for the grant of residence permits on humanitarian (hardship) grounds should be published”.

Another key policy option proposed by UNHCR to ensure that vulnerable family members and hardship cases have safe access to family reunion is the establishment of “programmes akin to the humanitarian admission programmes developed as part of the response to the Syrian crisis” (Nicholson, 2017). These programmes should involve vulnerable categories of refugees with urgent needs, such as medical needs, to secure them a residence permit on either permanent or temporary basis. Another example could be the adoption of “private sponsorship programmes” to enable vulnerable beneficiaries of international protection to safely move to Europe with the support of private citizens, NGOs, or faith-based groups.

2.3 Restricted timeframes for lodging an application
UNHCR outlines that the adoption of restrictive timeframes to apply for family reunification is a significant obstacle for beneficiaries of international protection. They may not be aware of the precise location of their family members and may have serious difficulties in collecting all the documentation required to lodge an application (UNHCR, 2012). As a result, UNHCR encourages Member States not to apply time limits to the use of the more favourable conditions granted to beneficiaries of international protection.

ECRE and Red Cross also propose to abolish short time limits for family reunification applications, unless they are adapted to permit a first provisional application to be made by the refugee in the country of asylum, allowing documentation and details to be submitted later (ECRE & Red Cross, 2014).

Researchers also acknowledge that sufficient time should be allowed to beneficiaries of international protection to apply for family reunification (Groenendijk, Costello & Storgaard, 2017; Nicholson F., 2018).

2.4 Concept of family member

UNHCR recommends Member States to implement ‘liberal criteria in identifying family members’ in order to include a broader category of family members under the scope of family reunification when dependency is shown between such family members (UNHCR, 2012). It is also proposed to adopt clear guidelines which define the meaning of ‘dependency’ in relation to a sponsor for the purpose of family reunification. UNCHR also supports the Commission’s assessment of Article 9(2) of the Directive which does not take sufficiently into account the particularities of the situation of refugees by allowing Member States to limit family reunification to those family relationships formed only before their entry in the EU. UNHCR therefore put forward the policy option to grant beneficiaries of international protection the same treatment as other legally residing third-country nationals, where the family is formed after the entry into a Member State.

Several organisations (CIEMI, Caritas Europe, Council of Europe Committee on Migration, ENAR, ETUC, International Commission of Jurists, Save the Children, TDHIF) call for a broader interpretation of the concept of family member that complies with human rights law’s requirements (European Commission, 2012). COFACE also emphasises that the Family Reunification Directive should reduce the discretion given to Member States with regard to the reunification of family members who are not part of the nuclear family (COFACE, 2017).

A similar position is supported by ECRE and Red Cross, which underline that Member States should systematically recognise the family reunification rights of dependent family members who are not covered by the concept of nuclear family. Furthermore, the meaning of dependency should not be merely assessed on the basis of financial and physical aspects, but should also include legal, emotional, social and security factors (ECRE & Red Cross, 2014). This policy option is widely
supported by academics who recommend adopting an extensive definition of family member eligible for family reunification (Groenendijk, Costello & Storgaard, 2017; Nicholson, 2018).

2.5 Children and unaccompanied minors

In order to improve the situation of children and unaccompanied minor, UNICEF identifies the best interests of the child as a priority of the family reunification procedure. In particular, it is proposed that procedures starting before the age of majority should not be interrupted or modified for the sole reason that the child has turned 18 (UNICEF, 2016). This policy option may be highly effective to overcome the obstacles stemming from the legal requirement according to which a minor must be under 18 when the decision on the asylum application is made. The UNICEF’s proposal has been recently implemented by the CJEU in the case of A and S v Staatssecretaris van Veiligheid en Justitie.

To the same extent, researchers suggest the policy option according to which a child must be regarded as such as long as the application for family reunification is submitted before he or she turns 18 (Groenendijk, Costello & Storgaard, 2017).

However, despite the CJEU ruling, in Germany a Foreign Ministry spokesperson declared that the Government would not implement this policy option (DRK-Suchdien, 2018). This practice may negatively affect a significant part of those 9,805 unaccompanied minors who applied for asylum in Germany in 2017 according to Eurostat data (Eurostat, 2018).

2.6 Lack of family tracing procedures and impossibility to access embassies

UNHCR encourages ‘Member States to use the possibility for consular representation offered by EU legislation for the issuance of visas for the purpose of family reunification where there is no embassy of the country of asylum in the family member’s country of residence’ (UNHCR, 2012).

Researchers also suggest ‘enable family reunification applications to be presented in the country of asylum, avoiding the need for families to make dangerous and costly journeys to embassies’ (Groenendijk, Costello & Storgaard, 2017). Measures should be implemented to ensure that embassies are in practice accessible, as for instance by enabling online applications and appointments. Moreover, it is pointed out that, if there is no embassy in the country of asylum, another Member State should be allowed to manage the issuance of visas.

A good practice has been found in Sweden where an application for family reunification can be submitted online directly by the sponsor. This option may benefit applicants who are unable to submit their applications themselves (European Migration Network, 2016). In addition, online applications reduce the need and costs to travel to a Swedish embassy in order to submit the application and improve the transparency of the entire process.
2.7 Burdensome and costly procedures

Researchers emphasise that Member States should not reject an application for family reunification for the sole reason that documentary evidence is lacking or not considered sufficiently reliable (Groenendijk, Costello & Storgaard, 2017). Information on the procedure and the documentation requirement should be available in different languages, posted on the public websites of embassies and made accessible in refugee camps. Moreover, to overcome the challenges families face in reunification procedures, a policy option would be to consider ‘issuing one-way laissez-passer documents to family members who cannot obtain national travel documents and accepting the Convention Travel Document (CTD) or travel documents of the International Committee of the Red Cross (ICRC).

With regard to the excessive costs of visa applications and embassy fees which may prevent family reunification, UNHCR calls on Member States to reduce or waive administrative and visa fees for beneficiaries of international protection. It is proposed that the European Commission and Member States could provide for financial support schemes in the next Migration and Asylum Fund under the Multi-annual Financial Framework for the family reunification of beneficiaries of international protection who lack enough resources to handle costly procedures (UNHCR, 2012).

To the same extent, to reduce practical barriers to family reunification, ECRE and Red Cross suggest making information on procedures and documentary requirements easy to access, by providing them in various languages and via relevant actors who support refugees in regions of origin. They also propose to reduce or waive administrative and visa fees and financially support those refugees who do not have sufficient economic resources to cover the costs of family reunification procedures (Red Cross & ECRE, 2014).

3. MAPPING THE PATTERNS OF DEBATE ON SOLUTIONS

3.1 The Commission’s Interpretative Guidelines

Among the research community and civil society actors there is wide consensus on the importance of providing more harmonised and favourable conditions for both refugees and beneficiaries of subsidiary protection when applying to family reunification in Europe. In particular, Member States should:

1. avoid discrimination between refugees and beneficiaries of subsidiary protection;
2. foster those legal practices allowing family reunification on grounds of undue hardship;
3. allow sufficient time for beneficiaries of international protection to apply for family reunification;
4. enlarge the definition of family members eligible for reunification and include family members who are dependent on the sponsor and the so-called post-flight families;
5. pay particular attention to children’s needs;
6. enable family reunification applications to be presented in the country of asylum;
7. ensure flexible and prompt family reunification procedures for beneficiaries of international protection and reduce or waive the documentation requirement.

Most of these policy options have been supported by the Commission which released Interpretative Guidelines in 2014 for a better enforcement of the Family Reunification Directive at national level. The Guidelines are not legally binding but aim to promote a uniform application and interpretation of the Directive’s provisions. The Commission has decided to not reopen the legislative debate concerning the Family Reunification Directive. This topic is not a top priority in the current EU policy agenda and there have not been any legislative developments since 2003 when the Family Directive was formally adopted. The Commission shows the political willingness to address the topic by means of soft law instruments rather than legislative measures (Conte C., 2018).

The Commission endorsed the first policy options advanced by researchers and stakeholders by clarifying that the Family Reunification Directive should not be interpreted as obliging Member States to deny beneficiaries of temporary or subsidiary protection the right to family reunification. The Commission agrees that the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees and encourages Member States to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection (European Commission, 2014).

As regards legal practices which allow family reunification on grounds of undue hardship, the Commission also noted that certain specific issues or personal circumstances must be taken into account when Member States apply integration measures. Specific individual circumstances include “cognitive abilities, the vulnerable position of the person in question, special cases of inaccessibility of teaching or testing facilities, or other situations of exceptional hardship”. In particular, the lower level of literacy of women and girls who do not have access to education in certain countries should be considered when assessing integration requirements.

The Commission acknowledges that beneficiaries of international protection encounter several barriers in applying for family reunification within the 3 months’ time limit. Therefore, the Commission points out that the removal of this time limitation is the most appropriate solution, otherwise Member States should consider those objective obstacles the applicant faces when assessing an individual application.

In addition, the Commission actively supported the recommendations to enlarge the definition of family members and prioritise the needs of minors in the EU legislative process. As part of the
Common European Asylum System (CEAS) reform, the Commission presented on 13 July 2016 the Proposal for a Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection. The new Proposal positively clarifies that the notion of family member should consider the different particular circumstances of dependency and those families formed outside the country of origin, but before their arrival on the territory of the Member States (Groenendijk, Costello & Storgaard, 2017). It also specifies that special attention should be paid to the best interests of the child. According to the Proposal, the concept of family member “should also reflect the reality of current migratory trends, according to which applicants often arrive to the territory of the Member States after a prolonged period of time in transit. The notion should therefore include families formed outside the country of origin, but before their arrival on the territory of the Member State”. The extended family definition in the Commission’s proposal is however relevant in the context of maintaining family unity, on the basis of which family members who do not qualify themselves as refugees are entitled to claim a residence permit and are entitled to the same rights granted to the refugee family member. The Commission’s proposal nor the recast Directive deals with the right to family reunification, which remains the subject of the Family Reunification Directive. Currently, the proposal on the reform of the Qualification Directive is still under negotiations between the Council and the European Parliament (Conte C., 2018).

The Commission also agrees that documentation requirements can be very challenging for refugees and their family members and may constitute a burdensome obstacle to family reunification. It therefore considers that MSs should facilitate the obtaining of travel documents and long-stay visas. To do so, MSs are encouraged to recognise and accept ICRC emergency travel documents and Convention Travel Documents, issue one-way laissez-passer documents, and offer family members the possibility of being issued a visa upon arrival in the MS (European Commission, 2014). Furthermore, the Commission recognises that family reunification procedures must be finalised within a reasonable time. In the Interpretative Guidelines, it is pointed out that, “if the workload exceptionally exceeds administrative capacity or if the application needs further examination, the maximum time limit of nine months may be justified” (European Commission, 2014).

4. MAPPING THE EVIDENCE BROUGHT

4.1 Evidences for a better implementation of the right to family reunion

Researchers (Storgaard, 2016) examined the legislative trends in the area of family reunification in some Member States (Norway, Denmark, Germany, Sweden and Austria).

It was found that Member States restrict access of third-country nationals to their territory in order to better control and manage large influxes of migrants. To do so, significant barriers have been put in place to hamper the possibility to enjoy family reunification rights by beneficiaries of subsidiary
protection. Member States justify their national policy because of the goals to avoid the breakdown of reception facilities and the decline of the integration process. This set of measures is considered effective by national governments to prevent negative attitudes against migrants. National authorities also underline that the decision to limit family reunification rights depends on the fact that the presence of migrants within the Member States’ territory is merely temporary.

By contrast, researchers underline that family reunion is a fundamental right of all beneficiaries of international protection which should not be used by Member States as a tool to stem migrations flows (Groenendijk, Costello, Storgaard, 2017; Nicholson, 2018).

International human right standards and EU law provisions require that individuals seeking international protection can reunify with their families in an effective way within a reasonable time. Member States must lift the existing obstacles and treat equally all individuals seeking international protection. Despite the efforts at EU level towards harmonising family rights for all beneficiaries of international protection, there is still room for manoeuvre for Member States to limit these rights, in particular for beneficiaries of subsidiary protection. Family reunification is instead an essential tool to protect the right of beneficiaries of international protection to family life and encourage their integration in the Member States (UNHCR, 2018). Studies show that family reunification is a crucial element to promote economic and social cohesion in the Member States (Beaton, Musgrave & Liebl, 2018). Moreover, effective family reunification procedures will have the positive impact of saving migrants’ life by means of safe and legal routes to Europe. As a result of restrictive or dysfunctional family reunification procedures, third country nationals entitled to family reunification under EU law are currently resorting to irregular and dangerous routes into the EU to be reunited with their family members.

4.1.1 The European Court of Human Rights

To uphold the policy options reported in this paper, scholars analysed key judgments of the European Court of Human Rights (ECtHR) concerning Articles 8 and 14 of the Convention, which developed a balancing test aiming to counterbalance the right of the State to control the entry, residence and expulsion of migrants with the individual rights to be reunited with their family (Czech, 2016; Storgaard, 2016). The ECtHR case-law shows that, under Article 8 of the Convention, Contracting States have the duty to facilitate reunification when family members are left behind on the basis of those circumstances motivating the recognition of the subsidiary protection status to the sponsor and where there is no alternative place for the family to reunite (Storgaard, 2016). In an important case, Kimfe v. Switzerland, the ECtHR emphasised the relevance of the “insurmountable obstacles” criterion in the proportionality assessment to accept or reject an application for family reunification. In Kimfe, the Court found that the “Government’s legitimate interest in immigration control was outweighed by the applicant’s interest in pursuing a family life” (Storgaard, 2016). The lack of any possibility for the family to reunite outside the Contracting State represents a crucial element in the proportionality assessment under Article 8 and the same decisive weight must be attributed to the “insurmountable obstacles” criterion in cases involving sponsors who are still at risk
of ill treatment in their country of origin. In another case, Tuquabo-Tekle v. The Netherlands, the Court similarly concluded that applications for family reunion needs to be carried out by taking into account the likelihood of risks for family members to be left behind.

The policy option to ensure flexible and prompt family reunification procedures and reduce or waive the documentation requirement finds also support in the ECtHR case-law. In the cases of Mugenzi v. France and Tanda-Muzinga v. France, the Court found that delays from authorities in assessing the family reunification applications is a violation of Art. 8 of the Convention (five years for Mr. Mugenzi and three and a half years for Mr. Tanda-Muzinga). In both cases, the ECtHR held that the refusal of French visa authorities to consider the certification of family composition released by the French asylum authorities was obstructing the right to family unit of beneficiaries of international protection (ECRE, 2014).

4.1.2 The European Court of Justice

Scholars also welcome the recent developments before the European Court of Justice in the case of K & B v Staatsecretaris van Veiligheid en Justitie. The Court found that Article 12(1) of Directive 2003/86 does not preclude national legislation which permits an application for family reunification on the basis of more favourable provisions to be rejected because it was lodged more than three months after the sponsor was granted refugee status, while affording the possibility of lodging a fresh application under a different set of national rules (Klaassen, 2018). The CJEU clarified that such different set of rules lay down the following: i) such a ground of refusal cannot apply to situations in which particular circumstances render the late submission of the initial application “objectively excusable”; ii) the persons concerned are to be fully informed of the consequences of the decision rejecting their initial application and of the measures which they can take to assert their rights to family reunification effectively; iii) the sponsors recognised as refugees must continue to benefit from the more favourable conditions for the exercise of the right to family reunification applicable to refugees, specified in Articles 10 and 11 or in Article 12(2) of the directive.

This judgment shows that even when applications are made outside the three-month period, the effectiveness of the right to family reunification should not be jeopardised by the application of the requirements under Article 7(1) Directive (M. Klaassen, 2018). This means that Member States can impose the conditions of Article 7(1), but cannot require family members to comply with integration measures from Article 7(2) Directive in case an application is lodged after the three months.
Annex

Overview of policy options

1. Discrimination between refugees and beneficiaries of subsidiary protection

<table>
<thead>
<tr>
<th>What is proposed</th>
<th>Beneficiaries of subsidiary protection should enjoy the same favourable conditions granted to refugees because of the similar push factors at the basis of their decision to leave their country of origin.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who is proposing it</td>
<td>ECRE, Red Cross, UNICEF, UNHCR, Care for Europe, Caritas Europe, Christian Group, COMECE, Council of Europe, ENAR, International Commission of Jurists, ILGA-Europe, IOM, TDHIF.</td>
</tr>
<tr>
<td>debated in the research community</td>
<td>Storgaard, 2016; Czech, 2016; Rohan, 2014.</td>
</tr>
<tr>
<td>What evidence is provided to argue that the proposal is effective?</td>
<td>Several Member States apply restrictive requirements for the family reunification of beneficiaries of subsidiary protection without taking into account individual circumstances and the conditions of vulnerable categories such as disabled and elderly people. According to the European Court of Human Rights, the difference in treatment need to be reasonably justified otherwise there is a violation of Article 14 of the Convention. The Court’s approach has recently shifted from a wide recognition for national prerogatives to a stronger human rights-based approach. ECHR developed a balancing test aimed to counterbalance the right to State to manage flows with the individual rights to be reunited with their family (Art.8).</td>
</tr>
<tr>
<td>Where does the proposal find support?</td>
<td>European Commission</td>
</tr>
</tbody>
</table>

2. Family reunification on grounds of undue hardship

<table>
<thead>
<tr>
<th>What is proposed</th>
<th>Foster legal practices allowing family reunification on grounds of undue hardship.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who is proposing it</td>
<td>UNHCR</td>
</tr>
<tr>
<td>debated in the research community</td>
<td></td>
</tr>
</tbody>
</table>
In March 2017, UNHCR observed that in practice almost no use had been made of this prerogative in Germany. It therefore recommended that the “use of this provision be routinely considered for subsidiary protection beneficiaries who would otherwise be excluded from family reunification and that the conditions for the grant of residence permits on humanitarian (hardship) grounds should be published”.

Where does the proposal find support?

3. Timeframe for beneficiaries of international protection to apply for family reunification

What is proposed
Allow sufficient time for beneficiaries of international protection to apply for family reunification.

Who is proposing it
proposed among UNHCR, Red Cross and ECRE


What evidence is provided to argue that the proposal is effective?
Several countries impose a ‘three-month time’ limit to apply for family reunification under more favourable conditions, otherwise additional stringent requirements have to be met by the sponsor. In practice, this deadline jeopardises family reunification because of the impossibility for beneficiaries of international protection to collect the necessary documents and timely attend appointments at the relevant embassies. Beneficiaries of international protection may not be aware of the precise location of their family members and may have serious difficulties in collecting all the documentation required to lodge an application.

Where does the proposal find support?
European Commission

4. The definition of family members

What is proposed
Enlarge the definition of family members eligible for reunification and include family members who are dependent on the sponsor and the so-called post-flight families.

Who is proposing it
proposed among Danish Refugee Council, UNHCR, Red Cross, ECRE, COFACE, CIEMI, Caritas Europe, Council of Europe Committee on Migration, ENAR, ETUC, International Commission of Jurists, Save the Children, TDHIF.

What evidence is provided to argue that the proposal is effective?

Article 9(2) of the Directive does not take sufficiently into account the particularities of the situation of refugees by allowing Member States to limit family reunification to those family relationships formed only before their entry in the EU. Moreover, the nuclear concept of family in practice excludes from family reunification several categories of individuals such as parents of adults, adult children, same sex partners and non-married partners who have not been able to live in a stable relationship with the sponsor.

Where does the proposal find support?

European Commission

5. Children and unaccompanied minors

What is proposed

Pay particular attention to children’s needs by recognising as ‘minors’ those third-country nationals or stateless persons who are below the age of 18 at the time of their entry into the territory of a Member State.

Who is proposing it

proposed stakeholders among UNICEF


What evidence is provided to argue that the proposal is effective?

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

Where does the proposal find support?

European Commission

6. Family reunification application

What is proposed

Enable family reunification applications to be presented in the country of asylum.

Who is proposing it

proposed stakeholders among UNHCR

debated in the research community Groenendijk C.A., Costello C., Storgaard H. L.; Nicholson F.
What evidence is provided to argue that the proposal is effective?

Several EU countries have closed their diplomatic offices in Syria and other countries of conflicts. This context forces individuals to apply for visa and undertake long and expensive journey in order to reach the country where the closest embassy is available. Measures should be implemented to ensure that embassies are in practice accessible, as for instance by enabling online applications and appointments. Moreover, it is pointed out that, if there is no embassy in the country of asylum, another Member State should be allowed to manage the issuance of visas.

Where does the proposal find support?

7. Family reunification procedures

What is proposed

Ensure flexible and prompt family reunification procedures for beneficiaries of international protection and reduce or waive the documentation requirement.

Who is proposing it

proposed stakeholders among UNHCR, ECRE and Red Cross

debated in the research community Groenendijk C.A., Costello C., Storgaard H. L.; Nicholson F.

What evidence is provided to argue that the proposal is effective?

The procedure to apply for family reunification is characterised by burdensome and costly requirements. Beneficiaries of international protection are required to submit official documents to apply for a residence permit and prove family links such as passport, birth and marriage certificates. However, the submission of these documents is in practice highly difficult as beneficiaries of international protection must approach the embassy of their country of origin to obtain the relevant documentation. This practice may increase the risk for them and family members of being persecuted in the country of origin. Furthermore, noncompliance with evidential and bureaucratic requirements may result in critical delays of the entire reunification procedure as cases are reviewed on a case-by-case basis. Beneficiaries of international protection often lack adequate access to detailed and precise information in a language that they can understand. Official authorities do not systematically provide sufficient information regarding requirements and deadlines to access family reunification and enjoy more favourable conditions.

Where does the proposal find support?

European Commission
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1. INTRODUCTION

The Global Compact on Refugees (GCR),\(^1\) endorsed by the United Nations (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, fair and equitable responsibility-sharing for hosting and supporting the world’s refugees among all UN Member States and other relevant stakeholders. Though non-legally binding, the Compact expresses the political ambition and will of UN members to stick to its guiding principles and implement its Programme of Action, advancing a set of arrangements for burden sharing and initiatives in key areas in need of support.

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. While recognising the key role played by states in advancing durable solutions for refugees, the GCR also calls for the establishment of a multi-stakeholder and partnership approach, which foresees the involvement of a broad set of actors – including independent civil society organisations, local communities and refugees themselves – in the design, monitoring and implementation of its actions.\(^2\)

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\(^2\) As stated in paragraph 3 of the UN GCR, its implementation engages the following ‘relevant stakeholders’: “international organizations within and outside the United Nations system, including those forming part of the International Red Cross and Red Crescent Movement; other humanitarian and development actors; international and regional financial institutions;
The GCR underlines the need to develop and facilitate mobility and admission channels for people in search of international protection. It seeks to enlarge the scope, size and quality of resettlement and to make available additional ‘complementary’ pathways to protection in a more systematic, organised and sustainable way. In support of efforts undertaken by states, the UN High Commissioner for Refugees (UNHCR) has committed to devising a three-year strategy (2019-2021) to increase the number of resettlement places in the scope of the already-existing multilateral resettlement architecture, involving additional countries in global resettlement efforts and improving the quality of resettlement programmes by fostering ‘good practices’ and new national and regional arrangements.

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, organised, sustainable and gender-responsive basis and to ensure they contain appropriate international protection safeguards. These are aimed 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. Specifically, the 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 migration avenues, which may include family reunification, education and labour opportunities (UNHCR, 2019).

The GCR provides a unique mirror to critically assess European Union (EU) policies on matters related to asylum and refugees, in particular in the framework of third country cooperation and arrangements. Existing literature on this Compact has placed increasing focus on its implementation challenges, particularly in light of its lack of legal ‘bindingness’ and its open-textured nature (Goodwin-Gill, 2019; Türk, 2019). The GCR relationship with the UN Global Compact for Safe, Orderly and Regular Migration (GCM) and its expected impacts on refugee mobility has also been addressed (Costello, 2019; Carrera, Lannoo, Stefan and Vosyliūtė, 2018).

Less attention has been paid to the opportunities that the GCR offers as a monitoring and assessment framework in two main areas: first, the role of the EU and its Member States, their compliance and

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3 Resettlement is defined by UNHCR as “the transfer of refugees from an asylum country to another State that has agreed to admit them – as refugees – with permanent settlement status. The status provided ensures protection against refoulement and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.” Refer to UNHCR Resettlement Handbook, retrievable from https://www.unhcr.org/46f7c0ee2.html The Handbook also states that “Resettlement is not a right, and there is no obligation on States to accept refugees through resettlement. Even if their case is submitted to a resettlement State by UNHCR, whether individual refugees will ultimately be resettled depends on the admission criteria of the resettlement State.”

4 The international architecture on resettlement includes Annual Tripartite Consultations and the Working Group on Resettlement. See: https://www.unhcr.org/partnership-resettlement.html
contribution towards the implementation of the GCR Programme of Action in ways that are loyal to the Compact and EU Treaties guiding principles; second, the operational implementation, as well as the main gaps and contested issues, of existing resettlement and complementary admission instruments for refugees and would-be refugees implemented at the EU and Member State levels.

In light of the previous, this Policy Brief examines the EU’s role in the implementation of the UN GCR. Section 2 starts by critically examining what we call the EU’s approach of ‘contained mobility’ which has been operationalised in the scope of EU third country arrangements like the 2016 EU-Turkey Statement. Section 3 covers the field of resettlement and highlights recent EU contributions and initiatives. Instruments falling under the notion of ‘complementary pathways’ are then examined in Section 4 (humanitarian visas), and Section 5 (other complementary pathways based on legal immigration channels). The brief concludes by recommending that the EU moves from an approach focused on ‘contained mobility’ towards one which is ‘facilitative’ (Aleinkoff, 1992), i.e. placing refugee’s rights and agency at the centre through facilitated resettlement and other complementary pathways driven by a fundamental rights, protection and humanitarianism rationale, and which is loyal to principles laid down in the EU founding Treaties and Member State constitutional traditions.

2. THE EUROPEAN UNION AND THE GCR: THIRD COUNTRY ARRANGEMENTS

The academic literature has brought to light the role that EU cooperation on migration and asylum matters has played in the development of policy and legal instruments focused on ‘containment’ of asylum seekers and refugees in countries of origin or transit. Since the 1990s, several European countries have actively engaged in the adoption of restrictive domestic policies driven by migration management priorities and focused on the prevention of entry and expulsion of asylum seekers. These have included, among others, restrictive visa policies, carrier sanctions, readmission agreements and arrangements, and the use of safe third country notions (for an analysis refer to Aleinkoff, 1992; Shacknove, 1993; Chimni, 1998).

Already in the early 90s, Aleinkoff (1992) identified a restrictive move in European asylum policy prioritising state controls over admissions and resettlement and underlined the existence of a containment or source-control bias aimed at removing the so-called ‘root causes’ of refugee mobility in countries of origin of refugee flows. In his view, “refugee law has become immigration law emphasising protection of borders rather than protection of persons”. Along the same line, Shacknove (1993) underlined states’ “immigration control mentality” translating into policies aimed at forcing asylum seekers into patterns of immigration, pre-empting their entry or containing them in countries of transit or origin.
Some of these same policies guided by non-arrival and non-admission logics\textsuperscript{5} have, since 1999, found their way into EU legal instruments, taking the shape of a common EU visa and border (Schengen) policy, EU readmission agreements and arrangements, carrier sanctions and the inclusion of provisions of ‘safe country concepts’ in EU asylum legislation (Byrne, Noll and Vedsted-Hansen, 2002; Costello, 2005; Scholten, 2015; Carrera, 2016; Costello, 2016; Costello, 2017; Carrera, 2018). As a consequence of this consolidated EU and national legal and policy framework centred on containment, refugees face overwhelming legal and practical barriers in accessing protection in the EU. Savino has rightly pointed out that the resulting paradox is one where EU policies “feed the very same phenomenon of unauthorised arrivals – that the broader EU migration policy intends to curb” (Savino, 2018).

When assessing the GCR, and its nexus with the GCM, through the lens of refugee containment literature, Costello (2019) reminds us how migration control practices suppress refugee mobility and bear down particularly heavily on refugees and would-be refugees. In her view, the bifurcation of the UN GCR and the GCM into two separate processes risks solidifying a distinction between the categories of ‘refugee’ and ‘migrant’ that has important consequences for refugee mobility and rights. This approach artificially reframes many people in search of international protection as ‘migrants’ and may lead to an unlawful side-lining of states’ international and regional human rights and refugee law commitments. While acknowledging the positive potential, inherent in the GCR design, to develop better resettlement opportunities, Costello (2019) points out the risk that the UN GCR “may serve to legitimate refugee containment, rather than open up greater mobility opportunities for refugees”.

During recent decades, the EU has developed a complex and diversified matrix of policy, legal and financial instruments to involve third countries in the management of migration, borders and asylum. More recently, scholars have identified how ‘in the name of the 2015 European Refugee Humanitarian Crisis’, EU cooperation with third countries on asylum and migration has been re-prioritised, leading to the adoption of a number of non-legally binding political ‘arrangements’. The literature has identified a shift in EU policy: from an approach emphasising formal cooperation through legal acts and international agreements, towards another calling for informal channels and political tools or non-legally binding/technical arrangements of cooperation often linked to emergency-driven EU financial tools (Carrera, den Hertog, Panizzon and Kostakopoulou, 2018; and Carrera, Santos and Strik, 2019).

\textsuperscript{5} Byrne, Noll and Vedsted-Hansen (2002: p. 13) have differentiated between ‘non-admission policies’, understood as instruments applying restrictive criteria for asylum seekers to be admitted and have access to assessment procedure and to territory and ‘non-arrival policies’ aimed at keeping asylum seekers at a distance from any asylum procedure or any possible territory of protection.
A case in point has been the conclusion of the 2016 EU-Turkey Statement (Carrera, Santos and Strik, 2019), which is controversially portrayed by some EU actors as a ‘model’ to be replicated in other EU third country arrangements. The ‘deal’ set up an operative framework under which asylum seekers having irregularly entered Greece via Turkey, or been intercepted in Turkish waters, would be returned to the latter. At the same time, it included the so-called ‘one-for-one’ (1:1) resettlement arrangement, according to which, for every Syrian returned from Greece to Turkey, another Syrian would be resettled from Turkey to the EU. The Statement was based on the political framing of Turkey as a ‘safe third country’, despite the fact that the country is not bound by the 1967 Protocol to the United Nations Geneva Convention on Refugees (thus it refuses to recognise full refugee status for non-European asylum seekers), and the wealth of evidence about the human rights violations and rule of law challenges in the country (Amnesty International, 2017; Council of Europe, 2017).

The EU-Turkey statement is an exemplary case illustrating how the containment bias often comes with specific forms of mobility and admission for refugees. The Statement in fact provides both containment and mobility elements in its priorities and design, and may be seen as a living instance of an EU ‘contained mobility’ approach. Such an approach combines aspects on containment – e.g. safe third country rules, border surveillance and interception at sea – with others on mobility, yet a kind of mobility that presents highly selective and restrictive features, e.g. 1:1 only covering Syrian nationals.

The Statement is a political declaration coming in the guise of a press release. The academic literature has expressed concerns about the strategic political ‘non-use’ of EU Treaty instruments that escape democratic scrutiny by the European Parliament and judicial control by the Court of Justice of the EU in Luxembourg, and the non-compatibility of this approach with the EU Treaty principles of inter-institutional balance and sincere and loyal cooperation (Carrera, den Hertog and Stefan, 2019; Carrera, den Hertog and Stefan, 2017).

There has also been substantial disagreement as regards the actual authorship of the EU-Turkey Statement, and the extent to which any EU institution was involved in its adoption. Surprisingly for many, the Luxembourg Court confirmed that it was a product of the Heads of Government and State of EU Member States, and not of any EU actor (including the European Commission). Irrespective of who the actual author was, EU institutions and agencies such as Frontex and EASO have been central in its operational implementation and financial support through the so-called ‘EU Facility for Refugees in Turkey’ (Carrera, 2019).

This has been acknowledged by the European Ombudsman, which in a Joint Inquiry issued on January 2017, reminded the Commission about its obligation to ensure robust human rights impact assessments of the Statement (European Ombudsman, 2017). The implementation of the EU-Turkey statement is an exempla

Statement has raised fundamental questions regarding the independence of civil society actors and non-governmental organisations in the Greek islands and the Hotspots. Many civil society actors decided to stop providing services and assistance to asylum seekers and leave the country due to the human rights challenges that the operationalisation of the Statement posed to their ethos, independence and humanitarian assistance principles (Carrera, Mitsilegas, Allsopp and Vosyliute, 2018). On the occasion of the third anniversary of the Statement in March 2019, a group of twenty-five civil society organisations sent an open letter to European leaders, reiterating their concerns about the ‘unfair and unnecessary containment policy’ implemented via the deal, which is still forcing around 12,000 refugees and asylum seekers to live in degrading conditions in hotspots on the Greek Islands.  

The human rights violations inherent in its practical implementation in Turkey and Greece have been well documented (Carrera, den Hertog and Stefan, 2019; Médecins Sans Frontières, 2019). The selective mobility logic included in the one-for-one resettlement scheme – which only covers certain Syrians – is contrary to established principles of international refugee law, which lie at the basis of the UN GCR. In particular, the scheme violates the prohibition of non-discrimination based on country of origin as laid down in Art. 3 of the 1951 Geneva Convention (Carrera and Guild, 2016). Finally, the effectiveness of the ‘deal’ has been largely questioned. The limited number of Syrian refugees that have been returned to Turkey in the framework of the Statement (337 from April 2016 to December 2018), as well as the total number of returns (only reaching about 2,000 over the same period) is a clear demonstration of the legal obstacles that arise when wrongly applying the safe third country concept (UNHCR, 2018a). Moreover, the EU-Turkey Statement has not prevented mobility from happening. According to statistics provided by 2019 Frontex Risk Analysis, in 2018 there were about 56,000 irregular border crossing from Turkey to Greece, in comparison to 42,000 entries in 2017 (Frontex, 2019). In light of the above, the EU-Turkey Statement provides a ‘non-model’ of third country cooperation and sharing of responsibility as it stands at odds with the human rights and refugee protection principles at the basis of the UN GCR and the EU Treaties.

3. RESETTLEMENT

Resettlement has represented the main channel for providing recognised refugees in first countries of asylum access to EU Member State territory. It involves the selection and transfer of refugees from a state in which they have sought protection to a third state which has agreed to admit them – as refugees – with permanent residence status. Identified as a ‘durable solution’ by the UNHCR,

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7 See NGOs calling on European leaders to urgently take action to end the humanitarian and human rights crisis at Europe’s borders. [https://oxfam.app.box.com/v/3yearsEUTurkeyDeal](https://oxfam.app.box.com/v/3yearsEUTurkeyDeal)
resettlement targets specifically vulnerable refugees that cannot enjoy an adequate level of protection in their country of first asylum (e.g. victims of torture, women and girls at risk, people in need of medical treatment not available in the country of residence) (European Resettlement Network, 2019).

The number of resettlement beneficiaries remains by and large in hands of relevant country governments. According to UNHCR data, after a growth in global resettlement quotas over the period 2012-2016, resettlement opportunities saw a steep reversal in 2017; in fact, the 20-year record high of 163,200 submissions in 2016 was more than halved in 2017, when only 75,200 refugees were submitted for resettlement. This negative trend should be read against the background of a global context characterised by unprecedented displacement and approximately 1.4 million refugees estimated to be in need of resettlement in 2019 (UNHCR, 2018b).

Traditionally, resettlement activities have been carried by a group of Member States outside the EU framework through the implementation of national resettlement programmes or ad hoc initiatives targeted to specific populations of refugees. Since 2000, the European Commission considered the potential establishment of a common EU approach on access to the territory for people in need of protection, including the option of “processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme” (European Commission, 2000). This was followed up with a Study exploring the feasibility of implementing so-called ‘Protected Entry Procedures’ (PEPs) in EU Member State diplomatic representations, which would allow asylum seekers to submit an asylum claim and be granted with an entry permit by a potential destination country outside its territory (Noll, Fagerlund and Liebaut, 2002). While the Commission followed up the reflection on some of these initiatives (European Commission, 2003), the discussion on the development of a common EU approach on legal and safe avenues was stalled when it reached EU Member States in the Council, which opposed ‘more EU’ in these areas.

Instead, the focus was then shifted to coordinating Member State resettlement efforts. The first EU joint action on resettlement date back to November 2008, when the EU Justice and Home Affairs (JHA) Council agreed to resettle 10,000 refugees from Iraq (ERN 2019). Following that experience, cooperation at the EU level was formalised in 2012 with the launch of the Joint EU resettlement Programme, which established a framework of voluntary participation of Member States in resettlement activities. Specifically, the Joint EU Resettlement Programme introduced a mechanism for setting common annual priorities on resettlement linked with the provision of financial incentives

8 The Study presented five main proposals for future EU policies, in particular: a flexible use of the visa regime that includes a protection dimension; the introduction of a sponsorship model which involve civil society actors in the area of selection funding and integration of beneficiaries of PEPs; the establishment of EU Regional Task Force supporting third countries’ authorities in processing of asylum claims and identifying people to be granted access in the EU; gradual legislative harmonisation through an EU Directive laying down best practices; and, finally, full harmonisation through an EU regulation on a so-called ‘Schengen Asylum Visa’. Refer to Section 7.2.2 of the Study.
to those Member States accepting to take part in the programme. The Commission motivated the establishment of the programme by the need to strengthen the EU global role in the field of resettlement, underlying that EU Member States accounted at the time less than 7% of refugees resettled worldwide (European Commission, 2009).

In spite of EU attempts to coordinate its resettlement efforts, expectations for a substantial increase in resettlement pledges by Member States in the following years were largely unmet (van Ballegooij and Navarra, 2018). However, since 2016, with the unfolding of the so-called European humanitarian refugee crisis and in line with global efforts promoted by the UNHCR, EU Member States initiated a number of ad hoc initiatives in this field.

In June 2015, the Commission adopted a proposal on a European Resettlement Scheme, which was followed by an agreement among the Member States in July the same year to resettle 22,504 persons in clear need of international protection over the following two years. As mentioned in the previous section, a resettlement component (the ‘one-to-one’ mechanism) was also included in the framework of the 2016 EU-Turkey Statement. The Statement specified that resettlement under this mechanism should take place, first, by filling the places still unallocated under the July 2015 Resettlement scheme and, afterwards, through a similar voluntary arrangement up to a limit of an additional 54,000 persons. In its Progress report on resettlement of 6 September 2017, the Commission stated that the total number of people resettled under both the 20 July 2015 scheme and the EU-Turkey deal since their launch was 22,518.

However, the Report also pointed to obstacles in implementation, underlining that nine Member States had not yet resettled under the 20 July 2015 scheme and thirteen Member States had not resettled under the EU-Turkey Statement (European Commission, 2017). In September 2017, recognising growing resettlement needs at the global level and the need for additional efforts by the EU, the Commission adopted a recommendation on enhancing legal pathways for persons in need of international protection, including the target to resettle 50,000 persons in the following two

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9 To meet resettlement needs under the EU-Turkey deal, in September 2016 it was decided to amend the Decision on intra-EU Relocation to the benefit of Italy and Greece adopted in September 2015 to make it possible for Member States to fulfil their obligations in relation to 54,000 places under that Decision by resettling Syrians from Turkey instead than relocating asylum applicants from Italy and Greece. See Council Decision 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2016] OJ L268/82.

years. According to the Commission, at the end of 2018, 15,900 out of the 50,000 places agreed had been filled (European Commission, 2018a).

Civil society and international organisations such as the UNHCR have consistently advocated for expanding resettlement places in Europe. Stakeholders active in the field of refugee protection have underlined the importance that the EU start coordinating its pledges in the area of resettlement in view of the first Global Refugee Forum to be held in December 2019, going beyond the 50,000 places already pledged in September 2017 (ECRE 2019). Civil society has also stressed the importance of going beyond traditional state-led resettlement programmes and exploring alternative instruments, such as community and private sponsorship programmes. In the context of resettlement, private and community sponsorship programmes involve a transfer of responsibility from government agencies to private actors for some elements of the identification, pre-departure, reception, or integration process of resettled refugees.

While recognising the value-added that a strengthened public-private partnership approach may bring to the implementation of resettlement programmes, sponsorship schemes should be based on the principle of additionality, meaning the beneficiaries must be admitted in addition to those who enter through government-supported programmes. From the point of view of procedures, there is a need to better ensure the integrity, certainty and non-discriminatory nature of selection procedures and vulnerability determination of applicants (ERN, 2017; ECRE & PICUM, 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”. 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 numbers resettled in Europe (Commission 2016). The Commission’s proposal provides a common definition of the notion of resettlement, the factors to be considered for including non-EU countries from where resettlement would occur and a set of common eligibility criteria and grounds for exclusion of applicants. It would establish common procedures and annual Union resettlement plans with targeted resettlement schemes 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 UN GCR. This includes a close linkage and inter-

12 Art. 2 of the Proposal defines resettlement as “the admission of third-country nationals and stateless persons in need of international protection from a third country to which or within which they have been displaced to the territory of the Member States with a view to granting them international protection”.
13 See Arts. 7 and 8, as well as 10 and 11 on procedures.
dependency between restrictive mobility and admission possibilities through resettlement and border and migration management. 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 (Cortinovis, 2018).

The introduction of a logic of ‘contained mobility’ in the EU Resettlement Framework has been one of the key stumbling blocks during trilogue talks between the EU co-legislators during the last two years. Specifically, recalling the position of several stakeholders, the European Parliament stressed in its Report 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”. Member States, on the other hand, have been consistent in underlining the importance of resettlement as a “strategic instrument to manage migration by helping to reduce the incentives for irregular migration” (Council of the European Union, 2018).

Several civil society actors having played an active role in the implementation of current resettlement programmes issued a Joint Comments Paper on 14 November 2016 that raises important concerns about the proposed Union Resettlement Framework.¹⁴ 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 lay at the heart of the UN GCR guiding principles. The kind of cooperation envisaged in the Commission proposal has been seen as posing major risks that refugees will be expelled to their country of origin in direct contravention of the non-refoulement principle (Savino, 2018).

UNHCR comments on the Framework raised additional concerns about the provision in the proposal to include family members as a separate category of eligible persons under the Framework (UNHCR, 2016). According to the UNHCR, the Framework would in this way contribute to blurring the

distinction between resettlement as a tool for protection (focusing on vulnerability criteria) and family reunification, which should be kept independent of resettlement targets and quotas. The UNHCR also recommended that the Union framework should avoid duplications with already existing structures and take place under “the existing international resettlement architecture”. Importantly, it also pointed out that it “understands States’ concerns and desire to deploy various tools to effectively manage migration. Yet, resettlement is, by design, a tool to provide protection and a durable solution to refugees rather than a migration management tool” (emphasis added).

4. HUMANITARIAN VISAS

The UN GCR calls for increasing the availability and predictability of complementary pathways which could include “humanitarian visas, humanitarian corridors and other humanitarian admission programmes”. There is not a commonly held and agreed international and EU definition for each of these three categories. The notion of ‘humanitarian admission’ is usually understood an ‘umbrella concept’ encompassing several sub-programmes, amongst which are referral mechanisms designed to provide expedited and time-efficient asylum processing and providing temporary protection to refugees (ICMC Europe, 2015). It can capture several protection tools such as Humanitarian Admission Programmes (HAPs), amongst which there are humanitarian visas and corridors, and others such as family reunification programmes (See Section 5 of this paper below). Existing research on HAPs shows high disparities and a wide-range of fragmented national-specific instruments and programmes across the EU (ERN+, 2018).

