

ReSOMA

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PLATFORM ON MIGRATION
AND ASYLUM

ASK THE EXPERT

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MIGRATION



The **Ask the expert policy briefs** are **highly informative tools** proposed in the framework of the ReSOMA project that aim at **facilitating knowledge sharing** and **social capital development**. By reacting to current events and developments that shape the European migration and integration debate during the duration of the project, these policy briefs will provide timely, evidence-based input to public debates as they unfold and feed in the overall process of identifying the unmet needs and defining policy trends.

An overall of **6 policy briefs** (2 each for migration, asylum and integration) **per year** will be sourced and drafted by lead experts from project partners with additional assistance by leading European think-tanks. In addition, the project will access leading expertise for the topic at hand through collaboration with research networks and other EU-funded research projects.

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TOPIC 1

The crackdown on migration-support NGOs

To prevent and combat migrant smuggling is one of the EU priorities within common migration policy. This includes the so-called Facilitators Package which includes Directive 2002/90/EC according to which each EU MS is required to implement legislation introducing criminal sanctions against the facilitation of irregular entry, transit and residence, and Framework Decision 2002/946/JHA which reinforced the penal framework by setting out minimum rules for sanctions. Under the implemented law, any person who intentionally assists unauthorised entry, transit, or residence of a non-UE national in the EU, is to be sanctioned unless they are doing so for humanitarian reasons.

Apart from the Facilitators Package, there are other examples of restrictive law to civil society adopted by the states. One of the most recent examples is legislation implemented recently by the Hungarian government against civil society organisations working on migration and asylum (EC 2017; Alexe 2018). Under the adopted law, anyone could be jailed for working for or with non-governmental organisations that are involved in helping or campaigning for asylum seekers. Also in other countries (such as Greece, Poland and Croatia) the laws curtailing civil society activities and their funding have been proposed and enacted recently (Civicus 2016; FRA 2018).

The Growing political pressure and fear of sanctions among migration-support NGOs should be elaborated on in a broader context: as a part of state policy to combat irregular migration by strengthening not only external borders, but also internal controls, such as those related to access to certain public services and welfare state (Engbersen, Broeders 2009; van Meeteren 2014). In the background, there is also a powerful political narrative framing migration as a security problem which is a domain of the rightist parties and is currently widely present in many EU countries.

The arguments against implemented regulations

Despite the fact that EU law does not allow the criminalisation of the facilitation of irregular entry when it is conducted on humanitarian grounds, the Facilitators Package was criticised for its optional character, lack of clarity, coherence with international law and legal certainty (Allsopp 2016, Carrera et al. 2016). The Facilitation Directive does not provide a definition of the 'humanitarian assistance' concept, leaving considerable discretion to the member states. In this context, the danger of criminalisation of humanitarian assistance provided by civil society organisations working with irregular migrants at the MS territory and at the external could occur occurred. The tension



between the criminalisation of people smuggling and those providing humanitarian assistance is concerned as a by-product of the Facilitators Package because it enables MS to provide criminal sanctions for a broad range of behaviours including people smuggling on the one side and humanitarian assistance on the other (Carrera et al. 2016). Moreover, this issue is connected to much broader debate related to the process of migrants' smuggling and criminalisation of migration (Triandafyllidou 2018).

A study commissioned by the European Parliament highlights the tension between criminalizing people smuggling migrants and not those who provide humanitarian assistance to migrants in distress (Carrera et al. 2016:11, see also Allsopp 2016, Provera 2015). The study also finds variation in the way in which the Facilitators package is implemented at the national level. Such a variation bears an effect on irregular migrants and those who assist them. Namely, civil society organisations fear sanctions and experience intimidation in their work with irregular migrants. Moreover, as a result of the discretionary implementation of the Facilitators Package in the national legislation and variety of interpretation by member states, there is a limitation to access to Asylum, Migration and Integration Fund (AMIF) funding sources to projects providing humanitarian assistance to irregular migrants. As a consequence, a significant part of the support provided to irregular migrants by civil society organisations remains unreported and unmonitored, which should be recognised as a negative indirect effect of existing EU law.