In the aftermath of the European humanitarian refugee crisis, the issuing of humanitarian visas to people in need of protection has been proposed by a wealth of civil society actors and scholars, fostering a debate about the added value for the adoption of a common set of EU rules in this area. A key difference between humanitarian visas and resettlement is that while the latter is addressed to those that have been already been accorded refugee status by the UNHCR, humanitarian visas would provide a means of access to asylum seekers in urgent need of protection whose actual Refugee Status Determination (RSD) is yet to be established. A study conducted in 2014 to take stock of Member State experiences in issuing humanitarian visas came to the conclusion that a total of 16 Member States were at the time running (or had run in the past) some form of scheme for issuing humanitarian visas, while recognising the lack of comprehensive and comparative qualitative and statistical knowledge on existing practices (Iben Jensen, 2014).

Besides programmes carried out by Member States based on national law, there is at present no EU legal framework for humanitarian visas. While the EU Visa Code allows derogations from the procedural and substantive criteria required for obtaining a visa based on “humanitarian grounds”, it does not expressly include a clear and consistent procedure for issuing Schengen visas for the purpose of reaching the territory of a Member State in order to seek international protection. This
was confirmed by the Court of Justice of the EU (CJEU) in the case between Syrian asylum-seekers v. the Belgian state (*X and X v. Belgium*),\(^{15}\) where it concluded that humanitarian visas were a matter of national law and policy. Scholars have however argued that the Luxembourg Court ruling completely disregards the extraterritorial application of the EU Charter of Fundamental Rights and its Articles 4 (Prohibition of torture and inhuman or degrading treatment or punishment) and 18 (right to asylum), and provides a too narrow and restrictive interpretation of Article 25.1 of the EU Visa Code, in particular the obligation to issue a short-term visa with limited territorial validity (Brouwer, 2017a; Brouwer, 2017b).

Currently, the main ‘refugee producing countries’ at the global level are included in the so-called EU visa “black list”, which implies that citizens of those countries must be in possession of a visa to cross the border and enter the Schengen area legally.\(^{16}\) This in turn implies that applicants from those countries should fulfil relevant criteria for obtaining a visa specified by the EU Visa Code, including evidence of an intention to return to their country of origin, which is obviously an unreasonable and disproportionate condition to apply in the case of refugees and other beneficiaries of subsidiary or complementary forms of international protection (Moreno-Lax, 2018; Brouwer, 2017a).

The reform of the EU Visa Code, initiated in 2014 by the European Commission, represented an opportunity for introducing a common EU approach on humanitarian visas. However, during trilogue negotiations that started in May 2016, the Council opposed the inclusion of provisions related to humanitarian visas put forward by the European Parliament. In light of diverging views in the Council, the Commission and the European Parliament, which mainly related to the Council and Commission’s opposition to include humanitarian visas in the EU Visa Code, the Commission withdrew its former proposal\(^{17}\) and published a new one in March 2018.\(^{18}\)

Following the refusal by Member States to consider provisions on humanitarian visas in the context of the reform of the EU Visa Code, the LIBE Committee decided to draft a Legislative Own-Initiative Report on Humanitarian Visas, requesting that the Commission submit a legislative proposal for a separate legal instrument in the form of a Regulation by 31 March 2019. The Report, formally adopted by the EP plenary in November 2018, recommends the introduction of a new legislative

\(^{15}\) CJEU, 7 March 2017, C-638/16 PPU, *X. and X. v. Belgium*.


instrument, a 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.

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 a person in need of international protection to enter the EU to seek asylum, and the corresponding obligation for the Member States to admit such a person (European Commission, 2019). According to the Commission, this stems from the fact that the 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, is problematic in line of extraterritorial protection-related obligations under the Charter of Fundamental Rights of the European Union (CFR). As argued by legal scholars, the CFR (including obligations of non-refoulement) applies whenever member states act within the scope of EU law (Art. 51 CFR), with territoriality non being a decisive criterion (Moreno Lax, 2018).

Furthermore, the Commission recalls the process of negotiation of the Union Resettlement Framework, on which co-legislators reached a political compromise in June 2018 and which now requires “full attention” from EU institutions. In a way that blurs the distinction between the specific rationales and different categories of targeted beneficiaries of these two instruments, the Commission concludes that, once adopted, the Union Resettlement Framework would have the potential to achieve the same objective pursued by the EP initiative on humanitarian visas, namely increasing the number of persons in need of international protection admitted into the EU.

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 and academia, 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 clear set of rules in this area would be instrumental in introducing a mechanism of safe and legal access to international protection in 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 (ECRE, 2019).

The European Parliament proposal was also informed by a Study (European Added Value Assessment accompanying the European Parliament’s legislative own initiative report) on Humanitarian Visas (van Ballegooij & Navarra, 2018). The Study emphasised that “EU legislation does not provide clear and complete standards on admission to the EU for asylum seeking purposes and that there is no
common understanding of the applicable practical arrangements”. The Study called for the need to ensure safe and legal pathways for people searching international protection in the EU and concluded that “one may reasonably expect a significant portion of migrants travelling to the EU to seek asylum through irregular means to apply for an EU humanitarian visa, thus reducing irregular migration flows to the EU”. It also provided evidence on the negative fundamental rights effects as well as the impacts of the current lack of a formalised humanitarian visa system at EU level on individuals, Member States and the Union as a whole.

The same EP study underlined that existing ‘Protected Entry Procedures’ (PEPs) adopted by EU Member States tend not to be open-ended, but quota-based, geographically bounded and limited in time, with highly complex selection criteria and not always protection-driven (Moreno-Lax, 2018). Existing admission schemes are also criticised for their lack of publicity, transparency and predictability and for non-alignment with legal certainty and rule of law standards. A key challenge relates to exact ways in which the integrity of the selection procedures of potential beneficiaries takes place in practice. The risks of corruption, extortion and clientelism when managing humanitarian visas schemes has been recently illustrated in the case of Belgium, with a local representative of the Flemish nationalist party N-VA suspended from his functions on account of allegations of selling humanitarian visas to refugees. According to revelations by investigative journalists, the local mayor allegedly charged the refugees a fee in order to be placed on a list of names eligible for the visa that he later sent to the then-immigration minister Theo Francken (Euronews, 2019).
5. COMPLEMENTARY PATHWAYS BASED ON LEGAL IMMIGRATION CHANNELS

Besides resettlement and other humanitarian entry channels, the UN GCR calls for additional complementary pathways to protection, by making flexible use of existing immigration policy tools, such as family reunification, study and mobility channels. Facilitating visas for the family members of beneficiaries of international protection that are already present in a Member State would be a straightforward way to use current immigration tools to assist safe access to the EU. To achieve that objective, the term ‘family member’ could be interpreted more widely (Collett et al., 2016).

The literature has understood that facilitating family reunification instruments and arrangement for refugees has been considered an essential pre-requisite for ensuring an effective delivery of the human right to family life stipulated in Article 8 of the European Convention of Human Rights, and Article 7 of the EU Charter of Fundamental Rights (Costello, Groenendijk and Halleskov, 2017). The European Court of Human Rights (ECtHR) in Strasbourg has held that in the case of refugees and others who are non-removable or expellable, there are ipso facto insurmountable obstacles for establishing family life in their country of origin. Establishing new entry channels for extended family members, however, may prove difficult considering the range of obstacles and restrictions that beneficiaries of international protection are currently facing to reunite even with core family members in several EU Member States (Conte, 2018).

Additional pathways to protection could also be created through enhanced opportunities for refugees to arrive safely in the framework of study or education programmes. This objective could be pursued first by ensuring that existing academic scholarship and apprenticeship programmes take into consideration the specific challenges faced by refugees in accessing those programmes, 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 programmes specifically targeted to refugees (UNHCR, 2015). In the aftermath of the Syrian crisis, promising practices have been introduced by some EU Member States, as well as the European Commission, such as the creation of partnerships with higher education institutions to offer ad hoc opportunities for refugees to come to Europe for their studies. While the numbers of refugees that have benefitted from these opportunities have generally been low, there is a need to carry out an independent evaluation of these programmes and potentially expand them in a way that is both sustainable and protection-sensitive (European resettlement network, 2017).

The same flexible and protection-based approach could also be explored to allow refugees access to existing labour mobility opportunities. This would require removing the legal, administrative, and informational barriers that often prevent refugees from accessing existing labour opportunities. As a further step, entry programmes specifically targeted at refugees could also be introduced, in consultation and partnership with the social partners, including interested employers and recruitment agencies of destination countries and in full compatibility with international labour

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19 Mengeshar Kimfe v. Switzerland, Judgement 9 July 2010, Application No. 24404/05.

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 programmes to facilitate reunion with extended family members should by no means be considered as an option for restricting the right to reunite with family members and facilitate family unity. 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 (Norwegian Refugee Council et al., 2018).

Furthermore, the admission of people in need of international protection, including those entering through migration-related channels, should be accompanied by comprehensive post-arrival integration policies. An individualised and tailored (follow-up) approach has proved particularly crucial for ensuring effective and durable labour market insertion by immigrants and refugees (Carrera and Vankova, 2019). Restrictive mandatory civic and language integration programmes, and restrictive family reunion policies, have undermined human rights and inclusion of asylum seekers, refugees and beneficiaries of subsidiary protection (Carrera and Vankova, 2019). Instead, voluntary introduction and labour insertion measures focused on skills provision and practical information on rights and entitlements at work can play a key role in successful socio-economic inclusion. Well-designed integration policies offering language courses, skills/qualifications-recognition and personalised professional training may facilitate refugee inclusion into their labour market and reduce the risks of exploitation, irregular work, and low wages and unfair working conditions. Adequate and long-term financial state support is central here (Carrera and Vankova, 2019).

**CONCLUSIONS**

The UN GCR provides a basis for predictable and equitable responsibility-sharing among all UN members and other international actors on refugee protection, thus addressing a major gap in the international protection regime since its creation in the 1950s. Its adoption raises the crucial question as regards the exact role and contributions by the EU, and its Member States, in its faithful implementation in line with its guiding principles and in full compliance with human rights and refugee law standards and EU Treaty principles. The GCR arrives in an EU policy context where the focus is mainly on shifting responsibilities on refugees towards third countries of transit and/or origin, which sometimes include admission or mobility opportunities and instruments that are highly
selective, discriminatory and migration-management driven. Current EU legal instruments, policy/political (non-legally binding) arrangements and emergency-driven funds give an overwhelming priority to non-admission of refugees and would-be refugees.

EU instruments and arrangements with third countries rely on expulsions (including so-called ‘voluntary repatriation’), non-arrival measures and addressing ‘the root causes of migration and refugee’ movements in countries and regions of origin. These policies exemplify a contained mobility logic. Restrictive and selective mobility/admission arrangements for refugees have been progressively consolidated and used in exchange of, or as incentives for, third country commitments to EU readmission and expulsions policy, with little consideration of their concrete negative impacts on human rights and international and regional refugee commitments, or their role in increasing ‘incapacity’ in third countries to uphold the rule of law, human rights and refugee protection standards.

This has come along with a reframing of individuals in search of protection from ‘refugees’ (thus legitimate beneficiaries of international protection) to ‘migrants’, which rests on the wrong assumption that they cannot rely on legal entitlements to seek asylum in the EU, and that Member States have no obligation to deliver refugee and human rights to them. It is in this respect that the relationship between the UN GCR and the GCM calls for close and detailed scrutiny during their implementation phases, including the effects of involving international organisations with no human rights and refugee protection firmly anchored in their mandates and statuses (Guild, Grant and Groenendijk, 2017). This is even more necessary in light of the existence of ‘complementary’ and/or ‘legal’ pathways for admission to refugees such as humanitarian admission programmes across EU countries – relying by and large on scattered, fragmented and obscure selection procedures, which do not clearly meet solid integrity, non-discriminatory selection and transparency standards, and involving a diversity of implementing actors.

The EU and its Member States could play a key role in ensuring that the UN GCR will make a difference in contrast to the current state of play in responsibility-sharing arrangements. A coordinated EU position in GCR implementation would be a most welcome way forward. EU Member States should refrain from undermining the effective implementation of the UN GCR, otherwise they would be infringing their obligation of sincere and loyal cooperation as established in Article 4.3 TEU. Such a coordinated EU position should give firm priority to human rights and refugee protection over an approach focused on containment bias (Guild and Grant, 2017).

In line with the guiding principles included in the GCR, calls have been made to EU and national policymakers to increase the scope of legal avenues for protection in Europe, through resettlement and other complementary pathways that are driven by a fundamental rights, protection and humanitarianism 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. As called for by the European Parliament, a set of common EU rules laying down a formal procedure for lodging and processing of applications for humanitarian visas would be instrumental in ensuring that
Member States comply with their protection obligations by issuing a visa on humanitarian grounds when this is necessary to prevent violations of the fundamental rights of the individuals concerned.

Attention is increasingly paid by a number of stakeholders to how to create additional non-humanitarian pathways to protection in the EU. Enabling entry for family members is a straightforward way of offering greater protection and guaranteeing the integration of refugees and beneficiaries of subsidiary forms of protection by upholding the right to family life. Current family reunification criteria could be made less burdensome and expanded. The possibility should be considered to facilitate entry of refugees through already existing or specifically designed education and labour migration channels. While the potential of complementary pathways to expand protection in the EU should be fully explored, those channels should be seen as additional to those already established by Member States, and ensure that beneficiaries are protected against *refoulement* and can access the asylum process in their country of residence.

The impact of contained mobility policies discussed in this Policy Brief should be considered in a context where EU external funding (in particular development funds) is increasingly mobilised in pursuit of similar non-admission and non-arrival objectives. Channelling EU development funds into the framework of ‘extra treaty’ arrangements with third countries that are driven by such an approach is not in line with UN Sustainable Development Goals (SDGs) or UN GCR principles and is not conducive to durable protection-driven solutions for refugees and other forced migrants. Development cooperation should not be ‘Euro-centric’ and instead aim mainly to meet the needs of developing countries. The ongoing negotiations on the next MFF 2021-2027 should centre on increasing the transparency and accountability of EU funding instruments, limiting emergency-driven funding tools and ensuring full consistency between EU external migration and refugee policy and the humanitarian and development principles enshrined in EU Treaties and UN human rights and refugee law commitments.

The following years will show whether the implementation of the UN GCR will be able to facilitate the establishment of a global responsibility sharing framework driven by international refugee protection and human rights considerations, where not only state actors, but also a wider set of stakeholders, including civil society and refugee organisations as well as refugees themselves are mobilised in assessing and delivering ‘solutions’ to the emerging refugee protection challenges at the global level. A substantial improvement is needed in the current policy responses adopted by the EU and its Member States to provide an effective contribution to the achievement of the common goals laid down in the GCR.
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1. INTRODUCTION

Search and Rescue (SAR) and disembarkation of persons in distress at sea in the Mediterranean continue to fuel divisions among some EU member states. The ‘closed ports’ policy declared by the Italian ministry of interior in June 2018, and the ensuing refusal to let non-governmental organisation (NGO) ships conducting SAR operations enter Italian ports, triggered new diplomatic confrontations between the Italian government and other EU governments regarding which state should assume responsibility for accepting disembarkation of people rescued at sea.20

Disembarkation issues rekindled in a context characterised by a widening SAR gap in the Central Mediterranean resulting from the penalisation of humanitarian actions and the strategic disengagement from SAR activities by the EU and its member states. Far from being a novelty, disputes over SAR and disembarkation are rooted in long-standing political controversies (Carrera and den Hertog, 2015; Parliamentary Assembly, Council of Europe, 2012; Basaran, 2014). The latest debates at the EU level unfold against the background of disagreements among Mediterranean coastal governments over the interpretation and applicability of the international law of the sea (Papastavridis, 2017; Moreno-Lax and Papastavridis, 2017).

Some of the proposals discussed during the second half of 2018, such as ‘regional disembarkation platforms’, which aim at shifting responsibilities for the disembarkation of rescued persons to North

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African countries, are both practically and legally unfeasible (Carrera et al., 2018). The European Commission also acknowledged that disembarkation platforms would be contrary to EU principles and ‘values’ laid down in the Treaties and member states’ constitutional and human rights traditions (European Commission, 2018a).

From the summer of 2018 onwards, cases of disembarkation following SAR operations conducted by NGOs and other vessels in international waters have been addressed through so-called “relocation and disembarkation arrangements”. These arrangements have consisted of voluntary, ad hoc or ‘ship-by-ship’ relocation schemes, involving a small group of member state governments ‘willing’ to accept a share of individuals disembarked in Spain, Malta and Italy. During the second half of 2018, these arrangements were conducted in a purely ‘intergovernmental’ and ad hoc fashion, falling completely outside the EU framework.

Since the beginning of 2019, disembarkation arrangements have counted with the involvement of the European Commission and EU agencies, including the European Asylum Support Office (EASO) and Frontex. The Commission has played the role of ‘facilitator’ among interested member states making pledges for relocations, while EASO and Frontex have provided support in the phases of first reception, provision of information and registration of disembarked persons upon request of the governments of Italy and Malta (European Commission, 2019). In spite of the Commission’s attempt to increase ‘predictability and transparency’ of relocation arrangements, the predominantly informal, secretive and intergovernmental nature of these instruments has prevailed. A profound lack of public accountability has characterised the entire relocation procedure, including regarding the number of people disembarked and relocated, participating member states, and respect of the rights of asylum seekers ‘pushed around’ participating member states through informal relocations.

This Policy Options Brief aims at critically examining recent developments on disembarkation and relocation arrangements in the Mediterranean. It argues that there is a wrong assumption behind current EU and national proposals and developments on SAR, disembarkation and their linkage with the allocation of responsibility for assessing asylum applications among EU member states. The prevailing idea seems to be that ‘contained mobility policies’ currently implemented in the Mediterranean are legitimate migration management strategies (Carrera and Cortinovis, 2019); i.e. that policies and instruments aimed at disengaging from SAR operations, criminalising SAR civil society actors, financing, training and sharing information on sightings of boats with the Libyan Coast Guard for the sake of ‘pulling migrants back’ to Libya, delaying or refusing disembarkation of rescued people, and disregarding the rights of people disembarked during informal relocations escape the rule of law, and therefore accountability and legal responsibility for crimes and human rights violations. However, EU and member state containment-driven action and inaction in the Mediterranean do not happen in a legal vacuum.

Neither national governments, nor the European institutions and agencies are free to ‘cherry pick’ from their rule of law and human rights responsibilities enshrined in national constitutions, EU Treaties and secondary law, which apply to all individuals, including those found in distress at sea
and seeking international protection in the EU. The direct and indirect action and/or inaction of those actors are captured by the concept of *portable justice*, according to which responsibilities and potential liabilities follow not only wherever they exercise *de facto* or *de jure* control and decisive influence over individuals, but also when their practices fall within the scope of EU law and financial instruments (Carrera et al. 2018).

The use of non-legally binding instruments such as disembarkation and relocation ‘arrangements’ and the informalisation of relocations among a small group of EU member states bring profound risks to European integration. Unlike with the beginnings of European cooperation on asylum and migration policies in the early 1990s, the current level of Europeanisation in these areas is – while imperfect – well advanced. ‘Flexible integration’ or ‘solidarity à la carte’ in the area of asylum may not further but actually reverse integration and undermine the objectives set out in the EU Treaties. It would allow some member states to free ride and lower down on existing EU asylum standards, and create ‘coalitions of the unwilling’ implementing diverging and competing areas of asylum within the Schengen area. These arrangements are deliberately ‘extra-legal’ and therefore challenge key EU rule of law principles set in the Treaties and national constitutions. They pose profound risks to the consistency of the EU asylum and borders acquis and the right to seek asylum in the EU.

After this Introduction, Section 2 of this Policy Options Brief outlines the evolution of the SAR scenario in the Central Mediterranean over the last few years, underlining the emergence of what we call the politics of SAR criminalisation and disengagement in the Mediterranean. Section 3 brings to light the main legal obligations and accountability venues of member states and EU actors regarding SAR and disembarkation stemming from international maritime law, international and regional human rights standards and secondary EU legislation in the field of border surveillance and asylum. Section 4 provides an analysis of the latest policy proposals that have been discussed and implemented in the EU context between the second half of 2018 and first half of 2019. The conclusions highlight the need for the EU to come back to the notion of *equal solidarity*, whereby responsibility is upheld and equally shared among all Schengen countries, and firmly rooted in EU principles and fundamental rights laid down in the Treaties and member states’ constitutional traditions.

### 2. A PERSISTENT SAR GAP IN THE CENTRAL MEDITERRANEAN

On Sunday 10 June 2018, the *Aquarius* ship, operated by Doctors without Borders (MSF) and the German NGO SOS Méditerranée, was heading North after having rescued 629 migrants in the course of six different SAR operations coordinated by the Italian Maritime Rescue Coordination Centre (MRCC) in international waters off the Libyan coast. The boat was halted on instruction from the Italian authorities when it was located at 35 nautical miles from Italy and 27 nautical miles from Malta (SOS Méditerranée, 2018). The Italian government refused the *Aquarius* access to Italy’s territorial waters, arguing that Malta should take responsibility for disembarking the migrants on board the
vessel. The Maltese authorities denounced the Italian government’s stance as a manifest violation of international law and refused authorisation to dock in the port of La Valletta. This disagreement led to a diplomatic standstill and a consequent operational impasse that impeded the swift disembarkation of rescued people in a place of safety. Eventually, the dispute over the fate of the Aquarius was broken by the decision of the Spanish government to allow disembarkation of the migrants on board in the port of Valencia.21

The refusal to allow access to Italian ports for NGO vessels conducting SAR operations represents only the last and most extreme of a series of legal and political attacks against civil society ships involved in SAR activities in the Mediterranean (Carrera et al., 2019a). Over the last three years, humanitarian civil society actors have been subject to increasing policing and criminalisation dynamics, which have resulted in preventing them from pursuing SAR activities (Commissioner for Human Rights, 2019).22 Actions taken to disrupt NGO activities have included politically-driven criminal investigations for facilitating irregular entry, the confiscation of NGO vessels, the attempt to limit their activities by imposing ‘codes of conduct’ as well as recurrent de-legitimisation and criminalisation campaigns by some politicians and media outlets accusing, without evidence, NGOs of collusion with smugglers (Vosiliute and Conte, 2018; Cuttitta 2018; FRA, 2018; Basaran, 2011).

Since the Aquarius incident, a number of other cases of SAR operations conducted by NGOs have produced similar situations of delayed disembarkation and have forced rescued individuals to a prolonged period at sea in precarious and unsafe conditions (ECRE, 2019a), as well as additional cases of prosecutions of involved NGOs (FRA, 2019). In January 2019, the NGO vessel Sea Watch 3 carrying 47 people was permitted to dock at the port of Catania in Italy, after spending two weeks at sea, only when an agreement involving relocation in a group of member states could be agreed.23 Soon afterwards, the Italian authorities refused to allow disembarkation from the NGO ship Mare Jonio, belonging to the Italian citizen-financed initiative ‘Mediterranea – Saving Humans’, after it had saved 49 people in international waters.24 In addition, over the last two years, reports have drawn

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22 Commissioner for Human Rights, Council of Europe, Letter to Prime Minister of Italy, Strasbourg, 31 January 2019. The letter stated: “I am deeply concerned, however, about some recent measures hampering and criminalising the work of NGOs who play a crucial role in saving lives at sea, banning disembarkation in Italian ports, and relinquishing responsibility for search and rescue operations to authorities which appear unwilling or unable to protect rescued migrants from torture or inhuman or degrading treatment.”


24 The Mare Jonio was allowed to disembark in the Italian port of Lampedusa the day after, on 19 March. The boat was seized immediately afterwards by order of the Italian Prosecutor in the context of an investigation into possible aiding and abetting of ‘illegal immigration’. See: Infomigrants, ‘Italy seizes migrant rescue boat Mare Jonio’, 20 March 2019, online: https://www.infomigrants.net/en/post/15804/italy-seizes-migrant-rescue-boat-mare-jonio
attention to several episodes of aggression and acts of hostility by the Libyan Coast Guard authorities towards NGOs intervening in rescue operations within the Libyan SAR zone (Cuttitta, 2018).

EU member state politics of SAR disengagement have also included a tactical choice to reduce the new mandate and operational area of the Frontex Joint Operation Themis in the Central Mediterranean, which was launched in January 2018 to replace the previous Operation Triton (initiated in 2014). A key change in the scope of the Themis operation was reducing even further its operational area to the Italian SAR zone and, in contrast to the Triton operation, not covering the Maltese SAR area any longer. The Maltese government refused to take part in Themis Joint Operation in the absence of a clear rule foreseeing the disembarkation in Italian ports of people rescued in the Maltese SAR zone, which was the case under Triton’s operational plan based on a bilateral deal between Italy and Malta.

Divisions between member states on disembarkation have also led to a downgrading of the Common Security and Defence Policy (CSDP) operation EUNAVFOR-MED Sophia, launched in 2015 with the main goal to disrupting “criminal networks of smugglers and traffickers in the Southern Central Mediterranean”. The overall rationale and effectiveness of the operation has been fundamentally questioned, including its negative contribution to the militarisation of maritime surveillance and the side effect of making trips more perilous as a result of its policy of destroying and confiscating boats (Carrera, 2018). While SAR was not formally included in the mandate of the mission, since its inception in 2015, the operation is reported to have rescued around 49,000 migrants.

At the end of 2018, the continuation of Operation Sophia became another source of contention between participating member states after a request by the Italian government to revise the mandate of the mission, and specifically the rule according to which all asylum seekers rescued in the framework of the mission should be disembarked in Italian ports. Due to the impossibility to reach an agreement on a new disembarkation arrangement, in March 2019, participating states decided to prolong the mission for a further six months but without deploying naval ships (to avoid involvement in SAR operations), focusing instead on air patrols and training of the Libyan Coast Guard (EEAS, 2019).

The stepping up of the Libyan Coast Guard in SAR operations constituted another important piece of the puzzle (UNHCR, 2019a). This development is directly related to the choice of the Italian

25 Interview with Frontex Official conducted by the authors. See also https://frontex.europa.eu/media-centre/news-release/frontex-launching-new-operation-in-central-med-yKqSc7
government to progressively cede control to Libyan forces over SAR operations outside Libyan territorial waters. Italy had assumed de facto SAR responsibilities over this area since 2013, when it began its humanitarian naval operation, Mare Nostrum. Libyan authorities submitted a declaration on a Libyan Search and Rescue Region (SRR) in December 2017, which was then officially validated by the International Maritime Organisation (IMO) in June 2018. The Libyan move was made possible by the operational and financial support provided to the Libyan authorities by the EU and Italian authorities (see section 3.2). According to UNHCR, during the second half of 2018, 85% of individuals rescued or intercepted in the newly established Libyan SAR region were disembarked in Libya, where they faced inhuman and degrading treatment in Libyan detention centres (UNHCR, 2019a).

The politics of criminalisation of NGOs and disengagement from SAR operations have contributed to making migrant journeys across the Mediterranean even more dangerous than in the past. According to UNHCR, an estimated 1,311 migrants lost their lives along the Central Mediterranean route connecting Libya to Italy during 2018. While the total number of deaths along this route more than halved in 2018 compared to 2017, the rate of deaths per number of people attempting the journey increased sharply. In particular, the rate went from one death for every 38 arrivals in 2017 to one for every 14 arrivals in 2018, and to one death for every 3 arrivals in the first four months of 2019 (UNHCR, 2019a, 2019b).

3. SEARCH AND RESCUE AT SEA: INTERNATIONAL AND EU LEGAL STANDARDS

The range of policies aimed at restricting SAR capacities and criminalizing civil society actors involved in SAR activities need to be read as components or ‘layers’ of a broader strategy of contained-mobility whose aim is that of deterring, limiting and filtering asylum seekers’ movements at different stages of their various mobility trajectories. The contained mobility strategy combines measures aimed at preventing people from leaving third country territories and entering the Schengen area – e.g. border surveillance and interception at sea – along with limited mobility opportunities, in the forms of selective and discriminatory admission opportunities for refugees and applicants for international

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31 The numbers reported above should be read in the context of an overall decrease in arrivals through the Central Mediterranean route to Italy over the last three years: 181,436 in 2016, 119,369 in 2017, 23,370 in 2018 and 2,447 in the first six months of 2019. See UNHCR, Mediterranean situation, Italy, https://data2.unhcr.org/en/situations/mediterranean/location/5205. According to IOM, from 2014 to 2018, an estimated 15,062 people died while crossing the Central Mediterranean route, making it the deadliest migration route in the world. See, IOM missing migrant project, online: https://missingmigrants.iom.int/region/mediterranean?migrant_route%5B%5D=1376&migrant_route%5B%5D=1377&migrant_route%5B%5D=1378
protection (Carrera and Cortinovis, 2019). Figure 1 below starts by showing how in the context of the Central Mediterranean EU and member state containment strategies are made up of various ‘layers’, which can be summarised as follows.

First, engaging third countries to conduct ‘migration management’ on their behalf as part of what has been called a ‘consensual or delegated containment’ approach (Moreno-Lax and Giuffré, 2017); this now includes delegating the enactment and implementation of interception measures (‘pullbacks’) to countries in North Africa, notably to Libya, taking the form of indirect EU financing, training and the sharing of information with third country authorities gathered through maritime satellite surveillance systems or aerial and vessel assets; second, strategically disengaging from SAR operations, including by reducing the operational areas of EU-coordinated maritime operations (e.g. the Frontex Themis joint operation); third, policing and criminalising civil society actors conducting SAR operations and shrinking their operation space in the Mediterranean; fourth, refusing to allow disembarkation of migrants rescued at sea in national ports; and fifth, applying substandard asylum procedures in the context of ‘hotspots’ and ad hoc relocation arrangements.

Figure 1 also identifies the set of legal, political and financial instruments used to implement the various contained mobility layers, which are of financial, political, legal and operational nature, and which have increasingly been designed as extra-EU Treaties. The two last fields of the figure lay down the main international, regional and EU legal instruments, as well as a selection of monitoring, judicial and administrative actors acting as ‘justice venues’ with a mandate to scrutinise, enforce or adjudicate on individuals’ cases and complaints. The arrow at the bottom of the figure aims at illustrating how, while unlawful practices and human rights violations and crimes emerging from contained mobility layers and instruments still experience substantial barriers for ensuring effective remedies to victims, they can nonetheless be potentially captured by the concepts of portable responsibility and justice.

The concept of portable responsibility is premised on the existence of a ‘functional approach’ to the applicability of EU fundamental rights in cases of extraterritorial policies and practices. This implies that the EU CFR applies whenever a situation falls under the remit of EU law, with territoriality not being a decisive criterion (Moreno-Lax and Costello, 2014; Carrera and Stefan, 2018; Carrera et al. 2018).

The concept of portable responsibility in the context of EU law entails that, whenever member states or EU authorities cooperate with third-country authorities – directly or indirectly through the provision of ‘support’, in the form of funding, training, equipment and any other kind of assistance – their responsibilities need to be assessed against the EU’s fundamental rights and legal standards. This requires compliance with the right to asylum (Art.18) and to an effective remedy (Art. 47) under the EUCFR (Carrera et al. 2018). If an EU Member State or an EU institution or agency provide direct or indirect financial and/or technical “assistance” to a third country that result in fundamental rights

violations, they could be considered liable in light of their obligations under the EU CFR before the Court of Justice of the EU (CJEU).

**Figure 1. Contained mobility and portable justice**

The multi-layered containment approach enacted by the EU and some EU member state governments in the Mediterranean seems to be based on the assumption that relevant EU member states can in fact be ‘exonerated’ of their legal responsibilities and escape accountability under international, regional and EU standards and venues. However, such an assumption is misleading. Contained mobility instruments at sea fall within the scope of international and regional standards laid down in international maritime law (see Section 3.1. below) and human rights law (see Section 3.2), and pose profound challenges to their faithful implementation. They also stand at odds with the principle of sincere and loyal cooperation found at the basis of EU law, including EU rules on maritime and border surveillance law (see Section 3.3.) (Moreno-Lax and Papastavridis, 2016; Carrera et al., 2018).

### 3.1. International maritime law

The most relevant international treaties covering SAR at sea include, first, the 1982 United Nations Convention on the Law of Sea (UNCLOS). Art. 98 of this Convention lays down a duty to every state to render assistance to any person found at sea in danger and to proceed with all possible speed to the rescue of persons in distress. The obligation to secure the right to life constitutes international
customary law. The UNCLOS Convention foresees the need for coastal states to establish, operate and maintain adequate and effective SAR services, which may include cooperation with neighbouring states and the conclusion of mutual regional arrangements (Art. 98.2). Simi
lar requirements are included in the 1974 International Convention for the Safeguard of Life at Sea (SOLAS Convention), specifically the obligation for shipmasters to provide "with all speed" assistance at sea. The SOLAS Conven
tion also states the need for states to ensure that "any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts" and to communicate and coordinate SAR activities, including through the establishment of SAR facilities.

A set of more detailed provisions are included in the 1979 International Convention on Maritime Search and Rescue (the so-called SAR Convention), which stipulates a common definition of 'rescue' entailing "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety" (emphasis added). The SAR Convention underlines the need for states to set up a Search and Rescue Region (SRR) and a Maritime Rescue Coordination Centre (MRCC) responsible for "promoting efficient organisation of search and rescue services and for coordinating the conduct of search and rescue operations" within their respective SAR region.

Important amendments to the SOLAS and SAR Conventions were introduced in 2004 to strengthen the search and rescue system and minimise the risk that commercial ships refrain from providing rescue to boats in distress (Barnes, 2010). The amended Paragraph 3.1.9 of the SAR Convention specifies that the state responsible for the SAR region where assistance has been rendered is primarily responsible for "ensuring such co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization" (emphasis added). The MRCC of the relevant SAR state is also required to initiate the process of identifying the most appropriate place of disembarkation of persons in distress at sea. Moreover, the same paragraph 3.1.9 requires states to cooperate to ensure that shipmasters providing assistance to persons in distress at sea are released from their obligations with minimum further deviation from their intended voyage, as long as this does not endanger their safety. This applies both to commercial ships and those of NGOs, and aims at incentivising the former to intervene in cases of boats in distress at sea.

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33 The UNCLOS framework foresees a dispute settlement procedure, some of which are considered compulsory and which states parties may declare preference for in light of Article 287 Section 2 of the Convention. These may include the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal established under Annex VII of the Convention or a special arbitral tribunal under Annex VIII. For the purposes of this paper it is important to highlight that Italy has declared as preferred venues for dispute resolution the ITLOS and the International Court of Justice. Refer to D. R. Rothwell and T. Stephens (2016).

34 Regulation 10 Ch. 5 of SOLAS.

35 The SAR Convention (para. 1.3.13) defines a "distress phase" as a "situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance".

The interpretation of the 2004 amendments to the SOLAS and SAR Conventions based on the principle of effectiveness would lend support to a default obligation of disembarkation on the SAR responsible state. However, divergent practices and interpretations of states underline how this is still a matter of contention (Trevisanut, 2010; Di Filippo, 2013). Papastavridis has argued that a key shortcoming of the international maritime Treaty system is that “it does not formally obligate the coastal State responsible for the Search and Rescue Area to disembark rescued persons on its own territory, but only impose rather an obligation of conduct” (Papastavridis, 2018; Papastavridis, 2017). However, such an ‘obligation of conduct’ may in fact become an obligation to disembark if no other option ensuring the safety of the rescued people and the swift conclusion of the disembarkation operation exists.

Indeed, international maritime law requires delivery of rescued persons as soon as possible to a ‘place of safety’ that is nevertheless not defined either in the SOLAS or in the SAR Convention. To address this gap, in 2004 the International Maritime Organization (IMO) issued ‘Guidelines on the Treatment of Persons Rescued At Sea’ which state the need, in the case of persons seeking international protection “to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened”. UNHCR has underlined that the place of safety concept must correspond with a place where rescued persons are not at any risk of persecution and where asylum seekers have access to fair and efficient asylum procedures and reception conditions (UNHCR, 2002). As is further developed in Section 3.3 below, EU maritime surveillance rules provide for a clearer EU concept of ‘place of safety’ that is international protection and fundamental rights driven.

3.2. International, regional and EU human and fundamental rights

The international legal regime governing SAR at sea and international and EU human rights instruments are interlinked and must be read in conjunction. The faithful application of international, regional and EU human rights standards substantially restricts the scope for non-disembarkation (and denying entry) strategies adopted by some Mediterranean states, as these fall within the scope of human rights jurisdiction. While a ‘migration management approach’ is driving current SAR and disembarkation activities in the Mediterranean, governments cannot evade or strategically avoid their previously-contracted international obligations towards migrants, asylum seekers and refugees even in the context of extraterritorial migration management operations (Moreno-Lax and Giuffré, 2017).

The relevant provisions concerning SAR and disembarkation outlined in the previous section should be read in light of relevant human rights standards, including for instance those covering the right to respect and protect life, the respect of the non-refoulement principle and the prohibition to expose people to death, torture or inhuman and degrading treatment, and the right to life. All these are enshrined not only in the 1951 UN Refugee Convention, but also in other key international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), and the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT), as well
as regional human rights frameworks, notably the European Convention of Human Rights (ECHR). Moreover, attacks on SAR civil society actors and their criminalisation are incompatible with the UN Declaration on Human Rights Defenders.

Within the international human rights framework, the principle of non-refoulement comprises the obligation not to extradite, deport or otherwise transfer (directly or indirectly) a person to a third country, thus not exposing her/him to a personal, foreseeable risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment. A joint communication by UN Special Procedures to the Italian government on 15 May 2019 states that “practices whereby countries of destination cooperate with another to prevent migrants and refugees from arriving have been characterized as ‘pullbacks’ and as violations of the principle of non-refoulement, which constitutes an integral part of the absolute and non-derogable prohibition of torture and other ill-treatment enshrined in Article 3 CAT and Articles 6 and 7 of ICCPR”. The communication also encouraged Italian judicial authorities to take into account its findings.  

The EU Fundamental Rights Agency (FRA) has emphasised that “state responsibility may exceptionally arise when a state aids, assists, directs and controls or coerces another state to engage in a conduct that violates international obligations” (FRA, 2016). This corresponds with Articles 16, 17 and 18 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which regulate state responsibilities when aiding or assisting other states in the commission of an “internationally wrongful act”, including grave human rights violations. The European Court of Human Rights (ECtHR) has made use of the ARSIWA when ascertaining whether states’ responsibility is engaged because of either their duty to refrain from wrongful conduct or their positive obligations under the convention. 

When any state engages, directly or indirectly, in internationally wrongful acts and grave human rights violations, their practices also fall within the framework of the Rome Statute and the jurisdiction of the International Criminal Court (ICC). A recent Communication to the Office of the Prosecutor of the International Criminal Court (ICC) titled “EU Migration Policies in the Central Mediterranean and Libya” points out that in the name of the so-called “European humanitarian refugee crisis” in 2015, the EU and its member states consciously enacted a “deterrence-based policy

37 United Nations Human Rights Special Procedures, Joint Communication, by the Special Rapporteur on the situation of human rights defenders; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on trafficking in persons, especially women and children, 15 May 2019, ALITA 4/2019.

38 Article 16 ARSIWA states: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”


of premeditated and intentional practice of non-assistance to migrants in distress at sea”, which has determined “a lethal gap in the relevant SAR zone, in an area under the effective control of the EU and its member states’ actors.” Particular attention is paid to the deathly effects of the strategy to reduce and limit the operational area of intervention of subsequent Frontex joint maritime operations such as Triton. That Communication further states that “The strategy followed by the EU consisted of the externalization of maritime and human rights obligations that comes with its effective control over the said zones to non-state actors, para-state actors and foreign partners, in a (failed) attempt to avoid exposure to these legal responsibilities”, and adds that “the only remaining question to resolve relates to the identity of the most responsible perpetrators, which requires intense investigations in the European apparatus and State members bureaucracies.”

Member states’ human rights responsibilities under the Council of Europe (CoE) and the European Convention of Human Rights (ECHR) require a protection-driven approach. CoE states parties involved in SAR operations have to take all necessary measures to protect the lives of individuals in situations of distress who are within their jurisdiction and influence. This principle was recently reiterated by the European Court of Human Rights (ECtHR) in an interim measure of 29 January 2019 concerning the case of the NGO vessel Sea Watch 3. The boat carried 47 rescued migrants on board, who were not allowed by the Italian authorities to go ashore. While the Court did not grant the applicants’ request to be disembarked as requested by the Captain of the ship, it requested the Italian government “to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary”. This has been confirmed by a more recent ECtHR interim measure also at the request of Sea Watch 3, where the Court insisted on the obligation by the Italian authorities “to continue to provide all necessary assistance to those persons on board Sea-Watch 3 who are in a vulnerable situation on account of their age or state of health”. This Interim Measure leaves however unanswered the extent to which people rescued by NGO boats need to go through the painful suffering of waiting indefinitely at sea and eventually become ‘vulnerable’ for a government such as Italy to be imposed an obligation to disembark.

The ECtHR case law has found that jurisdiction may be present in cases of both de jure as well as de facto (indirect) control by state actors, both territorially and extraterritorially. The extraterritorial

42 Paragraph 480 adds that “The manner in which these crimes have been committed is the result of a systematization of impunity set up through a complex structure of power with diverse types of State and non-State actors, and a combination of co-perpetrators at different levels operating both within and outside an area of armed conflict. This apparatus allowed the executors to act without fear of retaliation, and the planners to be certain that they would never face any kind of accountability”.
43 Ibid., paragraph 503.
44 See “ECHR grants an interim measure in case concerning the Sea Watch 3 vessel”. European Court of Human Rights, Newsletter - February 2019.
45 See “The Court decides not to indicate an interim measure requiring that the applicants be authorised to disembark in Italy from the ship Sea-Watch 3”, European Court of Human Rights Press Release, 25.6.2019.
application of the ECHR was recognised by the ECtHR in the Hirsi Jamaa and Others v. Italy of February 2012 (Giuffre, 2016). The Strasbourg Court ruled that – in the context of the “pushback operations” to Libya conducted by the Italian Navy forces – Italy had assumed both continuous and exclusive de jure and de facto control over the affected applicants by bringing them on board Italian navy vessels and returning them to Libya.46

The ECtHR jurisprudence described above represents a basis for addressing some of the more sophisticated containment policies currently deployed in the Mediterranean, including those involving the provision of financial, technical and operational support to third countries authorities for preventing asylum seekers and migrants’ movements (Baumgärtel, 2018; Pijnenburg, 2018; Fink and Gombeer, 2018). Global Legal Action Network, 2018).

In May 2018, a coalition of NGOs and scholars filed an application against Italy with the ECtHR concerning an incident on 6 November 2017 in which the Libyan Coast Guard interfered with the efforts of the NGO vessel Sea-Watch 3 to rescue 130 migrants from a sinking dinghy in international waters. According to the applicants, more than 20 persons drowned before and during the operation, while 47 others were ‘pulled back’ to Libya, where they endured detention in inhumane conditions, beatings, extortion, starvation, and rape (Global Legal Action Network, 2018).

The applicants claim that the intervention of the Libyan coast guard was partly coordinated by the MRCC in Rome, while an Italian navy ship, part of the Italian Mare Sicuro operation, was also closed to the area of intervention. In addition, the episode should be read in the context of the terms of the 2017 Italy-Libya Memorandum of understanding, as well as financial support provided to the Libyan Coastguard by the EU, including through the EU Trust Fund for Africa. These circumstances, they argue, establishes Italy’s legal responsibility under the ECHR for the actions of Italian and Libyan vessels in the case under consideration.47

3.3. EU rules on maritime and border surveillance

SAR and disembarkation activities of EU member states are currently not covered by a common EU legal framework, except for those activities carried out in the context of Frontex-led joint operations at sea (Carrera and den Hertog, 2015), which are covered by Regulation 656/201448 and the Schengen Borders Code (SBC).49 Regulation 656/2014 applies to all Frontex-coordinated maritime border surveillance operations and includes a set of SAR and disembarkation obligations for ‘participating

46 Hirsi Jamaa and Others v. Italy, para. 81.
47 For an overview of events providing evidence of direct and indirect involvement of EU and member states’ authorities in interception, detention and pullback operations conducted by the Libyan Coast Guard, see Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute. EU Migration Policies in the Central Mediterranean and Libya (2014-2019), sections 1.3.3 and 1.3.4.
units’ (i.e. the law-enforcement vessels of member states). The main merit of Regulation 656/2014 is that of providing interpretative clarity on some SAR and disembarkation issues under the international maritime law framework by including more detailed and precise rules. It also foresees EU definitions of autonomous nature and shared standards that can be seen as ‘benchmarks’ against which current malpractices by some EU member states in the Mediterranean can be assessed.

In the case of disembarkation following a SAR operation, the regulation establishes that the member state hosting the operation and participating member states shall cooperate with the responsible Rescue Coordinating Centre (RCC) to identify a place of safety and ensure that disembarkation of rescued persons is carried out rapidly and effectively. In case it is not possible to ensure that, the participating unit shall be authorised to disembark the rescued persons in the member state hosting the operation (Art. 10.1). Art. 2.12 provides a clear and protection-driven definition of ‘place of safety’, which could be considered as an autonomous EU legal concept. According to this provision the notion of ‘place of safety’ means a “location where rescue operations are considered to terminate and where the survivors’ safety of life is not threatened, where their basic needs can be met and from which transportation arrangements can be made [...] taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement”.

Article 4 of the regulation includes provisions on protection of fundamental rights and non-refoulement, which apply to all cases of disembarkation in the context of sea operations conducted by the Frontex agency (Peers, 2014). In line with the Hirsi Case of the ECtHR discussed above, the regulation lays down a set of procedural steps to be followed when considering disembarkation of rescued migrants in a third country. Article 4 requires, in the context of planning a sea operation, that the host member state, in coordination with participating member states and the Frontex agency, takes into consideration the general situation in the third country concerned, based on information derived from a broad range of sources, including evidence provided by international organisations, EU bodies and agencies, before disembarking rescued persons in a third country.

The regulation also foresees in Art. 4.3 a central EU benchmark: before any rescued person is disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a third country, the Frontex operation must conduct a case-by-case assessment of their personal circumstances and provide information on the destination. The rescued persons will also need to be offered the possibility “to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-refoulement”. In practice, Art. 4.3 makes it mandatory that the rescued persons are in fact disembarked in EU member states for such an individual assessment to be carried out properly. The Maritime Surveillance Regulation provides a template to be used in future EU-coordinated SAR operations, and to assess the legality of the indirect support and cooperation between the EU, Frontex, the Italian government and the Libyan Coast Guard authorities.
4. TAKING STOCK OF POLICY PROPOSALS ON SAR AND DISEMBARKATION IN THE MEDITERRANEAN

4.1. Controlled centres and regional disembarkation platforms

Basaran (2014) has argued that in recent years “an increasing number of laws, regulations and practices on national, regional and international levels have effectively discouraged rescue at sea and encouraged seafarers to look away, leading to the incremental institutionalization of a norm of indifference to the lives of migrants”. EU policy discussions continued this worrying course of action during the second half of 2018 under the Austrian Presidency of the EU.

The European Council held in June 2018, in the midst of disputes over disembarkation between member states, called for ‘a new approach based on shared or complementary actions among member states to the disembarkation of those who are saved in SAR operations. To identify concrete proposals in this area, EU heads of state called on the Council and the Commission to swiftly explore the concept of “regional disembarkation platforms”, in close cooperation with relevant third countries as well as UNHCR and IOM. On the same occasion, the European Council agreed to explore the possibility for those disembarked on the EU territory to be transferred to so-called “controlled centres” in EU member states (European Council, 2018).

The concepts of ‘disembarkation platforms’ and ‘controlled centres’ were further elaborated by the European Commission in two informal ‘non-papers’ released in June and July 2018 (European Commission 2018b, 2018c). Discussions regarding the operationalisation of the two concepts have also been conducted within an EU Council Working Group (Council of the EU, 2018). However, ‘disembarkation platforms’ or ‘arrangements’ (as they were subsequently defined by the Commission) as well as ‘controlled centres’ have remained insufficiently developed and characterised by a worrisome lack of legal certainty (European Parliament, 2018a).

‘Controlled centres’ would mean that migrants disembarked in an EU member state would be transferred to these centres for an assessment of their international protection needs. They would essentially entail the continuation and further expansion of the hotspot approach deployed in Greece and Italy since 2015, albeit with a more formalised and systematic de facto use of ‘administrative detention’. In its elaboration of the concept, the Commission specified that migrants and asylum seekers disembarked in those centres would be registered and processed in an “orderly and effective way”, with full EU support, including for the sake of voluntary relocation. The Commission recommended an expanded use of accelerated and border procedures, followed by a quick return procedure in case of negative decisions (European Commission, 2018a, 2018c).

The establishment of ‘controlled centres’ has raised serious concerns regarding their potential negative impact on protection standards in the EU, which would rather make of them ‘uncontrolled centres’ from a human rights perspective. A joint communication issued by UN Special Procedures
(five UN Rapporteurs and two Working Groups) to the European institutions on 18 September 2018 emphasised the difficulties that such centres would face in ensuring due process guarantees and legal safeguards, “including proper individual assessments and safeguards against arbitrary detention”.

An expansion of the hotspots model is indeed problematic, in light of the wealth of evidence of forced fingerprinting of individuals, quasi-detention practices, degrading and inhuman reception conditions and expedited and discriminatory admissibility interviews occurring in the hotspots in Italy and Greece (ECRE, 2016; Danish Refugee Council, 2019). Hotspots have been criticised as an additional manifestation of EU containment policies attempting to establish an ‘informal’ system of sub-standard asylum procedures operating at the borders, whose main objective is that of reducing and filtering access to international protection in the EU (Maiani 2018: ECRE 2018; Caritas Europe, 2018; PICUM, 2017).

The idea of establishing “regional disembarkation platforms” has also been the object of strong criticism. The possibility of disembarking individuals in distress at sea on the territory of a third country is conditional on the respect of legal obligations under international and EU law, including the principle of non-refoulement as codified in the Geneva Convention and other relevant provisions under the ECHR and the EU CFR (see Section 3 above; Carrera and Lannoo, 2018). UNHCR and IOM have clearly identified a set of conditions that should underpin any cooperation approach to disembarkation following SAR operations in the Mediterranean. First, the determination of places of disembarkation should be carried out in a manner that ensures respect for human rights and the principle of non-refoulement.

Second, people rescued at sea should be granted adequate, safe and dignified reception conditions and have access to asylum procedures in line with relevant international and national standards. Finally, arrangements with countries outside the EU should be coupled with clear commitments from the EU side to provide solutions for refugees, including resettlement and other forms of admission, such as expanded family reunification opportunities (UNHCR-IOM, 2018). All these conditions make the various ‘policy options’ or ‘scenarios’ laid down by the European Commission non-paper on disembarkation platforms in Africa unfeasible.

Major political and operational obstacles associated with involving third countries in disembarkation arrangements should also be underlined. Both the Commission and the Council have underlined the need to secure the agreement of third countries through financial and operational support, as well as resettlement pledges and other protection pathways (European Commission, 2018b; Council of the EU, 2018). African states’ reluctance to accept disembarkation of migrants rescued at sea on their territory clearly emerges from a common African Union (AU) position paper leaked to the press, which equates the establishment of disembarkation platforms in their territories to the creation of

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“de facto detention centres”, and calls on African states to refuse to cooperate with the EU in the implementation of those plans.51

4.2. Ad hoc disembarkation and relocation arrangements

In the background of these disagreements, since the summer of 2018, cases of disembarkation following SAR operations conducted by civil society and other vessels have been addressed through new instruments called ad hoc or “temporary” disembarkation and relocation arrangements.52 These ‘arrangements’ have in practice involved a small group of member states willing to relocate a share of disembarked asylum seekers from Spain, Italy and Malta (ECRE, 2019).

The arrangements have mainly covered situations of migrants rescued in Libyan or international waters by civil society actor boats and for which there is no agreement between EU member states, notably between Italy and Malta, over who should take responsibility for disembarkation. The arrangements have been described as ‘ad hoc’ in nature, and have followed a boat-by-boat approach aimed at breaking political standoffs between governments forbidding or delaying disembarkation in their ports (ECRE 2019). Table 2 below outlines the only existing publicly available information about the outputs of member state arrangements during the second half of 2018, which reveals a limited number of people subject to relocations.53

Table 1. Ad hoc disembarkation and relocation arrangements (June – October 2018)

<table>
<thead>
<tr>
<th>Ship</th>
<th>Date</th>
<th>Port</th>
<th>DE</th>
<th>BE</th>
<th>ES</th>
<th>FR</th>
<th>IE</th>
<th>LU</th>
<th>NL</th>
<th>NO</th>
<th>PT</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aquarius</td>
<td>17/06/18</td>
<td>Valencia, ES</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>78</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>78</td>
</tr>
<tr>
<td>Lifeline</td>
<td>27/06/18</td>
<td>Valletta, MT</td>
<td>-</td>
<td>6</td>
<td>-</td>
<td>52</td>
<td>26</td>
<td>15</td>
<td>20</td>
<td>7</td>
<td>-</td>
<td>126</td>
</tr>
<tr>
<td>Open Arms</td>
<td>09/08/18</td>
<td>Algeciras, ES</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>20</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>20</td>
</tr>
<tr>
<td>Aquarius</td>
<td>15/08/18</td>
<td>Valletta, MT</td>
<td>50</td>
<td>-</td>
<td>60</td>
<td>60</td>
<td>17</td>
<td>5</td>
<td>-</td>
<td>-</td>
<td>30</td>
<td>222</td>
</tr>
<tr>
<td>Aquarius</td>
<td>01/10/18</td>
<td>Valletta, MT</td>
<td>15</td>
<td>-</td>
<td>15</td>
<td>18</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>58</td>
</tr>
</tbody>
</table>


52 Ad hoc arrangements on disembarkation and relocation have been referred to in different ways in EU debates. The European Commission has referred to them mainly as “temporary arrangements on disembarkation” (European Commission, 2019), a terminology that has also been followed in the context of debates conducted under the Romanian Presidency of the Council (Council of the EU, 2019a). The same arrangements were also defined as “transitory measures” in a discussion paper prepared by the Romanian Presidency for an Informal meeting of the strategic committee on immigration, frontiers and asylum (SCIFIA) held in Bucharest on March 2019 (Council of the EU, 2019b). While defining these arrangements as “temporary” or “transitory” points to the fact that they are limited in time and only apply to very specific situations, this terminology may be misleading in the absence of a clear indication of the period of time during which these arrangements will remain applicable. For the purposes of this paper, we chose to refer to them as ad hoc disembarkation and relocation arrangements.

53 As stressed by ECRE (2019), the lack of publicly available information on ad hoc relocation arrangements does not allow adequate oversight of member states’ compliance with their relocation commitments in practice.
While often labelled as ‘practical’ or expressions of ‘pragmatism’ by some EU policymakers, their informal or extra-Treaty nature raises serious concerns regarding their compliance with EU asylum standards, EU Treaty principles and fundamental rights. Cases have been reported of asylum applicants disembarked in Malta who have been arbitrarily detained until their transfer to other member states, without allowing them the possibility to lodge an asylum claim. Similarly, it has been reported that persons disembarked in Spain have been subject to transfer procedures under relocation arrangements without prior registration of their asylum claim and without reception conditions in line with existing EU asylum law (ECRE, 2019).

Since early 2019, upon request from concerned member states, the European Commission has in some way been involved in the implementation of informal relocation arrangements after disembarkation and the development of a so-called ‘supportive platform for operational cooperation’. The Commission has played the role of a ‘facilitator’ or ‘deal broker’ in the context of member states pledging exercise. Upon request for assistance from a member state, either Italy or Malta, the Commission proceeds with putting together a group of EU member states interested or willing to make ‘pledges’ from those people disembarked.

The voluntary nature of the system has meant that the implementation of relocation arrangements has been based on the “good will” of participating member states. This has not helped in clarifying the concrete circumstances justifying the triggering of these arrangements by the requesting Member States. Table 3 below provides an updated overview of the disembarkation and relocation arrangements implemented in the first half of 2019, which shows how relocation arrangements have involved only a limited number of disembarked persons.55

Table 2. Ad hoc and relocation arrangements facilitated by the Commission and EU agencies (January – June 2019)

<table>
<thead>
<tr>
<th>Ship</th>
<th>Date</th>
<th>Place of disembarkation</th>
<th>N° of people disembarked</th>
<th>EU agencies involved</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sea Watch 3</strong> and <strong>Sea Eye</strong> (NGOs vessels)</td>
<td>9.01.2019</td>
<td>La Valletta (Malta)</td>
<td>49</td>
<td>EASO</td>
</tr>
<tr>
<td><strong>Sea Watch 3</strong> (NGO vessel)</td>
<td>31.01.2019</td>
<td>Catania (Italy)</td>
<td>47</td>
<td>EASO/FRONTEX</td>
</tr>
</tbody>
</table>

54 According to a Working Paper titled “Guidelines on Temporary Arrangements for Disembarkation” of 12 June 2019 prepared by Romanian Presidency of the EU, the following actors participate in this ‘platform’: “the Commission, the Presidency, the requesting Member State, participating Member States, relevant EU agencies, Council Secretariat”, Council of the EU (2019), Guidelines on Temporary Arrangements for Disembarkation, WK 7219/2019 INIT, Brussels, 12 June 2019.

55 The total number of relocated people as well as the number of people relocated to each participating member states is not publicly available for the relocation arrangements reported in the table.
EU agencies, chiefly EASO and Frontex, have been mobilised to provide support to member state authorities in dealing with specific procedural steps following the disembarkation of rescued persons, including first reception, registration, relocation and return. The role of Frontex in ad hoc disembarkation arrangements has only covered Italy. It has been mainly focused on conducting ‘hotspot-related tasks’, mainly identification and nationality determination, fingerprinting and registration of disembarked individuals in EU information systems such as Eurodac and Schengen Information System (SIS) II, upon request of concerned member states.

EASO has played a more substantive role in both Malta and Italy. EASO support has materialised in different activities for different countries involved in these arrangements since the beginning of 2019. These have often included, for instance, the provision of information on the international protection procedure, registration of applications for international protection for relocation purposes, support to Member States’ delegations in planning and running the interviews of candidates, the selection and matching processes of applicants (preparation of selection/matching lists).

The matching process has been heterogeneous and inconsistent, with no clear distribution key mechanism being applied. Interviews conducted for this paper revealed that since the beginning of 2019 the distribution was decided on the basis of a “kind of matching system” where elements considered included family unity, or the family links of applicants with a specific country. EASO support aimed at moving towards a “fairer and proportionate distribution” system among the participating governments when matching asylum applicants to specific states, in particular by allocating to each of the participating member states a proportional share of applicants with high and low recognition rates.\(^{56}\) This has been confirmed by a Working Paper titled “Guidelines on Temporary Arrangements for Disembarkation” of 12 June 2019 prepared by Romanian Presidency of the EU, according to which the composition of the ‘relocation pool’ is determined by “the indications by the Member States of relocation of the profiles that these Member States are willing to accept.

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\(^{56}\) EASO, Request for Access to Document (No. 03753), EASO/ED/2019/283, Valetta, 14 June 2019. The answer to this Request did not include information on the total number of applicants relocated by Member States involved. As an example, in the case of disembarkation of 47 people by the NGO Sea Watch 3 on 31 January 2016 reported in Table 3, seven member states contributed to the relocation of a total of 30 people: France, Germany, Lithuania, Luxembourg, Malta, Portugal and Romania (EASO 2019).
(variable geometry). “It remains however unclear how the Commission’s and EASO involvement has prevented member states from only accepting applicants from nationalities with high recognition rates, and avoiding the inherent discrimination based on ‘cherry picking’ or ‘first comes, first served basis’ practices.

Interviews with EU policy-makers conducted in the context of this study revealed that some EU member states had expressed interest or “preferences” for specific “profiles” of applicants – such as specific nationalities, families or only those qualified as ‘vulnerable’. The exact implementation procedure of relocation arrangements was described by the Commission in terms of a ‘workflow’ or “step-by-step work plan that would ensure that the Member State concerned receives the operational and effective assistance it needs from the Commission, EU agencies and other Member States” (European Commission, 2019). This notion, however, is in itself alien to any existing EU legal act and implies that the procedure remains outside any meaningful legal framework.

The contribution by the European Commission and EU agencies since the beginning of 2019 has not helped in bringing full legal certainty to the operationalisation of ad hoc relocation arrangements. The procedure has remained intergovernmental and characterised by a high level of informality and lack of transparency. Arrangements have been designed in a way that makes it impossible to fully guarantee that EU asylum acquis standards are complied with by EU member state authorities across the various phases comprising the ‘workflow’.

To remedy some of these deficiencies, human rights organisations called on EU governments to establish, as an interim measure, a predictable arrangement or ‘mechanism’ for disembarking and relocating people rescued at sea among member states (Amnesty International and Human Rights Watch, 2019; ECRE, 2019; Council of Europe, 2019). They also recommended that relocation of asylum seekers rescued at sea should fully comply with the CEAS rules and make sure that disembarked people are granted access to an asylum procedure and adequate reception conditions, and that the transfers should be carried out in accordance with the Dublin Regulation.

Ad hoc disembarkation and relocation arrangements could be seen as an instance of flexible and ‘differentiated integration’ in EU asylum policy (De Witte et al., 2017). However, the extent to which ‘flexible integration’ in the area of asylum and relocation may further the objectives of the EU and reinforce the integration process in this area remains doubtful. The EU Treaties clearly talk about the development of a common EU asylum policy and a uniform status of asylum valid throughout the Union (Article 78.1 and 78.2 TFEU). Informal or even formalised ‘variable geometry’ in this domain, with a small group of member states cooperating among themselves, would put at risk the objective of the Treaties of having a single and unique area of asylum common to all EU member states (which are also members of the Schengen system). It would also pose fundamental challenges to the effective and equal implementation of existing EU asylum acquis across the Union.

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57 Council of the EU (2019a), Guidelines on Temporary Arrangements for Disembarkation, WK 7219/2019 INIT, Brussels, 12 June 2019. The Guidelines also foresee that Member States willing to relocate voluntarily will receive a lump sum of 6000 EUR per applicant, in line with the amended Article 18 of the AMIF Regulation 516/2014.
The principle of solidarity and fair sharing of responsibility enshrined in the Lisbon Treaty should not be considered as a pick and choose or ‘à la carte’ option for national governments and their ministries of interior. It implies equality among all EU member states and that a common EU response to that common challenge should be prioritised and preferred (Carrera and Lannoo, 2018). This understanding of the EU principle of solidarity as “equal solidarity” – whereby responsibility is upheld and equally shared among all Schengen countries – was reflected in the ruling by the Court of Justice of the EU in the judgement on relocation quotas against Hungary and Slovakia.58 The Court emphasised that “When one or more Member States are faced with an “emergency situation characterized by a sudden inflow of nationals of third countries” (Art. 78.3 TFEU), the responses “must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy”.

CONCLUSIONS: EQUAL SOLIDARITY

This Policy Options brief has underlined how the highly politicised and long-standing debates on SAR and disembarkation among some EU member states continue preventing sustainable, common and principled policy responses ensuring international protection standards and preventing deaths in the Mediterranean. The multi-layered legal framework governing SAR and disembarkation provides, however, a set of obligations upon member state governments, including the absolute and non-derogable commitment to preventing loss of lives at sea, and a due diligence duty to coordinate effective and timely SAR responses and guarantee international protection and non-refoulement of rescued people. Member states are not free to tactically choose not to save lives at sea or disembark people to safety or to evade their own legal responsibilities under EU and national constitutional law when cooperating with third countries.

European institutions should resist arguments based on the current impasse in the reform of the EU Dublin system, as excuses by some member state governments and ministries of interior to avoid complying with their obligations under international, regional, EU and constitutional fundamental rights standards. Relocation arrangements among a few EU member states for people disembarked in the Mediterranean have in fact entailed ‘less EU’ and damaged the furthering of European integration in the CEAS, and its reform. Ideas to pursue ‘coalitions of the willing’ or ‘solidarity pacts’ among a reduced group of governments to foster variable solidarity in the field of asylum may at first sight be attractive, but they bring major risks poisoning the sustainability and consistency of the CEAS and the Schengen system. They may also bring Europeanisation ‘backwards’ in the areas of asylum and Schengen by setting up differing and competing areas of solidarity inside the Union.

The European Commission and the European Parliament should make sure that all EU member states fully and effectively comply with their commitments under international maritime, refugee and human rights standards and EU law. Efficient and timely enforcement of current standards – including infringement proceedings by the Commission – should become a clear priority during the next legislature. The EU counts with sound legal competences in the areas of border surveillance in the Schengen Borders Code and access to international protection and reception conditions in existing EU directives composing the CEAS. There is also a common set of legal standards on SAR and disembarkation applying in the context of Frontex-led maritime joint operations, which constitute ‘benchmarks’ when assessing the legality of current member state practices.

No EU member state should be permitted to police or criminalise civil society actors involved in SAR or humanitarian assistance in the Mediterranean. Such actions constitute an illegitimate restriction of the fundamental right of freedom of association enshrined in Article 11 of the EU Charter of Fundamental Rights and the independence of human rights defenders safeguarded by the UN Declaration on Human Rights Defenders. The criminalisation of NGOs constitutes a major threat to the EU’s founding values enshrined in Article 2 TEU, which lay at the very basis of mutual-trust cooperation in the EU. The current EU legal framework on migrant smuggling should be amended to include an obligation for member states not to criminalise humanitarian assistance to asylum seekers and irregular immigrants (Carrera et a. 2019b).

Current ad hoc and ‘informal’ disembarkation and relocation arrangements supported and coordinated by the European Commission and EASO since early 2019 constitute extra-Treaty and intergovernmental initiatives standing at odds with EU principles. As guardian of the Treaties, the European Commission should only support initiatives unequivocally falling within EU remits of action, so that any administrative cooperation among member states takes place in the scope of protection standards envisaged in EU law.

During the previous legislature, a logic of ‘consensus’ or de facto unanimity drove negotiations on the CEAS reform files inside the Council and the European Council. This was the case in spite of the qualified majority voting rule formally foreseen in the EU Treaties under the ordinary legislative procedure and the existence of clear indications that a large group of member states exceeding qualified majority were in favour of engaging with the European Parliament in the negotiations of the CEAS reform package. Such a political choice is not in compliance with the decision-making rules on asylum in the Treaties and violates the principle of sincere cooperation among European institutions. As a consequence of the ‘package approach’ linking the approval of the recast Dublin

59 European Parliament, Letter by Claude Moraes (Former Chair of the LIBE Committee in the European Parliament) to Permanent Representation of Austria before the EU, 3 December 2018, IPOL-COM-LIBE D(2018) 46538 (in possession of the authors), which stated that “... in last week’s coreper (sic) meeting the Presidency decided to the text on the updated mandates prepared at technical level by the Council Presidency and to refer them back to technical level for further drafting despite clear indications that a large number of Member States exceeding qualify (sic) majority were in favour of reengaging with the European Parliament in the negotiations of the proposed texts... I would like to recall that Articles 16.3 TEU, 78.2 and 294 TFEU read in combination provide that decisions fall under ordinary legislative procedure and must be taken in Council by qualified majority. These rules need to be respected to allow for decisions to be taken in an area of great importance for European citizens and to ensure the principle of sincere cooperation among institutions”. 
Regulation to all the other CEAS legislative instruments under negotiation, the whole reform of EU asylum rules has been put on hold. The decision-making rules and procedures in the Lisbon Treaty (QMV) should be re-applied and the ‘package approach’ abandoned.

Pending a comprehensive reform of the Dublin system, member states may decide to take up responsibility to assess an application for international protection, even if they are not responsible following the Dublin Regulation criteria based on the “humanitarian clause” foreseen by Article 17 of the Dublin Regulation (‘Discretionary Clauses’). Based on all the challenges identified in this paper about the disembarkation and relocation arrangements, any new relocation system linked to disembarkation in the Mediterranean should, however, take place under a clear EU remit and be strictly linked to the swift adoption of the proposed reformed of the Dublin Regulation. The setting up of a permanent corrective (relocation) mechanism for sharing responsibility on asylum applicants should not be à la carte but involve all EU member states (European Parliament, 2017). The guiding principle should be one of ‘equal solidary’, whereby all EU member states share fairly and equally the responsibility over asylum seekers across the Union in full compliance with EU constitutive principles and fundamental rights.

The politics of criminalisation and disengagement in SAR operational capacities in the Mediterranean, and the EU indirect cooperation and support to Libyan Coast Guard actors to carry out unlawful ‘pullbacks’, has resulted in an increase in the number of lives lost at sea, grave human rights violations and crimes against humanity. EU policies of containment as well as those of discouragement and indifference on SAR should be abandoned. Instead, the EU should reconsider the feasibility of setting up a new SAR joint operation in the Mediterranean (European Parliament, 2015, 2016, 2018b; UNHCR, 2015; Amnesty International, 2015). EU agencies, such as Frontex and EASO, could be assigned to coordinating and supporting tasks in different phases of the proposed EU SAR Joint Operation (Carrera and Lannoo, 2018). Any future operational support provided by EU agencies should be focused on SAR and safeguarding international protection of people rescued at sea.

EU funding instruments must not be used as an attempt to bypass the Treaties, national constitutions and international commitments. The EU should stop funding migration management-driven training and ‘incapacity building’ on SAR and border maritime surveillance in unsafe third countries such as Libya through EU Trust Funds. These activities are illegal and incompatible with the above-mentioned standards, which bind the European institutions and agencies. The European Court of Auditors (ECA) should carry out an investigation into the ways in which the EU Trust Fund for Africa has supported the activities of the Italian ministry of interior with regard to “strengthening capacity of Libyan authorities on search and rescue” and “tackling irregular border crossings”. The EU could establish an EU SAR fund to help reinforce a coordinated EU SAR response (European Parliament, 2018b), and

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to strengthen EU member state disembarkation capacities, reception facilities and domestic asylum systems.

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1. INTRODUCTION

The policy options proposed by international and regional standard-setting institutions, European agencies and institutions, ReSOMA stakeholders, policy makers and researchers to prevent the criminalisation of solidarity. Some of these proposals aim to reform the EU legal framework delineated by the Facilitators Package while others suggests to address the broader phenomenon of ‘policing humanitarianism’ (Carrera, S., Mitsilegas V., Allsopp J. & Vosyliute L., 2019). The Facilitators Package contains several legal flaws that risk increasing the criminal prosecution of NGOs and volunteers who provide humanitarian assistance to refugees and other migrants (Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018).

The Facilitator Package is highly criticised for its incoherence with international law standards, namely the UN Protocol against Migrant Smuggling. In particular, the lack of a financial or other material benefit requirement to establish the crime of ‘facilitation of entry’ and the voluntary character of the humanitarian exemption clause represent the main shortcomings of EU law (European Union Fundamental Rights Agency, 2014; United Nations Office on Drugs and Crime, 2017). Civil society and academia widely agree that the phenomenon of criminalisation of solidarity has emerged partly due to the implementation and interpretation of the Facilitation Directive at European and national level. ‘Anti-smuggling’ laws have not been framed in terms of criminal justice, but rather as migration management tools and also for the purposes of political communication tools (Carrera S., Allsopp J. and Vosyliute L., 2018; Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018).

The crackdown on NGOs is a multi-faceted phenomenon and contexts of rule of law backsliding like Hungary and in creating the ‘hostile environment’ towards refugees and other migrants, like the UK, France, Italy and Belgium (Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018). The crackdown

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61 PICUM, ECRE, Social Platform, EUROCITIES
on NGOs can manifest as silencing critical civil society actors through limiting their access to public funding, including to the EU AMIF and ESF funds aimed to support civil society projects (Westerby R., 2018; Szuleka S., 2017; Vosyliute L. & Conte C., 2018). Against this background, this brief will map the different policy recommendations proposed by the main stakeholders and researchers to remove hurdles for NGOs to freely operate and uphold the values enshrined in Article 2 of the Treaty of the European Union (TEU), democracy, the rule of law and respect for fundamental rights, such as the respect for human dignity, freedom of association, freedom of speech, freedom of conscience, equality and non-discrimination (Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018).
2. IDENTIFYING AND MAPPING KEY POLICY OPTIONS

2.1 Migrant smuggling or humanitarian assistance: proposals to reform the Facilitation Directive

The central issues are the legal framing and the implementation of Art. 1(2) of the Directive 2002/90 which has a facultative nature and allows Member States to decide whether civil society actors and family members are exempted from criminalisation (European Union Fundamental Rights Agency, 2014; Carrera S., Guild E., Aliverti A., Allsopp J., Manieri M.G., LeVoy M., Gutheil M., Heetman A. 2016; Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018; Vosyliute L. & Conte C., 2018).

At the moment the EU Facilitation Directive allows any Member State to decide whether to impose sanctions on individuals who “intentionally assist a migrant to enter, or transit across, the territory of a Member State” (Article 1 para. 2 of the Directive).

The EU Fundamental Rights Agency (2014) have noted that some Member States have declared exemptions on grounds of humanitarian assistance, however empiric research shows that prosecutions of volunteers and NGOs still take place even in these countries (Carrera, S., Mitsilegas V., Allsopp J. & Vosyliute L., 2019). For instance, NGOs conducting search and rescue operations have been investigated and even prosecuted in Italy and Greece, despite the explicit exemption of humanitarian assistance (Carrera S., Allsopp J., Vosyliute L., 2018).

In France, where such explicit exemption is not declared in national laws but came about in July, 2018 after the French Constitutional Court interpreted the principle of fraternity as covering “the freedom to help others for humanitarian purposes, without consideration for the legality of their stay on national territory” (Allsopp, J., 2018). However, the principle of ‘fraternity’ later was not extended to the humanitarian facilitation of entry. Therefore, on 8 of November, 2018 two out of seven volunteers involved in NGOs that help migrants (referred to as ‘Briançon 7’) were charged with “12-month sentences, of which four months are to be carried out behind bars”, while the rest – were issued with “six-month suspended sentences” for providing humanitarian assistance to migrants entering France via the French Alps (Clatot, P. (2018). The research indicate that delinations between the ‘facilitation of stay’ and ‘facilitation of entry’ in practice are also blurred and add to legal uncertainty (Carrera S., Vosyliutė L., Smialowski S., Allsopp J. & Sanchez G., 2018).

The empiric research shows that the humanitarian exemptions may be limited to situations of “state of necessity”, as for example in Italy, and exclude the broader scope of helping refugees and migrants (Carrera S., Allsopp J., Vosyliute L., 2018). The legal gaps and barriers identified at EU and national level have led to a narrowing discussion of what constitutes ‘genuine humanitarian’ acts aimed to exclude the civil disobedience and citizen mobilizations from humanitarian exemption, as opposed to the discussion on ‘what is the crime of migrant smuggling?’. The latter type of discussion would
focus on narrowing the definition of crime of migrant smuggling so that limited law enforcement resources would be invested in criminal cases worth investigating for the purposes of public interest.

To address the ongoing criminalisation of solidarity various policy proposals have been put forward by various civil society actors, such as PICUM, Social Platform, ECRE, Red Cross, Amnesty International, Medcins sans Frontieres, FEANTSA, CIVICUS, Human Rights Watch, Frontline Defenders, and many others. For example, European Citizens’ Initiative “We are welcoming Europe” has mobilised more than 170 civil society organisations that are calling to decriminalise humanitarian assistance. Various mobilisations happened on concrete prosecutions, as for example, petition submitted to the European Parliaments Committee on Petitions by Paula Schmid Porras on behalf of PROEM-AID (Schmid Porras, P. 2017). Some suggestions came from international and regional human rights bodies or even the European institutions and agencies (European Union Fundamental Rights Agency, 2014; United Nations Office on Drugs and Crime, 2017; European Union Fundamental Rights Agency, 2018; European Parliament 2018; Council of Europe, 2018; Human Rights Committee, 2018).


In this ReSOMA policy options brief we further elaborate on four proposals:

- the legislative revision of the Facilitator’s Package that requires ‘financial gain or other material benefit’ to trigger investigation on the crime of facilitation of entry/transit and stay across the EU;
- the revision of Article 1(2) of the Facilitation Directive to make ‘humanitarian exemption’ clause mandatory;
- the Guidelines for implementing Firewalls between civil society and law enforcement;
- the creation of an observatory for monitoring criminalisation of civil society.

### 2.1.1 The criterion of ‘financial gain or other material benefit’

NGOs including PICUM (2017), Social Platform, Red Cross EU Office and researchers from different institutions such as Migration Policy Group, CEPS, Queen Mary University, Refugee Studies Centre, European University Institute, University of Oxford, as well as the Fundamental Rights Agency, propose that the EU Facilitators Package should be amended in line with the [UN standards included under the Protocol against the Smuggling of Migrants](https://www.ohchr.org/EN/HRBodies/CRPMIG/Pages/default.aspx). The EU has to recognise the criterion of
The UN Smuggling Protocol identifies the legal threshold to assess the element of financial gain that has the scope to persecute the activities of organised criminal groups acting for profit (UNODC, 2006; UNODC 2017). Under international law, the reference to “financial or other material benefit” aims to exclude groups which pursue legitimate political or social aims. A profit motive or link is therefore required to leave out those groups that do not seek to obtain any “financial or other material benefit” from the definition of “organized criminal group” (United Nations Office on Drugs and Crime, 2004).

The gain element should be qualified to cover only “unjust enrichment or profit” and exclude “bona fide shopkeepers, landlords and businesses” (Carrera S. et al., 2016; Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018). The concept of excessive gain has been also applied at judicial level. For instance, the Austrian Supreme Court found that a taxi driver who assisted refugees to cross the border from Hungary to the country was not a smuggler because of the application of standard fees for the service provided (Schloenhardt A., 2016). The financial gain therefore did not constitute personal benefit in the sense of unjust enrichment.

2.1.2 The exemption on grounds of humanitarian assistance: how to define it?

EU law should introduce an obligatory provision that expressly prohibits the criminalisation of civil society actors. The Facilitation Directive does not effectively discourage Member States from criminalising civil society organisations and should therefore be amended. For instance, in France, national case-law outlines that the notion of “organised gang” that was meant to tackle only criminal organisations, it is now being used against NGOs’ volunteers (Statewatch, 2018). Statewatch emphasises that this provision is often misused by national authorities as a “tool to intimidate citizens who show solidarity with migrants trying to cross the French Alps”.

This policy option is widely supported among stakeholders (PICUM, Social Platform, FRA, Red Cross EU Office) and researchers (for example, Carrera S., Guild E., Aliverti A., Allsopp J., Manieri M.G., LeVoy M., Gutheil M., Heetman A. 2016; Carrera S., Allsopp J., Vosyiute L. 2018; Carrera S., Vosyliutė L., Smialowski S., Allsopp J. & Sanchez G., 2018; Provera M. 2015; Portes A., Fernandez-Kelly P., Light D., 2012; Van der Leun J., Bouter H., 2015). They recommend 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 Social Platform, 2016 and FRA, 2014). In this regard, the EU should also develop guidelines for Member States to ensure that service providers are not obliged to report undocumented migrants when providing humanitarian assistance (e.g. emergency shelter, food, health care and other necessities).

The United Nations Office on Drugs and Crimes (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” (United Nations Office on Drugs and Crime, 2004). Some good practices can also be found at national level. In Lithuania, it is forbidden to punish assistance of migrants in case of unforeseen circumstances, such as emergency or rescue (FRA, 2014). The legislation in Ireland and the United Kingdom explicitly exempts from punishment those volunteers acting on behalf of an organisation which aims to assist asylum seekers and does not charge for its services (FRA, 2014 and Race Relations Institute, 2017). In Austria, the law does not allow exceptions for humanitarian reasons, but it enshrines an exemption that expressly prohibits the punishment of assistance to family members (spouses, children or parents) on humanitarian grounds.

A study coordinated by CEPS on the implementation of the Facilitation Directive outlines that civil society organisations embrace a concept of ‘humanitarian assistance’ that “mainly relates to services that assist migrants to access their fundamental rights (health care, shelter, hygiene and legal assistance) and to live with human dignity” (Aliverti A., Carrera S., Guild E., Aliverti A., Allsopp J., Manieri M.G., LeVoy M., Gutheil M., Heetman A, 2016). To the same extent, a researcher from the Refugee Studies Centre highlights that the concept of humanitarian smuggling should refer to “acts facilitating irregular entry that are morally permissible and fall outside the scope of punishable offences under smuggling prohibitions” (Landry R., 2017).

2.1.3 Implementing firewalls

NGOs and researchers also call on the EU institutions to develop guidelines for Implementing Firewalls between civil society and law enforcement which guarantees safe humanitarian assistance and access to justice (Carrera S., J. Allsopp and L. Vosyliute, 2017). This policy option is supported among stakeholders (PICUM, Social Platform, ETUC) and academics (Crépeau F. and Hastie B., 2015; Carrera S., Allsopp J. and Vosyliute L., 2017)). “Firewalls” have been also proposed at the UN level discussions on the Global Compact on Migration (Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018).

The firewalls aim to de-couple protection of fundamental rights from immigration law enforcement. The formalised separation between basic service provision and immigration control may directly impact the work of volunteers and NGOs when providing humanitarian assistance to refugees and migrant in irregular situations (Crepeau F. and Hastie B., 2015). The firewall would prevent the imposition of fines and administrative sanctions, prosecution for migration-related criminal offences, arrest and detention. The argument of setting up ‘firewalls’ has been extended to civil society actors, to protect their mandate, when cooperation with law enforcement is requested or necessary (Carrera et. al, 2018).
2.1.4 The creation of an observatory

Civil society and researchers suggest the creation of an observatory to systematically monitor the respect of the human rights of migrants and the effective enforcement of the Facilitators’ Package. Such observatory could be funded from the new EU Values Fund. This proposal is supported among stakeholders (PICUM) and researchers (Carrera S., Guild E., Aliverti A., Allsopp J., Manieri M.G., LeVoy M., Gutheil M., Heetman A., 2016; Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018).

The vague concept of "migrant smuggling activities" allows national authorities to investigate individuals who help migrants to cross or to stay without making any profit. 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(Carrera S., Guild E., Aliverti A., Allsopp J., Manieri M.G., LeVoy M., Gutheil M., Heetman A., 2016; Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018).

2.2 Proposals to facilitate access to funding for NGOs assisting migrants

2.2.1 Increasing the flexibility to funding agencies

Funding rules developed by several Member States for National Programmes represent barriers to AMIF participation for civil society organisations who assist migrants. For instance, in Hungary AMIF applicant organisations are obliged to sign a blanket authorisation that empowers the Ministry of the Interior to directly withdraw money from the organisation’s bank account at any point during and after the project implementation period (Westerby R., 2018). Moreover, according to a survey launched by Bruegel among 25 NGOs, the administrative burden related to the AMIF application procedure, the pay-out and the ex-post auditing are considered excessive obstacles by NGOs (Darvas Z., Wolff G., Chiacchio F., Efstathiou K., Raposo I. G., 2018). Researchers therefore recommend “increasing the flexibility available to funding agencies in case of unforeseen needs, reducing administrative burdens in the process of awarding grants to beneficiaries and speeding-up payments once grants have been awarded” (Darvas Z., Wolff G., Chiacchio F., Efstathiou K., Raposo I. G., 2018). Other researchers also propose that the Commission should “find the necessary responses as much as possible within the existing possibilities for flexibility and emergency in the EU budget and in the different EU funding instruments” (Den Hertog L., 2016).

2.2.2 Direct allocation of minimum funding to CSOs

EU funding opportunities are crucial for NGOs to implement their activities and provide services to migrants. To overcome this issue, NGOs and stakeholders propose that National Programmes “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 R., 2018). It is also suggested the introduction of a systematic monitoring mechanism carried out by the Commission to assess that Member States comply with the requirements of transparency, communication and information sharing.

2.3 How to ensure rule of law and safe space for civil society?

2.3.1 Financial support for NGOs

Researchers and stakeholders warn that rule of law backsliding has the effect of shrinking space for NGOs (Szuleka M., 2018). In some countries, NGOs experience increasing difficulties in promoting European values and are targeted by the governing majority as other fundamental democratic actors, such as the judiciary or independent media. Researchers propose that the European Union should introduce a "new financial mechanism designed to provide financial support for civil society organisations working for human rights protection, rule of law and democracy” (Szuleka M., 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 such as monitoring, advocacy or strategic litigation. Civil society actors should be regularly involved and consulted in the work of the steering and monitoring committees dealing with the allocation of EU funds in the Member States.

2.3.2 Suspension of funding for rule of law’s violation

Stakeholder (ECRE) and researchers (Westerby R., 2018; Šelih J., Bond I. & Dolan C., 2017) also recommend tying funding to the respect of the rule of law and the values embodied under Article 2 of the Treaty of the EU such as human dignity, freedom, democracy, equality and respect for human rights. Key policy options include the establishment of a regular rule of law assessment in the Member States carried out by the EU’s Fundamental Rights Agency, with input from the Council of Europe and civil society. In case 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 EU treaties’ values (Šelih J., Bond I. & Dolan C., 2017).

2.3.3 EU Civil Society Shadow Reporting Mechanism

To monitor the shrinking space for civil society and assess the respect of rule of law, researchers and stakeholders propose to develop an EU Civil Society Shadow Reporting or Complaints Mechanism that feeds into the assessment of EU Democracy, Rule of Law and Fundamental Rights Mechanism, and the work of EU Agencies in countering smuggling and migration/border management policies (Carrera S., Allsopp J. and Vosyliute L., 2017; Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018).
3. MAPPING THE PATTERNS OF DEBATE ON SOLUTIONS

3.1 Reforming the Facilitation Directive and adopting guidelines

A significant part of the migration research community (for example, Carrera S., Guild E., Aliverti A., Allsopp J., Manieri M. G., LeVoy M., Gutheil M., Heetman A. 2016; Carrera S., Allsopp J., Vosyliute L. 2018; Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018; Provera M. 2015; Portes A., Fernandez-Kelly P., Light D., 2012; Van der Leun J., Bouter H., 2015) and several civil society actors (PICUM, Social Platform and Red Cross EU Office) unanimously agree that NGOs assisting refugees and other migrants are experiencing an unprecedented policing of their activities. The broad margin of discretion recognised to the Member States in implementing the Facilitation Directive is identified as one of the main factors that has contributed to the escalation of criminalisation against NGOs in Europe (Carrera S. et al. 2016; Vosyliute L. & Conte C., ReSoma 2018).

Consensus among these researchers, stakeholders, and regional and international human rights bodies has emerged on the fact that the lack of a mandatory exemption on the ground of humanitarian assistance under the Facilitation Directive has the effect of increasing the risk of being prosecuted for helping refugees and migrants. As a result, they propose to revise the Facilitators Package in compliance with the UN Protocol against the Smuggling of Migrants. A rewording of the Facilitation Directive and the adoption of practical guidance to support Member States in implementing EU law are considered as necessary steps to tackle the criminalisation of solidarity (Carrera S., Vosyliūtė L., Smialowski S., Allsopp J. & Sanchez G., 2018).

The policy option, advanced by civil society organisations, to revise the Facilitation Directive has been endorsed by the European Parliament, which has adopted on 5 July 2018 a resolution to end the criminalisation and punishment of organisations and individuals who assist migrants in need. The EP expresses “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 Smuggling Protocol. 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. The EP calls for fostering the operational cooperation between national authorities and NGOs and individuals in order to provide humanitarian assistance in an efficient and coordinated way.