Indirect effects of crackdown on migration-support NGOs

Anxiety among NGOs working with irregular migrants

This issue is especially important in member states at the common EU external border that have faced increased arrivals at various times, such as Italy, Spain, Greece or Hungary. The lifeguards, ship owners, fishermen and NGO workers could be charged with human smuggling after intervening to save peoples' lives at sea or offer help at the border zone. There are accusations of politicians and media that NGOs conducting lifesaving search and rescue operations (SAR) on the high seas and providing reception shelters across Europe indirectly encourage human smugglers and at the same time influence the migration crisis at the Mediterranean Sea (Cuttitta 2017). Lumping together irregular migrants and rejected asylum seekers as well as persons providing assistance to them in the same category as people who cause disorder or crime lead to undermine the work of civil society actors and growing distrust between national authorities, NGOs partners and public opinion.

Restriction of civil society and rule of law

Besides the direct side-effect of the crackdown on migration-support NGOs such as anxiety among these organisations, volunteers and supporters, it generated also an indirect effect by questioning the condition of civil society, human rights, democracy and rule of law. The process of increasing restrictions and delegitimisation of humanitarian emergency relief has been described among others



as “shrinking space for civil society” (EP 2017), “fundamental crisis of humanitarianism (Zaviršek 2017), “criminalization of solidarity in the EU” (IRR 2017) or “reinforcing deterrence” (Fekete 2018).

It is worth noting the wide negative social consequences of the crackdown on migration-support NGOs. As Maurizio Ambrosini (2015: 131) concluded in his research “the definition, regulation, and treatment of irregular immigrants constitute a “battlefield,” where exclusion and rejection are not the only possible outcomes”. One of the consequences is undermining the confidence in civic society organisations which leads to diminishing of social trust and social cohesion as well as shrinking of space for humanitarian activism at Europe's borders (IRR 2017). The illusion that migration control is more effective that is nothing new and is well documented in history of European states (Behrman 2018).

The key role of civil society partners

Civil society actors' role is manifold in the area of migration and asylum. They are providers of so-called “institutionalized compassion” (Portes et al. 2012) by delivering alternative services: food, psychological support, legal advice, and shelter. They are also protectors of fundamental rights of refugees and migrants by maintaining surveillance over the state and EU law and practices in the field of migration control, opposing stricter regulations, and making public opinion aware of the issue of migration (Spencer 2006). In times when official policies toward irregular migrants have hardened, the role of civil

society organisations as key supportive actors with respect to the daily basic needs of irregular migrants and human rights defenders is essential (Ambrosini 2015). Under the recent political pressure, however, NGOs have to consider what kind of provided assistance is legal according to the national and EU rules. The research among NGOs in the Netherlands working with irregular migrants showed a constant uncertainty resulted from “a constant negotiation [which] is going on in the bureaucratic field of irregularity and it is at least partially modelled on the more restrictive structure of the national policy” (Van der Leun, Bouter 2015:151).

Uncertain future of NGOs assisting irregular migrants

As it was summarised in EP report “The global clampdown on civil society has deepened and accelerated in very recent times. It may not be an entirely new problem, but it is one that has assumed an unprecedented depth and seriousness, and that is likely to continue for the foreseeable future” (EP 2017:9). As a response to deficiencies in the rule of law noticeable in some EU member states, the mechanism of making the EU budget allocation dependent on rule of law was recommended. Moreover, the EP acknowledges the fact that NGOs across the EU face serious financial shortages due to limited access to public funds at a national level. As a consequence, the European Values Instrument was proposed by the EP as a device to support civil society organisations which promote EU fundamental values within the societies



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by creating a separate budget line for NGOs in post-2020 budgets (EP 2018).



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TOPIC 2

Migration-related conditionality in EU external funding

In response to the increasing number of migrants and asylum seekers arriving on the territory of the EU, several legal and political tools were adopted to target, in particular, the EU neighbourhood and African countries. Among others, EU Trust Funds (EUTF, for Central African Republic, Syria and recently Emergency Trust Fund for Africa), New Partnership Framework on Migration (2016), and EU Facility for Refugees in Turkey (2016) were launched. An additional supportive instrument is the proposal for the next Multiannual Financial Framework (2021-2027) which anticipates a serious increase in EU budget for the management of migration and asylum area creating a new flexible financial reserve to tackle unforeseen events and to respond to emergencies in areas such as security and migration. The aim of all mentioned tools is to address the root causes of irregular migration and displaced persons, better organisation of legal migration and well-managed mobility, fighting against human trafficking and smuggling, facilitating return and reintegration of irregular migrants. These instruments are based on conditionality approach regarding cooperation with third countries in the field of migration.