The Parliament outlines that a very limited number of Member States has transposed the humanitarian assistance exemption included under the Facilitation Directive and notes that the exemption should be implemented as a bar to prosecution. The EP therefore calls on Member States to “transpose the humanitarian assistance exemption to ensure that prosecution is not pursued against individuals and civil society organisations assisting migrants for humanitarian reasons”. The
EP urges 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”.

The EP also supports the proposal of creating an observatory for cases of criminalisation and recommends introducing **“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, 2018).

However, the reform of the Facilitation Package does not seem to be a priority on the political agenda of the **European Commission**. The Commission has instead agreed to develop an **observatory of cases of criminalisation** following the EP’s resolution. The Commission has also informed the Race International Institute 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” (Commission, 2018).

By contrast, the policy recommendation to put in place firewall between civil society and law enforcement does not seem to find strong political support in the EU institutions. Nonetheless, the **European Commission against Racism and Intolerance** (ECRI) of the Council of Europe already adopted this policy option and published guidelines in May 2016 to give clear recommendations for European governments to implement firewalls. They 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).

### 3.2 Facilitated access to funding for NGOs assisting migrants

Scholars (Carrera S., Guild E., Aliverti A., Allsopp J., Manieri M.G., LeVoy M., Gutheil M., Heetman A., 2016) jointly support the proposal of empowering civil society organisations to carry out their role by directly allocating reasonable minimum percentages of programme funding. This policy option is also promoted by stakeholders as ECRE and UNCHR that recognise the need for establishing dedicated support systems for civil society organisations during the pre-application and implementation phase of AMIF programmes. Think-thanks, such as CEPS and Bruegel, instead suggest providing more flexibility to funding agencies in case of unforeseen needs and reducing the administrative burdens for awarding grants to beneficiaries and accelerate the payments process.
The policy option to directly allocate minimum funding to CSOs has not been explicitly supported by the EU institutions yet. However, the discussion on the allocation of funding is a political priority in the EU political agenda. The negotiation process for agreement on the new MFF are ongoing and involve the Council, the European Parliament, and the European Commission (Westerby R., 2018).

3.3 Rule of law conditionality

The policy option of reducing funds for Member States that do not comply with basic institutional requirements of the rule of law is mostly supported by researchers and academics (Halmai G., 2018; Pech L., 2017 and Bárd P., 2017). The adoption of the conditionality approach within the new Multiannual Financial Framework is considered as a positive avenue to enforce compliance with joint values (Halmai G., 2018). Researchers point out that the use of rule of law conditionality may be necessary because of the failure of the traditional mechanism of the infringement procedure and the unanimity requirement for sanctions according to Article 7(2) and (3) TFEU (Halmai G., 2018). By contrast, civil society organisations have not yet expressly endorsed this policy option that risk penalising the citizens and regions of the Member States concerned, which highly require financial support through EU funding.

The policy option proposed to link and strengthen EU funds and the respect of rule of law is widely supported by the European Parliament and the Commission.

In 2018, the Commission 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. 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 G., 2018). The budget commissioner, Günther Öttinger, also declared that EU funds could be dependent on the respect for the rule of law in the 2021-2027 EU budget (Maurice E., 2017).

The European Parliament stated in a resolution 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”. Therefore, the resolution 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 L., 2019).
4. MAPPING THE EVIDENCE BROUGHT

4.1 Evidences to change the Facilitation Directive

The evaluation of the Facilitators’ Package carried out under the Commission’s Regulatory Fitness and Performance Programme (REFIT) shows that the Commission did not find sufficient evidences to amend the current legal framework between 2014 and 2016. According to the Commission’s assessment, “although perceived risks of being criminalised for providing humanitarian assistance must be taken into serious consideration, they do not appear to be so prominently linked to the legal framework in place as to its understanding and actual application” (European Commission, 2017). The Commission found that the Facilitation Directive’s evaluation is highly challenging because of the lack of data available.

By contrast, stakeholders and researchers strongly emphasise that the shrinking space for civil society organisations has a systematic nature and results from the implementation of EU and national policies (Vosyliute L. & Conte C., ReSoma 2018). NGOs point out that the rising number of volunteers and humanitarian actors convicted for helping migrants in transit since 2015 is the main evidence of the ongoing shrinking humanitarian space for migration work (Red Cross EU Office, 2017). Moreover, researchers point out that the lack of legal harmonisation among the practices of the Member States is contributing to legal and judicial ambiguity (Carrera S., Guild E., Aliverti A., Allsopp J., Manieri M.G., LeVoy M., Gutheil M., Heetman A., 2016).

National laws on facilitation are a “patchwork of different patterns of criminalisation and exemption” (Fekete L., Webber F., Edmond-Pettitt A., 2017). An investigation carried out by the Race Relations Institute reported the prosecutions of 45 individual “humanitarian actors” under different anti-smuggling or immigration laws in the Member States (Fekete L., Webber F., Edmond-Pettitt A., 2017).

FRA underlines that all EU Member States, except Ireland, have ratified the UN Smuggling of Migrants Protocol which requires to criminalise the procurement of irregular entry or residence of migrants when it aims to obtain, directly or indirectly, a financial or other material benefit (FRA, 2018).

The Interpretive Notes to the UN Smuggling of Migrants Protocol (paragraph 92) clarify that the reference to financial or other material benefit for the perpetrator does not apply to family members or other support groups, such as religious or non-governmental organisations from punishment. By introducing this requirement in domestic law, Member States will have the legal obligation to not prosecute NGOs and volunteers assisting migrants for humanitarian reasons.

By contrast, current legislation at the EU and national levels creates confusion among service-providers and those wanting to assist irregular migrants in relation to the extent of assistance they can legally provide to irregular migrants. A research on the inclusion and exclusion of irregular immigrants in Dutch civil society shows that the lack of legal clarity places NGOs in a kind of “grey
zone” and causes situations where the “NGOs have to choose who deserves support and who does not” (Van der Leun J. & Bouter H., 2015). In addition, to give a few examples, in the UK, humanitarian motivation is relevant only to sentencing and does not exclude guilt. As a consequence, a 25-year-old volunteer, who tried to bring an Albanian mother and two sons to the UK to join their husband and father, was sentenced to 14 months’ imprisonment (Fekete L., Webber F., Edmond-Pettitt A., 2017). This judgment was merely suspended on the ground of the volunteer ‘misguided humanitarianism’. Greek law on facilitation of illegal entry does not criminalise rescue at sea, in line with the international conventions’ obligations under the International Convention on the Safety of Life at Sea, the Convention on Maritime Rescue and the UN Convention on the Law of the Sea. Nevertheless, in August 2018, the Greek police arrested a Syrian refugee, Sarah Mardini, along with a Greek and an Irish volunteer, for helping migrants enter the country illegally.

National courts in Europe may be inspired by the landmark Supreme Court of Canada’s decision in the case of R. v. Appulonappa (2015 SCC 59). This judgement provides for a significant legal precedent that clarifies the smuggling prohibition (Landry R., 2016). The Court ruled that the Immigration and Refugee Protection Act should be interpreted as not applying to: i) persons providing humanitarian aid to asylum-seekers; ii) to asylum-seekers who provide each other mutual aid (including aid to family members). In this regard, three categories of conducts should not be prosecuted: i) humanitarian aid to undocumented entrants, ii) mutual aid amongst asylum-seekers, and iii) assistance to family entering without the required documents.

The Canadian Immigration and Refugee Protection Act is very similar to the EU Facilitation Directive as it risks criminalising those individuals who facilitate irregular entry for humanitarian reasons. The SCC found that the law exceeded its legislative purpose of prosecuting criminal organisations. The ‘broad punitive goal that would prosecute persons with no connection to and no furtherance of organised crime is not consistent with Parliament’s purpose’ (2015 SCC 59). This judgement can be considered as a positive judicial interpretation of laws which criminalise human smuggling. It might help identify those material conducts and categories of individuals who fall outside the legal purpose of prohibiting human smuggling.

Against this background, clarity and legal certainty should represent the main guiding principles of the legislative reform of the Facilitation Directive. Political guidelines and accurate legal parameters will ensure better coherence in criminal national laws and reduce unjustified criminalisation of solidarity. The recommended changes should allow to reduce the fear and intimidation of the social organisations in their work with irregular migrants and help to open more national and local funding resources for their assistance activities. EU law would contribute to make the work of city services and civil society organisations easier and safer.

It may be said that the policy proposal to explicitly exempt humanitarian assistance from the scope of the EU Facilitation Directive is in line with the underlying conclusions of the European Consensus on Humanitarian Aid, signed by the Council, European Parliament and European Commission in 2007.
The Consensus aims at improving the quality of the EU’s humanitarian response and clarifies the meaning of humanitarian aid.

The European Consensus on Humanitarian Aid sets out “that humanitarian aid is a fundamental expression of the universal value of solidarity between people and a moral imperative” (Council and the Representatives of the Governments of the Member States, 2008). It emphasises that refugees and internally displaced persons are severely affected by humanitarian crises. The European Consensus clarifies that the objective of EU humanitarian aid is to provide 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”. Humanitarian aid should encompass different activities such as “assistance, relief and protection operations to save and preserve life in humanitarian crises or their immediate aftermath, but also actions aimed at facilitating or obtaining access to people in need and the free flow of assistance”.

Some authors also argue that the EU Facilitation Directive is both disproportionate and unethical when its purpose is to control migration by targeting not only criminal networks but also those who act in solidarity (Provera M. 2015, Aliverti A. 2012). The ethical argument is often pointed out in case of health care services provided to irregular migrants, following the argument that health care is a human right (Portes et al. 2012). Researchers also emphasise that the criminalisation of humanitarian assistance produces direct and indirect consequences at the local and regional level (Ambrosini M., 2015; Van den Dulpel A., 2017; Ryngbec A., 2015). Policy makers should acknowledge the social backlash stemming from the criminalisation of single individuals, groups and organisations which provide humanitarian assistance to irregular migrants. When citizens are prosecuted for acts of assistance, it may allow for unexpected consequences such as social resistance. This context may undermine the social cohesion and trust to national and EU institutions as well as the legitimacy of the law. Citizens may disapprove the work of the institutions by contesting and violating the implemented laws. The process of resistance against criminalisation is built on the grounds of ethical values (faith, compassion, charity, political idealism, and personal interest), but also on cost-benefit estimates. In fact, cities tackling issues such as social inclusion and public health found that “inclusion costs less than exclusion” and allowed irregular migrants to access fundamental services (Ryngbeck A., 2015).

4.2 Facilitated access to funding for NGOs assisting migrants

Stakeholders (UNHCR & ECRE, 2018) and researchers (Carrera S., Guild E., Aliverti A., Allsopp J., Manieri M.G., LeVoy M., Gutheil M., Heetman A., 2016.) suggest that National Programmes should better enable civil society organisations to carry out their work in the next MMF by granting them minimum percentages of programme funding, because the extent to which they benefit from AMIF National Programme funding differs extensively at national level and NGOs receive a very small proportion of AMIF National Programme funding.
In fact, **Member States with less well-established sectors show positive examples of increasing civil society participation in implementing AMIF National Programmes** (Westerby R., 2018, 2018). By contrast, where the AMIF implementation remains largely under the Member States’ control, civil society actors and smaller organisations face several barriers in access to funds and participate in AMIF National Programmes.

The improvement of accessibility of AMIF National Programme funds for civil society organisations is crucial as NGOs play a significant role as providers of basic services for irregular migrants. NGOs often step in where the state directly or indirectly refuses to provide essential services and basic rights to irregular migrants (Ambrosini M. and Van der Leun J., 2015).

### 4.3 Rule of law conditionality

Researchers (Halmai G., 2018; Pech L., 2017 and Bárd P., 2017; Westerby R., 2018; Šelih J., Bond I. & Dolan C., 2017) bring forward that financial instruments are among the EU main tools to influence the Member States. To the same extent, stakeholders suggest reinforcing the link between the provision of EU funds to Member States and their respect for rule of law and the rights (ECRE, 2018).

The **suspension of EU funds in case of violation of the EU fundamental values would be a deterrent mechanism** to ensure the respect of the rule of law where other instruments have failed (Šelih J., Bond I. & Dolan C., 2017). By linking the respect for the rule of law to disbursement of EU structural and investment funds that are worth €450 billion between 2014 and 2020, the EU will have more powerful instruments to ensure that Member States will align with the EU fundamental values and that European taxpayers’ money is spent effectively.
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1. INTRODUCTION

The Global Compact on Refugees (GCR),\(^{62}\) endorsed by the United Nations (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, fair and equitable responsibility-sharing for hosting and supporting the world’s refugees among all UN Member States and other relevant stakeholders. Though non-legally binding, the Compact expresses the political ambition and will of UN members to stick to its guiding principles and implement its Programme of Action, advancing a set of arrangements for burden sharing and initiatives in key areas in need of support.

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. While recognising the key role played by states in advancing durable solutions for refugees, the GCR also calls for the establishment of a multi-stakeholder and partnership approach, which foresees the involvement of a broad set of actors – including independent civil society organisations, local communities and refugees themselves – in the design, monitoring and implementation of its actions.\(^{63}\)


\(^{63}\) As stated in paragraph 3 of the UN GCR, its implementation engages the following ‘relevant stakeholders’: “international organizations within and outside the United Nations system, including those forming part of the International Red Cross and Red Crescent Movement; other humanitarian and development actors; international and regional financial institutions;
The GCR underlines the need to develop and facilitate mobility and admission channels for people in search of international protection. It seeks to enlarge the scope, size and quality of resettlement and to make available additional ‘complementary’ pathways to protection in a more systematic, organised and sustainable way. In support of efforts undertaken by states, the UN High Commissioner for Refugees (UNHCR) has committed to devising a three-year strategy (2019-2021) to increase the number of resettlement places in the scope of the already-existing multilateral resettlement architecture, involving additional countries in global resettlement efforts and improving the quality of resettlement programmes by fostering ‘good practices’ and new national and regional arrangements.

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, organised, sustainable and gender-responsive basis and to ensure they contain appropriate international protection safeguards. These are aimed 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. Specifically, the 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 migration avenues, which may include family reunification, education and labour opportunities (UNHCR, 2019).

The GCR provides a unique mirror to critically assess European Union (EU) policies on matters related to asylum and refugees, in particular in the framework of third country cooperation and arrangements. Existing literature on this Compact has placed increasing focus on its implementation challenges, particularly in light of its lack of legal ‘bindingness’ and its open-textured nature (Goodwin-Gill, 2019; Türk, 2019). The GCR relationship with the UN Global Compact for Safe, Orderly and Regular Migration (GCM) and its expected impacts on refugee mobility has also been addressed (Costello, 2019; Carrera, Lannoo, Stefan and Vosyliūtė, 2018).

Less attention has been paid to the opportunities that the GCR offers as a monitoring and assessment framework in two main areas: first, the role of the EU and its Member States, their compliance and

\[\text{regional organizations; local authorities; civil society, including faith-based organizations; academics and other experts; the private sector; media; host community members and refugees themselves.}\]

\[\text{Resettlement is defined by UNHCR as "the transfer of refugees from an asylum country to another State that has agreed to admit them – as refugees – with permanent settlement status. The status provided ensures protection against refoulement and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country." Refer to UNHCR Resettlement Handbook, retrievable from }\text{https://www.unhcr.org/46f7c0ee2.html} \text{The Handbook also states that "Resettlement is not a right, and there is no obligation on States to accept refugees through resettlement. Even if their case is submitted to a resettlement State by UNHCR, whether individual refugees will ultimately be resettled depends on the admission criteria of the resettlement State."}\]

\[\text{The international architecture on resettlement includes Annual Tripartite Consultations and the Working Group on Resettlement. See: }\text{https://www.unhcr.org/partnership-resettlement.html} \]
contribution towards the implementation of the GCR Programme of Action in ways that are loyal to the Compact and EU Treaties guiding principles; second, the operational implementation, as well as the main gaps and contested issues, of existing resettlement and complementary admission instruments for refugees and would-be refugees implemented at the EU and Member State levels.

In light of the previous, this Policy Brief examines the EU’s role in the implementation of the UN GCR. Section 2 starts by critically examining what we call the EU’s approach of ‘contained mobility’ which has been operationalised in the scope of EU third country arrangements like the 2016 EU-Turkey Statement. Section 3 covers the field of resettlement and highlights recent EU contributions and initiatives. Instruments falling under the notion of ‘complementary pathways’ are then examined in Section 4 (humanitarian visas), and Section 5 (other complementary pathways based on legal immigration channels). The brief concludes by recommending that the EU moves from an approach focused on ‘contained mobility’ towards one which is ‘facilitative’ (Aleinikoff, 1992), i.e. placing refugee’s rights and agency at the centre through facilitated resettlement and other complementary pathways driven by a fundamental rights, protection and humanitarianism rationale, and which is loyal to principles laid down in the EU founding Treaties and Member State constitutional traditions.

2. THE EUROPEAN UNION AND THE GCR: THIRD COUNTRY ARRANGEMENTS

The academic literature has brought to light the role that EU cooperation on migration and asylum matters has played in the development of policy and legal instruments focused on ‘containment’ of asylum seekers and refugees in countries of origin or transit. Since the 1990s, several European countries have actively engaged in the adoption of restrictive domestic policies driven by migration management priorities and focused on the prevention of entry and expulsion of asylum seekers. These have included, among others, restrictive visa policies, carrier sanctions, readmission agreements and arrangements, and the use of safe third country notions (for an analysis refer to Aleinikoff, 1992; Shacknove, 1993; Chimni, 1998).

Already in the early 90s, Aleinikoff (1992) identified a restrictive move in European asylum policy prioritising state controls over admissions and resettlement and underlined the existence of a containment or source-control bias aimed at removing the so-called ‘root causes’ of refugee mobility in countries of origin of refugee flows. In his view, “refugee law has become immigration law emphasising protection of borders rather than protection of persons”. Along the same line, Shacknove (1993) underlined states’ immigration control mentality” translating into policies aimed at forcing asylum seekers into patterns of immigration, pre-empting their entry or containing them in countries of transit or origin.
Some of these same policies guided by non-arrival and non-admission logics have, since 1999, found their way into EU legal instruments, taking the shape of a common EU visa and border (Schengen) policy, EU readmission agreements and arrangements, carrier sanctions and the inclusion of provisions of ‘safe country concepts’ in EU asylum legislation (Byrne, Noll and Vedsted-Hansen, 2002; Costello, 2005; Scholten, 2015; Carrera, 2016; Costello, 2016; Costello, 2017; Carrera, 2018). As a consequence of this consolidated EU and national legal and policy framework centred on containment, refugees face overwhelming legal and practical barriers in accessing protection in the EU. Savino has rightly pointed out that the resulting paradox is one where EU policies “feed the very same phenomenon of unauthorised arrivals – that the broader EU migration policy intends to curb” (Savino, 2018).

When assessing the GCR, and its nexus with the GCM, through the lens of refugee containment literature, Costello (2019) reminds us how migration control practices suppress refugee mobility and bear down particularly heavily on refugees and would-be refugees. In her view, the bifurcation of the UN GCR and the GCM into two separate processes risks solidifying a distinction between the categories of ‘refugee’ and ‘migrant’ that has important consequences for refugee mobility and rights. This approach artificially reframes many people in search of international protection as ‘migrants’ and may lead to an unlawful side-lining of states’ international and regional human rights and refugee law commitments. While acknowledging the positive potential, inherent in the GCR design, to develop better resettlement opportunities, Costello (2019) points out the risk that the UN GCR “may serve to legitimate refugee containment, rather than open up greater mobility opportunities for refugees”.

During recent decades, the EU has developed a complex and diversified matrix of policy, legal and financial instruments to involve third countries in the management of migration, borders and asylum. More recently, scholars have identified how ‘in the name of the 2015 European Refugee Humanitarian Crisis’, EU cooperation with third countries on asylum and migration has been re-prioritised, leading to the adoption of a number of non-legally binding political ‘arrangements’. The literature has identified a shift in EU policy: from an approach emphasising formal cooperation through legal acts and international agreements, towards another calling for informal channels and political tools or non-legally binding/technical arrangements of cooperation often linked to emergency-driven EU financial tools (Carrera, den Hertog, Panizzon and Kostakopoulou, 2018; and Carrera, Santos and Strik, 2019).

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66 Byrne, Noll and Vedsted-Hansen (2002: p. 13) have differentiated between ‘non-admission policies’, understood as instruments applying restrictive criteria for asylum seekers to be admitted and have access to assessment procedure and to territory and ‘non-arrival policies’ aimed at keeping asylum seekers at a distance from any asylum procedure or any possible territory of protection.
A case in point has been the conclusion of the 2016 EU-Turkey Statement (Carrera, Santos and Strik, 2019), which is controversially portrayed by some EU actors as a ‘model’ to be replicated in other EU third country arrangements. The ‘deal’ set up an operative framework under which asylum seekers having irregularly entered Greece via Turkey, or been intercepted in Turkish waters, would be returned to the latter. At the same time, it included the so-called ‘one-for-one’ (1:1) resettlement arrangement, according to which, for every Syrian returned from Greece to Turkey, another Syrian would be resettled from Turkey to the EU. The Statement was based on the political framing of Turkey as a ‘safe third country’, despite the fact that the country is not bound by the 1967 Protocol to the United Nations Geneva Convention on Refugees (thus it refuses to recognise full refugee status for non-European asylum seekers), and the wealth of evidence about the human rights violations and rule of law challenges in the country (Amnesty International, 2017; Council of Europe, 2017).

The EU-Turkey statement is an exemplary case illustrating how the containment bias often comes with specific forms of mobility and admission for refugees. The Statement in fact provides both containment and mobility elements in its priorities and design, and may be seen as a living instance of an EU ‘contained mobility’ approach. Such an approach combines aspects on containment – e.g. safe third country rules, border surveillance and interception at sea – with others on mobility, yet a kind of mobility that presents highly selective and restrictive features, e.g. 1:1 only covering Syrian nationals.

The Statement is a political declaration coming in the guise of a press release. The academic literature has expressed concerns about the strategic political ‘non-use’ of EU Treaty instruments that escape democratic scrutiny by the European Parliament and judicial control by the Court of Justice of the EU in Luxembourg, and the non-compatibility of this approach with the EU Treaty principles of inter-institutional balance and sincere and loyal cooperation (Carrera, den Hertog and Stefan, 2019; Carrera, den Hertog and Stefan, 2017).

There has also been substantial disagreement as regards the actual authorship of the EU-Turkey Statement, and the extent to which any EU institution was involved in its adoption. Surprisingly for many, the Luxembourg Court confirmed that it was a product of the Heads of Government and State of EU Member States, and not of any EU actor (including the European Commission). Irrespective of who the actual author was, EU institutions and agencies such as Frontex and EASO have been central in its operational implementation and financial support through the so-called ‘EU Facility for Refugees in Turkey’ (Carrera, 2019).

This has been acknowledged by the European Ombudsman, which in a Joint Inquiry issued on January 2017, reminded the Commission about its obligation to ensure robust human rights impact assessments of the Statement (European Ombudsman, 2017). The implementation of the EU-Turkey Statement has raised fundamental questions regarding the independence of civil society actors and

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non-governmental organisations in the Greek islands and the Hotspots. Many civil society actors decided to stop providing services and assistance to asylum seekers and leave the country due to the human rights challenges that the operationalisation of the Statement posed to their ethos, independence and humanitarian assistance principles (Carrera, Mitsilegas, Allsopp and Vosyliute, 2018). On the occasion of the third anniversary of the Statement in March 2019, a group of twenty-five civil society organisations sent an open letter to European leaders, reiterating their concerns about the ‘unfair and unnecessary containment policy’ implemented via the deal, which is still forcing around 12,000 refugees and asylum seekers to live in degrading conditions in hotspots on the Greek Islands.

The human rights violations inherent in its practical implementation in Turkey and Greece have been well documented (Carrera, den Hertog and Stefan, 2019; Médecins Sans Frontières, 2019). The selective mobility logic included in the one-for-one resettlement scheme – which only covers certain Syrians – is contrary to established principles of international refugee law, which lie at the basis of the UN GCR. In particular, the scheme violates the prohibition of non-discrimination based on country of origin as laid down in Art. 3 of the 1951 Geneva Convention (Carrera and Guild, 2016).

Finally, the effectiveness of the ‘deal’ has been largely questioned. The limited number of Syrian refugees that have been returned to Turkey in the framework of the Statement (337 from April 2016 to December 2018), as well as the total number of returns (only reaching about 2,000 over the same period) is a clear demonstration of the legal obstacles that arise when wrongly applying the safe third country concept (UNHCR, 2018a). Moreover, the EU-Turkey Statement has not prevented mobility from happening. According to statistics provided by 2019 Frontex Risk Analysis, in 2018 there were about 56,000 irregular border crossing from Turkey to Greece, in comparison to 42,000 entries in 2017 (Frontex, 2019). In light of the above, the EU-Turkey Statement provides a ‘non-model’ of third country cooperation and sharing of responsibility as it stands at odds with the human rights and refugee protection principles at the basis of the UN GCR and the EU Treaties.

3. RESETTLEMENT

Resettlement has represented the main channel for providing recognised refugees in first countries of asylum access to EU Member State territory. It involves the selection and transfer of refugees from a state in which they have sought protection to a third state which has agreed to admit them – as refugees – with permanent residence status. Identified as a ‘durable solution’ by the UNHCR, resettlement targets specifically vulnerable refugees that cannot enjoy an adequate level of protection in their country of first asylum (e.g. victims of torture, women and girls at risk, people in

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68 See NGOs calling on European leaders to urgently take action to end the humanitarian and human rights crisis at Europe’s borders. [https://oxfam.app.box.com/v/3yearsEUTurkeyDeal](https://oxfam.app.box.com/v/3yearsEUTurkeyDeal)
need of medical treatment not available in the country of residence) (European Resettlement Network, 2019).

The number of resettlement beneficiaries remains by and large in hands of relevant country governments. According to UNHCR data, after a growth in global resettlement quotas over the period 2012-2016, resettlement opportunities saw a steep reversal in 2017; in fact, the 20-year record high of 163,200 submissions in 2016 was more than halved in 2017, when only 75,200 refugees were submitted for resettlement. This negative trend should be read against the background of a global context characterised by unprecedented displacement and approximately 1.4 million refugees estimated to be in need of resettlement in 2019 (UNHCR, 2018b).

Traditionally, resettlement activities have been carried by a group of Member States outside the EU framework through the implementation of national resettlement programmes or ad hoc initiatives targeted to specific populations of refugees. Since 2000, the European Commission considered the potential establishment of a common EU approach on access to the territory for people in need of protection, including the option of “processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme” (European Commission, 2000). This was followed up with a Study exploring the feasibility of implementing so-called ‘Protected Entry Procedures’ (PEPs) in EU Member State diplomatic representations, which would allow asylum seekers to submit an asylum claim and be granted with an entry permit by a potential destination country outside its territory (Noll, Fagerlund and Liebaut, 2002). While the Commission followed up the reflection on some of these initiatives (European Commission, 2003), the discussion on the development of a common EU approach on legal and safe avenues was stalled when it reached EU Member States in the Council, which opposed ‘more EU’ in these areas.

Instead, the focus was then shifted to coordinating Member State resettlement efforts. The first EU joint action on resettlement date back to November 2008, when the EU Justice and Home Affairs (JHA) Council agreed to resettle 10,000 refugees from Iraq (ERN 2019). Following that experience, cooperation at the EU level was formalised in 2012 with the launch of the Joint EU resettlement Programme, which established a framework of voluntary participation of Member States in resettlement activities. Specifically, the Joint EU Resettlement Programme introduced a mechanism for setting common annual priorities on resettlement linked with the provision of financial incentives to those Member States accepting to take part in the programme. The Commission motivated the establishment of the programme by the need to strengthen the EU global role in the field of

69 The Study presented five main proposals for future EU policies, in particular: a flexible use of the visa regime that includes a protection dimension; the introduction of a sponsorship model which involve civil society actors in the area of selection funding and integration of beneficiaries of PEPs; the establishment of EU Regional Task Force supporting third countries’ authorities in processing of asylum claims and identifying people to be granted access in the EU; gradual legislative harmonisation through an EU Directive laying down best practices; and, finally, full harmonisation through and EU regulation on a so-called ‘Schengen Asylum Visa’. Refer to Section 7.2.2 of the Study.
resettlement, underlying that EU Member States accounted at the time less than 7% of refugees resettled worldwide (European Commission, 2009).

In spite of EU attempts to coordinate its resettlement efforts, expectations for a substantial increase in resettlement pledges by Member States in the following years were largely unmet (van Ballegooij and Navarra, 2018). However, since 2016, with the unfolding of the so-called European humanitarian refugee crisis and in line with global efforts promoted by the UNHCR, EU Member States initiated a number of ad hoc initiatives in this field.

In June 2015, the Commission adopted a proposal on a European Resettlement Scheme, which was followed by an agreement among the Member States in July the same year to resettle 22,504 persons in clear need of international protection over the following two years. As mentioned in the previous section, a resettlement component (the ‘one-to-one’ mechanism) was also included in the framework of the 2016 EU-Turkey Statement. The Statement specified that resettlement under this mechanism should take place, first, by filling the places still unallocated under the July 2015 Resettlement scheme and, afterwards, through a similar voluntary arrangement up to a limit of an additional 54,000 persons.\(^70\) In its Progress report on resettlement of 6 September 2017, the Commission stated that the total number of people resettled under both the 20 July 2015 scheme and the EU-Turkey deal since their launch was 22,518.\(^71\)

However, the Report also pointed to obstacles in implementation, underlining that nine Member States had not yet resettled under the 20 July 2015 scheme and thirteen Member States had not resettled under the EU-Turkey Statement (European Commission, 2017). In September 2017, recognising growing resettlement needs at the global level and the need for additional efforts by the EU, the Commission adopted a recommendation on enhancing legal pathways for persons in need of international protection, including the target to resettle 50,000 persons in the following two years. According to the Commission, at the end of 2018, 15,900 out of the 50,000 places agreed had been filled (European Commission, 2018a).

Civil society and international organisations such as the UNHCR have consistently advocated for expanding resettlement places in Europe. Stakeholders active in the field of refugee protection have

\(^70\)To meet resettlement needs under the EU-Turkey deal, in September 2016 it was decided to amend the Decision on intra-EU Relocation to the benefit of Italy and Greece adopted in September 2015 to make it possible for Member States to fulfil their obligations in relation to 54,000 places under that Decision by resettling Syrians from Turkey instead than relocating asylum applicants from Italy and Greece. See Council Decision 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2016] OJ L268/82.

underlined the importance that the EU start coordinating its pledges in the area of resettlement in view of the first Global Refugee Forum to be held in December 2019, going beyond the 50,000 places already pledged in September 2017 (ECRE 2019). Civil society has also stressed the importance of going beyond traditional state-led resettlement programmes and exploring alternative instruments, such as community and private sponsorship programmes. In the context of resettlement, private and community sponsorship programmes involve a transfer of responsibility from government agencies to private actors for some elements of the identification, pre-departure, reception, or integration process of resettled refugees.

While recognising the value-added that a strengthened public-private partnership approach may bring to the implementation of resettlement programmes, sponsorship schemes should be based on the principle of additionality, meaning the beneficiaries must be admitted in addition to those who enter through government-supported programmes. From the point of view of procedures, there is a need to better ensure the integrity, certainty and non-discriminatory nature of selection procedures and vulnerability determination of applicants (ERN, 2017; ECRE & PICUM, 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”. 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 numbers resettled in Europe (Commission 2016). The Commission’s proposal provides a common definition of the notion of resettlement, the factors to be considered for including non-EU countries from where resettlement would occur and a set of common eligibility criteria and grounds for exclusion of applicants. It would establish common procedures and annual Union resettlement plans with targeted resettlement schemes 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 UN GCR. This includes a close linkage and interdependency between restrictive mobility and admission possibilities through resettlement and border and migration management. 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

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73 Art. 2 of the Proposal defines resettlement as “the admission of third-country nationals and stateless persons in need of international protection from a third country to which or within which they have been displaced to the territory of the Member States with a view to granting them international protection”.

74 See Arts. 7 and 8, as well as 10 and 11 on procedures.
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 (Cortinovis, 2018).

The introduction of a logic of ‘contained mobility’ in the EU Resettlement Framework has been one of the key stumbling blocks during trilogue talks between the EU co-legislators during the last two years. Specifically, recalling the position of several stakeholders, the European Parliament stressed in its Report 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”. Member States, on the other hand, have been consistent in underlining the importance of resettlement as a “strategic instrument to manage migration by helping to reduce the incentives for irregular migration” (Council of the European Union, 2018).

Several civil society actors having played an active role in the implementation of current resettlement programmes issued a Joint Comments Paper on 14 November 2016 that raises 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 lay at the heart of the UN GCR guiding principles. The kind of cooperation envisaged in the Commission proposal has been seen as posing major risks that refugees will be expelled to their country of origin in direct contravention of the non-refoulement principle (Savino, 2018).

UNHCR comments on the Framework raised additional concerns about the provision in the proposal to include family members as a separate category of eligible persons under the Framework (UNHCR, 2016). According to the UNHCR, the Framework would in this way contribute to blurring the distinction between resettlement as a tool for protection (focusing on vulnerability criteria) and family reunification, which should be kept independent of resettlement targets and quotas. The UNHCR also recommended that the Union framework should avoid duplications with already existing structures and take place under “the existing international resettlement architecture”. Importantly, it also pointed out that it “understands States’ concerns and desire to deploy various tools to effectively

manage migration. Yet, resettlement is, by design, *a tool to provide protection and a durable solution to refugees rather than a migration management tool*" (emphasis added).

4. HUMANITARIAN VISAS

The UN GCR calls for increasing the availability and predictability of complementary pathways which could include “humanitarian visas, humanitarian corridors and other humanitarian admission programmes”. There is not a commonly held and agreed international and EU definition for each of these three categories. The notion of ‘humanitarian admission’ is usually understood an ‘umbrella concept’ encompassing several sub-programmes, amongst which are referral mechanisms designed to provide expedited and time-efficient asylum processing and providing temporary protection to refugees (ICMC Europe, 2015). It can capture several protection tools such as Humanitarian Admission Programmes (HAPs), amongst which there are humanitarian visas and corridors, and others such as family reunification programmes (See Section 5 of this paper below). Existing research on HAPs shows high disparities and a wide-range of fragmented national-specific instruments and programmes across the EU (ERN+, 2018).

In the aftermath of the European humanitarian refugee crisis, the issuing of humanitarian visas to people in need of protection has been proposed by a wealth of civil society actors and scholars, fostering a debate about the added value for the adoption of a common set of EU rules in this area. A key difference between humanitarian visas and resettlement is that while the latter is addressed to those that have been already been accorded refugee status by the UNHCR, humanitarian visas would provide a means of access to asylum seekers in urgent need of protection whose actual Refugee Status Determination (RSD) is yet to be established. A study conducted in 2014 to take stock of Member State experiences in issuing humanitarian visas came to the conclusion that a total of 16 Member States were at the time running (or had run in the past) some form of scheme for issuing humanitarian visas, while recognising the lack of comprehensive and comparative qualitative and statistical knowledge on existing practices (Iben Jensen, 2014).

Besides programmes carried out by Member States based on national law, there is at present no EU legal framework for humanitarian visas. While the EU Visa Code allows derogations from the procedural and substantive criteria required for obtaining a visa based on “humanitarian grounds”, it does not expressly include a clear and consistent procedure for issuing Schengen visas for the purpose of reaching the territory of a Member State in order to seek international protection. This was confirmed by the Court of Justice of the EU (CJEU) in the case between Syrian asylum-seekers v. the Belgian state (*X and X v. Belgium*), where it concluded that humanitarian visas were a matter of national law and policy. Scholars have however argued that the Luxembourg Court ruling completely disregards the extraterritorial application of the EU Charter of Fundamental Rights and its Articles 4

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76 CJEU, 7 March 2017, C-638/16 PPU, *X. and X. v. Belgium*. 
(Prohibition of torture and inhuman or degrading treatment or punishment) and 18 (right to asylum), and provides a too narrow and restrictive interpretation of Article 25.1 of the EU Visa Code, in particular the obligation to issue a short-term visa with limited territorial validity (Brouwer, 2017a; Brouwer, 2017b).

Currently, the main ‘refugee producing countries’ at the global level are included in the so-called EU visa “black list”, which implies that citizens of those countries must be in possession of a visa to cross the border and enter the Schengen area legally.\textsuperscript{77} This in turn implies that applicants from those countries should fulfil relevant criteria for obtaining a visa specified by the EU Visa Code, including evidence of an intention to return to their country of origin, which is obviously an unreasonable and disproportionate condition to apply in the case of refugees and other beneficiaries of subsidiary or complementary forms of international protection (Moreno-Lax, 2018; Brouwer, 2017a).

The reform of the EU Visa Code, initiated in 2014 by the European Commission, represented an opportunity for introducing a common EU approach on humanitarian visas. However, during trilogue negotiations that started in May 2016, the Council opposed the inclusion of provisions related to humanitarian visas put forward by the European Parliament. In light of diverging views in the Council, the Commission and the European Parliament, which mainly related to the Council and Commission’s opposition to include humanitarian visas in the EU Visa Code, the Commission withdrew its former proposal\textsuperscript{78} and published a new one in March 2018.\textsuperscript{79}

Following the refusal by Member States to consider provisions on humanitarian visas in the context of the reform of the EU Visa Code, the LIBE Committee decided to draft a Legislative Own-Initiative Report on Humanitarian Visas, requesting that the Commission submit a legislative proposal for a separate legal instrument in the form of a Regulation by 31 March 2019. The Report, formally adopted by the EP plenary in November 2018, recommends the introduction of a new legislative instrument, a 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.

\textsuperscript{77} See Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification), OJ L 303/39, 28.11.2018. For statistical data on main countries of origin of refugees see UNHCR Statistical yearbooks, available at: https://www.unhcr.org/statistical-yearbooks.html


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 a person in need of international protection to enter the EU to seek asylum, and the corresponding obligation for the Member States to admit such a person (European Commission, 2019). According to the Commission, this stems from the fact that the 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, is problematic in line of extraterritorial protection-related obligations under the Charter of Fundamental Rights of the European Union (CFR). As argued by legal scholars, the CFR (including obligations of non-refoulement) applies whenever member states act within the scope of EU law (Art. 51 CFR), with territoriality non being a decisive criterion (Moreno Lax, 2018).

Furthermore, the Commission recalls the process of negotiation of the Union Resettlement Framework, on which co-legislators reached a political compromise in June 2018 and which now requires “full attention” from EU institutions. In a way that blurs the distinction between the specific rationales and different categories of targeted beneficiaries of these two instruments, the Commission concludes that, once adopted, the Union Resettlement Framework would have the potential to achieve the same objective pursued by the EP initiative on humanitarian visas, namely increasing the number of persons in need of international protection admitted into the EU.

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 and academia, that took part in the consultation processes 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 clear set of rules in this area would be instrumental in introducing a mechanism of safe and legal access to international protection in 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 (ECRE, 2019).

The European Parliament proposal was also informed by a Study (European Added Value Assessment accompanying the European Parliament’s legislative own initiative report) on Humanitarian Visas (van Ballegooij & Navarra, 2018). The Study emphasised that “EU legislation does not provide clear and complete standards on admission to the EU for asylum seeking purposes and that there is no common understanding of the applicable practical arrangements”. The Study called for the need to ensure safe and legal pathways for people searching international protection in the EU and concluded that “one may reasonably expect a significant portion of migrants travelling to the EU to seek asylum through irregular means to apply for an EU humanitarian visa, thus reducing irregular migration flows to the EU”. It also provided evidence on the negative fundamental rights effects as
well as the impacts of the current lack of a formalised humanitarian visa system at EU level on individuals, Member States and the Union as a whole.

The same EP study underlined that existing ‘Protected Entry Procedures’ (PEPs) adopted by EU Member States tend not to be open-ended, but quota-based, geographically bounded and limited in time, with highly complex selection criteria and not always protection-driven (Moreno-Lax, 2018). Existing admission schemes are also criticised for their lack of publicity, transparency and predictability and for non-alignment with legal certainty and rule of law standards. A key challenge relates to exact ways in which the integrity of the selection procedures of potential beneficiaries takes place in practice. The risks of corruption, extortion and clientelism when managing humanitarian visas schemes has been recently illustrated in the case of Belgium, with a local representative of the Flemish nationalist party N-VA suspended from his functions on account of allegations of selling humanitarian visas to refugees. According to revelations by investigative journalists, the local mayor allegedly charged the refugees a fee in order to be placed on a list of names eligible for the visa that he later sent to the then-immigration minister Theo Francken (Euronews, 2019).
5. COMPLEMENTARY PATHWAYS BASED ON LEGAL IMMIGRATION CHANNELS

Besides resettlement and other humanitarian entry channels, the UN GCR calls for additional complementary pathways to protection, by making flexible use of existing immigration policy tools, such as family reunification, study and mobility channels. Facilitating visas for the family members of beneficiaries of international protection that are already present in a Member State would be a straightforward way to use current immigration tools to assist safe access to the EU. To achieve that objective, the term ‘family member’ could be interpreted more widely (Collett et al., 2016).

The literature has understood that facilitating family reunification instruments and arrangement for refugees has been considered an essential pre-requisite for ensuring an effective delivery of the human right to family life stipulated in Article 8 of the European Convention of Human Rights, and Article 7 of the EU Charter of Fundamental Rights (Costello, Groenendijk and Halleskov, 2017). The European Court of Human Rights (ECtHR) in Strasbourg has held\(^{80}\) that in the case of refugees and others who are non-removable or expellable, there are *ipso facto* insurmountable obstacles for establishing family life in their country of origin. Establishing new entry channels for extended family members, however, may prove difficult considering the range of obstacles and restrictions that beneficiaries of international protection are currently facing to reunite even with core family members in several EU Member States (Conte, 2018).

Additional pathways to protection could also be created through enhanced opportunities for refugees to arrive safely in the framework of study or education programmes. This objective could be pursued first by ensuring that existing academic scholarship and apprenticeship programmes take into consideration the specific challenges faced by refugees in accessing those programmes, 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 programmes specifically targeted to refugees (UNHCR, 2015). In the aftermath of the Syrian crisis, promising practices have been introduced by some EU Member States, as well as the European Commission, such as the creation of partnerships with higher education institutions to offer ad hoc opportunities for refugees to come to Europe for their studies. While the numbers of refugees that have benefitted from these opportunities have generally been low, there is a need to carry out an independent evaluation of these programmes and potentially expand them in a way that is both sustainable and protection-sensitive (European resettlement network, 2017).

The same flexible and protection-based approach could also be explored to allow refugees access to existing labour mobility opportunities. This would require removing the legal,

\(^{80}\) *Mengeshar Kimfe v. Switzerland*, Judgement 9 July 2010, Application No. 24404/05.
administrative, and informational barriers that often prevent refugees from accessing existing labour opportunities. As a further step, entry programmes specifically targeted at refugees could also be introduced, in consultation and partnership with the social partners, including interested employers and recruitment agencies of destination countries and in full compatibility with international labour standards laid down in International Labour Organisation (ILO) instruments (UNHCR/ILO, 2012; Norwegian refugee Council et al., 2018: 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 programmes to facilitate reunion with extended family members should by no means be considered as an option for restricting the right to reunite with family members and facilitate family unity. 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 (Norwegian Refugee Council et al., 2018).

Furthermore, the admission of people in need of international protection, including those entering through migration-related channels, should be accompanied by comprehensive post-arrival integration policies. An individualised and tailored (follow-up) approach has proved particularly crucial for ensuring effective and durable labour market insertion by immigrants and refugees (Carrera and Vankova, 2019). Restrictive mandatory civic and language integration programmes, and restrictive family reunion policies, have undermined human rights and inclusion of asylum seekers, refugees and beneficiaries of subsidiary protection (Carrera and Vankova,
2019). Instead, voluntary introduction and labour insertion measures focused on skills provision and practical information on rights and entitlements at work can play a key role in successful socio-economic inclusion. Well-designed integration policies offering language courses, skills/qualifications-recognition and personalised professional training may facilitate refugee inclusion into their labour market and reduce the risks of exploitation, irregular work, and low wages and unfair working conditions. Adequate and long-term financial state support is central here (Carrera and Vankova, 2019).

**CONCLUSIONS**

The UN GCR provides a basis for predictable and equitable responsibility-sharing among all UN members and other international actors on refugee protection, thus addressing a major gap in the international protection regime since its creation in the 1950s. Its adoption raises the crucial question as regards the exact role and contributions by the EU, and its Member States, in its faithful implementation in line with its guiding principles and in full compliance with human rights and refugee law standards and EU Treaty principles. The GCR arrives in an EU policy context where the focus is mainly on shifting responsibilities on refugees towards third countries of transit and/or origin, which sometimes include admission or mobility opportunities and instruments that are highly selective, discriminatory and migration-management driven. Current EU legal instruments, policy/political (non-legally binding) arrangements and emergency-driven funds give an overwhelming priority to non-admission of refugees and would-be refugees.

EU instruments and arrangements with third countries rely on expulsions (including so-called ‘voluntary repatriation’), non-arrival measures and addressing ‘the root causes of migration and refugee’ movements in countries and regions of origin. These policies exemplify a contained mobility logic. Restrictive and selective mobility/admission arrangements for refugees have been progressively consolidated and used in exchange of, or as incentives for, third country commitments to EU readmission and expulsions policy, with little consideration of their concrete
negative impacts on human rights and international and regional refugee commitments, or their role in increasing ‘incapacity’ in third countries to uphold the rule of law, human rights and refugee protection standards.

This has come along with a reframing of individuals in search of protection from ‘refugees’ (thus legitimate beneficiaries of international protection) to ‘migrants’, which rests on the wrong assumption that they cannot rely on legal entitlements to seek asylum in the EU, and that Member States have no obligation to deliver refugee and human rights to them. It is in this respect that the relationship between the UN GCR and the GCM calls for close and detailed scrutiny during their implementation phases, including the effects of involving international organisations with no human rights and refugee protection firmly anchored in their mandates and statuses (Guild, Grant and Groenendijk, 2017). This is even more necessary in light of the existence of ‘complementary’ and/or ‘legal’ pathways for admission to refugees such as humanitarian admission programmes across EU countries – relying by and large on scattered, fragmented and obscure selection procedures, which do not clearly meet solid integrity, non-discriminatory selection and transparency standards, and involving a diversity of implementing actors.

The EU and its Member States could play a key role in ensuring that the UN GCR will make a difference in contrast to the current state of play in responsibility-sharing arrangements. A coordinated EU position in GCR implementation would be a most welcome way forward. EU Member States should refrain from undermining the effective implementation of the UN GCR, otherwise they would be infringing their obligation of sincere and loyal cooperation as established in Article 4.3 TEU. Such a coordinated EU position should give firm priority to human rights and refugee protection over an approach focused on containment bias (Guild and Grant, 2017).

In line with the guiding principles included in the GCR, calls have been made to EU and national policymakers to increase the scope of legal avenues for protection in Europe, through resettlement and other complementary pathways that are driven by a fundamental rights,
protection and humanitarianism 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. As called for by the European Parliament, a set of common EU rules laying down a formal procedure for lodging and processing of applications for humanitarian visas would be instrumental in ensuring that Member States comply with their protection obligations by issuing a visa on humanitarian grounds when this is necessary to prevent violations of the fundamental rights of the individuals concerned.

Attention is increasingly paid by a number of stakeholders to how to create additional non-humanitarian pathways to protection in the EU. Enabling entry for family members is a straightforward way of offering greater protection and guaranteeing the integration of refugees and beneficiaries of subsidiary forms of protection by upholding the right to family life. Current family reunification criteria could be made less burdensome and expanded. The possibility should be considered to facilitate entry of refugees through already existing or specifically designed education and labour migration channels. While the potential of complementary pathways to expand protection in the EU should be fully explored, those channels should be seen as additional to those already established by Member States, and ensure that beneficiaries are protected against referral and can access the asylum process in their country of residence.

The impact of contained mobility policies discussed in this Policy Brief should be considered in a context where EU external funding (in particular development funds) is increasingly mobilised in pursuit of similar non-admission and non-arrival objectives. Channelling EU development funds into the framework of ‘extra treaty’ arrangements with third countries that are driven by such an approach is not in line with UN Sustainable Development Goals (SDGs) or UN GCR principles and is not conducive to durable protection-driven solutions for refugees and other forced migrants. Development cooperation should not be ‘Euro-centric’ and instead aim mainly to meet the needs of developing countries. The ongoing negotiations on the next MFF 2021-2027 should centre on increasing the transparency and accountability of EU funding instruments, limiting emergency-driven funding tools and ensuring full consistency between EU external migration and refugee
policy and the humanitarian and development principles enshrined in EU Treaties and UN human rights and refugee law commitments.

The following years will show whether the implementation of the UN GCR will be able to facilitate the establishment of a global responsibility sharing framework driven by international refugee protection and human rights considerations, where not only state actors, but also a wider set of stakeholders, including civil society and refugee organisations as well as refugees themselves are mobilised in assessing and delivering ‘solutions’ to the emerging refugee protection challenges at the global level. A substantial improvement is needed in the current policy responses adopted by the EU and its Member States to provide an effective contribution to the achievement of the common goals laid down in the GCR.
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1. INTRODUCTION

The ReSOMA Discussion Brief on the EU Return Policy has outlined the rapid developments and key controversies in the area of EU return policy until July 2018 (Cortinovis 2018a). The initial brief has highlighted how since 2015 EU returns policies, operations, agencies have been reshaped and reinforced in the aftermath of the so-called, European humanitarian ‘refugee crisis’. In addition, the policy brief situated the discussion on return in a broader context of developing a web of formal EU readmission agreements and, increasingly promoted, non-formal arrangements with third countries (Carrera 2016; Cortinovis 2018a; Cortinovis 2018b). European Commission and the Member States at the Council have prioritised swift returns of asylum seekers whose applications have been rejected and other irregular migrants as one of the most visible responses to Europe’s humanitarian ‘refugee crisis’ in a short-medium term period.

This Policy Options brief further updates on developments in this policy area that took place between August 2018 – May 2019. This Policy Options brief aims to critically assess the role of evidence in the debate on the alternatives in the EU Return policy. This brief underlines how the ‘politics’ have been outweighing the role of ‘evidence’ and how the efficiency of the EU return operations has fed a blame-shifting game between the European Commission, the European Border and Coast Guard Agency (Frontex) and the EU Member States.
1.1 The long tale of blame-shifting

In June 2018 the Council "welcomed the legislative proposals" to increase the efficiency of returns and on 12 September 2018 Jean Claude Junker during the State of the Union Address has announced the "last elements needed for compromise on migration and border reform" (European Commission 2018b). Among these 'last elements' two proposals focused on increasing 'efficiency' or rather the rate, of expulsions: the proposed recast EU return directive and updated European Border and Coast Guard (Frontex) regulation. This is illustrative of the Commission acting in "a crisis mode" and "blame shifting" for ineffectiveness of returns between Member States and Commission, to the Frontex, third countries, and the most visibly to irregular migrants and asylum seekers whose applications have been rejected (Carrera 2016; Carrera and Den Hertog 2016; Carrera 2019).

The Commission's Memorandum accompanying proposal to amend the directive has reiterated that "the shortcomings of Member States' return procedures and practices hamper the effectiveness of the EU return system" (European Commission 2018a: 2). Also, the Commission has highlighted that the Member States are not using up 'the flexibilities' readily provided within the Return Directive.

The Commission has responded to certain Ministries of Interior calls to allow for more coercive methods that would entail reducing the fundamental rights safeguards, in particular, in the border zones at the external EU Schengen border zones. However, the Commission's concessions on the side of procedural safeguards also entailed increasing 'Europeanisation' of these Member State actions.

Current Commission's proposal imposes extremely tight deadlines and more stringent requirements, not only to the persons issued the return decisions but also to the EU Member States, that will have a hard time to comply with this Directive, if it will be approved. For example, Member States have lost their discretion to grant the cheaper and less coercive options, such as non-issuing return decision, granting voluntary return for migrants that are deemed 'at risk of absconding' (Article 9), non-detention of children and families (Article 18), shorter than 3 months' detention periods, option to not-impose entry bans in certain cases (Article 13), limiting appeals on return decisions to speedy single judicial review (Article 16).
Besides, the Frontex also got more competences in the area of returns in two last recasts in 2016 and 2019. The recast Return Directive obliges the Member States to communicate all their decisions to a new central return management system (Article 14). This system will track what the Member States do (not) do. In short, the Commission attempted to gain more information and control over the return procedures.

It seems that such a move has been subsequently met with caution at the Council of the EU. During its attempts to find partial agreement on the recast directive, Member States suggested re-wording some of the passages as an attempt to reclaim the lost ‘margin of discretion’ as to apply less coercive measures, for example to grant voluntary period for persons, even they are at risk of absconding, exempting children from detention, etc. (Council of the EU 2019a and 2019b).

1.2 The Commission’s departure from Impact Assessment procedure

The key controversy aroused when the Commission has not backed its proposal to recast Return directive with any impact assessment. While this is not a unique situation in the past years, it raises some pertinent questions on Commission’s compliance with its own “Better Regulation Guidelines” (2017d) and playing the role that it was assigned under Interinstitutional Agreement on Better Law-Making (European Parliament, Council of the European Union and European Commission 2016).

In its explanatory memorandum, the Commission argues that Impact Assessment “is deemed not necessary” in light of the “urgency in which legislative proposals need to be tabled” and refers to prior technical consultations with Member States' Ministries of Interior and European Migration Network (EMN) (European Commission 2018:6). Such a move indicates that politics outweighed the evidence in policy-making, as Commission was not even attempting to resort for its legitimising function. This ReSOMA policy options brief provides a critical analysis of the role of politics and evidence in the EU policy-making, as the notion of ‘evidence-based policy’ making may often mask some of trade-offs and caveats. This brief argues that it is worth leaving such theoretical debate aside and coming back to the Commission’s accountability under its given mandate under EU treaties and abovementioned agreements and guidelines.

In absence of Commission’s Impact Assessment, the European Parliament has initiated its own “substitute impact assessment” which uses the very parameters of the Commission’s Better
Regulation Guidelines, namely subsidiarity, proportionality, coherence, relevance, efficiency and effectiveness (European Commission 2017d). This assessment concluded that: “there is no clear evidence supporting the Commission's claim, that its proposal would lead to more effective returns of irregular migrants” (Eisele et al. 2019).

Commissions' decision to strike out Impact Assessment and all the related public consultations on how such a proposal may translate into actual changes on the ground, in the end, has not proved to save time. The rushed and limited evidence-base provided by the Commission has made more difficult the political negotiations at the Parliament. These negotiations took place at a time when MEPs were going into 'elections mode' and when European party families made their pre-existing divisions on EU migration and asylum policies even more apparent. Negotiations happened in the on-going interinstitutional battle when so-called 'Asylum Package' remained blocked at the Council. Eventually, this proposal has not reached the needed political support in the European Parliament and therefore will be subject for the negotiations between the newly elected Parliament, Commission and Council (Legislative Observatory of the European Parliament 2019b).

Also, the only partial agreement has been reached at the Council of the EU (2019a and 2019b) on this file. While there was broad consensus on the need to revise the Return Directive, Council has proposed numerous amendments that are attempting to reverse some of the stringent requirements put on the Member States and take back the leverage. The most outstanding issue on which the Member States could not find the agreement remained ‘the border procedure’ (Article 22) and this leads back to the Asylum Package. At the Council, there was no consensus on the similar provisions in the proposal to recast Asylum Procedures Regulation (2016/0467). This ReSOMA policy options brief contributes to the ongoing debate and aims to highlight how alternative views from academia and civil society remained not considered or were side-lined in the absence of public consultations.

1.3 The assessment of policy alternatives

Civil society, academia as well as UN and Council of Europe bodies have challenged many of the proposed amendments to the Return Directive. Many of them have also proposed policy alternatives
on how to go about the asylum seekers whose applications have been rejected and other irregular migrants who do not or no longer fulfils the criteria for residence within the EU.

The policy options brief goes a step further and explores the policy alternatives that are in line with the principle of subsidiarity and respect individual human rights. They are the following:

- Increased procedural guarantees and individual engagement in asylum procedures and returns
- Regularisation of non-removable third-country national
- Increased focus on voluntary returns, reintegration support and durable solutions

Alternatives to detention is another key solution in the process of return, however, it will be only briefly touched upon in this paper as it is a subject to a separate ReSOMA Discussion Brief.

The academia, civil society and practitioners have gathered some evidence that such policy alternatives could lead to more sustainable solutions for all parties involved, namely the rejected asylum seekers and irregular migrants, third countries of origin, or so-called ‘safe third countries’ and also for the EU Member States. The quick overview of these policy alternatives reveals, that indeed when migrants' agency, fundamental rights are put into the equation this leads to more sustainable results, less coercive and cheaper policies, for everyone involved. Such solutions make it easier for the European institutions and EU Member States' to comply with their commitments under EU law as well as under international humanitarian and human rights laws. It must be stressed that certain rights, such as non-refoulment, fair trial provisions, are not subject to derogations, even in the context of political pressures for more efficient returns or related border controls and migration management purposes.

Therefore, we further analyse solutions that could be developed in the spirit of Tampere, as 20 years ago EU Member States have agreed to develop common EU asylum and migration policies based on the principles of equal solidarity, responsibility-sharing, non-discrimination and fairness. The Global Compact on Migration and Global Compact on Refugees add a new global dimension for the EU policy making. Both compacts also highlight the agency of migrants, including in an irregular situation and asylum seekers, including when their asylum applications are rejected, and when they are issued return orders.
Also, the rule of law and democratic accountability requires the EU institutions’ and Member States’ governments to act within the given remits of their competences. EU oversight institutions, including Court of Justice of the EU, European Ombudsman, European Court of Auditors as well as European Parliament are vigilant as to what are the likely impacts of more coercive policies, in terms of Fundamental Rights of asylum seekers whose applications have been rejected and irregular migrants and what is happening to them after they are returned. In addition, also Council of Europe court in Strasbourg as well as International Criminal Court (ICC) in the blame-shifting game between The Hague have signalled that various (in)actions by the EU and its Member States will be scrutinised under their respective competences.

This policy options brief also draws on the discussions on this subject during a ReSOMA Task Force meeting, a ReSOMA Transnational Feedback meeting and a closed door-event organised by the Danish Refugee Council (DRC).

2. WHAT HAS THE NEW RETURN DECISION PROPOSED TO CHANGE?

This section highlights some of the coercive solutions that are more stringent towards migrants and towards EU member States as proposed by the European Commission (2018 a) in its Proposal to recast directive. The new directive proposes the following innovations:

- A new list of criteria defining the risk of absconding (Article 6);
- An article introducing an obligation to cooperate on irregular migrants and rejected asylum applicants (Article 7);
- A requirement for the EU Member States to immediately and automatically issue the return decisions (8) for those third-country nationals whose irregular stay has ended;
- Making it obligatory for the Member States not to grant period of voluntary departure for persons who are falling under criteria of risk of absconding or whose application was dismissed as ‘fraudulent or manifestly unfounded’, or if they ‘pose a risk to public policy, public security or national security’ (Article 9).

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81 “Global Migration and Asylum Conversation: Data, Research and Policy” took place on 29 of April 2019 in Brussels. The event was co-organised between CEPS on behalf of ReSOMA Network and London SOAS Migration Leadership Team.

82 “DRC Roundtable asylum-return nexus in the EU hotspots”, took place on 30 of April in Brussels. The event was organised by DRC. CEPS was taking part in it.
- The obligatory imposition of entry bans when voluntary departure has not been granted when persons have not complied with a voluntary departure period and also a possibility to impose entry bans on exiting third-country nationals (Article 13);
- A new article requiring the Member States to create a return management system and share it with the central return management system of Frontex (Article 14);
- Reducing procedural remedies and safeguards, namely allowing for the removal decisions pending the final decision on the appeal and also reducing the appeals to single judicial review (Article 16);
- Imposing on Member States obligatory detention of returnees and also the required minimum duration of 3 months (Article 18)
- Creation of a new border procedure to adopt certain return decisions in a fast-track and speedy manner as to expel irregular migrants and potential asylum seekers without granting a possibility to submit their asylum claims (Article 22).

All of these articles need to be seen as mutually reinforcing and leading towards more coercive behaviour against irregular migrants and potential or rejected asylum seekers

Limited procedural safeguards also need to be considered together with increasingly automated return decisions (Articles 8 and 16). This article foresees that return decisions "shall be issued immediately after the adoption of a decision ending a legal stay of a third-country national in the same act" (Article 8 para. 6). Besides, all of such decisions would need to be communicated to the central return management system, that is also enabling sharing of personal data via return management procedures with agencies of third countries (Article 14).

An open list of criteria to determine the 'risk of absconding' (new Article 6) is also including an 'obligation to cooperate' (Article 7) that needs to be seen in overall, reduced possibilities to appeal return decisions. The Commission proposed to establish such ‘risk of absconding’ on a rebuttable presumption, meaning that the burden of proof shifts to the irregular migrant or asylum seekers whose applications have been rejected that they are not going to abscond, and therefore do not need to be detained and forcibly removed. While the open list of the risk of absconding may look as empowering Member States’ and their enforcement agencies, this clause also imposed more stringent procedures on them. Increased grounds for the use of pre-removal detention (Article 18,
6) and also introducing a mandatory minimum duration for detention 3 months (Article 18) is very likely to overburden the Member States. They also cannot grant them voluntary departure and they have to automatically issue entry bans, what is likely to lead to the Member States’ detention facilities being overused.

The proposal placed various restrictions on when the Member States shall not grant voluntary departure period. This is likely to lead to increased use of forced returns. The FRA (2019) has highlighted that such proposal reverses the principle of primacy of voluntary return over forced. New Article 9 is precluding voluntary returns when persons were determined at ‘risk of absconding’ (Article 6) or to not comply with an order to cooperate (7). Such measures are likely increasing the costs on the side of the Member States to expel people via forced return procedure, that otherwise would have been keen to return voluntarily. This also led the Council to propose that it should be not the Member States but irregular migrants paying for their forced returns. Meaning that persons would be given a ‘fresh start’ in a country of origin or third country with a hefty fine or debt. This reverses the logic of durable solutions for persons returned, where personal agency and assistance for the reintegration were deemed the key to ensure that return indeed leads to sustainable results for all parties involved (Caritas et al 2019).

Increased use of entry bans, including the option to impose them upon third-country nationals exiting the EU (Article 13). The provision on entry bans also imposes the maximum duration of entry bans up to 5 years and in certain cases makes it obligatory to issue such bans, if no voluntary period for departure has been granted (risk of absconding) or when the obligation to return was not complied with (Article 13 para 1). Council has attempted to increase such duration up to 10 years and also attempted to impose entry bans on persons who are benefiting from assisted voluntary return.

The introduction of a new border procedure (Article 22) risks creating a new default procedure for the returns with fundamental rights safeguards lowered to an extent that is very likely to lead to refoulment to countries where irregular migrants and potential asylum seekers would face torture, inhuman and degrading treatment (Eisele 2019). The border procedure is severely limiting procedural guarantees, including the suspensive effect of an appeal against a return order, it is also imposing extremely short timelines: 48 hours to lodge appeals against return decision (22, para. 5), and for
temporary suspension of return decision (22, para 6) – if these timelines may lead to the Member States violating their commitments under international law, such as non-refoulement.

The Commission’s proposal to recast the directive was widely criticised by academics (Peers 2018; Molnar 2018; Muir and Molinari 2018; Fernandes and Galea 2018; Meijers Committee 2018; Carrera 2019) civil society (Caritas et. al. 2018; ECRE 2018; Amnesty International 2018), European Parliament (Sargentini 2019) and its Research Service (Eisele 2019; Diaz Crego 2019; EU’s Fundamental Rights Agency (FRA 2019), European Economic and Social Committee (EESC 2019). Among submissions of academia and civil society, there were serious concerns raised that the focus on return rates has prevented the development of policy alternatives invested in durable solutions and a holistic approach to migration and asylum.

Various civil society organisations (ECRE 2015; PICUM 2017; DRC 2018; Caritas Europa et. al. 2018; ECRE 2018; Amnesty International 2018; Human Rights Watch 2018; International Detention Coalition 2018; DRC 2019) have consistently opposed the ever-increasing list of coercive measures proposed by the European Commission since 2015 (2015a; 2015b; 2015c; 2017a; 2017b; 2017c). These have increasingly challenged the principles underpinning the directive, such as the primacy of voluntary return, use of detention as a last resort and the best interests of the child. Civil society organisations' critique is based on the risk of violations of international and EU law, European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) jurisprudence as well as evidence on what is happening to individuals when such measures are put in practice.

Several academics also have been for long critical on the coercive approach of the Directive since the very inception of the EU return directive (Acosta Arcazo 2009, Baldaccini 2009, Carrera and Merlino 2009). Academics (Meijers Committee 2018; Molnar 2018; Peers 2018; Muir and Molinari 2018; Carrera 2016); the EU’s Fundamental Rights Agency (FRA 2019) and the European Parliamentary Research Service (EPRS) (Eisele et al. 2019; Diaz Crego 2019) have been bringing forward also case law of the European Court of Human Rights (ECtHR) as well as Court of Justice of the European Union(CJEU) that have been upholding individual rights and/or limiting Member States’ discretionary powers in the area of return operations and reminding that measures infringing upon fundamental rights not only need to be legitimate (as prescribed by law) but also necessary and proportional to the aim pursued. Besides, the EU proposed measures also need to comply with the principle of subsidiarity and not to interfere unduly with national legal systems, for example requiring a
substantial change of the application of the laws on the asylum procedure, purposes for detention, etc.

Also, regional and international human rights bodies have reacted to the Commissions' proposal. For example, the Parliamentary Assembly of Council of Europe has highlighted that many of the EU Member States are already denying the right to asylum by conducting pushbacks and pullbacks at the EU external borders. The swift ‘border procedure’ therefore needs to be analysed within this context.

3. WHAT IS THE ROLE FOR EVIDENCE IN THE EU POLICY-MAKING ON RETURNS?

The policy option brief critically assesses the fact that the European Commission has decided not to conduct the ex-ante impact assessment for the proposal to recast of the EU Return directive. The Commission has argued that it is due to the "urgency" of the need for such legislation, although the Commission's explanatory memorandum also details how "making returns more effective has been the priority for the Commission over the past years". The European Parliamentary Research Service also questions why such impact assessment has not been conducted earlier, recalling that the "Commission was already ready to revise the Return Directive in early 2017, as it is apparent from the Renewed action plan on return" (Eisele 2019). It raises questions about the weight and meaning of the evidence vis-à-vis politics. It also requires critical reflection on the ‘evidence-based policy-making’ that presupposes that ‘independent and impartial evidence exists at all. Nevertheless, it brings back the issue of accountability of EU institutions acting within their defined roles, namely as set out in Treaties, and further detailed in the Inter-Institutional Agreement on Better Law-Making and Commissions' Better Regulation Guidelines, defining Commission's tasks in informing policy debate and engaging diverse stakeholders in the EU policy-making.
3.1. Why the Impact Assessment was deemed “not necessary”?

This Commission’s move to respond to political salience of the issue with measures that are not substantiated by diverse evidence is not unprecedented, nevertheless it stands at odds with Commission’s own “Better Regulation Guidelines” (2017d) and Interinstitutional Agreement on Better Law-Making (European Parliament, Council of the European Union and European Commission 2016).

The Interinstitutional Agreement highlights the importance of impact assessments for achieving the overall goal of improving the quality of EU policy-making and that they are an obligatory step for making well-informed decisions. In this agreement there is an expectation that Commission will undertake Impact Assessments as a default procedure for “its legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts” (Article 13, European Parliament, Council of the European Union and European Commission 2016, emphasis added).

Changes in return procedures are de facto lowering guarantees and safeguards by making the overall procedure more coercive will have a significant effects, first of all on returnees. The proposed amendments as argues civil society (ECRE 2018; DRC 2018; Caritas et al. 2019; Amnesty International 2018), FRA (2019) and European Parliamentary Research Service (Eisele 2019) are very likely to lead to an increased number of asylum seekers whose applications have been rejected and other migrants, who do not or no longer have their residency status – to be detained and returned with less procedural guarantees, including, via the newly proposed border procedure (Article 22). Therefore, ‘significant effects’ are likely to be felt by relevant national law enforcement and asylum agencies, judicial bodies. Local societies, for example, where detention facilities are going to be created or expanded may be affected, as well as countries of origin or ‘safe third countries’ where irregular migrants or asylum seekers whose applications have been rejected, will be expelled.

While it is entirely unclear how a more coercive approach will translate into increased ‘effectiveness and efficiency’ of return procedures, there seems to be following a trend in the interlinked areas of border controls and asylum. The Commission has not conducted impact assessments to accompany the proposal to recast the European Border and Coast Guard regulation, nor Asylum Procedures Regulation in 2016 and 2018.
Also, no evaluation reports, legally required under the Return Directive as required by Article 19, the last implementation report being conducted in 2014. Similarly, no evaluation reports have been submitted concerning several EU asylum directives. On the latter, the Commission explained that it "would have been confusing and distracting to the ongoing negotiations" to recast CEAS (European Commission 2019b). In this case, the letter drafted by Avramopoulos highlighted that explanatory memorandums to the asylum proposals should be regarded as sufficient evidence and hinted that Commission's political priorities should not be subject to a rigorous evaluation in light of contradictory and critical evidence.

As the Explanatory Memorandum itself highlights, how in the limited evidence on return rates was instrumentalised in the long-standing the blame-shifting game between Commission, Member States, and Frontex in the area of Return (Carrera 2016). It subsequently led to shifting institutional roles and disengaging other stakeholders that were not accepting such framing of the 'crisis-led' issue and side-lining the European Parliament (Meijers Committee 2018; Carrera 2019). For example, the report conducted by the LIBE committee has challenged some of the key assumptions behind the Return rates and highlighted the reasons behind the low return rates (Sargenti 2019).

3.2. How have interinstitutional roles shifted?

The Commission presented a proposal to recast Return directive, as well as to expand the Frontex mandate as its “A contribution from the European Commission to the Leaders’ meeting in Salzburg on 19-20 September 2018 Council meeting in Salzburg”. Therefore, the recast Return proposal needs to be read as the more political contribution to the work of the Council. As elaborated above the Commissions' proposal came without proper assessment and consultations. Besides, the Chairperson of EP LIBE Committee, Claude Moraes commented on this wording as side-lining the role of the European Parliament.

This situation has led the European Parliament to initiate a "substitute impact assessment" based on the parameters of the Commission’s Better Regulation Guidelines (Eisele et al. 2019). The FRA has been asked not by the Commission, but by the European Parliament, whether the newly proposed elements in the Returns directive are in line with fundamental rights, as it is enshrined in the mandate of the agency. Subsequently, FRA (2019) has raised numerous legal concerns, regarding proportionality and necessity and in some cases, even legitimacy of amendments proposing to
infringe upon the rights of persons, who are subject to return decisions. For example, the issue of including among the ‘grounds of detention the ‘public policy and national security’ - FRA has stressed that this is mixing criminal justice and migration management mandates. Nevertheless, latest Council negotiations have not clarified the situation, by replacing ground of ‘public policy’ with ‘public order‘ and ‘public security’.

The EU decision-making process, according to the Interinstitutional Agreement, relies on Commission evidence in light of its role as ‘Guardian of the Treaties’. It seems that this agreement has not anticipated a situation where the Commission itself becomes ‘more political’ and less interested in the diverse sources of evidence. Commission seems at least on paper to side with the ‘Council’ and serves primarily the interests of the EU Member States, while the European Parliament de facto takes up the role of ‘Guardian of the Treaties’ by providing the EU legal arguments when assessing proposals’ compliance with the principles of subsidiarity, coherence, relevance, effectiveness and efficiency. Such actual institutional redesign brings back to the broader question of EU’s migration and asylum policies being stuck in ‘third pillar’ logics and led by Member States priorities, rather by EU Treaties and ‘ever closer union’ principles. It also hides the blame-shifting game who is guilty of ‘inefficiency of returns’ and leads to intergovernmentalism through the backdoor (Carrera 2019).

3.3. Limited stakeholders’ consultation: the fate of alternative views challenging the blame-shifting game

In the epicentre of the blame-shifting of responsibilities, the Commission’s decision not to conduct an impact assessment further led to limiting the type of evidence that was taken into consideration when drafting the proposal to recast the Return directive. Public and open stakeholders’ consultations are part of the process when conducting impact assessments. The Commission added in this memorandum that “[c]ivil society was also consulted” (European Commission 2018 a: 6), leaving it vague when and with whom such consultation took place, and even more importantly, how the results of such consultation have been taken on board.

In the section reflecting on “stakeholder consultations”, besides, the European Migration Network studies, the Commission refers exclusively to political processes that happened among the Member States: European Council conclusions of October 2016; The Malta Declaration of Heads of State or
Government of February 2017 and finally, the European Council conclusions of June 2018 (European Commission 2018 a: 6). On this point, the think-tank Meijers Committee (2018) expressed that absence of evidence and rather political nature of the proposal “makes it difficult to verify the proposal’s effectiveness, necessity and proportionality” of the proposal.

The Commission, while elaborating on the ‘collection and use of expertise’ has claimed to rely on rather technical evidence coming from the Schengen Evaluation and Monitoring Mechanism, the Return Expert Group of the European Migration Network (EMN REG), and Frontex. However, this expertise has been collected to revise the Return Handbook (2017c) and not the proposal to recast the directive.

On several occasions, the Commission refers to the EMN study on “effectiveness of return in the EU Member States” (EMN 2017). However, as pointed out by civil society, also this EMN study conducted in 2017 is more nuanced than the Commission’s proposal. ECRE highlights that evidence provided by the EMN contradicted some of the amendments proposed such as on reducing voluntary departure periods, the minimum duration of detention, or entry bans at the exit (ECRE 2018).

Moreover, the Commission was not referring back to its implementation reports of the Return Directive in 2013 and 2014, nor evaluating the impact of recent revisions of soft law instruments, such as EU action plans on return (2015 b; 2017a), the Return Handbook (2015c and 2017 c) or the Commission’s 2017 Recommendations (2017b) (Eisele 2019; ECRE 2018). In this regard, ECRE concluded that “overall evidence base for return policy is limited and sources of evidence non-transparent” (ECRE 2018a:6).

The civil society, academia as well as human rights bodies have made their concerns known after the European Commission announced its first action plan (European Commission 2015 b). Furthermore, the renewed action plan(2017a) and related Recommendations on increasing efficiency of returns (2017b) sparked a wave of discontent among civil society, not the least on how civil society was merely informed. 90 civil society organisations were concerned about the lowering of human rights safeguards in the proposals and the Commission falling short of good governance, as documents were “released without any prior consultation with civil society and local authorities, on the same day they gathered for the EU Migration Forum, the Commission’s official annual forum to consult
stakeholders” (PICUM 2017a). Subsequently, several civil society organisations published more detailed comments and recommendations (International Detention Coalition 2017; DRC 2017).

International and regional human rights bodies also have raised their concerns already in 2017. For example, the UN High Commissioner of Human Rights (2017) expressed concerns about the trend in employing more coercive measures in return policy? The Council of Europe, Commissioner of Human Rights (2017) also reacted to these proposals raising both efficiency and human rights concerns for detaining migrants, and in particular migrant children. The proposed use of detention of minors was also taken up by the European Ombudsman (2017a) who urged to interpret and clarify the Handbook of the Return procedures in line with the EU Fundamental Rights and in particular with the principle of the best interest of the child in the return procedures.

Academia has also made numerous contributions pointing to the fact that lowered fundamental rights safeguards are contrary to the EU legal framework, and that external factors precluding returns are outside of the Commission’s or its Member States’ influence (see for example Meijers Committee 2018; Carrera 2016; Acosta Arcazo 2009, Baldaccini 2009). Academics have warned that Commission and the Member States are set to fail as they raised unrealistic hopes to increase returns that are subject to cooperation of third countries, instead of addressing gaps and barriers in the area of legal migration and the Common European Asylum System (CEAS) (Carrera 2016). However, the abovementioned arguments do not seem to be reflected in the proposed Return recast directive, either.

Thus, by focusing ‘on technical’ expertise’ and ‘targeted revisions’ to increase the return rate Commission seemed to narrow down who is eligible to present their evidence. While the Member States and their enforcement agencies are certainly among key stakeholders to be consulted, the concerns and evidence produced by civil society, academia, UN and regional bodies, as well as the EU’s own Fundamental Rights Agency seemed to be effectively side-lined. For example, civil society has, by and large, reiterated very similar concerns to those raised in 2017 and also earlier (Amnesty International 2018; Caritas Europa et al 2018; ECRE 2018).
3.4. Fundamental Rights as a key criterion for Coherence, Effectiveness and Efficiency

In this section explores why open and transparent consultation is critical for efficiency and what does efficiency entails in the EU’s legal framework. Commission’s Better Regulation Guidelines prescribes to balance ‘efficiency’ among other criteria such as relevance, coherence, effectiveness, subsidiarity, necessity and proportionality. ‘Efficiency and Effectiveness’ as it is understood in the EU’s Better Regulation Guidelines and Interinstitutional Agreement entails the respect, protection and promotion of fundamental rights. Thus, any measure that is unnecessary or disproportionally breaches fundamental rights cannot be regarded as ‘coherent’ nor ‘efficient or effective’. Not only is such measure in breach of the EU’s standards enshrined in the EU Treaties and the Charter for Fundamental Rights, but the people affected by such legislation could also challenge measures before national or European Courts and eventually it would need to be changed and/or dismissed.

The decision not to conduct the Impact Assessment and not even to request FRA’s Opinion, also indicates that European Commission has proposed to recast the EU Return directive, without due investigation into potential fundamental rights impacts. The proposal is merely reiterating that the “proposal respects fundamental rights and observes the principles recognised by Articles 2 and 6 of the Treaty of the European Union and reflected in the Charter of the Fundamental Rights of the EU” (European Commission 2018 a: 6).

However, detailed explanation of the specific provisions of the proposal, contains a disclaimer downplaying the potential impact of proposed amendments, that “targeted changes do not amend the safeguards and rights of third-country nationals and respects their fundamental rights, in particular, the principle of non-refoulment” (European Commission 2018 a: 6). Such claims were quickly challenged by academics (Peers 2018; Muir and Molinari 2018) who argue that the proposed provisions contain various operational clauses that are increasingly coercive and removing fundamental rights safeguards. It also led FRA (2019) to stress the importance “to ensure that operational provisions of the Return Directive also continue to reflect these fundamental rights and principles and ensure their practical application by national authorities” (FRA 2019:19). The European Parliament (Eisele 2019), while assessing only selected Articles also stressed the cumulative effects of such amendments being likely to lead to more coercion and less voluntary returns. The further elaboration on mapping underlying assumptions also indicates, how ‘fundamental rights’ have been reframed as obstacles (see assumption 3 in chapter 4).
4. MAPPING THE DEBATE AT THE EU LEVEL AND THE ROLE OF UNDERLYING ASSUMPTIONS

A mapping exercise of the EU debate shows that several underlying assumptions are guiding the design of the current EU return policies, including the proposal to recast the Return directive. Therefore, this section critically assesses the underlying assumptions that were surfacing since the 2015 European Agenda on Migration and subsequent reforms of the EU’s return policy and examines whether they are substantiated and diverse evidence-proof.

Assumption 1: Irregular migrants are aware of shortcomings in the EU return policy

The European Migration Agenda has proposed the increased enforcement of returns as a key disincentive to irregular migration and migrant smuggling, in light of the European humanitarian refugee crisis. It has made a very vague assumption that (European Commission 2015 a, emphasis added):

“One of the incentives for irregular migrants is the knowledge that the EU’s return system – meant to return irregular migrants or those whose asylum applications are refused – works imperfectly.”

While this assumption of a connection between knowledge of returns and irregular migration and migrant smuggling may sound convincing from the perspective of policy-makers, and maybe appealing to some of their electorates, from the research point of view there is no sound evidence to support it (Acosta Arcazo 2009; Baldaccini 2009; Carrera and Merlino 2009; Carrera 2016; Carrera 2019; Carrera et al. 2019). This is also supported by the empirical findings of the motivations to migrate, for example, Afrobarometer is indicating that not detailed knowledge on return policies but aspirations to find work, education and a better life are driving the migration to Europe as well as to other higher-income countries in Africa and elsewhere (Appiah-Nyamekye Sanny et al. 2019). Similarly, academic advisors to the Europol concluded that irregular migration is a result of geopolitical and socio-economic factors and that increased anti-smuggling measures might not be the best or the only response to the phenomenon (Taylor et al. 2017). Similarly, return operations might not be the best response in light of patchy and narrow legal migration channels. For example,
among all persons issued EU Blue Cards in 2016, there were only 2.2% of persons having the nationality of sub-Saharan African countries (Carrera et al. 2019 b).

Civil society has argued that shaping a return policy with the aim of preventing irregular migration is not useful, as there is no actual link indicating that potential irregular migrants have such ‘knowledge’ in the first place, and secondly, it is the significant consideration when they are making decision to migrate into the EU and/or are forced to do so (PICUM 2015; Caritas et al. 2018; DRC 2018).

**Assumption 2: The gap between issued return decisions and actual returns means ‘inefficiency’**

Despite increased EU funding and operational measures taken in the area of returns, the results are modest, and not showcasing attempted ‘success’, in terms of numbers. Indeed, statistics showing that the gap between persons issued expulsion orders and actual returns has broadened is the main publicly declared justification to reduce rights and procedural guarantees of returnees. There is little critical analysis of why this gap occurred and what has it meant.

The continuous "unsatisfactory" speed of return procedures and the decreased return rate was also later repeated as one the key factors that led to these measures as well as to recast the directive (European Commission 2018 b):

“The rate of effective returns throughout the EU decreased from 45.8% in 2016 to merely 36.6% in 2017 and national practices continue to vary and do not sufficiently use the flexibility provided by the rules.”

As it also could mean that persons who wanted to return or could be returned, already have done so. It also could mean that returns to certain countries of origin could not take place due to the worsening situation in the countries of origin or to third countries where it is not safe to return to. However, the Commission also does not clarify in any of its documents what kind of return rate should be seen as ‘satisfactory’. At least in political speeches implying that “everyone” who do not or no longer have the valid residence permit, need to be returned. Such claim assumes that all asylum seekers whose applications have been rejected had the fair and quality procedure as well as effective remedy to appeal their rejections and/or return decisions.
The evidence coming from academia, civil society, international organisations, and human rights bodies has suggested that the number of issued return decisions is likely too high, as not all of them complied with the procedural safeguards. Civil society explains that perhaps persons who are not in position to return are still issued expulsion orders, and thus the gap in statistics was already a result of unfairness in the asylum procedure/ or speed of returns decisions, and not due the inefficiency of return procedures (PICUM 2017; Amnesty International 2018; ECRE 2018; Caritas et. al. 2018; DRC 2019). For example, faith-based organisations representing churches across Europe have raised very serious concerns regarding the fact “that the safeguards and guarantees embedded in the asylum procedures and the Geneva Convention are being eroded to increase the number of returns.” (Caritas Europa et al. 2018)

However, the Commission (2019a) continues to argue that various legal, operational and financial measures need to be taken, including the recast of the EU Return Directive as:

“Addressing the low rate of return from the EU must remain a key objective. It is an indispensable link in the chain of migration management. Low return rates undermine the credibility of the system for the public and increase incentives for irregular migration and secondary movements.”

Thus, the question raised by academia is whether the speed with which return decisions are issued is in line with fundamental rights standards and that better monitoring is needed how such decisions are made (see, for example, Meijers Committee 2018; Eisele 2019). Civil society and Fundamental Rights agency suggests instead to explore safeguards so that return decisions would not be issued prematurely (FRA 2019; PICUM 2017; Amnesty International 2018; ECRE 2018; Caritas et. al. 2018). Civil society also called to oblige the Member States to withdraw return decisions when there is no prospect of durable solutions when persons return or are forcibly returned (Caritas et al. 2018). The durable solutions also need to be explored for non-removable in the countries of destination (see section 5).
Assumption 3: Fundamental rights as obstacles to ‘effective returns’

The rights of asylum seekers other migrants, procedural guarantees and safeguards in the area of return as well as the sovereignty of third countries are labelled as obstacles for increasing the efficiency of the return decisions. For example, EPP think tank has claimed that (Novotny, 2019):

“This low rate [of returns] has been due to uncooperative countries of origin, the unduly lenient interpretations of migrants’ rights, the costs involved, difficulties with establishing identity and the police effort required.”

Quite interestingly ‘lenient interpretation of migrant rights’ and related costs on the side of national authorities and police efforts are predisposed as opposites. While, as civil society organisations continue to argue - regularisation, which one of the most lenient interpretations of migrants’ rights could be the least police effort-intensive and cheapest. Moreover, regularisation could have a positive impact on overall return rates in the Member States, if for example people with no foreseeable possibility to be returned were granted temporary status and the return order withdrawn.

However, as it will be elaborated below, the very presumption that the CEAS is functioning properly, and that decisions refusing international protection are taken in compliance with EU law in respect of Fundamental Rights proves to be wrong in numerous cases.

Civil society and academia continue to argue that inadequate reception conditions, deficient asylum procedures and absence of safe and legal pathways for refugees and asylum seekers are among the reasons why so many people have no choice but to come and live irregularly, and therefore be subject to return policies.
**Assumption 4: Asylum procedures within the EU are not deficient**

The increased returns were ‘packaged’ as a way to ensure the rights of ‘genuine’ asylum seekers and refugees and to strengthen the states' sovereign competence to control borders and “to restore the trust in Schengen” (European Commission 2019).

For example, in 2017 Avramopulous has stressed that (European Commission 2017 f):

“Ensuring that irregular migrants are returned swiftly will not only take pressure off the asylum systems in Member States and ensure appropriate capacity to protect those who are genuinely in need of protection"

The Commission (2019), when proposing to recast the Return directive, again stressed that in line with 2017 proposals "Member States should take to improve their internal return procedures to ensure humane and swift return of those not in need of international protection". The balance between ‘humane’ and 'swift' from the perspective of various civil society organisations (ECRE 2015; PICUM 2017; DRC 2018; Caritas Europa et. al. 2018) has not been upheld and is leading towards less humane and swifter returns.

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

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

As mentioned above, many international and regional human rights bodies, academics and civil society organisations have already in 2017 criticised the Commission for developing policies that are likely to increase suffering, but without increasing ‘efficiency' of returns. For example, the International Detention Coalition argues (2017):
Under pressure from the Member States to achieve quick results, the Commission has opted for short term policy measures which are not supported by evidence and are likely to be counterproductive and self-defeating.

Similarly, when assessing the Commissions’ proposal to amend the Returns directive, the EU’s Fundamental Rights Agency (FRA 2019b) has argued that fundamental rights are not obstacles, but “respect for fundamental rights is in the interest of the national authorities” and that “fundamental rights violations can lead to challenges that can undermine the effectiveness and credibility of the EU’s return policy”. All EU institutions, and not only the FRA, are in charge of ensuring that Fundamental Rights standards and EU legislative and other initiatives are not contravening or unnecessary and disproportionately infringing such rights (FRA 2019b).

The latest proposal to amend the EBCG regulation contained a clause allowing the Frontex to conduct return operations from third countries to other third countries. Eventually, this clause has been stricken-out by the European Parliament. The European Parliament raised concerns that the EU would become responsible for what happens with people returned from these third countries. For example, if Frontex would return people from countries where the asylum procedure is deficient, Frontex may end up facilitating refoulment and could be held responsible for this.

5. TOWARDS INCREASING MIGRANTS’ AGENCY: AN OVERVIEW OF UNEXPLORED POLICY ALTERNATIVE

The New York Declaration (UN General Assembly 2016) and subsequent Global Compacts’ suggest better taking into account the agency of asylum seekers whose applications have been rejected and other irregular migrants and proposes options that are based on incentives rather than coercion. Thus both the Global Compact for Migration (GCM) as well as the Global Compact on Refugees (GCR) put forward some of the policy options that are underexplored in the currently proposed amendments to the EU Return directive.
The European Commission’s proposal to amend the Return directive has been criticised by civil society as undermining commitments under the GCR and GCM as well as bypassing pending legislation at the EP (ReSOMA Transnational Feedback Meeting 2019). Therefore, in their written submissions civil society, academia as well as EU agencies have particularly criticised proposed Article 22 creating a new border procedure, which is referencing the pending legislation on asylum and also the foreseen commitments in the Global Compacts (ECRE 2018; Meijers Committee 2018; Eisele 2019; FRA 2019). Although the European Parliament’s rapporteur has called to drop Article 22 Border procedure, Council has eventually changed some of the timeframe limits for the appeals (‘at least of 48 hours’ as opposed ‘up to 48 hours’), but has not abandoned the idea to create a border procedure with significantly lowered procedural guarantees to expel third-country nationals whose asylum application has been rejected in a border procedure (Council of the EU 2019a and 2019b).

However, the evidence submitted by scholars, civil society and practitioners discussed below has shown that alternative approaches could lead to more sustainable and durable solutions for persons concerned, EU Member States and possibly also the countries of transit and origin.

In the area of returns, FRA (2019) highlighted that EU should recommit, operationalise and strengthen “the underlying principles governing EU return policy, including the principles of non-refoulment, the best interests of the child, the primacy of voluntary departure over forced returns, the right to family life, and the use of detention as a measure of last resort.” FRA has criticised that the Commission’s proposal while listing abovementioned principles in the recitals of the recast directive – aims to operationalise measures that by and large go into the opposite direction.

The Commissions’ last available implementation report in 2014 has also stressed on the importance of these principles while applying the Return directive in practice (European Commission 2014, emphasis added):

“The implementation report, forming part of this Communication, shows that a number of shortcomings remain in several Member States, such as aspects of detention conditions in some Member States and an absence of independent forced return monitoring systems. In addition, there is scope for improvement in many Member States, with a more systematic use of alternatives to detention and the promotion of voluntary departure.”

The Commission proposal recasting the Return Directive shifted from principle of primacy of voluntary departure to increased use of forced returns, from the principle of detention as a measure of last resort to use of detention as default measure and replaced incentives to cooperate with the obligation to cooperate. The Return management system is also primarily aimed at monitoring return rates – whether member states are using the ‘flexibilities provided by the EU law’ to increase the efficiency of return to the detriment of fundamental rights compliance in forced returns. This shows that return rates were assigned overall higher priority than procedural and fundamental rights safeguards to prevent a breach of non-refoulment.
The various policy alternatives presented by academia, civil society and various international institutions have not been yet considered. This section of the policy options brief shifts attention to some of the alternatives of preferred legislative framing, that is likely to be proportional and cost-efficient, and also in line with EU fundamental values and international commitments.

5.1. Increased incentives to cooperate by increasing procedural safeguards and guarantees

This sub-section is critically assessing whether the coercive practices, such as an obligation to cooperate are examined, and subsequently, it is arguing that increasing procedural safeguards will increase incentives for individuals to cooperate and to make procedures cheaper and human rights compliant.

In the explanatory memorandum to recast the return directive, when justifying the limitation to a single level of jurisdiction to review return decisions issued to asylum seekers whose applications have been rejected, the European Commission (2018a) asserts that onward appeals for rejected asylum seekers are too time-consuming and constitute unnecessary multiple assessments of refoulement risks. Furthermore, the newly proposed obligation to cooperate (Article 7), illustrates the choice for a punitive approach instead of positive incentives to return. The EP’s substitute assessment has highlighted that as non-cooperation is considered as one of the grounds of the risks of absconding (Article 6) it further leads to the increasingly arbitrary use of pre-removal detention that is likely to be very costly and will lead to overcrowding (Eisele 2019:14). Another European Parliamentary Research Service brief stresses that in absence of clear sanctions for non-compliance with the obligation to cooperate also is likely to lead to the Member States establishing their sanctioning regimes (Diaz Crego 2019:7).

The FRA (2019) has also highlighted that the proposed recast directive does not take into account situations of stateless persons, who would also be obliged to ‘cooperate in obtaining their documents’ (Article 7) while the very fact of being stateless seems to constitute a risk of absconding (Article 6). Moreover, the obligation to cooperate covers aspects ‘of requesting travel documents’ from third countries, what already the Member States’ can readily do without obliging and penalising third-country nationals.

The civil society argues that in many circumstances increased the use of coercion may lead to sacrificing the quality of return decision for the sake of speed and meeting political priorities to increase the return rates (ECRE 2018; Amnesty International 2018; Caritas et al.2018; DRC 2018; DRC 2019). For example, the International Detention Coalition (2017) has argued that:

“The punitive approach and end of process focus on forced returns is likely to decrease not increase cooperation and compliance with immigration decisions, as well as respect for human rights.”
The DRC similarly stresses that the obligation to cooperate in the return procedure further infringes upon the very principle of 'the free, informed and voluntary return' (DRC 2019). While at the moment many returns are falling into a grey area between voluntary and involuntary, such new possibility to sanction returnees may lead to simply re-labelling 'mandatory' and even 'forced returns' as voluntary. In light of these trends nine faith-based organisations have called for the clear separation between voluntary and forced return stressing that: "authorities must refrain from exercising coercion and pressure on potential beneficiaries of voluntary return programmes" (Caritas et al. 2018). Recent research also indicated that in Greek hot-spots voluntary returns were only left as an option for asylum seekers whose applications have been rejected insofar as they refrained from appealing their negative asylum decisions (Carrera et al. 2019). Nevertheless, this has not led to an increase in voluntary returns either.

Along the same lines of reasoning, the Commission proposed to amend Articles 16, on remedies and appeals, where the judicial review would be unduly limited to a single level of jurisdiction if asylum decision has been already appealed.

ECRE (2018) argues that by taking a more prescriptive approach than the CIEU case law, which found that two-level judicial appeal is no required under EU law but not prohibited either, “the Commission proposal arguably disregards the principle of procedural autonomy” and thus should be seen as infringing into the principle of subsidiarity. Moreover, Article 16. para. 3 also limited automatic suspensive effect of the appeal against return decision, meaning that persons, as a rule, would be sent out pending final decision on the legality of such measure with exception of asylum applicants where "breach of refoulment has not been already assessed" (European Commission 2018 a). The current proposal only provides for five days to submit appeals against return decisions following a final decision rejecting an asylum application, and the request for the temporary suspensive effect of the appeal needs to be decided upon within 48 hours. Such extremely short time limits are likely to decrease the quality of the appeals lodges and the decisions taken on the appeals and the requests for suspensive effect. ECRE (2018) for example proposes to give reasonable time limits for the individuals concerned to launch appeals as it is the very essence of the right to an effective remedy.

Alternatives: Impartial and trusted pre-departure counselling

The pre-departure counselling as an alternative option is that it is less costly if it can convince TCNs to return voluntarily and be more cooperative within the return process. In light of the primacy of voluntary return, the role of counselling is crucial. For example, DRC (2019) argues that it entails having the physical space and time to engage with a counsellor, obtain separate legal advice should it be needed to explore appeal options, prepare for the return.

DRC (2019) further builds the argument on the lessons learnt by civil society in the hot-spot procedures. Namely, that persons not only need timely legal assistance and information about their rights but also psychosocial assistance and quality interpretation, in all stages of the procedure. DRC
stresses that the very beginning of the process is the most important stage: when persons know their rights and have the possibility to explore their options, with someone they trust, they are more likely to choose the options that are less coercive to themselves and less costly to the countries of return, appeal against negative asylum decision, return decision or voluntary return.

Similarly, nine faith-based organisations were calling for “investing in appropriate counselling and support” on Assisted Voluntary Return and Reintegration (AVRR) and other options, need to start as soon as return decisions are issued (Caritas et al. 2018:4). Moreover, they stressed that the very nature of pre-departure counselling should promote increase ‘voluntariness’ and build trust:

“pre-departure counselling [on AVRR] should be carried out by impartial and trusted professional social services staff, without prejudice of the outcome, using a humane and individualised approach, taking into account the fact that return is a difficult decision, often entailing shame and depression.” (Caritas et al. 2018:5).

Early-engagement and counselling are also the necessary elements of effectiveness and voluntariness. They were also recommended by the Council of Europe study (2017:96):

“Individuals should have a clear understanding of the asylum or migration process at the beginning stages of the procedure, but also the reasons of why a particular alternative to detention scheme has been chosen, the reasons why any restrictions or negative consequences for non-compliance have been deemed necessary, or any other relevant information as circumstances change throughout the process. Such knowledge was found to be a key factor in strengthening the efficiency of alternative to detention systems and to better prepare individuals for voluntary return should their asylum or migration claim fail, leading to improved voluntary return rates.”

Similar conclusions were reached in the EPIM’s interim evaluation report of three pilot projects within the European ATD Network (Ohtani 2018:15):

“Quality case management can increase individuals’ ability to work towards case resolution. Even with various levels of vulnerability and wide diversity of people’s circumstances, qualitative evaluation suggests that holistic and individualised case management can have a positive impact on individuals’ ability to engage with immigration procedures, including cases of great complexity and with previous experience of detention, when certain conditions are met.”

The report has also highlighted that only in half of the analysed cases (4 out of 8) “these decisions were made in a fully informed and truly voluntary manner, with the migrants having a clear idea and plan for their lives ahead” (Ohtani 2018:22).

Pre-departure counselling should include, not only legal information but also the medical and psycho-social support. It is also necessary to assess the individuals’ fitness to fly as well as possible causes of vulnerability, including physical and mental health issues, which could affect the legitimacy
of the return decision, or require specific safeguards to be implemented during the return process, for example assistance and ensuring that health condition will not worsen in the country of return.

**Alternatives: Granting sufficient time for reflection and appeals**

The reasonable time limits to appeal is an issue of procedural fairness and efficiency and quality of the appeal. Meaning, that more time the person is given to appeal the better quality of the appeal submission and more complete evidence brought before the Court to take the decision. It would make return procedure more efficient in the end and member states would not risk violating their international obligations.

During the reflection appeals period, medical and psycho-social support is also needed. For example, during this period organisation may also learn that persons are victims of crime, such as victims of trafficking that may lead to opening criminal investigations, or that they are minors (ECRE 2018). Therefore, sufficient time is needed to reflect on a voluntary return or other available options, such as starting appeals against the return decision and also for bringing new important information about the applicants.

**5.2. Increased voluntary returns and reintegration support**

The Commission in its proposal to recast the return directive has amended Article 9 on voluntary return to make its application more stringent among the EU Member States. According to the proposed Article 9 para. 4, Member States are precluded to grant a period for voluntary departure, to individuals presenting a risk of absconding, when their application for legal stay was dismissed as ‘manifestly unfounded’ or where the person poses a "risk to public policy, public security or national security".

The FRA (2019) has evaluated such proposal as challenging the primacy of voluntary departure versus forced returns. Civil society organisations in all their submissions have stressed the importance to highlight the primacy of voluntary departure and in particular of assisted voluntary returns (PICUM 2015; ECRE 2018; Amnesty International 2018; Caritas et al.2018; DRC 2018.)

For example, Amnesty International (2018) has recommended:

“EU law should increase opportunities for people subject to return procedures to depart voluntarily, thereby avoiding the risk of arbitrary and costly detention, instead of limiting them. Facilitating voluntary departures would provide for a more dignified and sustainable, and altogether less costly, return policy.”

As discussed above, also the process leading to the voluntary departure should not be coercive, namely criticising Article 7 introducing obligation towards third-country nationals to cooperate with
the authorities. Similarly, many civil society organisations have criticised the entry bans at the exit, as this is precisely persons self-organised ‘voluntary’ return (see the section below).

**Alternatives: Keeping ‘voluntary’ character of the Assisted Voluntary Return and Reintegration**

Civil society further has provided evidence that persons in return procedures are more likely to cooperate when they are well informed, given the time to reflect and know their options. Thus civil society organisation advocate for the EU and the Member States' to shift their attention from increasing the return rates at any costs, to duly considering the well-being and possibilities for the reintegration of returnees (DRC, 2019; Caritas et al. 2018; ECRE 2018). They suggest building on the agency on the irregular migrants and asylum seekers whose applications have been rejected to find durable solutions for them. For example, nine faith-based organisations underlined that:

“[I]t is fundamental to keep the voluntary nature of the ‘voluntary’ return programmes and render the reintegration process efficient. Assisted Voluntary Return and Reintegration (AVRR) programmes should put the well-being of migrants at the centre to empower the person to start a new phase of life in the country of the return.” (Caritas et al. 2018:4)

For this, the independence of civil society organisations' mandate needs to be protected as they are seen as a trusted interlocutor to potential returnees. Civil society or services expected to provide counselling, therefore, should not be used for migration management functions. Civil society organisations also warn against such function to be undertaken by Frontex or other law enforcement agencies as they have a different mandate and are politically accountable for return rates (Caritas et al. 2018:4). Civil society organisations also urged to leave the separate European voluntary returns fund that could fund such civil society operations. Also, some Member States claim that voluntary return assistance as ‘a pull factor’, although civil society evidence is rebutting such allegations, the Commission also has moved to harmonise voluntary return assistance (Statewatch 2016).

5.3. Reducing the use of entry bans and in particular on the occasion of border controls at exit

**Critical evidence against the entry bans on the exit**

The European Commission proposed a key novelty – possibility for the Member States to impose the entry bans upon exiting irregularly staying third-country nationals when no prior return decision has been issued (Article 13, para. 2 European Commission 2018 a). Civil society organisations (Amnesty International 2018; ECRE 2018), academia (Carrera 2019; Peers 2018; Meijers Committee 2018), the European Parliament’s rapporteur (Sargentini 2019) and the EP Research Service (Eisele 2019; Diaz Crego 2019) as well as FRA (2019) have argued against this measure, as it is likely to rather prevent people from leaving the EU voluntarily and it looks also at odds with Commission's goal to increase
the 'efficiency' of returns. Research conducted by academics (Fernandes and Galea 2019) and national authorities also indicate additional administrative burden (Leerkes et al. 2014, EMN Slovene 2014). Finally, additional may clause as well as contradicts the direction indicated by the European Commission (2014) that was aiming at harmonisation of entry bans rather than their expansion.

The logic of such an entry ban on the surface seems to be to prevent re-entry. However, ECRE (2018:13) has aptly elaborated that such measure is contrary to the overall logic of the use of the entry ban in the Return directive “which is to sanction a person’s non-compliance with an obligation to return” as it is laid out in the first paragraph of Article 13. ECRE (2018:13) was concerned that such provision would be used as "a tool to retroactively penalise irregular residence". Moreover, it was added that "individual assessment" in such cases where no prior decision was made by relevant authorities is likely to be "challenging and may result in standard decisions with potentially grave circumstances for the individuals concerned" (ECRE 2018:13). Similarly, FRA (2018: 10) warned against the implied swift decision as being in contradiction with the procedural safeguards foreseen in the Returns Directive itself, and “the right to good administration, including the right to be heard, which is a general principle of EU law”. Amnesty International also commented that “it is difficult to see when it [entry ban on the exit] would be justified or proportional” (Amnesty International 2018). EPRS research also highlighted that such procedure on the exit is likely to delay the voluntary departure of third-country nationals (Eisele 2019: 11).

Economic analysis has shown only partial direct costs for the Member States for associated with entering such new type of entry ban into the system and related EU coordination and monitoring costs (Fernandes and Galea 2019: 139). However, judging from the EMN Slovenia (2014) report analysing the procedure to issue entry bans, it seems that "direct costs" should also take into account that 'individual assessments' would also require to consider certain factors, such as the length of the entry ban, when the responsible authority “has to take into account the nature and gravity of the circumstances that led to the residence”. Also, the Meijers Committee (2018) referred to the evidence in research requested by the Dutch government (Leerkes et al. 2014), that in general, an “obligation always to issue entry bans leads to complaints about unnecessary administrative burdening”. Moreover, such costs would increase if persons concerned will ask for the withdrawal of entry bans or would challenge their grounds or proportionality of the length in light of procedural safeguards foreseen in the directive (FRA 2018: 11).

Broader analysis of societal and economic impacts has shown that because imposing entry bans at the exit might actually discourage irregular migrants from organising their departure, “as a result, the costs associated with the shadow economy, organised crime and human trafficking identified in status quo assessment would be unlikely to abate” (Fernandes and Galea 2019: 145). However, it seems that by limiting the “right to leave the country of irregular residence” such measures could lead to exacerbate vulnerability and increase the likelihood of abuse (Vosyliute and Joki 2018; UNODC 2013). Also, authorities would not have much time needed to ascertain that irregular migrants exiting, are not victims of trafficking, exploitation, as it would result in their double
penalisation which would be in contradiction with the Return directive itself as well as with Victims’ Rights directive.

Finally, imposing entry bans at border controls at exiting EU territory, and in general the use of entry bans could actually lead towards increased demand for forged documents, or facilitating their exit or entry with help of migrant smugglers as criminal networks are described as being fluid and responsive towards new type of circumstances and business opportunities, including created by the EU’s legislation (Taylor et al. 2017). For example, migrant smuggling market is likely responding to the increased usage of entry bans with a better quality of forged documents, to bypass border controls without showing the real documents.

**Potential impacts of entry ban as an increased measure**

Article 13 should be seen in the light of overall recast, and in particular in conjunction of Articles 9 and 6 which reduced the minimum duration for voluntary departure as well as prohibitions to grant voluntary departure. Peers (2018) has warned that "narrowing down the cases where the voluntary departure is possible to have a knock-on effect that more entry bans are issued." And the insufficient time for voluntary departure seems to be among concerns for almost half of the EU Member States (EMN 2017: 72). For instance, the Slovak Republic highlighted that due to short voluntary departure periods, "the delayed voluntary departure of third-country nationals creates an overlap with the entry ban authorisation system, as an alert is automatically created in the SIS (Schengen Information System) immediately after the return decision is issued.” (EMN 2017: 72).

Subsequently, new Article 6 para: 1(p) 'non-compliance with entry' bans is qualified as one of the deciding factors to determine the risk of absconding (Article 6, para 2) and further increases the prospects of detention (Article 18, para:1 (a)). Therefore, the direct and indirect costs, societal and economic impacts, as well as impacts on criminality may be far-reaching, and without "any clear impact or effect on efficiency on returns" (Eisele 2019).

ECRE (2018:13) highlighted "far-reaching negative consequences for persons seeking asylum". Namely, that such EU wide measure "does not take into account possible changes in the countries of origin that might entail a risk of prosecution and force individuals to leave again after they have been returned." And such risks are far from theoretical as nine faith-based organisations, representing “Churches through Europe” are witnessing an increasing push towards “increase returns of asylum seekers whose applications have been rejected and irregular migrants to conflict and fragile countries, such as Afghanistan, Iraq or Sudan” (Caritas Europa et al. 2018: 8). Similar concerns have been raised by DRC (2018). Furthermore, ECRE (2018:13) has highlighted that the right to asylum


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in the EU is not effective across the EU and thus “asylum seekers are likely to be unfairly denied protection in some Member States”.

Similarly, PICUM (2017:7) argues that “lengthy re-entry bans on migrants who have been subject to removals [...] contributes to a logic of criminalisation of migration.” PICUM (2017) was in particular concerned about the rights of the lawful return and the proportionality of this measure as it may violate the right to family life and other rights.

The FRA (2018) has also cautioned against the use of speedy and automatic entry bans, in particular without return decision. As “a speedy issuing of entry bans at the border is also likely to reduce the practical opportunity to object to possible mistakes based on incorrect data contained in national or EU databases which may be used as a basis to justify the issuance of an entry ban. (FRA 2018: 37).

Alternatives

As an alternative approach was proposed in the study conducted by the Meijers Committee (2018). This study relied on the evidence collected in the empiric research requested by the Dutch government (Leerkes et al. 2014), it argued that “the mere threat of a possible future entry ban may be more effective in stimulating third-country nationals to leave on their account, than an automatically issued entry ban.” In this report, it was also argued that any ‘automatic’ measures may lead to burdening the administrative offices and therefore making it difficult to apply individual assessment on necessity and proportionality.

For the similar reasons FRA (2018) that suggested limiting the use of entry bans only based on the final return decision, in the circumstances when it is necessary and proportional to the situation of the individual. ECRE (2018) was even more cautious and recommended to leave the possibility for member states to use entry bans, but not to impose it automatically as sanction for non-compliance with a voluntary departure period as it might violate the right to seek asylum and other rights given that situation in some countries of origin are not stable.

Amnesty International (2018) more generally suggested to shift the focus from entry bans and to alternatives that are promoting the primacy of voluntary returns. As it was noted that such alternatives do contribute to human rights protection and prevent individuals from falling into the hands of organised criminal groups who easily adapt to the changing situation (Taylor et al. 2017).

5.4. Automatic obligation to regularise the status of non-removable persons

Critical evidence to de-link Nexus between returns and asylum procedure

While the Commission in its proposed Article 8 makes it obligatory for the Member States to issue the return decisions in connection with the termination of the legal stay, it also proposes to issue the return decision “immediately after the adoption of a decision ending a legal stay” including decisions
not to grant refugee or subsidiary protection status (Article 8, para: 6). The recast proposal also limited applicability of paragraph on “procedural safeguards available” to this provision.

The proposed Article 8 also needs to be read in line with proposed Article 16 on remedies, that attempted to limit remedies to a single level of jurisdiction and giving only 5 days to file the appeals against return decisions following a negative asylum decision. In this regard, ECRE (2018: 10) raises concerns that person presumed to be in the category of risk of absconding would be issued a decision ending legal stay, return decision, a removal order and an entry ban at the same time with little possibilities to challenge them.

From the explanatory memorandum, it becomes clear that the attempt is to issue return decisions, before the rejections to grant international protection become final. While such proposal can be seen as in line with Gnandi judgement (CJEU Case C-181/16), the CJEU has highlighted that suspensive effect and remedies should remain available for international protection applicants (ECRE 2018:10). ECRE (2018:10) has argued that "there may be little efficiency gains [for national administrations]."

Similarly, Moraru (2019) notices a shift in a ‘post-refugee crisis CJEU case law’ as the Court in Gnandi judgement has reversed the previous pre-crisis principle separating asylum seekers and irregular migrants subject to returns decisions. For example, according to the CJEU ruling in Arslan case (C-534/11), return decisions have suspended and cannot be enforced before asylum appeals are finished and quite contrary Gnandi case (C-181/16) suggests that return orders can be issued immediately after the first rejection of asylum application before it becomes final. This, as ECRE (2018) notices have added to “conceptual confusion and legal uncertainty” as to who people are – asylum applicants or irregular migrants before the decision to grant asylum becomes final. This also leads to increasing divisions among national Constitutional courts, as some of them continued to follow Arslan precedent, in light of states international obligations under Humanitarian and Human rights law (Moraru 2019).

Such divisions and lack of clarity, in practical terms, is likely to lead in statistical double counting as persons still in the asylum procedure, would be counted as persons with return decisions and thus are negatively affecting the impression of the ‘efficiency of return rates’.

For example, FRA (2019:9) insisted on issuing return decisions once decision to end the legal stay is final and also to introduce “clear safeguards to protect the right to asylum, the principle of non-refoulment as well as “the right to an effective remedy" and also “the respect to private and family life”. The FRA (2019) assessment also notices that under the proposed Article 14 establishing return management procedures, authorities risk starting exchanging personal data on asylum applicants too early, before such decisions become final and thus to compromise the safety of asylum applicants.
Faith-based organisations called for the very clear separations between international protection and return policies, as this led to “the categorisation of asylum seekers in function of their likelihood to remain in the hosting country”, longer periods of detention or isolation, wider use of safe country concepts and accelerated procedures” (Caritas et al. 2018: 5).

DRC (2019) provides evidence from the hot spots in Greece and Italy that such proposals should be seen in the context of already deficient asylum procedures: namely fast-track and nationality-based approaches, insufficient vulnerability assessments, lack of legal aid, counselling, lack of procedural safeguards, short deadlines and limited effectiveness of appeals. DRC (2019:12) raises a particular situation in Italy, where persons are being returned directly from hot-spots without the possibility for an individual assessment by a judicial authority of an individual’s status as it was proposed with Salvini Decree introducing Border Procedures.

The EESC (2019) proposed that “Article 8 should be expanded to include the possibility of third-country nationals being given a reasonable opportunity to comply with the obligation to leave the country on their own or to seek alternative ways to regularise their situation.” And this is the situation for people who do not have prospects to be returned due to the principles of non-refoulment and also stateless persons, or where the links with the country of origin are weak or inexistent (ECRE 2018; Caritas et al. 2018; DRC 2018).

Similarly, PICUM (2017) argued that “unremovable migrants should not be detained and should be granted leave to remain”. In light of proposed possibilities to increase detention, for example, pending documents from the third country, many non-removable persons would likely end up spending years in detention centres. Also, CJEU in El Dridi judgment (C-61/11, PPU) has precluded the imposition of a prison term on an illegally staying third-country national who does not comply with an order to leave the national territory.

Besides detention as a punitive measure for irregular migration, it seems that expulsions were also used as a punitive measure for non-nationals committing petty crimes. For example, during the UK’s Windrush scandal many persons deported for petty crimes after more than 30 years of living in the country. The proportionality, in this case, is questionable, as of such expulsion measures can be more severe to an individual than serving the foreseen sentence in the UK’s prisons (Freeman-Powell 2019).

**Alternatives**

The civil society and academia have highlighted the lack of balance in Article 8 – while the Member States are obliged to issue the return decisions automatically, the decisions to grant to stay remain are not. Article 8 of the Return Directive contains an optional clause for the Member States to grant a right to stay for “compassionate, humanitarian and other reasons”. This possibility provided in the Return directive deserves a closer look, as it is also in line with the Global Compact on Migration – Objective 5 foreseeing to enhance availability and flexibility of legal pathways. Namely, “to develop
or build on existing national practices for admission and stay of appropriate duration based on compassionate, humanitarian or other consideration for migrants [...] return to their country of origin is not possible." (GCM, Article 21 (g)).

EESC (2019:1.14) has also called for mentioning some promising practices that aim “to prevent illegally-staying foreign nationals from falling into a chronically irregular situation. Such best practices include granting residence permits on exceptional grounds of strong social, work or family ties (arraigo) in Spain or the Duldung provision in Germany.” However, academia has criticised the Duldung provision for being subject for constant renewal each 3 to 6 months and raising issues of precarity, limiting mobility rights, and also limiting the rights of children as they also carry Duldung status (Van Baar 2017).

PICUM (2017:29) has proposed to better explore "durable solutions for migrants who cannot be returned" and that "unreturnable migrants should be granted access to a regular residence status and access to social services, including housing, healthcare and education." Among such solutions, the cheapest and the most human rights compliant would be the regularisation process. While there are controversies that regularisation of undocumented migrants who have been living in a country for a prolonged period of times, may create 'a pull factor', there is no sound evidence supporting this hypothesis. On the other hand, there is sound evidence proving that the inclusion of undocumented migrant would benefit society. Previous ReSOMA Discussion Brief on undocumented indicated the negative individual, societal and economic impacts are present and well-evidenced by civil society, trade unions and employers, and academia (Vosyliute and Joki 2018).

5.5. Other alternatives

Various actors have advocated for the increased use of alternatives to detention, including in the return procedures. For example, the International Coalition on Detention (2017) has rebutted the proposals that detention can increase the return rate. The civil society has developed and mapped various alternatives to detention used in the several EU Member States (ECRE 2018; IDC 2017; Council of Europe 2017). Detention was regarded as a measure of last resort in the Commission’s implementation assessment in 2014. This is not discussed in this brief since it is subject of a separate ReSOMA brief on Alternatives to Detention.

Also, broader reforms are needed. The European Parliament has been consistently calling for a holistic approach on migration since 2014 and in particular after the emergence of the crisis in the Central Mediterranean (European Parliament, 2016). PICUM (2017) also highlighted that: "Current emphasis on border control in Europe significantly overshadows the need to address other causes of irregularity, such as inadequate visa and residence policies, administrative failures and difficulties in understanding the complex procedures of residence work permits. This was further evidenced in the academic research highlighting the very gaps and barriers in the area of legal migration (Carrera et al. 2018).
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Policy Option Brief

Topic N° 7

Comprehensive, longer-term support for the integration of migrants: Options for the 2021 to 2027 MFF*

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1. INTRODUCTION

This ReSOMA Policy Options Brief takes a closer look at proposals which aim to make EU funding support for migrant integration more relevant for comprehensive policies with a longer-term orientation. Such proposals aim to ensure that EU support focuses not only on short-term measures in the arrival context but effectively contributes to mainstreamed integration policies across Europe. Thus, this ReSOMA brief addresses a key topic driving current efforts at improving the EU’s response to migration and integration challenges in the next 2021 to 2027 multiannual financial framework (MFF). Both civil society organisations and local/regional authorities have put forward ideas and concrete proposals for changes in the legal base of the AMF and ESF+ funds as presented by the European Commission in 2018.

This brief introduces the policy option, presents the corresponding proposals advanced by EU-level stakeholder organisations and traces the patterns of debate and support that the proposals garner, with a special focus on the European Parliament and the state of negotiations as of February 2019. Furthermore, the evidence base of the stakeholder proposals is discussed, pointing to key findings that support the arguments and alternative solutions advocated by stakeholder organisations.

1.1 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

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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 start from 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 peace meal, 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 (cf. ReSoma Discussion Brief on ‘maintaining mainstreaming’, chapter 4 on key issues and controversies).

2. PROPOSALS, THEIR DEBATE AND EVIDENCE BASE

The policy option aiming for mainstreamed, longer-term integration policies responds to the Commission proposals for the 2021 to 2027 Multiannual Financial Framework (EC 2018a, b, c) with regard to:

- the European Social Fund (as ESF+) to become a foremost EU funding source for migrant integration with a longer-term impact, in particular for measures related to labour market integration and social inclusion;
- ESF+ specific objectives relating to the funds’ various intervention areas (including labour market participation, education and training, equal access to services and fighting poverty and deprivation);
- provisions to concentrate ESF+ resources on challenges identified in national reform programmes, in the European Semester and Country-Specific Recommendations (CSR);
- the Common Provisions Regulation (CPR) in future also applying to the Asylum and Migration Fund (AMF), next to the Structural Funds which include ESF+;
provisions in the CPR to link programming of funds implemented in Member States more strongly to the European Semester and Country-Specific Recommendations (CSR) made in this context;

- horizontal and thematic 'enabling conditions' in the CPR, setting out prerequisite conditions for implementation of the funds, incl. on effective application of the EU Charter of Fundamental Rights;

- provisions in the AMF regulation stipulating a focus of integration spending under this fund on the early stages of integration of third-country nationals.

More information on the Commission proposals for the upcoming EU programme period can be found in the ReSoma Discussion Briefs on ‘sustaining mainstreaming’ and ‘cities as providers of services’, chapters 3.2 on the EU post-2021 policy agenda.

2.1 Specific proposals put forward

Specific stakeholder proposals put forward as reaction to the Commission proposals and relevant for this policy option (details cf. Annex) 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 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+.

2.2 Patterns of debate & support

The thrust of these proposals is widely supported by the European stakeholder organisations that have voiced an opinion on the Commission’s legislative proposals. Organizations active in the social inclusion field are particularly outspoken on the social dimension of the European Semester and its implications for how EU monies are spent in Member States. It is also the aspect where stakeholder positions appear most critical of the Commission plans. Nevertheless, both civil society- and local authority-based stakeholder organisations are broadly supportive of the Commission proposals to increase integration spending under ESF+ and suggest modifications that would better ensure the actual use of ESF+ as a lever for integration mainstreaming, as well as for longer-term orientation of integration policies in Member States.
Among the membership of European stakeholder organisations, the interest in additional impetus for integration mainstreaming arriving through EU programmes is highest in countries where there is a lack of comprehensive policies with a long-term outlook. That said, better coordination among EU funds as they are being implemented through different authorities is a shared concern of integration stakeholders throughout the EU (typically, AMIF has been channelled through home affairs portfolios and ESF through ministries of employment and social affairs). If not done in a proper way, the fear goes, uncoordinated priority-setting in Member States AMF and ESF+ programmes may lead to painful funding gaps, missing out on support for integration in both funds.

While stakeholder concerns related to AMF pertain to the risk of non-use for integration in the absence of minimum allocations to the integration/legal migration programme objective, fears related to the ESF+ stem from the reluctance of many Member States to effectively regard migrant integration as within the scope of this fund. For many actors on national level, the ESF is traditionally tied to a European cohesion philosophy and a notion of using EU means to facilitate socio-economic catch-up processes of Member States and a reduction of development gaps among European countries. The idea to spend EU means on migrants and not for the ‘own people’ often sits uneasy, in particular in countries hard hit by the economic crisis in recent years, or where a self-perception as country of transit still prevails. A similar reluctance can be observed in the context of the ERDF, which may be used to finance reception infrastructures.

**Support in the European Parliament**

In the European Parliament, as co-legislator of the future EU funds in the 2021 to 2027 MFF, a number of the concerns brought forward by stakeholder organisations have been taken up in the ongoing negotiations.

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 adopted on 12 December 2018) reflect Parliament’s eventual positions on the legislative proposals tabled by the Commission (EP 2018 c,d). 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 (details cf. 3.1);
- additional general objectives of the ESF+ (and supporting related Member State policies) 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 (details cf. 3.3);
- 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 (details cf. 3.3);
- 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 (details cf. 3.3);
• 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 (details cf. 3.4);
• 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+ (details cf. 3.5);
• a separate specific objective of ESF+ solely dedicated to the promotion of long-term socio-economic integration of third country nationals, including migrants (details cf. 3.6);
• 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 (details cf. 3.6).

Amendments to the Common Provisions Regulation, agreed on by a vote in the Committee on Regional Development in January 2019 and included in the committee’s report awaiting the plenary vote (EP 2019), refer to:

• the Commission, when assessing the, to take into account not only relevant, but also Inclusion of the overall policy objectives of the structural funds (including a more social and inclusive Europe implementing the European Pillar of Social Rights) in the needs assessment leading to Partnership Agreements between Commission and Member States, thus going beyond CSRs (details cf. 3.1);
• 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 (details cf. 3.1);
• arrangements for implementation of the European Pillar of Social Rights as horizontal enabling condition, applicable to all specific ESF+ objectives (details cf. 3.2);
• provision that enabling conditions are also seen as prerequisite for inclusive and non-discriminatory (and not only effective and efficient) use of EU support (details cf. 3.2);
• 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 (details cf. 3.3);
• a concrete action plan as well as measures 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 (details cf. 3.3).

Amendments to the AMF regulation as proposed by the Commission, put forward by the rapporteur in her Draft Report or tabled by members of the Civil Liberties, Justice and Home Affairs (LIBE) Committee thereafter, further address some of the above-mentioned stakeholder concerns (EP 2018e,f). The decisive vote in the Parliament’s LIBE Committee is due to take place in February 2019:

• national coordination mechanisms among AMF, ESF+ and ERDF assessing the extent to which measures implemented through the ESF+ and ERDF are contributing to the integration of third country nationals; and Commission assessment of coherence and complementary (details cf. 3.4);
• cross-Fund national Integration Monitoring Committees, overseeing the implementation of AMF and ESF+ in all stages (details cf. 3.4);
• scope of AMF as supporting integration measures tailor-made to the needs of third-country nationals as well as actions supporting Member States’ capacities in the field of integration, complemented by interventions to promote the socio-economic integration of third-country nationals financed under the ERDF and ESF+; replacing the initial proposal that AMF is to focus on measures generally implemented in the early stage of integration, whereas interventions with a longer-term impact should be financed under the ERDF and ESF+ (details cf. 3.6).

2.3 Evidence base of proposals

Lack of long-term integration policies, paired with sparse EU support

Evidence for the need of a longer-term orientation of integration policies in many Member States comes from comparative research on integration policies in Europe. For example, MIPEX – the Migrant Integration Policy Index84 – has been assessing a number of indicators that typically point out whether countries are prepared to provide migrants and their children an enduring, long-term perspective for inclusion and socio-economic well-being. Examined whether EU Member States provide e.g. targeted support for labour market integration (including recognition of qualifications, active economic integration measures, policies for youth and women and support to access public employment services), only Austria, Denmark, Estonia, Finland, Germany, Portugal and Sweden had favourable or slightly favourable policies in place, based on 2014 data (i.e. the countries scored at least 60 out of 100 in the policy index). With regard to targeting needs in the education system, similarly indicative for the long-term quality of integration policies (including advice and guidance, language learning support, migrant pupil monitoring, targeted measures to address educational needs as well as teacher training), only Denmark, Estonia, Finland and Sweden scored favourable (i.e. higher than 80), with Belgium, Czechia, Italy, the Netherlands, Portugal, Romania, Romania and the UK implementing slightly favourable policies (scoring 60 to 79; Huddleston et al. 2015).

Against this background of widely lacking long-term orientation of integration policies across Europe, the impact of EU instruments supposed to enhance integration policies needs to be assessed. ECRE/UNHCR research on AMIF implementation has pointed out a focus on short-term measures in several Member States. Although a definitive assessment of long-term sustainability of AMIF-funded measures is not yet possible, based on a survey among civil society organisations it seems safe to say that in particular in Bulgaria, Hungary and Romania the use of AMIF mainly for the provision of basic services is unlikely to lead to integration support that is functional in the longer term (ECRE/UNHCR 2018: 30). Assessing 26 national AMIF interim evaluation reports, the research also finds that countries tend to focus AMIF integration spending on measures in the early phase of settling in, such as language learning (16 Member States supporting activities), civic and social orientation (13 countries) as well as initial support to access services (11 countries). Fewer states, on the contrary, invest AMIF means in areas which are crucial to providing migrants with a longer-term

84 www.mipex.eu
integration perspective, such as education (8 countries), housing (6 countries) and health (5 countries), with only labour market integration (14 countries) being the exception to the rule (ECRE/UNHCR 2019: 38f).

With regard to the use of the ESF for support of integration measures with a longer-term character, the picture is somewhat different. A 2018 survey among national (regional, in the case of Belgium) authorities represented in the European Integration Network (EIN) identified 15 countries/regions using ESF for migrant-related employment measures, 13 countries/regions funding vocational training from ESF, 14 countries/regions supporting migrant integration under the fund’s social inclusion bracket, and eight countries helping migrants in the education field with ESF means. Two countries each, according to this survey done for a report of the European Court of Auditors, use ESF in the housing and health areas (ECA 2018: Annex III; concerning the use of ESF for migrant integration see also ReSOMA Policy Option Brief ‘High levels of EU support for migrant integration, implemented by civil society and local authorities’, chapter 2.1.3).

**Little consideration for migrant integration in the European Semester**

The proposition to strengthen the role of the European Semester in guiding Member States efforts for migrant integration hinges on a number of preconditions. First of all, consideration of the employment and social performance of Member States in the governance of the Economic and Monetary Union (as envisaged by the European Pillar of Social Rights) needs to be assured in a policy process originally designed to coordinate macro-economic policies. Once this basic precondition is fulfilled, migrant integration challenges must feature in the assessment of policy needs in Member States conducted together with the Commission, and from there make it into the rather small number of country-specific recommendations (CSR) designed to drive reforms at national level. These recommendations have to be agreed by the Commission and the Member States and will remain to a have a non-binding and unanimous character under the 2021 to 2027 MFF.

It is exactly this context of rather ambitious EU governance objectives in which stakeholder proposals focus on the role of the European Pillar of Social Rights in the European Semester and a strengthening of the EU’s hand in the implementation of recommendations. Proposals along these lines can draw on the regular analysis of the adequacy and completeness of CSRs from a social inclusion point of view provided by the European Social Network (ESN), the platform of local public services in the EU. Its ‘Reference Group on the European Semester’ has been assessing Country Reports and recommendations in the light of the needs identified by the health, social welfare, employment, education and housing services represented in the network. While it notes that ‘the importance of the country reports in the European Semester and the level of detail of the analysis contained have increased’ over the years (ESN 2016: 22), the Reference Group continues to highlight important gaps and areas where more attention is needed in the Commission’s analysis of social policy challenges. For the 2017 Country Reports, these included topics with implications for migrant integration as relevant as accessibility of the health system (in Latvia), housing and homelessness (in Ireland), integration of ethnic minorities groups (in Portugal) and adequately trained staff in social
services (in Czechia), to give a few examples (ESN 2017: 22). Looking at the 2016/17 Country-Specific Recommendations, group members representing five Member States expressed a rather negative assessment of the CSRs, while 12 of them agreed or at least partially agreed that the CSRs adequately addressed the main socio-economic challenges of their countries (ESN 2016: 22).

Particularly revealing is the comparison between the priorities for the European Semester identified by ESN’s ‘country profiles’ and the CSRs actually adopted by the Council in the following year. While challenges related to the integration of migrants and refugees were explicitly highlighted by ESN stakeholders in 2017 for Austria, Belgium, France, Germany, Italy, the Netherlands, Poland and Sweden (ESN 2017), the CSRs adopted in 2018 only in the cases of Austria (concerning the wide performance gap between students with and without a migrant background) and France (related to labour market conditions for people with a migrant background) eventually contained relevant recommendations (CEU 2018 a,b).

**Insufficiently coordinated implementation of EU funds**

Little systematic analysis exists about the quality of coordination among the implementing authorities and intermediate bodies in Member States of AMIF, ESF and other EU instruments used to support migrant integration. However, the already mentioned report of the European Court of Auditors also highlights the problematic situation with regard to complementarity, synergies, overlaps and risk of funding gaps. Building on own research, reports of Member State supreme audit institutions and the survey among Member State authorities, it concludes that without effective coordination there is a clear risk of inefficient policy implementation due to the complexity of funding arrangements (ECA 2018: 30).

Overall, next to AMIF eight EU instruments were identified by the ECA report as being used for migrant integration in the current programme period, with 23 countries/regions using ESF, six countries/regions using Erasmus+, five countries/regions using the ERDF, four countries/regions the FEAD, three countries/regions the EAFRD and one country/region each EaSI, Horizon 2020 and the Youth Employment Initiative. More than 400 organisations are calculated to be involved in managing integration measures financed by the EU in the current programme period. In spite of provisions in the EU regulatory framework asking Member States for mechanisms to coordinate the different European instruments, at least in eight Member States national audit institutions identify weaknesses in these coordination mechanisms (ECA 2018: 28-30, Annex III). As the European Social Fund, relabelled ESF+, is intended to gain a much bigger role in EU support for migrant integration, evidence like this weigh in even more heavily. It directly informs stakeholder proposals on better coordination among Managing Authorities and all other authorities and intermediate bodies that are involved in the implementation of the funds.
3. ANNEX: STAKEHOLDER PROPOSALS AND THEIR SUPPORT IN DETAIL

3.1 What is proposed

To ensure a proper balance among social and macroeconomic objectives in the European Semester process, so that adequate investment for social inclusion and poverty reduction in line with the European Pillar of Social Rights, including for the socio-economic integration of third-country nationals, is guaranteed. Investments from ESF+ must be able to take into account regional and local realities and support measures tailored to the needs and target groups identified at local level without having to focus on CSR priorities that do not correspond to the most urgent or prevalent needs in an area.

Who is proposing it

among stakeholder organisations:
EU Alliance for Investing in Children (incl. PICUM), EUROCITIES, Social Platform

Where does the proposal find support?

in the European Parliament:
ESF+ regulation amendments adopted by the EP:
- to add to the provisions on thematic concentration of national ESF+ spending that Member States shall address the challenges identified in the Social Scoreboard under the European Semester (Amendment 92 on Art. 7.1)

Common Provisions Regulation (CPR) amendments adopted by the EP Committee on Regional Development:
- the Commission, when assessing the Partnership Agreement, to take into account not only relevant country-specific recommendations, but also the overall policy objectives of the structural funds, including a more social and inclusive Europe implementing the European Pillar of Social Rights (Amendment 98 on Art. 9.1 referring to Art. 4 CPR)
- Member States, when regularly presenting to the monitoring committee and the Commission the progress in implementing the programmes, to take into account not only progress in support of the country-specific recommendations, but also of the European Pillar of Social Rights (Amendment 12 on Rec. 13)
- mid-term reviews of structural funds (incl. ESF+) to take into account not only challenges identified in relevant country-specific recommendations adopted in 2024 and the socio-economic situation, but also the state of implementation of the European Pillar of Social Rights and territorial needs with a view to reducing disparities and economic and social inequalities (Amendment 119 on Art. 14.1.b);
- adjustments of programmes following mid-term reviews of structural funds (incl ESF+) to take into account not only new challenges and relevant country-specific recommendations, but also progress with the European Pillar of Social Rights as well as demographic challenges (Amendment 18 on Rec. 19)
3.2

**What is proposed**

Enabling conditions with their fulfilment criteria should have a strong role for a thorough implementation of the European Pillar of Social Rights and in ensuring that investments are in full compliance with the EU Charter on Fundamental Rights. The European Semester and its Country Reports should have an important role in monitoring how Member States implement enabling conditions, including on the effective application and implementation of the EU Charter of Fundamental Rights.

**Who is proposing it**

Among stakeholder organisations:
EU Alliance for Investing in Children (incl. PICUM), Social Platform

**Where does the proposal find support?**

In the European Parliament:
Common Provisions Regulation (CPR) amendments adopted by the EP Committee on Regional Development:
- to add as horizontal enabling condition (i.e. prerequisite conditions for implementation of funds applicable to all specific objectives) arrangements at national level to ensure the proper implementation of the principles of the European Pillar of Social Rights that contribute to upward social convergence and cohesion in the EU (Amendment 379 on Annex III Table row 6a new)
- to stress that enabling conditions linked to specific objectives are a prerequisite not only for effective and efficient use of EU support granted by the funds, but also for their inclusive and non-discriminatory use (Amendment 16 on Rec. 17)

3.3

**What is proposed**

To mainstream support to the integration of third country nationals into all objectives and sections of ESF+ as a cross-cutting priority, by including them as recipients of measures under all the specific objectives (and not only in targeted measures under the objective ‘Promoting socio-economic integration of third country nationals’). The promotion of equal opportunities for all, without discrimination based on nationality and residence status should be added to the equality clause of the fund (Art. 6.1).

**Who is proposing it**

Among stakeholder organisations:
ECRE, PICUM, Social Platform

**Where does the proposal find support?**

In the European Parliament:
ESF+ regulation amendments adopted by the EP:
- to add to the general objectives of the ESF+ inclusive societies, high levels of quality employment, job creation, quality and inclusive education and training, equal opportunities, eradicating poverty, including child poverty, social inclusion and integration and social cohesion;
- to add to the Member State policies supported by the fund equal access to the labour market, lifelong learning, high quality working conditions, social protection, integration and inclusion, eradicating
poverty, including child poverty, investment in children and young people, non-discrimination, gender equality and access to basic services (Amendment 88 on Art. 3)

- to add to the specific objectives of the ESF+ the inclusiveness of education and training systems, services for access to housing and person-centred healthcare, and access to equal social protection, with a particular focus on children and disadvantaged groups and the most deprived people (Amendment 89 on Art. 4)

- to highlight integration challenges related to the management of migration flows as the context in which the ESF+ will be implemented (Amendment 8 on Rec. 5)

- to stress as goals of ESF+ support the integration into the labour market of disadvantaged groups and economically inactive; acquisition of language skills; the reduction of horizontal and vertical segregation; the non-discriminatory nature, accessibility and inclusiveness of education and training systems; the accessibility of the teaching profession for minorities and migrants; educational schemes for low-skilled adults to acquire a minimum level of literacy; the study of languages, also through a wider adoption of the toolkit for language support for refugees developed by the Council of Europe (Amendments 16 on Rec. 13, 18 on Rec. 14, 25 on Rec. 15d new, 30 on Rec. 18, 54 on Rec. 28b new)

Common Provisions Regulation (CPR) amendments adopted by the EP Committee on Regional Development:

- to add as fulfilment criteria of the thematic enabling condition (i.e. a prerequisite condition for implementation of ESF+) related to a national strategic policy framework for the education and training system that it includes measures ensuring access to non-segregated education and training (Amendment 396 on Annex IV Policy Objective 4 row 2/column 4)

- to add as fulfilment criteria of the thematic enabling condition (i.e. a prerequisite condition for implementation of ESF+) related to a national strategic policy framework for social inclusion and poverty reduction that it also includes an action plan; an that it includes measures to combat segregation through access to quality services not only for migrants but also for refugees (Amendment 401 on Annex IV Policy Objective 4 row 4/column 4)

3.4 What is proposed

To **strongly and systematically coordinate** and align on EU level and between Managing Authorities the actions and priorities implemented by Member States funded under AMF, ESF+ and ERDF shared management, to avoid gaps between short, medium and long-term integration interventions at local level. The actions and priorities of the AMF decided each year should be coordinated with the ERDF and ESF+. Rules for ESF+ and AMF programmes should be as closely aligned as possible, to ensure coherent programming, management and monitoring requirements.
Cross-Fund national Integration Monitoring Committees (ECRE) should be tasked with reviewing planned calls, identifying unmet needs, providing advice as well as input to programme evaluation.

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- ESF+ regulation amendments adopted by the EP:
  - to specify (in the provisions on coordination, complementarity and coherence with other EU funds) that mechanisms for coordination to avoid duplication of effort need to include Managing Authorities responsible for implementation to deliver integrated approaches, coherent and streamlined support actions (Amendment 92 on Art. 7.1)
  - to stress synergies between ESF+ and the Rights and Values programme to ensure that ESF+ can mainstream and scale up actions to prevent and combat discrimination, racism, xenophobia, anti-semitism, islamophobia and other forms of intolerance, as well as devoting specific actions to prevent hatred, segregation and stigmatisation, including bullying, harassment and intolerant treatment (Amendment 28 on Rec. 17a new)
  - to stress (in the context of the role of ESF+ for promoting integration of third-country-nationals) that this may include initiatives on local level and that ESF+ funded actions are not only complementary to actions financed under the AMF, but also the European Regional Development Fund and those funds which can have a positive effect on the inclusion of third-country nationals (Amendment 34 on Rec 20, similar Amendment 45 on Rec. 24)
  - the authorities responsible for planning and implementing the ESF+ to coordinate with the authorities designated to manage the interventions of the AMF, in order to promote the integration of third-country nationals at all levels in the best possible way through strategies implemented mainly by local and regional authorities and non-governmental organisations and by the most appropriate measures tailored to the particular situation of the third-country nationals (Amendment 35 Rec. 20a new)

- AMF regulation tabled amendments:
  - the relevant Member States authorities, in the context of coordination mechanisms among the Managing Authorities of AMF, ESF+ and ERDF, to assess the extent to which measures implemented through the ESF+ and ERDF are contributing to the integration of third county nationals (Greens-EFA; Amendment 203 on Rec. 14)
  - the Commission to be able to assess where AMF, ESF+ and ERDF connect and to ascertain in particular how coherent and complementary these connections are (ALDE; Amendment 204 on Rec. 14)
  - the Commission to provide additional guidance on the establishment of cross-Fund national Integration Monitoring Committees, in order to ensure a proper articulation between the proposed AMF and ESF+. These bodies would assume an advisory
and oversight role in relation to migrant integration in the AMF and ESF+, by reviewing planned Calls for Proposals (including through joint AMF/ESF+ actions, where appropriate); identifying unmet migrant integration needs; providing advisory recommendations on project selection; and providing input into performance reviews, reporting and evaluations of the AMF and ESF+. The Integration Monitoring Committee would be represented in the membership of the AMF and ESF+ Monitoring Committees and carry out its role in collaboration with Fund-specific national Managing Authorities. As provided for Fund-specific Monitoring Committees, all data and information provided to Integration Monitoring Committees would be made public. Monitoring of the performance and impact of the AMF and ESF+ funds with regards to socio-economic inclusion of third country nationals should be achieved through the use of common performance indicators (GUE/NGL and S&D; Amendments 205 and 206 on Rec. 14 a new)

3.5 What is proposed

To address the priorities of the European Action Plan on the integration of third country nationals in national operational programmes for ESF+ implementation. The Action Plan should be included in the list of key Union initiatives whose implementation is to be supported from ESF+. Specific reporting on how the Cohesion Funds contribute to the implementation of the European Action Plan on the integration of third-country nationals should be requested by the Commission.

Who is proposing it

among stakeholder organisations:
ECRE, PICUM

Where does the proposal find support?

in the European Parliament:
ESF+ regulation amendments adopted by the EP:
• to add the Action Plan on the integration of third country nationals to the Union initiatives whose implementation is to be supported from ESF+ (Amendment 4 on Rec. 3)

3.6 What is proposed

To ensure ongoing, effective support for early and long-term integration in the broader framework of building inclusive societies, and to avoid the planned division of responsibilities between the funds is used as a justification by Member States to exclude specific target groups such as asylum seekers and people with precarious status from broader integration programmes. Integration of asylum seekers and newly arriving migrants must not fall between the ESF+ and the AMF, so that integration and participation from the day third country nationals arrive in an EU Member State is ensured. In particular, early labour market integration should be fundable from the ESF+.

Who is proposing it

among stakeholder organisations:
ECRE, PICUM, Social Platform
Where does the proposal find support?

in the European Parliament:

AMF regulation Draft Report:

- to specify that measures financed under AMF should support integration measures tailored to the needs of third-country nationals and horizontal actions supporting Member States’ capacities in the field of integration, complemented by interventions to promote the socio-economic integration of third-country nationals financed under the ERDF and ESF+; thus replacing the Commission proposal that AMF is to support measures that are generally implemented in the early stage of integration, whereas interventions with a longer-term impact should be financed under the ERDF and ESF+ (Amendment 15 on Rec. 13; reflected in Amendments 105/106 on Annex II.2.b/2.a new, Amendments 128/133 on Annex III.3.g/3.a new)

AMF regulation tabled amendments:

- to stress that it is crucial to support Member States’ policies for integration of third-country nationals; thus replacing the Commission proposal stressing that it is crucial to support Member States’ policies for early integration of legally staying third-country nationals (Greens-EFA; Amendment 198 on Rec. 12, reflected in Amendments 557/560 on Annex II.2.b/2.a new and Amendment 625 on Annex III.3.g)

- to specify that measures financed under AMF should support integration measures tailored to the needs of third-country nationals and horizontal actions supporting Member States’ capacities in the field of integration, complemented by interventions to promote the socio-economic integration of third-country nationals financed under the ERDF and ESF+ (GUE/NGL; Amendment 201 on Rec. 13, reflected in Amendment 559 on Annex II.2.b and Amendment 624 on Annex III.3.g)

ESF+ regulation amendments adopted by the EP:

- to specify that a distinct specific objective is dedicated to the promotion of long-term socio-economic integration of third country nationals, including migrants (Amendment 89 on Art. 4.1.viii)

- to specify that the scope of integration measures supported from ESF+ should focus on third-country nationals legally residing in a Member State or where appropriate in the process of acquiring legal residence in a Member State, including beneficiaries of international protection (Amendment 35 Rec. 20a new)
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1. INTRODUCTION

This ReSOMA Policy Options Brief addresses two key issues driving current efforts at improving EU support for integration in the upcoming 2021 to 2027 programme cycle. Next to ensuring sufficient overall funding in line with the needs in Member States, a crucial challenge is to widen the participation in the relevant EU funds of integration actors which are locally active and provide support on community level. Local/regional authorities and civil society organisations alike strive for amendments of the legal base of the AMF and ESF+ funds proposed by the European Commission in 2018, by proposing a range of proposals informed by these overarching goals. This brief introduces the policy options, presents the corresponding proposals advanced by EU-level stakeholder organisations and traces the patterns of debate and support that the proposals garner, with a special focus on the European Parliament and reflecting the state of play of negotiations as of January 2019. Chapters on the evidence base of the stakeholder proposals highlight major findings that underpin the proposals and point out the type of evidence used.

Another key issue in the ongoing debate about the place of migrant integration in the next EU funding cycle, ensuring that EU support focuses not only on short-term measures in the arrival context, is addressed in the forthcoming ReSOMA Policy Options Brief on comprehensive, longer-term integration policies.

1.1 Policy option adequate funding – to ensure sufficient spending on integration according to 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 advantageous 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 (cf. ReSoma Discussion Briefs on ‘cities as providers of services’ and ‘maintaining mainstreaming’, chapters 4 on key issues and controversies).

1.2 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 (cf. ReSoma Discussion Brief on ‘cities as providers of services’, chapter 4 on key issues and controversies).

2. PROPOSALS, THEIR DEBATE AND EVIDENCE BASE

2.1 Policy option adequate funding – proposals to ensure sufficient spending on integration according to needs across all Member States

The policy option aiming for sufficient levels of EU integration spending responds to the Commission proposals (EC 2018b,c) for the 2021 to 2027 Multiannual Financial Framework (MFF) with regard to:

- the Asylum and Migration Fund (AMF) with a focus on early integration to replace AMIF,
- the proposed ‘legal migration and integration’ heading of Member State AMF programmes under shared management,
- future integration support from the AMF Thematic Facility managed by the Commission, the European Social Fund (as ESF+) to become a foremost EU funding source for longer-term integration,
- the proposed ESF+ specific objective on integration of third-country nationals under the ESF’s social inclusion bracket, and
- the merging of today’s FEAD/support for the most deprived into ESF+.

(cf. ReSoma Discussion Briefs on ‘cities as providers of services’ and ‘sustaining mainstreaming of immigrant integration’, chapters 3.2. on the post-2021 agenda and MFF proposals.)

2.1.1 Specific proposals put forward

Specific stakeholder proposals put forward as reaction to the Commission proposals and relevant for this policy option (details cf. 3.1) are:

- 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 MS 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 and of marginalised communities as two separate specific objectives of ESF+, to ensure equal attention to the two target groups;

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.

2.1.2 Patterns of debate & support

Proposals on ensuring sufficient funding levels for integration are brought forward by basically all relevant EU-level stakeholder organisations, reflecting the concerns of their membership. On the level of Member States, the debate has different focal points depending on countries’ peculiar situations. Generally, the policy option has the highest salience in countries which lack systematic integration spending in line with needs, or where migration-related policies find scarce political support (e.g. various East-Central European Member States). Discussions among stakeholders take a somewhat different course in Member States with high levels of national integration spending and where integration objectives tend to be more mainstreamed across policy fields. In countries such as Germany, the Netherlands or Sweden, key concerns are rather how to effectively use the comparably small EU budgets for piloting and scaling up of innovative measures, or how to focus the means to address specific gaps and use the funds to leverage national spending in such deficiency areas.

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. Amendments to the AMF regulation as proposed by the Commission, put forward by the rapporteur in her Draft Report or tabled by members of the Civil Liberties, Justice and Home Affairs (LIBE) Committee thereafter, address most of the above-mentioned concerns (EP 2018 e,f):

A minimum allocation of between 20% and 40% of funds to integration and legal migration in national AMF programmes (however not including a requirement on actual minimum spending);
together with a proposed minimum allocation under the Thematic Facility of between 20% and 40% to integration and legal migration spending (details cf. 3.1.1);

- Deletion of any provision that would link the allocation of AMF means to Member States to criteria related to countering irregular migration such as numbers of returns (details cf. 3.1.2);
- Increase of the share of the AMF to be allocated to the Thematic Facility from 40% to 50%, resulting in equal shares of the fund under shared management, implemented in national programmes, and under direct/indirect management, implemented by the Commission (details cf. 3.1.3);
- 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, victims of violence and torture as well as the provision of psycho-social and rehabilitation services (details cf. 3.1.5);
- Increased transparency on how funds are used and facilitated monitoring of state of programme implementation; through publication of actions, beneficiaries and annual performance reports; submission of reports to Parliament and Council; and detailed provisions on mid-term and retrospective evaluation reports (details cf. 3.1.6).

In addition, the AMF Draft Report tabled by the S&D rapporteur proposes to amend the integration objective of the fund, deleting the focus on early integration foreseen by the Commission. Among the political groups represented in the Committee, this change is supported by Greens-EFA and EUL/NGL as evidenced by amendments tabled. The proposal to maintain the fund’s hitherto name, ‘Asylum, Migration and Integration Fund (AMIF)’, is supported by the ALDE, Greens-EFA, EUL/NGL and S&D groups. The decisive vote in the Parliament’s LIBE Committee is due to take place in February 2019.

Concerning the ESF+ regulation, the Report of the Employment and Social Affairs Committee following its vote that took place on 3 December 2012 embodies Parliament’s eventual stances on the proposals put forward by stakeholders (EP 2018c,d):

- 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 (details cf. 3.1.7);
- Socio-economic integration of third-country nationals to become a separate specific objective of ESF+ in the social inclusion policy area (details cf. 3.1.8);
- 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 (details cf. 3.1.9);
- Sustainable Development Goals as additional reference for ESF+, to ensure its scope includes asylum seekers and persons with an irregular status (details cf. 3.1.10).
2.1.3 Evidence base of proposals

Stakeholder proposals and demands are mostly buttressed by data and evidence about past implementation of EU funds in Member States. Partly, reports are gathered by stakeholder organisations, utilising expertise available among their membership. Partly, evidence comes from consultancy research, often related to Commissions-sponsored networks and platforms in the context of specific programmes. Stakeholders can also draw on reports of other EU bodies such as the European Court of Auditors, or the Commission’s own assessment and evaluation reports.

Notably, most of this evidence is focused on the input side of programme implementation, i.e. the financial volume available for integration measures. Concentrating on input factors in this way is caused by an underlying notion of policy effectiveness which assumes that more spending will lead to improved outcomes, but also by the fact that this type of evidence simply is much easier to come by. Concerns about the output quality of policies and measures implemented through EU means may resonate in stakeholder proposals on improved monitoring and evaluation of the programmes, but long-term impact assessments of migrant integration policies are notoriously scarce in general, be they EU-funded or not (e.g. Bilgili 2015).

Use of the AMIF for integration purposes

A recent ECRE/UNHCR report about the use of AMIF on national level (ECRE/UNHCR 2018a) provides crucial evidence, pointing out the relevance of many stakeholder proposals for the ongoing AMF negotiations. Drawing on member organisation and local staff expertise, the report highlights the limited impact of the AMIF programmes under shared management in countries with no national integration strategy or defined policy approach; naming Cyprus, Bulgaria, Hungary and Slovakia as examples. At the same time, Hungary and Slovakia exemplify Member States where AMIF is the only remaining integration funding source. That countries can get away with not fully addressing integration needs under existing programme rules is evidenced by the United Kingdom (only measures for resettled persons), Czechia (lack of awareness measures), Austria and Hungary (vulnerable groups not addressed). Czechia and Austria are moreover quoted as countries where political priorities have influenced the content of AMIF calls. In seven Member States, including large countries such as Germany and Spain but also Greece and Hungary, AMIF is found to substitute state financing under responsibilities stemming from the Common European Asylum System instead of complementing it (ECRE/UNHCR 2018a: 27-31).

Concerning the allocation of national AMIF funds to the integration priority, the same report finds that across European sub-regions more than 30% of means are allocated on integration actions, but with notable exceptions for Greece/Italy/Malta and UK/Ireland. Only in four countries respondents found the distribution of AMIF basic allocations across the priorities (i.e. asylum, integration, return) as in line with the predominant needs. The findings also suggest that minimum allocation to priorities as required under the 2014-20 AMIF does not necessarily produce spending in the same proportions. Based on this intelligence, EU legislators are advised to maintain in the 2021-27 AMF the minimum
allocation rule concerning the integration priority and moreover turn it into an actual spending requirement (ECRE/UNHCR 2018a: 23).

With regard to the overall allocation key of AMF funds to Member States, another recent joint ECRE/UNHCR report points out how the proposed indicator (number of returns) in practice would lead to financially rewarding Member States with a below-average recognition rate and correspondingly high return numbers (ECRE/UNHCR 2018b: 50). The calculation (based on 2015-17 figures) shows such an incentive structure for seven countries, providing the evidence to propose that return figures should be taken out of the allocation formula as they would only distort allocation of funds according to Member States’ needs in the asylum and integration areas.

Lack of transparency in AMIF implementation

That weak provisions of the AMIF legal base lead to a lack of transparency of national spending practice is evidenced by both stakeholder research and insights of the European Court of Auditors. To what extent AMIF spending corresponds to the priorities of the national programmes is not known due to insufficient programme-level information rules and widespread Member State communication malpractice. Overall, there is a lack of consistent public information on calls for projects, beneficiaries, projects and financing. ECRE/UNHCR has found that as of end 2017, only eight countries have held information and training events open to participation by civil society actors, while another group of eight Member States has not even published any kind of guidance for project implementation. How AMIF funding is being used is not being published at all by eight countries, and only partly by 16 Member States. Information on the impact of AMIF actions is practically absent, also because the annual Commission implementation reports are not published (ECRE/UNHCR 2018b: 24-26).

Sluggish implementation, in spite of the needs and challenges associated with the 2015/16 peak in arrivals, is a peculiar problem of AMIF, with an average of only 16% expenditure committed across Member States by the end of 2017 and two countries not spending at all. The Commission’s ad hoc requests of action plans to speed up implementation in Member States judged to be behind schedule (as done for Bulgaria, Croatia, Greece, Italy and Poland) are seemingly not enough to address the underlying problem (ECA 2018: 26, ECRE/UNHCR 2018a: 27-31).

Use of the ESF for integration purposes

Under the ESF, supposed to become the major EU funding source for longer-term integration, dedicated integration spending has been difficult to track either. Until now, the lack of unambiguous output indicators has made it difficult to pinpoint the number of migrant/foreign-background beneficiaries disentangled from other minorities and marginalised minorities (e.g. ECA 2018: 26); suggesting a more differentiated output/result indicator system for the upcoming 2012 to 2027 MFF. While 23 Member States have used the ESF to implement measures for the integration of migrants, only six governments report to a European Court of Auditors survey that the numbers of migrants supported by EU funds are fully known (ECA 2018: Annex III). Only where Member States have
foreseen refugee- or migrant-specific sub-programmes in their national ESF programmes and report about implementation (e.g. Belgium, Germany, Italy, Portugal, Spain, cf. EAPN 2016), a clearer picture about use of ESF means for migrant integration exists.

Member State spending under the overall ESF bracket for social inclusion and poverty reduction is a key reference data insofar, as it has encompassed much of the support benefitting migrants. In future as well, the ESF+ specific objective on the socio-economic integration of third-country nationals will be situated in the social inclusion policy area of the fund’s objectives. An analysis of the 2014-2020 ESF partnership agreements and operational programmes undertaken for the Commission has shown that 25.6% of the total ESF budget was allocated to the promotion of social inclusion, combating poverty and any discrimination (Thematic Objective 9). 20 Member States have allocated between 20% and 30% of their ESF budgets to TO9, with only Finland and Lithuania sticking to the minimum requirement of 20% foreseen in the 2014 to 2020 MFF. Austria, Belgium, France, Germany, Ireland, Latvia, the Netherlands and Malta allocated more than 30% of their ESF budget to social inclusion (Fondazione Brodolini, CEPS and COWI 2016, ESF Transnational Platform/AEIDL 2018a:6). This evidence of actual Member States preferences strongly suggests, for the upcoming funding cycle, a minimum allocation to the social inclusion and poverty reduction objectives above the current 20%; and has informed the stakeholder proposals on a minimum allocation of at least 30% of national programmes to the social inclusion policy area.

2.2 Policy option broader participation – proposals to ensure funds can be accessed by civil society and local/ regional authorities, and that these actors are fully involved in the funds’ governance

The policy option aiming for broader involvement of the local/regional levels and civil society in the funds responds to the Commission proposals (EC 2018a,b,c) for the 2021 to 2027 MFF with regard to:

- support from the AMF Thematic Facility for integration actions implemented by LRA and CSO;
- increased EU co-financing of 90% for actions implemented by LRA and CSO under the fund’s integration objective;
- AMF allocation rules to the asylum, integration and return objectives in Member States programmes;
- under the ESF+ European co-financing rates of 40 to 70% (reduced compared to the current MFF);
- the Partnership Principle in the Common Provisions Regulation (CPR) extending to AMF, ESF+ and ERDF;
- provisions in the AMF and ESF+ regulations on programming, monitoring, reporting and evaluation;
- CPR provisions on common programme rules as well as on combined, cumulative and complementary funding from different funds.
(cf. ReSoma Discussion Briefs on ‘cities as providers of services’ and ‘sustaining mainstreaming of immigrant integration’, chapters 3.2. on the post-2021 agenda and MFF proposals.)

2.2.1 Specific proposals put forward

Specific proposals put forward by integration stakeholder organisations as reaction to the Commission proposals or in the course of the ongoing legislative process, and relevant for this policy option, are (details cf. 3.2):

- 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; additionally, the extension of the proposed 90% co-financing rate for integration actions led by civil society and local/regional authorities across all AMF objectives;
- 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.

2.2.2 Patterns of debate & support

Striving for more involvement in EU funds programming and implementation is a strong focus for all EU-level organisations representing civil society and sub-national levels of government. Again, on Member State level the debate is more nuanced. On the one hand, the pattern already observed regarding the debate on sufficient overall integration funding also holds true in this context: In countries where integration policies are generally less developed and which lack support structures for the inclusion of migrants and refugees, better and direct access for local/regional authorities and NGOs is a key issue. Municipalities and civil society in countries with higher levels of integration spending rather discuss the added value of EU funding for leveraging innovation and filling specific gaps. A common concern, though, across countries is the accessibility of the funds for small entities which lack the capacities and resources required for successful participation in EU programmes, be it smaller cities or civic platforms and small-scale NGOs.

On the other hand, arguments around the partnership principle and the funds’ governance are highly diverging, both across Member States and within countries. This discussion reflects different administrative cultures and variations in the general civil society-state relationship as much as
diverging consultation practices in various policy fields, as the EU instruments are being implemented through different ministries and management structures. Reinforced transnational, cross-country cooperation and exchange among civil society and local/regional authorities concerning their involvement in programme planning, implementation and evaluation seems in order, given this multitude of issues with partnership-based programme implementation in Member States.

Support in the European Parliament

In the ongoing legislative process most of the stakeholder positions have been taken up by MEPs involved in the dossiers. Amendments on the proposed AMF regulation tabled as part of the LIBE Committee’s Draft Report and afterwards address all of the above-mentioned concerns related to AMF; awaiting the Committee vote in February 2019 (EP 2018e,f):

- A minimum allocation of between 30% and 60% of national AMF programmes to civil society organisations as well as local and regional authorities (details cf. 3.2.2)
- An increased general EU co-financing rate of at a maximum 80% to 85% of eligible expenditure, across all AMF objectives including integration; and encouragement of Member States to provide matching national co-financing (details cf. 3.2.3)
- A minimum allocation of between 2% and 20% of the AMF Thematic Facility either only to local/regional authorities or to local/regional authorities as well as civils society organisations, implementing integration actions (details cf. 3.2.4)
- 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 (details cf. 3.2.5)
- The Commission to consult with civil society organisations when preparing delegated acts concerning actions eligible for higher co-financing, operating support and further development the common monitoring and evaluation framework (details cf. 3.2.6)

With regard to the ESF+ regulation, the Report of the Employment and Social Affairs Committee also reflects key proposals put forward by stakeholders (EP 2018c,d):

- 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 (details cf. 3.3.5)
- 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 (details cf. 3.3.7)

2.2.3 Evidence base of proposals

A wide range of stakeholder literature exists assessing to what extent civil society and local/regional actors actually benefit from the EU programmes in the integration and migration field. To a large extent, these reports are based on survey work among member organisations and other actors
involved in partnership consultations, complemented by analysis of programme documents. It is noteworthy that hard evidence on spending committed to local bodies and civil society organisations only is available through programme monitoring and evaluation reports put together by the Commission or Member States for the Commission, to the extent that they are being made public.

*Limited civil society and local authority participation in current funding cycle*

Concerning the role of civil society in implementing AMIF and as beneficiary of the fund, important insights are provided by the recent ‘Follow the Money’ report (ECRE/UNHCR 2018a). A key finding relates to significant variation across Europe. While in a number of Member States NGOs are even the main implementing agencies for AMIF funds, in some countries civil society receives only a small share of available means (with Estonia and Poland as examples for largely state-led implementation).

Generally, NGO participation in implementing AMIF is found by ECRE/UNHCR research to be the more extensive, the stronger civil society sectors are, the more established structures of state-civil society collaboration exist, and the more NGOs do have pre-existing roles in national integration frameworks. Barriers to NGO involvement resulting from national approaches to managing the funds include lack of support in pre-application phase, non-transparent call procedures, cumbersome eligibility rules, lack of pre-financing and delays in project approval and payments. Where governments do not provide co-financing for national programme actions (e.g. Hungary and Romania), project carriers can be hard pressed to source additional funding (ECRE/UNHCR 2018a: 40-43).

In what concerns AMIF uptake on the local level, the situation is even more pronounced than for civil society organisations. As evidenced by the Commission’s mid-term review, only 10% of all national programme funds committed 2014 to 2017 have been spent by local public bodies under the AMIF integration priority (EC 2018d, ECRE 2018b). In the case of the ESF on the other hand, 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, or that coordination gaps exist at the ESF/ERDF nexus (EUROCITIES 2018a, HLG 2017, Urban Agenda 2018, Social Platform 2018a).

*Evidence on cities’ role in the integration of migrants and refugees*

In any case, proposing broader involvement of local authorities in the funds is based on the assumption that cities have a key role, or are even better placed than national governments, to deal with the reception, early integration and long-term inclusion of migrants. In addition, cities and their organisations can point out that increased efforts at urban-level integration strategies take place in
the context of a revival of local social inclusion and welfare policies, with innovation, experimentation and piloting of solutions that are difficult to achieve at higher levels of government (Jeffrey 2018).

Ample evidence exists on the willingness of many cities, in particular during the 2015/16 arrivals, to take an open, welcoming stance and innovate local-level integration policies. Based on research among member cities, EUROCITIES has documented such efforts in a series of publications on reception, education and labour market integration (EUROCITIES 2016, 2017a, 2017d). City networks like ‘Solidarity Cities’ and ‘Arrival Cities’ are built around such ‘champions’ and ‘coalitions of the willing’, with ongoing academic research exploring this development (Bendel et al. forthcoming).

All of this evidence is used to argue that the proposals on better access for cities to integration funding would be effective, in the sense of sufficient uptake and absorption of EU instruments among cities. Other research has provided a more nuanced picture, pointing out that among European cities there are also those more reluctant to receive migrants or are even openly rejecting it (e.g. Ambrosini 2013), or that local-level integration polices may be closely tied to national reception policies with little leeway for autonomous action (e.g. Emilsson 2015). Findings like these indicate an uptake of means that possibly would be lower than expected by advocates of more EU integration spending being channelled to the local level.

**Multi-stakeholder governance: evidence on partnership implementation in Structural Funds in general**

With regard to the partnership principle, i.e. the participation of local and regional authorities as well as civil society organisations in programme planning, implementation and monitoring, a number of assessments is available. Following the adoption of the European Code of Conduct on Partnership (ECCP), a CEMR report has gathered evidence on its implementation in Member States throughout the Structural Funds (including ESF) in the planning of the current programme period, based on a membership survey. It found that out of 18 countries assessed only four had fully involved local and regional authorities in the process in all stages, and another ten Member States at least partially applied the standards set forth in the ECCP. Huge differences in practices persisted not only across countries, but also from one fund to the other, and from partnership agreements to operational programmes (CEMR 2015).

These findings are confirmed by a report for the Commission on the implementation of the partnership principle in Structural Funds programmes including ERDF and multi-fund programmes co-financed by ESF, based on stakeholder perceptions and document analysis. It concluded that while the reinforced legal framework clearly contributed to significant improvements, the partnership principle is still implemented very differently, with the level and type of partner involvement often depending on national administrative structures, the existence of different historical legacies and the technical capacity of the partners. As a general picture across Member States, public authorities, especially from the national and regional levels, are overrepresented at the expense of the general public, civil society and the social and economic partners (Sweco, Spatial Foresight and Nordregio 2016, also cf. CPMR 2018b, EPRS 2017).

*Evidence on implementation of the Partnership Principle in the ESF*
Focused on the European Social Fund and its social inclusion and poverty reduction objective, a report of the European Anti-Poverty Network (EAPN) based on a membership survey likewise found a generally low level of engagement of NGOs and low satisfaction with the quality of the engagement. Only nine out of the 16 EAPN member networks participating in the survey were involved in the drafting of the ESF Partnership Agreement and the Operational Programmes (Czech Republic, Finland, Germany, Ireland, Italy, Poland, Portugal, Romania, Spain), while seven were not consulted. Only Germany, Italy, Poland and Romania confirmed a positive involvement that resulted in an impact on the Partnership Agreement and/or the Operational Programme. The quality of the social sector’s participation in ESF Monitoring Committees is widely questioned, with only Germany, Romania and Spain reporting high levels of participation. Reasons highlighted for non-involvement were lack of access to political decision-making and insufficiently participative mechanisms (EAPN 2016: 8).

Most recently, a review of the European Code of Conduct on Partnership conducted by the ESF Transnational Platform identified the key problems leading to limited opportunities for genuine stakeholder involvement in the design, implementation, monitoring and evaluation of programmes. Notably, these finding resulted from comprehensive survey work with ESF management authorities, Programme Monitoring Committees, NGO stakeholders and social partners in all Member States. Recommendations for strengthened partnership provisions derived from these challenges include: More clarity on what representativeness means, with encouragement of greater diversity in partner selection and clear procedures for including partners; more transparency in decision-making processes with clearer guidance around timeframes, expectations and opportunities for partner input; ongoing involvement in all phases of programme development and implementation, going beyond consultation and integrating the local voice through bottom-up and participative approaches; more assistance and training to strengthen the institutional capacities and partnership skills needed to contribute effectively to programmes and projects; and more proactive and appropriate involvement in review and assessment processes (ESF Transnational Platform/AEIDL 2018b: 32-35).

Evidence on implementation of the Partnership Principle in the AMIF

Concerning the AMIF, where the partnership principle is anchored in a less committing way than in the Structural Funds, systematic assessment is provided by ECRE/UNHCR research. Member States experience reflects the soft wording of the partnership provision in the AMIF regulation, only asking to include regional and local authorities ‘where applicable’ and NGOs and social partners ‘where deemed appropriate’. In practice, the partnership principle is not applied in a consistent way, and in many cases it is not obvious how and if at all consultations impacted on the priorities chosen for the national programmes. Only seven Member States could be identified that consulted in the preparation phase with a range of stakeholders, while other countries witnessed pro-forma consultations after determination of priorities (France) or outright rejection of civil society consultation requests (Germany). Not a single national programme document refers to needs analyses or data provided by non-governmental actors; and nowhere is the Partnership Principle
being interpreted as meaning that different types of actors have equitable or minimum access to funding.

Likewise, with regard to civil society and local/regional authority participation in Monitoring Committees which oversee programme implementation, the Partnership Principle is interpreted in very different, often restrictive ways. Practices found include just observer status for civil society organisations (Hungary), participation of only the government office for cooperation with NGOs (Croatia), mere lip-service to the principle (Romania) and delayed inclusion of NGOs (Great Britain, Greece). Last not least, the report notes that the evaluation framework does not ask Member States to seek the input of partners, and that the AMIF regulation does not foresee implementation of the Partnership Principle at European level (ECRE/UNHCR 2018a: 36-40)

Evidence on higher efficiency and impact of policies based on consultation and participation

A common trait of all reports mentioned is that they mostly focus on assessing the implementation practice of the partnership principle, highlighting either good practices or deficiencies in Member States. This literature rather refers to, and not necessarily includes, evidence on the outcome of policies that have been pursued in partnership, i.e. the reasons why governments should embark on a multi-stakeholder governance framework when developing and implementing policies in the first place. For example, the review of the European Code of Conduct on Partnership done by the ESF Transnational Network highlights and confirms the rationale for partnership as proposed by e.g. a 2014 Committee of the Regions report for the Commission (Van den Brande 2014). Thus, effective delivery of structural funds programmes is catalysed by the partnership principle, leading to: Focus and improved coordination, as policy needs as well as perspectives of end-users and target groups are more clearly identified when including different societal actors; better access to resources and innovative solutions, as more creative and dynamic approaches become available from diverse contributions; institutional strengthening, capacity building and sustainability, as disadvantaged or marginalised actors gain a stronger voice in the political arena, overcome resource limitations and assume a more proactive role; and higher legitimacy, stability and sustainability, as a more democratic 'mandate' gained through broader participation of different organisations, groups and citizens results in durable change (ESF Transnational Platform/AEIDL 2018b: 5-7).

The stakeholder survey conducted for the Commission’s assessment of the partnership principle’s implementation confirms these propositions. The report found that added value in terms of better thematic balance and focus of structural funds programmes, stemming from more expertise and know-how consideration, is exemplified through countries such as Bulgaria, Cyprus, Estonia, Ireland, Latvia, Malta, Poland and Slovenia. Higher commitment and more ownership, leading to facilitated policy implementation, could be observed in Bulgaria, Cyprus, Estonia, Finland, Germany, Ireland, the Netherlands, Malta, Poland, Slovenia, Spain and Sweden (Sweco, Spatial Foresight and Nordregio 2016: 38-49).
Annex

Overview of policy options

3.1 Adequate funding

3.1.1 What is proposed
To introduce in the AMF national programmes under shared management minimum allocation and spending requirements for the integration and legal migration actions, to ensure that Member States adequately invest in these areas and are obliged to use the funds for these purposes. The ringfencing should amount to at least 30% of AMF funds allocated to, and spent by, a Member State (ECRE, CEMR).

Flexible spending under the Thematic Facility, however, should not be bound by allocation requirements, but be closely overseen by the European Parliament (ECRE).

Who is proposing it
among stakeholder organisations:
ECRE, CEMR, EUROCITIES

Where does the proposal find support?
in the European Parliament:
AMF regulation Draft Report:
• Member States to allocate a minimum of 20% of their allocated funding to the integration/legal migration-specific objectives (Amendment 65 on Art. 13.1);
• But contrary to ECRE proposal: a minimum of 20% of the funding from the Thematic Facility to be allocated to the integration/legal migration specific objectives (Amendment 60 on Art. 9.2)
AMF regulation tabled amendments:
• Member States to allocate a minimum of 20% each of their allocated funding to the integration- as well as legal migration-specific objectives (Greens-EFA; Amendment 368 on new Art. 8.3a)
• a minimum of 20% each of the funding from the Thematic Facility to be allocated to the integration- as well as the legal migration specific objectives (Greens-EFA; Amendment 368 on new Art. 8.3a)
• Member States to allocate a minimum of 15% each of their allocated funding to the integration- as well as legal migration-specific objectives (ALDE; Amendment 401 on Art. 13.1)

3.1.2 What is proposed
To base allocation of AMF funds to Member States only on numbers of third-country nationals who arrived, and not also on numbers of persons obliged to return/being returned. Available funding should match the needs in the asylum and integration areas and not incentivise low recognition rates. Furthermore, allocation indicators should include beneficiaries of humanitarian protection/protection status under national legislation (next to recognised refugees and persons under subsidiary protection).
| Who is proposing it | among stakeholder organisations: ECRE |
| Who does the proposal find support? | AMF regulation tabled amendments: |
| | • 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 (Greens-EFA, GUE-NGL; Amendments 504 and 505 on Annex I.1.b) |

3.1.3

What is proposed

To **increase the percentage of the AMF fund that is managed by the European Commission under the Thematic Facility from 40 to 50%**.

| Who is proposing it | among stakeholder organisations: ECRE |
| Who does the proposal find support? | AMF regulation tabled amendments: |
| | • 50% of AMF means to be allocated to national programmes and the Thematic Facility each (Greens-EFA; Amendments 363 and 366 on Art. 8.2) |

3.1.4

What is proposed

It should be possible for the European Commission to **reabsorb funds where Member States deliberately chose not to spend** EU resources and spend them under the Thematic Facility. Where the mid-term review finds consistent underspending or an unwillingness of a Member State to disburse the funding allocated to its national programme, the European Commission should suspend further dispersal of funds and ask for a reabsorption of the funds already dispersed to the Member State.

| Who is proposing it | among stakeholder organisations: ECRE |
| Who does the proposal find support? | |

3.1.5

What is proposed

To explicitly extend the general scope of **support from AMF to include the early identification of victims of violence and torture** and other vulnerable groups and the **delivery of qualified psycho-social and rehabilitation services to the victims of violence and torture**. The Thematic Facility should also expressly provide adequate support to specialized civil society organisations for delivering qualified psycho-social and rehabilitation services.

| Who is proposing it | among stakeholder organisations: ECRE |
| Who does the proposal find support? | in the European Parliament: AMF regulation Draft Report: |
to add to measures implemented through the fund the promotion and implementation of protection measures for vulnerable persons (Amendment 106 on Annex II.2);

- to add to the AMF scope of support of victims of trafficking, minors and other vulnerable persons, ensuring early identification of victims of violence and torture and other vulnerable persons and their referral to specialised services, and provision of qualified psycho-social and rehabilitation services to victims of violence and torture (Amendments 118, 122, 123 on Annex III)

AMF regulation tabled amendments:
- to add to the scope of the Thematic Facility support to specialised civil society organisations for delivering qualified psycho-social and rehabilitation services to victims of violence and torture and other vulnerable groups (GUE-NGL; Amendment 374 on Art. 9.1)
- to add the number of vulnerable persons granted international protection to the information set out in Annual Performance Reports (ALDE; Amendment 435 on Art. 30.2)
- to add the number of vulnerable persons assisted through the programme to the information set out in Annual Performance Reports (EPP/S&D/ALDE, GUE-NGL; Amendments 486 and on Art. 30.2)
- to add to AMF scope of support the identification of special procedural and reception needs of victims of torture, gender-based violence, victims of trafficking, children and other vulnerable persons; and provision of specialised support (GUE-NGL; Amendment 588 on Annex III.2.c)
- to add to AMF scope of support the identification of special procedural and reception needs of vulnerable persons (ALDE; Amendments 590 on Annex III.2.c)
- to add to AMF scope of support the early identification of victims of violence and torture and other vulnerable groups upon arrival to a Member State and referral to specialised services (Greens-EFA, GUE-NGL; Amendments 606 and 607 on Annex III.2.c)
- to add to AMF scope of support the delivery of qualified psycho-social and rehabilitation services to the victims of violence and torture (Greens-EFA, GUE-NGL; Amendments 608 and 609 on Annex III.2.c)

3.1.6
What is proposed

To increase the transparency on how AMF funds are used and facilitate monitoring through publication of the annual performance reports as well as mid-term evaluations by the Member States and the European Commission.

Who is proposing it

among stakeholder organisations:
ECRE

Where does the proposal find support?

in the European Parliament:
AMF regulation Draft Report
• to publish the annual performance reports of Member States on a dedicated website (Amendment 88 on Art. 30.3)
• to at least annually provide the European Parliament and the Council with information on programme performance in line with the AMF core performance indicators (Amendment 84 on Art. 28.1 referring to Annex V);
• to make available upon request to the European Parliament and to the Council the progress towards achievement of the programme objectives in line with the AMF output indicators (Amendment 85 on Art. 28.3 referring to Annex VIII);
• to make public the mid-term and retrospective evaluation reports and present them to the European Parliament (Amendment 87 on Art. 29.2)

AMF regulation tabled amendments:
• to make publicly available the thematic facilities work programme and present it to the European Parliament (S&D, GUE-NGL; Amendments 375 and 376 on Art. 9.2)
• Member State to publish their programme on a dedicated, regularly updated website, specifying the actions supported and listing the beneficiaries (GUE-NGL; Amendment 420 on new Art. 13.9a)
• to establish in Member States National Contact Points composed of independent and qualified experts providing up-to-date, objective, reliable and comparable information on migration, integration and asylum and facilitating the access to relevant documents and information as well as accessibility of the Programme funds to potential beneficiaries (S&D; Amendment 450 on Art. 21.3a new)
• the Commission to submit an evaluation report to the European Parliament and the Council at the same time as the mid-term review (GUE-NGL; Amendment 471 on Art. 29.1)
• to specify provisions on the mid-term review in terms of criteria to be used to assess effectiveness, efficiency, relevance and coherence of the instrument (EPP; Amendment 472 on Art. 29.1)
• the Commission to submit to the European Parliament the mid-term and retrospective evaluation reports (ALDE, Amendment 474 on Art. 29.2)
• the Commission to make public and communicate to the European Parliament the mid-term and retrospective evaluation reports (Greens-EFA, Amendment 475 on Art. 29.2)
• Managing Authorities and the Commission to publish Annual Performance Reports of Member States on dedicated websites (GUE-NGL, Greens-EFA; Amendments 476 on Art. 30.1 and 489 on Art 30.4a new)
• to add to the Annual Performance Reports a breakdown of the annual accounts of the national programme into recoveries, pre-financing to final beneficiaries and expenditure actually incurred (EPP; Amendment 477 on Art. 30.2)
• the Commission to submit to the European Parliament and the Council a summary of the Annual Performance Reports on an annual basis (EPP; Amendment 488 on Art. 30.3a new)
3.1.7
What is proposed
To increase from **25% to 30% the minimum share of ESF+ funds spent on social inclusion and reducing poverty** in Member States programmes under shared management (and to exclude support addressing material deprivation from this share, to be covered by another minimum spending requirement, Social Platform). As the socio-economic integration of third-country nationals falls under this sub-heading of proposed ESF+ objectives, increasing the share would create more possibilities for targeted support of integration measures that go beyond labour-market integration.

Who is proposing it
*among stakeholder organisations:*
Social Platform, EU Alliance for Investing in Children

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<th>Where does the proposal find support?</th>
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| *in the European Parliament:*
  | ESF+ regulation Committee Report: |
  | - Member States to allocate at least 27% of their ESF+ resources under shared management of their ESF+ resources under shared management to the specific objectives for the social inclusion policy (Compromise Amendment 7 7 on Art 7.3; EPP, S&D) |

3.1.8
What is proposed
To split the ‘socio-economic integration of third-country nationals and of marginalised communities such as the Roma’ into two **separate specific objectives**, on equal footing, of the future ESF+. Both groups should receive adequate attention in national ESF+ programmes under shared management and supporting one of them should not happen to the detriment of the other.

Who is proposing it
*among stakeholder organisations:*
Social Platform

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| *in the European Parliament:*
  | ESF+ regulation Committee Report: |
  | - to promote long-term socio-economic integration of third country nationals, including migrants, as a separate specific objective (Compromise Amendment 4 4 on Art 4.1.viii/viia; EPP, S&D, ALDE, Greens/EFA) |

3.1.9
What is proposed
To require Member States to spend a **minimum share of 4%** of their ESF+ funds under shared management on the two specific objectives addressing **social inclusion of the most deprived and material deprivation** (instead of the proposed minimum spending requirement of 2% for the objective addressing material deprivation only). This would ensure that, post-FEAD, spending for social inclusion of the most deprived remains on an appropriate level, in line with the national strategic framework of poverty reduction and social inclusion as proposed as an ESF+ enabling condition.
Who is proposing it among stakeholder organisations: Social Platform

Where does the proposal find support? in the European Parliament: ESF+ regulation Committee Report:
- Member States to allocate at least 3% of their ESF+ resources under shared management to the specific objective of addressing social inclusion of the most deprived and/or material deprivation; in addition to the minimum allocation of at least 27% of the ESF+ resources to the specific objectives vii to x of Article 4.1 (Compromise Amendment 7 7 on Art 7.4; EPP, S&D)

3.1.10
What is proposed Application of the ESF+ should be also guided by the European Social Charter and the Sustainable Development Goals (and not only the European Pillar of Social Rights), to ensure in the ESF+ target groups inclusion of asylum seekers, persons whose claims have been rejected or who have an irregular status.

Who is proposing it among stakeholder organisations: ECRE, PICUM

Where does the proposal find support? in the European Parliament: ESF+ regulation Committee Report:
- As general objective of the fund, ESF+ to be in line with, among others, the commitment of the Union and its Member States to achieve the Sustainable Development Goals (Compromise Amendment 3 3 on Art 3; EPP, S&D, ALDE, GUE/NGL, Greens/EFA)

3.2 Broader participation

3.2.1
What is proposed To create a new EU funding instrument offering direct financial support to cities in return for receiving refugees and asylum seekers.
Under such an incentive scheme, municipalities would apply directly to receive funding for the integration of refugees and asylum seekers whom they wish to welcome. Working with municipalities, local-level NGOs and civil society initiatives would also benefit from such funds. The instrument should be linked to resettlement and/or EU-internal relocation programmes.

Who is proposing it In its most detailed form, the proposal has been articulated by Gesine Schwan of the Humboldt-Viadrina Governance Platform in cooperation with the European Stability Initiative (Knaus & Schwan 2018). The Commission proposals on the 2021-2027 MFF did not explicitly take up
the concept; potentially, however, the proposed AMF Thematic Facility could be used in an ad-hoc manner to implement elements of the proposal.

| Where does the proposal find support? | The proposal was included in the European Parliament’s resolution on the MFF post-2020 of 14 March 2018. French president Macron in his speech to the EP on 17 April 2018 likewise proposed the creation of a European programme to “directly financially support local communities that welcome and integrate refugees”. The proposal also resonated in the position paper of the Urban Agenda Partnership on Inclusion of Migrants and Refugees coordinated by EUROCITIES, calling for direct access for cities to AMIF funding and Block Grants for cities (EUROCITIES 2018c). |

3.2.2 What is proposed

To introduce reasonable **minimum allocations for local authorities and civil society organisations** across all priorities within **national AMF programmes** and reserve these for actions implemented by such actors (ECRE: 30% for such actions under the asylum and integration objectives).

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<th>Who is proposing it</th>
<th>among stakeholder organisations: ECRE, EUROCITIES</th>
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<th>Where does the proposal find support?</th>
<th><strong>in the European Parliament:</strong> AMF regulation tabled amendments:</th>
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<td></td>
<td>• at least 30% of the financial resources of the national programmes to be allocated to activities carried out by local and regional authorities and at least 30% to be allocated to activities carried out by civil society organisations (Greens-EFA; Amendment 369 on Art. 8.3b new)</td>
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<td>• a minimum of 30% of funding to be allocated to civil society organisations, including migrant and refugee-led organisations, and local authorities (GUE-NGL; Amendments 403 on Art. 13.1b new and 502 on Annex I.1.b)</td>
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<td>• adding to the fund’s scope of support the establishment and development of regional and local strategies in asylum, migration and integration (Greens-EFA; Amendment 636 on Annex III.1.a new)</td>
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<td>• adding to the fund’s scope of support capacity building of integration services provided by local authorities, including first accommodation, counselling, shelters, housing, education and vocational trainings (GUE-NGL, Greens-EFA; Amendments 626 and 636 on Annex III.3.ka new)</td>
</tr>
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</table>
### 3.2.3 What is proposed

To facilitate civil society and local/regional authority participation in implementing national programmes across all AMF intervention fields, the maximum **EU co-financing rate** should be increased from 75% to **80%**. **Member States** should be encouraged to **provide matching funds** for activities supported by the AMF. In addition, the proposed 90% EU co-financing rate for integration measures implemented by civil society organisations and local/regional authorities should be extended to any AMF-funded action pursued by these actors.

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<th>Who is proposing it</th>
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<td>ECRE</td>
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<th>Where does the proposal find support?</th>
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<td>AMF regulation Draft Report:</td>
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<td>• to increase the maximum EU co-financing rate from 75% to 80% of eligible expenditure of a project, across all AMF objectives including integration (Amendment 64 on Art 12.1)</td>
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**AMF regulation tabled amendments:**

- to increase the maximum EU co-financing rate from 75% to 80% of eligible expenditure of a project, across all AMF objectives including integration (S&D, Greens-EFA, GUE-NGL; Amendments 393, 394 and 395 on Art 12.1)
- to increase the maximum EU co-financing rate from 75% to 85% of eligible expenditure of a project, across all AMF objectives including integration (S&D; Amendment 397 on Art 12.1)
- Member States to be encouraged to provide matching funds for activities supported by the AMF (S&D, Greens-EFA, GUE-NGL; Amendments 393, 394 and 395 on Art 12.1)
- Maximum EU co-financing of 75% to be provided to ensure adequate co-financing by the Member States (EPP; Amendment 396 on Art 12.1)

### 3.2.4 What is proposed

To **reserve a significant part of funding from the AMF Thematic Facility for local authorities (EUROCITIES) resp. 5% for civil society and local/regional authorities** (ECRE) in the annual or multi-annual programmes, to support integration and reception actions implemented locally. It should be assured that the Thematic Facility funding is easily and directly accessible to cities and civil society.

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<th>Who is proposing it</th>
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<td>EUROCITIES, ECRE</td>
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<th>Where does the proposal find support?</th>
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<td>AMF regulation Draft Report:</td>
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<td>• to explicitly dedicate the Thematic Facility support for solidarity and responsibility efforts of Member States also to actions at regional or</td>
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local level and to international and non-governmental organisations (Amendment 59 on Art. 9.1.e)

- to grant a minimum of 2% of the AMF Thematic Facility to local and regional authorities implementing integration actions (Amendment 62 on Art. 9.6)

**AMF regulation tabled amendments:**

- to explicitly dedicate the Thematic Facility support for solidarity and responsibility efforts of Member States also to actions at regional or local level and to international and non-governmental organisations, including migrants organisations (GUE-NGL; Amendment 370 on Art. 9.1.e)

- to explicitly dedicate the Thematic Facility support for solidarity and responsibility efforts of Member States also to actions at local or regional level and civil society organisations therein (Greens-EFA; Amendment 371 on Art. 9.1.e)

- to explicitly dedicate the Thematic Facility support for solidarity and responsibility efforts of Member States also to actions at local or regional level and civil society organisations (ALDE; Amendment 372 on Art. 9.1.e)

- to grant a minimum of 7% of the Thematic Facility to local and regional authorities or civil society organisations implementing integration and reception actions (EPP, S&D; Amendment 384 on Art. 9.6)

- to grant a minimum of 10% of the Thematic Facility to local and regional authorities implementing integration actions (Greens-EFA; Amendment 385 on Art. 9.6)

- to grant a minimum of 20% of the Thematic Facility to local and regional authorities or civil society organisations implementing integration and reception actions (GUE-NGL; Amendment 386 on Art. 9.6)

- to allow Emergency Assistance (drawn from the Thematic Facility) to take the form of grants awarded directly to local and regional bodies subjected to heavy migratory pressure, and in particular those responsible for the reception and integration of unaccompanied child migrants (S&D, EPP; Amendment 463 on Art. 26.2)

### 3.2.5 What is proposed

To strongly anchor a **mandatory Partnership Principle** – ensuring meaningful and inclusive participation of civil society, local and regional authorities, equality bodies, national human rights institutions and social partners in the programming, implementation, monitoring and evaluation of EU funds under shared management – not only in the Common Provisions Regulation but also in the AMF and ESF+ Regulations. With regard to the AMF, the provision should be as far-reaching and inclusive as proposed by the European Parliament for the ESF+ regulation, also ensure that the EU Agency for Asylum is associated to the process of developing the programmes at an early stage, and expressly also extent to mid-term and retrospective evaluation (ECRE).
The European Commission should also assess the extent to which partners have been adequately involved in the development of the national programme, closely supervise the practical implementation and make recommendations to the Member States in this respect. Some funding should be earmarked for capacity building of civil society organisations and local/regional authorities.

Who is proposing it  
among stakeholder organisations:  
CEMR, ECRE (re. AMF), EUROCITIES, Social Platform (re. ESF+)

Where does the proposal find support?  
in the European Parliament:

AMF regulation Draft Report:
- To add to the AMF regulation a provision on partnerships (without prejudice to Art. 6 CPR), including at least local and regional authorities or their representative associations, relevant international organisations, non-governmental organisations and social partners (Amendment 47 on Art. 3a new)

AMF regulation tabled amendments:
- to add to fund’s objective on the integration of third-country nationals that this is to be pursued in close cooperation with civil society as well as with local and regional governments and their representative associations (S&D; Amendment 308 on Art. 3.2b)
- Member States to ensure, in partnership with local and regional authorities, meaningful participation of social civil society organisations, national human rights institutions and other relevant organisations in the programming, implementation, monitoring and evaluation of policies and initiatives supported by AMF national programmes (EPP, S&D; Amendment 327 on Art. 3a new)
- Member States to ensure a partnership with local and regional authorities, social partners, civil society organisations including refugees and migrants organisations, equality bodies, national human rights organisations, to be involved in the preparation, implementation, monitoring and evaluation of programmes, and with particular attention given to the participation of refugee and migrant-led organisations (GUE-NGL; Amendment 334 on Art. 4a new)
- a partnership, including local and regional authorities, economic and social partners, relevant bodies representing civil society, environmental partners and bodies responsible for promoting social inclusion, fundamental rights, rights of persons with disabilities, gender equality and non-discrimination, to be involved in the preparation, implementation, monitoring and evaluation of national programmes (Greens-EFA; Amendment 335 on Art. 4a new; similar Amendment 348 on Art. 6.2a new)

ESF+ regulation Committee Report:
- Each Member State to ensure in partnership with local and regional authorities, meaningful participation of social partners, civil society organisations, equality bodies, national human rights institutions and other relevant or representative organisations in the
programming and delivery of employment, education, non-discrimination and social inclusion policies and initiatives supported by the ESF+ strand under shared management; in accordance with Art. 6 CPR and the European Code of Conduct on Partnership (Compromise Amendment 8 11 on Art 8.1; EPP, S&D, ALDE, GUE/NGL, Greens/EFA)

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<th>3.2.6</th>
<th>What is proposed</th>
<th>To introduce, as an <strong>EU-level Partnership Principle</strong>, partnership planning also to the AMF <strong>Thematic Facility</strong> under direct or indirect management (Union actions). The European Commission should adopt the practice of regular consultation with civil society organisations and other stakeholders on the planning and implementation of activities under the Thematic Facility. Also on EU level programming and monitoring of implementation should take place in a consultative manner.</th>
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<td>Who is proposing it</td>
<td>among stakeholder organisations:</td>
<td>ECRE</td>
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<tr>
<td>Where does the proposal find support?</td>
<td>AMF regulation tabled amendments:</td>
<td>• the Commission to also consult with civil society organisations, including migrants and refugees organisations, when preparing delegated acts concerning actions eligible for higher co-financing (including integration measures implemented by local and regional authorities and civil-society organisations), operating support and further development the common monitoring and evaluation framework (GUE-NGL; Amendment 289 on Recital 56)</td>
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<th>3.2.7</th>
<th>What is proposed</th>
<th>To include <strong>European civil society stakeholders in the ESF+ Committee</strong> (up to now bringing together government and social partner stakeholders), to reflect their key role in the design and delivery of the ESF and to come closer to an EU-level Partnership Principle.</th>
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<td>Who is proposing it</td>
<td>among stakeholder organisations:</td>
<td>Social Platform</td>
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<td>Where does the proposal find support?</td>
<td>in the European Parliament:</td>
<td><strong>ESF+ regulation Committee Report:</strong></td>
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<td>• Each Member State to appoint to the ESF+ Committee one government representative, one representative of the workers’ organisations, one representative of the employers’ organisations, one representative of civil society, one representative of the equality bodies or other independent human right institutions in accordance with Art. 6.1.c of the future CPR; at Union level the ESF+ Committee to include one representative from each of the organisations representing workers’ organisations, employers’ organisations and</td>
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</table>
civil society organisations. (Compromise Amendment 40 36 on Art. 40.2 and 40.3; EPP, S&D, ALDE, GUE/NGL, Greens/EFA)
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Policy Option Brief

Topic n° 9

Supporting the social inclusion of the undocumented: Options for the 2021 to 2027 MFF*

Author: MPG

1. INTRODUCTION

This ReSOMA Policy Options Brief takes a closer look at proposals which aim to render EU funding support more accessible for measures supporting the social inclusion of the undocumented. Such proposals aim for the availability of EU funds supporting the most deprived and facilitating access to social services; eligibility rules allowing to also support the undocumented, with a view to EU fundamental rights and equality obligations; reporting requirements that would allow full participation of target groups that often include persons with diverse, often fluid, residence status; and EU support for measures that help to achieve regular residence status.

Thus, this ReSOMA brief addresses a crucial policy option driving current efforts at improving the EU’s response to migration and integration challenges in the next 2021 to 2027 multiannual financial framework (MFF). Civil society organisations in particular have put forward ideas and concrete proposals for changes in the legal base of the AMF and ESF+ funds as presented by the European Commission in 2018. This brief introduces the policy option, highlights the corresponding proposals advanced by EU-level stakeholder organisations and traces the patterns of debate and support that the proposals garner, with a special focus on the European Parliament and the state of negotiations as of June 2019. With its perspective on support for the undocumented, the brief complements the previous ReSOMA Policy Option 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’, discussing options for the 2021 to 2027 MFF.

*By Alexander Wolffhardt, Migration Policy Group
1.1 **Policy option better inclusion of the undocumented** – to facilitate with EU funds pragmatic solutions for social inclusion pursued by local and societal actors

This policy option builds on the conviction that integration measures which are strictly based on residence status do not reflect the reality of the migrant inclusion challenge in the EU, risk undermining successful integration and fail to reach target groups with urgent needs. It asks for active support measures also for those without a regular status in order to avoid pockets of exclusion, loss of social cohesion, and ending up with overall weaker and divided societies. Allowing undocumented to access language, counselling, education, training, social security, training and other support services acknowledges the fact that migration statuses frequently change over time and different members of the same family may have different statuses, leading to variegated access to social services (ECRE & PICUM 2019). Pursuing this policy option denies the claim that such inclusion measures would create incentives for irregular migration to Europe as being besides the facts. The majority of persons with an irregular status does not arrive by illegally crossing the EU external border but become undocumented by losing their residence permit through visa expiration, loss of work permit or rejection of asylum application (Chauvin & Garces-Mascarenas 2014). Exclusion from integration pathways of people who de facto live in EU countries over extended periods of time thus is counter-productive, creating barriers to early and decisive support and delaying or even obstructing socio-economic inclusion.

EU programmes, their objectives and funding opportunities, play an increasingly important role in supporting migrant integration in EU Member States. In the upcoming programme period 2021 to 2027, the current AMIF is proposed to increase from euro 3.1bn to 10.4 bn, with additional possibilities for integration support. Crucially, the European Social Fund, as ESF+, is to become a major funding source for migrant integration as well. The more this instrument (which will also include a programme strand supporting the most deprived) will be drawn on to facilitate migrant integration across EU Member States, the more relevant EU funding opportunities will become for measures supporting the social inclusion of the undocumented.

Proposals put forward by stakeholder organisations in this context start from the fact that up to now EU funding instruments only in a very limited way can support the inclusion of undocumented migrants. Solely FEAD – the Fund for European Aid to the Most Deprived – in principle has allowed co-funding for measures supporting the undocumented. Comparatively small in scale, FEAD was designed to help people take first steps out of poverty and social exclusion by addressing their most basic needs. However, Member States have wide discretion in their national programmes, in terms of priorities, the definition of target groups and actual funding decisions. In the 2014 to 2020 period, migrants in an irregular situation were not explicitly mentioned in any of the Member State Operational Programmes and related performance indicators. No clear overview exists of the actual uptake of FEAD with regard to undocumented migrants.
Other EU funding programmes exclude irregular migrants in their eligibility rules. The ESF primarily targets persons with legal labour market access, thus excluding persons without the right to work (EC 2015, 2018). The AMIF supports integration only for third country nationals with a regular residence status. In practice, national reporting and auditing requirements on listing final recipients often decide on whether EU co-funded actions may benefit persons without regular residence status. In this context, identity and status checks can discourage migrants from accessing services, whether they have a regular status or not, thereby compromising the impact and efficacy of EU-supported measures (ECRE & PICUM 2019).

Another starting point for stakeholder proposals is the fact that social inclusion of the undocumented is mostly pursued on local level and through civil society organisations. Faced on a daily basis with the immediate needs of resident populations lacking a regular status, local authorities’ concern for social cohesion, humanitarian standards and their responsibility for service delivery often leads to a pragmatic approach, independent from the migration control considerations of central governments. Civil society organisations frequently play a key role in this local level efforts, for providing access to both social services and justice for violations waged against them (Levoy & Geddie 2009, Spencer 2017; cf. ReSOMA Discussion Brief on ‘The social inclusion of undocumented migrants’, chapter 2.4). The stronger inclination of local authorities and NGOs to support the social inclusion of the undocumented raises the question of accessibility of the EU funds for these actors. As a range of stakeholder research has pointed out, the current system of channelling AMIF and ESF through national authorities and Member States programmes in many cases leaves them bereft of adequate and direct access to EU funds (ECRE & UNHCR 2017, 2019, EUROCITIES 2017 a,b, 2018a, Social Platform 2018a, Urban Agenda 2018; cf. ReSOMA Discussion Brief on ‘Cities as providers of services to migrant populations’, chapter 4.1).

2. PROPOSALS, THEIR DEBATE AND EVIDENCE BASE

The policy option aiming for better inclusion of the undocumented responds to the Commission proposals for the 2021 to 2027 Multiannual Financial Framework (EC 2018a, b, c) with regard to:

- The merging of the ESF, FEAD, YEI (Youth Employment Initiative), 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,
- At least 25% of national ESF+ will have to be earmarked for social inclusion and fighting poverty; with at least 2% dedicated to measures targeting the most deprived.
- the European Social Fund (as ESF+) to become a foremost EU funding source for migrant integration with a longer-term impact, in particular for measures related to labour market integration and social inclusion;
ESF+ specific objectives relating to the funds’ various intervention areas (including labour market participation, education and training, equal access to services and fighting poverty and deprivation);

Simultaneously, the restructuring of AMIF to an Asylum and Migration Fund (AMF), to primarily 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.

provisions to concentrate ESF+ resources on challenges identified in national reform programmes, in the European Semester and Country-Specific Recommendations (CSR);

the Common Provisions Regulation (CPR) in future also applying to the Asylum and Migration Fund (AMF), next to the Structural Funds which include ESF+; and including simplification of implementation and financial management rules;

horizontal and thematic ‘enabling conditions’ in the CPR, setting out prerequisite conditions for implementation of the funds, incl. on effective application of the EU Charter of Fundamental Rights.

More information on the Commission proposals for the upcoming EU programme period can be found in the ReSOMA Discussion Briefs on ‘Sustaining mainstreaming of immigrant integration’ and ‘Cities as providers of services to migrant populations’, chapters 3.2 on the EU post-2021 policy agenda.

2.1 Specific proposals put forward

Specific stakeholder proposals put forward as reaction to the Commission proposals and relevant for the policy option aiming for better inclusion of the undocumented (details cf. part 3) include:

- adequate investment for social inclusion and poverty reduction in line with the European Pillar of Social Rights; and consideration of social objectives in the European Semester process;
- more regular monitoring through the European Semester of how Member States implement enabling conditions, including the application of the EU Charter of Fundamental Rights;
- 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;
- use of ESF+ funds to avoid discrimination on the basis of residence status in social services and focus on those who are excluded from mainstream social security in healthcare and long-term care services;
- 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;
- 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;
- facilitated reporting requirements without questions about or proof of migration status;
• improved access to ESF+ funds for civil society and local authorities, and support for capacity building for civil society organisations in delivering social inclusion;
• support for measures that fight exploitation of irregular migrants, allowing to safely report abuses without risking being reported, detained or deported;
• support for regularisation campaigns and procedures to apply for residence status from within the country;
• 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+.

2.2 Patterns of debate & support

The envisaged merger of FEAD into an upscaled ESF+ with a generally stronger focus on migrant integration has turned out to be the pivot of debate among stakeholders, the EU institutions and Member States. While this development has the potential to broaden the access of undocumented to social services (such as basic health assistance), the integration of FEAD as ESF+ sub-strand together with the adoption of ESF rules, on the other hand, threaten to increase the obstacles for social inclusion of the undocumented. While the hitherto definition of most deprived target groups within national programmes is kept in the Commission 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).

Four main considerations and concerns can be identified that have driven stakeholder proposals, and later on resonated in the European Parliament:

• **Availability of EU funds supporting the most deprived and facilitating access to wider social services:** leading to the proposals aimed at increasing the potential funding pool from which social inclusion measures for the undocumented could benefit, foremost enhancing the overall weight of the ESF+ strand supporting the most deprived (ex-FEAD), but also increasing the share of the ESF+ dedicated to social inclusion and generally the mainstreaming of support for third country nationals/integration under the ESF+.

• **Eligibility rules of EU instruments allowing to also support the undocumented:** leading to the proposals aimed at overcoming the restricted access to the existing EU instruments (legally residing TCNs for AMF, legal access to labour market for the ESF), by incurring the Fundamental Rights Charter of the EU, European Convention on Human Rights, and the Sustainable Development Goals next to the European Pillar of Social Rights, which all entail access to e.g. health care and education irrespective of residence status.

• **Reporting requirements that would allow full participation of target groups that often include persons with diverse, often fluid, residence status:** leading to the proposals aimed at reduced reporting requirements without questions about or proof of migration status;
stakeholder organisations working on the ground see this demand as particularly relevant for health assistance, education, employment services as well as accommodation and food or material support for the most deprived.

- **EU support for measures that help to achieve regular residence status**: leading to the proposals aimed at EU support for regularisation campaigns and initiatives both at local and national level; as well as extending the scope of EU support to procedures to apply for residence status from within the country, with funding for e.g. information, legal and language support.

Among Member States, debate in the Council meanwhile revolves around the increased use of ESF+ for integration spending in general, but also the very existence of a dedicated instrument targeting the most deprived. As some net contributor Member States have argued, social relief as supported by FEAD or the prospective ESF+ strand should be a purely national competence as a matter of principle; while other Member States see it as manifestation of European solidarity and the social dimension of the EU.

*Support in the European Parliament*

In the European Parliament, as co-legislator of the future EU funds in the 2021 to 2027 MFF, a number of the concerns brought forward by stakeholder organisations have been taken up in the ongoing negotiations.

With regard to the **Common Provisions Regulation**, amendments adopted by the European Parliament on 13 February 2019 based on the report of the Committee on Regional Development (EP 2019c), reflect Parliament’s eventual positions on the legislative proposals tabled by the Commission. With a view to the stakeholder proposals, these amendments refer to:

- 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 (details cf. 3.1);
- arrangements for implementation of the European Pillar of Social Rights as horizontal enabling condition, applicable to all specific ESF+ objectives (details cf. 3.2);
- provision that enabling conditions are also seen as prerequisite for inclusive and non-discriminatory (and not only effective and efficient) use of EU support (details cf. 3.2);
- 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 (details cf. 3.4);
- provisions on the hardest to reach in the context of people excluded from health and long-term care as part of the national strategic policy framework for health, which is required as thematic enabling condition (details cf. 3.4).

- The inclusion of challenges identified in the Social Scoreboard under the European Semester in the provisions on thematic concentration of national ESF+ spending (details cf. 3.1);
- Charter of Fundamental Rights of the EU, European Pillar of Social Rights and Sustainable Development Goals as additional reference for ESF+, to ensure its scope includes asylum seekers and persons with an irregular status (details cf. 3.3);
- 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 (details cf. 3.4);
- 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 (details cf. 3.4);
- 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 (details cf. 3.5);
- at least 3% of national ESF+ programmes to be spent on the two specific objectives addressing social inclusion of the most deprived and/or material deprivation (details cf. 3.6);
- as simple as possible reporting requirements for common and programme-specific result indicators; and provision that sensitive personal data can be surveyed anonymously for common indicators (details cf. 3.7);
- a far-reaching partnership principle, asking for meaningful participation of social partners, civil society organisations, equality bodies, national human rights institutions and other relevant or representative organisations (details cf. 3.8);
- at least 2% of ESF+ resources allocated to the capacity building of social partners and civil society organisations (details cf. 3.8);
- 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 (details cf. 3.11).

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):

- promotion and implementation of protection measures for vulnerable persons in the context of integration measures as additional AMF implementation measures (details cf. 3.9);
- promotion and development of structural and supporting measures facilitating regular residence in the Union as additional AMF implementation measures (details cf. 3.10);
• scope of AMF as supporting integration measures for third-country nationals 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 (details cf. 3.11).
### 3. STAKEHOLDER PROPOSALS AND THEIR SUPPORT IN DETAIL

#### 3.1

<table>
<thead>
<tr>
<th>Who is proposing it</th>
<th>among stakeholder organisations:</th>
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<tbody>
<tr>
<td>EU Alliance for Investing in Children (incl. PICUM), EUROCITIES, Social Platform</td>
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<tr>
<th>Where does the proposal find support?</th>
<th>in the European Parliament:</th>
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<tr>
<td>ESF+ regulation amendments adopted:</td>
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<tr>
<td>to add to the provisions on thematic concentration of national ESF+ spending that Member States shall address the challenges identified in the Social Scoreboard under the European Semester (Amendment 92 on Art 7.1)</td>
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<td>Common Provisions Regulation (CPR) amendments adopted:</td>
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<td>the Commission, when assessing the Partnership Agreement, to take into account not only relevant country-specific recommendations, but also the overall policy objectives of the structural funds, including a more social and inclusive Europe implementing the European Pillar of Social Rights (Amendment 98 on Art. 9.1 refering to Art. 4 CPR)</td>
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<td>Member States, when regularly presenting to the monitoring committee and the Commission the progress in implementing the programmes, to take into account not only progress in support of the country-specific recommendations, but also of the European Pillar of Social Rights (Amendment 12 on Rec. 13)</td>
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mid-term reviews of structural funds (incl ESF+) to take into account not only challenges identified in relevant country-specific recommendations adopted in 2024 and the socio-economic situation, but also the state of implementation of the European Pillar of Social Rights and territorial needs with a view to reducing disparities and economic and social inequalities (Amendment 119 on Art. 14.1.b);

- adjustments of programmes following mid-term reviews of structural funds to take into account not only new challenges and relevant country-specific recommendations, but also progress with the European Pillar of Social Rights as well as demographic challenges (Amendment 18 on Rec. 19)

3.2

What is proposed

Enabling conditions with their fulfilment criteria should have a strong role for a thorough implementation of the European Pillar of Social Rights and in ensuring that investments are in full compliance with the EU Charter on Fundamental Rights. The European Semester and its Country Reports should have an important role in monitoring on a more regular basis how Member States implement enabling conditions, including on the effective application and implementation of the EU Charter of Fundamental Rights.

Who is proposing it among stakeholder organisations:
EU Alliance for Investing in Children (incl. PICUM), Social Platform

Where does the proposal find support? in the European Parliament: Common Provisions Regulation (CPR) amendments adopted:

- to add as horizontal enabling condition (i.e. prerequisite conditions for implementation of funds applicable to all specific objectives) arrangements at national level to ensure the proper implementation of the principles of the European Pillar of Social Rights that contribute to upward social convergence and cohesion in the EU (Amendment 379 on Annex III Table row 6a new)
to stress that enabling conditions linked to specific objectives are a prerequisite not only for effective and efficient use of EU support granted by the funds, but also for their inclusive and non-discriminatory use (Amendment 16 on Rec. 17)

3.3

What is proposed

Application of the ESF+ should be also guided by the European Social Charter and the Sustainable Development Goals (and not only the European Pillar of Social Rights), to ensure in the ESF+ target groups inclusion of asylum seekers, persons whose claims have been rejected or who have an irregular status.

Who is proposing it

among stakeholder organisations:
ECRE, PICUM

Where does the proposal find support?

in the European Parliament:
ESF+ legislative resolution/amendments adopted:

- to stress that all actions under the ESF+ should respect the Charter of Fundamental Rights of the EU, the European Convention for the Protection of Human Rights and Fundamental Freedoms and have regard to the UN Convention on the Rights of Persons with Disabilities (Amendment 2 on Rec. 1)

- to stress that the ESF+ should contribute to implementing the Sustainable Development Goals by, inter alia, eradicating extreme forms of poverty and promoting quality and inclusive education, gender equality, inclusive economic growth, decent work for all, and reducing inequality (Amendment 5 on Rec. 4).

- as general objective of the fund, ESF+ to be in line with, among others, the Treaties of the EU and the Charter of Fundamental Rights of the EU, delivering on the principles set out in the European Pillar of Social Rights, and the commitment of the Union and its Member
to achieve the Sustainable Development Goals
(Amendment 88 on Art 3)

3.4

What is proposed

To avoid discrimination on the basis of residence status in social services and employment, training, housing and education actions funded from ESF+, and to invest funds in specific measures to protect migrant workers from abuses, enabling all workers regardless of their status to enjoy fair, safe and secure working conditions, file a complaint and access remedies in cases of abuses. For healthcare and long-term care services, the ESF+ should also focus on those who are excluded from mainstream social security. The promotion of equal opportunities for all, without discrimination based on nationality and residence status, should be added to the equality clause of the fund (Art. 6.1).

Who is proposing it
among stakeholder organisations:
ECRE, PICUM, Social Platform

Where does the proposal find support?
in the European Parliament:
ESF+ regulation amendments adopted:

- to add to the general objectives of the ESF+ inclusive societies, high levels of quality employment, job creation, quality and inclusive education and training, equal opportunities, eradicating poverty, including child poverty, social inclusion and integration and social cohesion;
- to add to the Member State policies supported by the fund equal access to the labour market, lifelong learning, high quality working conditions, social protection, integration and inclusion, eradicating poverty, including child poverty, investment in children and young people, non-discrimination, gender equality and access to basic services (Amendment 88 on Art. 3)
- to add to the specific objectives of the ESF+ the inclusiveness of education and training systems, services for access to housing and person-centred healthcare, and access to equal social protection, with a
particular focus on children and disadvantaged groups and the most deprived people, and fighting discrimination against marginalised communities (Amendment 89 on Art. 4)

- to highlight integration challenges related to the management of migration flows as the context in which the ESF+ will be implemented (Amendment 8 on Rec. 5)

- to stress as goals of ESF+ social integration of people experiencing or at risk of poverty or social exclusion, labour market integration of disadvantaged groups and economically inactive; acquisition of language skills; the reduction of horizontal and vertical segregation; the non-discriminatory nature, accessibility and inclusiveness of education and training systems; educational schemes for low-skilled adults to acquire a minimum level of literacy; and access to healthcare and adequate housing services (Amendments 16 on Rec. 13, 18 on Rec. 14, 25 on Rec. 15d new, 30 on Rec. 18)

Common Provisions Regulation (CPR) amendments adopted:

- to add as fulfilment criteria of the thematic enabling condition (i.e. a prerequisite condition for implementation of ESF+) related to a national strategic policy framework for the education and training system that it includes measures ensuring access to non-segregated education and training (Amendment 396 on Annex IV Policy Objective 4 row 2/column 4)

- to add as fulfilment criteria of the thematic enabling condition related to a national strategic policy framework for social inclusion and poverty reduction that it also includes the promotion of social integration of people at risk of poverty or social exclusion, including the most deprived and children (Amendment 400 on Annex IV Policy Objective 4 row 4/column 2, point 4.3.1a new)

- to add as fulfilment criteria of the thematic enabling condition related to a national strategic policy framework for health that it also refers to those hardest to reach in the context of measures focusing on individuals excluded from health and long-term care
3.5

What is proposed

To increase from **25% to 30% the minimum share of ESF+ funds spent on social inclusion and reducing poverty** in Member States programmes under shared management (and to exclude support addressing material deprivation from this share, to be covered by another minimum spending requirement, Social Platform). As the socio-economic integration of third-country nationals falls under this sub-heading of proposed ESF+ objectives, increasing the share would create more possibilities for targeted support of integration measures that go beyond labour-market integration.

Who is proposing it

among stakeholder organisations:

Social Platform, EU Alliance for Investing in Children

Where does the proposal find support?

in the European Parliament:

ESF+ legislative resolution/amendments adopted:

- Member States to allocate at least 27% of their ESF+ resources under shared management of their ESF+ resources under shared management to the specific objectives for the social inclusion policy (Amendment 92 on Art 7.3)

3.6

What is proposed

To require Member States to spend a **minimum share of 4%** of their ESF+ funds under shared management on the two specific objectives addressing **social inclusion of the most deprived and material deprivation** (instead of the proposed minimum spending requirement of 2% for the objective addressing material deprivation only). This would ensure that, post-FEAD, spending for social inclusion of the most deprived remains on an appropriate level, in line with the national strategic framework of poverty reduction and social inclusion as proposed as an ESF+ enabling condition.
Who is proposing it among stakeholder organisations:
Social Platform

Where does the proposal find support? in the European Parliament:
ESF+ legislative resolution/amendments adopted:

- Member States to allocate at least 3% of their ESF+ resources under shared management to the specific objective of addressing social inclusion of the most deprived and/or material deprivation; in addition to the minimum allocation of at least 27% of the ESF+ resources to the specific objectives vii to x of Article 4.1 (Amendment 92 on Art 7.4)

- 3.7

What is proposed To ensure that social services are accessible to all resulting from reduced reporting requirements. Particularly for actions delivering health and psychological assistance, education and employment services, and accommodation and food or material support for the most deprived the reporting requirements should be kept as light as possible and never include questions about or proof of migration status.

Who is proposing it among stakeholder organisations:
ECRE, PICUM

Where does the proposal find support? in the European Parliament:
ESF+ regulation amendments adopted:

- with a view to the ESF+ strand supporting the most deprived, to stress that due to the nature of the operations and the type of end recipients, it is necessary that the simplest possible rules apply to support which addresses material deprivation of the most deprived (Amendment 31 on Rec. 19)

- with regard to common and programme-specific result indicators, to add that reporting requirements
shall be kept as simple as possible (Amendment 107 on Art. 21.2)

- to add to provisions on common indicators for ESF+ support under shared management that sensitive personal data can be surveyed anonymously (Amendment 153 on Annex I)

3.8

What is proposed

To **improve accession and management of ESF+ funds for civil society and local authorities**, by supporting local and regional experiences of successful inclusion under the direct-management strand of the EaSI programme; and by allocating an adequate percentage of the resources under shared management to capacity building supporting the participation of civil society organisations in delivering social inclusion.

Who is proposing it among stakeholder organisations:
ECRE, PICUM

Where does the proposal find support?

**ESF+ regulation amendments adopted:**

- to stress that in order to eradicate poverty and ensure greater social inclusion, the ESF+ should promote the active participation of specialised NGOs and organisations representing people living in poverty both in the preparation and in the implementation of the programmes dedicated to this. (Amendment 33 on Rec. 19.b new)

- each Member State to ensure in partnership with local and regional authorities, meaningful participation of social partners, civil society organisations, equality bodies, national human rights institutions and other relevant or representative organisations in the programming and delivery of employment, education, non-discrimination and social inclusion policies and
initiatives supported by the ESF+ strand under shared management; in accordance with Art. 6 CPR and the European Code of Conduct on Partnership (Amendment 94 on Art 8.1)

- Member States to allocate at least 2% of ESF+ resources for the capacity building of social partners and civil society organisations at Union and national level in the form of training, networking measures, and strengthening of the social dialogue (Amendment 94 on Art 8.2)

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3.9

What is proposed

To invest under AMF in measures that facilitate regular migration and fight exploitation of irregular migrants, including **services allowing undocumented workers to safely report abuses by their employers** without risking being reported to the migration authorities, being detained or deported, as remedy against labour exploitation and irregular employment.

Who is proposing it

among stakeholder organisations:

ECRE, PICUM

Where does the proposal find support?

in the European Parliament:

AMF regulation amendments adopted:

- to add to the AMF implementation measures the promotion and implementation of protection measures for vulnerable persons in the context of integration measures (Amendment 179 on Annex II, point 2.a (b) new)

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3.10

What is proposed

To support with EU funding **regularisation campaigns and initiatives** (both at local and national level) of individuals already present in a Member State and active in employment, as a means to reduce irregular migration and effectively tackle unreported employment and socio-
economic exclusion. Specifically, EU support should be available for accessible procedures to apply for residence status from within the country, including through information, legal and language support, adequate resourcing and minimal fees.

Who is proposing it among stakeholder organisations: ECRE, PICUM

Where does the proposal find support? in the European Parliament: AMF regulation amendments adopted:

- to add to the AMF implementation measures the promotion and development of structural and supporting measures facilitating regular entry to and residence in the Union (Amendment 176 on Annex II, point a aa new)

3.11

What is proposed To ensure ongoing, effective support for early and long-term integration in the broader framework of building inclusive societies, and to avoid that the planned division of responsibilities between AMF and ESF+ is used as a justification by Member States to exclude specific target groups such as asylum seekers and people with precarious status from broader integration programmes.

Who is proposing it among stakeholder organisations: ECRE, PICUM, Social Platform

Where does the proposal find support? in the European Parliament: AMF regulation amendments adopted:

- to specify that measures financed under AMF should support integration measures tailor-made to the needs of third-country nationals that are generally implemented in the early stages of integration, and horizontal actions supporting Member States’ capacities in the field of integration, complemented by interventions to promote the
social and economic inclusion of third-country nationals financed under the structural funds; thus replacing the Commission proposal that AMF is to support measures that are *generally implemented in the early stage* of integration, whereas interventions with a longer-term impact should be financed under the ERDF and ESF+ (Amendment 20 on Rec. 13; reflected in Amendments 179 on Annex II.2.a and 211/216 on Annex III.3.g/3.a new)

**ESF+ regulation amendments adopted:**

- to specify that a distinct specific objective is dedicated to the promotion of *long-term* socio-economic integration of third country nationals, including migrants (Amendment 89 on Art. 4.1.viii)

- to specify that the scope of integration measures supported from ESF+ should focus on third-country nationals legally residing in a Member State or where appropriate in the process of acquiring legal residence in a Member State, including beneficiaries of international protection (Amendment 35 Rec. 20a new)
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