The evolution of political conditionality in the EU

The conditionality model is not a new instrument and has already been used in

the past; it has been identified by some scholars as the main mode of external governance in EU enlargement politics and promoting democracy and human rights in third countries (e.g. Grabbe 2005; Lavenex 2008; Pinelli 2004). The EU sets the adoption of democratic rules and practices as conditions that the third countries have to fulfil in order to receive financial assistance and institutional association or – ultimately - membership, and, in case of EU enlargement policy, it was widely perceived as a very successful approach. Currently, this already “tested” model is used for another purpose: to increase effectiveness of external dimension of EU migration policy. The EU partnerships with the third countries and transfer of EU aid and development funds may rely on conditionalities linked to migration control and cooperation with the EU in the field of returns and readmission (Lavenex, Panizzon 2013).

Critical overview of the conditionality approach

Although EU conditionality is mainly positive (“the EU offers and withholds carrots but does not carry a big stick”, Schimmelfennig, Scholtz 2008: 190), still there are several important critical points underlined in academic debate to this approach as well as to EU re-distributive policies based on it (e.g. Killick 1997, Koch 2015, Kölling 2017). The conditionality ap-

proach is described as hierarchical in the sense that it works through a vertical process of command (where the EU transfers are predetermined) and control (where obedience is regularly monitored). Human rights violations and corruption were also pointed out as important negative outcomes of the conditionality approach (CONCORD 2018, ECRE 2017).

Another important point in the debate over the conditionality approach is an allegation of lack of 'democratic' basis, that political decisions on external funding based on conditionality neglect the fundamental elements and treaty objectives of economic and social cohesion policy, as well as promotion of development cooperation, rule of law and human rights principles (included, among others, in Lisbon Treaty) (FRA 2014). Other concerns are related to EUTF's focus on quick-fix projects with the main aim to stem migratory flows to Europe while effective policy dealing with forced and irregular migration requires a long term and sustainable approach, and the fact that the geographic location of funded projects is based on the identification of places of origin of irregular migration to the EU rather than on analyses of the concrete needs of development aid (CONCORD 2018, Hauck et al. 2015).

Factors determining the effectiveness of the conditionality approach

As it was underlined in the conclusions based on analysis of the Mobility Partnerships, various factors determining the effectiveness of the conditionality approach (Reslow 2012). Among others, the resonance of the EU policy with national policy objectives, the administrative ca-

capacity of the target state, the domestic costs of adopting the EU policy and the credibility of the promises made has to be mentioned. The effectiveness of conditionality in EU external funding also requires a proper balance between clear definition of the terms of conditionality and certain flexibility; if conditions are too strict and narrow, this could become responsible for a low ratio of funds spent, if they are too wide – it could negatively impact the efficiency (Kölling 2017). Some studies show clearly, that the conditionality approach has its limits, it is more effective in countries when a degree of interdependency with the EU is higher, it also requires some flexibility (it is not a one-size-fits-all approach) and taking into account the adverse socio-economic and political contexts on the ground (Börzel, Hackenesch 2013).

Short term consequences approach prevails

The results of research done by Oxfam (2017:4) show that majority of EUTF funds was spent on everyday migration management, and only 3% of the budget was allocated to developing safe and regular routes of migration which is contrary to commitments under the Valletta Action Plan. Thus, the important question arises about the long-term consequences of the new EU approach for development, human rights and security of the partner countries, and stability in the whole African region. "The focus on short-term EU interests might jeopardize long term interests for African partners" (ECRE 2017). The concerns over EUTF transparency, accountability and effectiveness were also raised by the European Parliament in the evaluation report on EUTF (EP 2016) and European Court of Auditors (2016). It must



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bear in mind the cost-benefit balance: either stemming the flow of migrants and refugees into Europe or democratisation and human rights in neighbouring states since one may come at the cost of the other.

To conclude, there are serious concerns related to making EU external funding and development aid conditional on migration control by third countries.

These concerns are varied and include: possible negative impact on migrants' fundamental rights protection, coherence and effectiveness of EU external policy as such, long-term effects for the development of the third countries, and last but not least, the EU credibility and its role in the propagation of fundamental values and human rights. The question seems to be still open if migration-related conditionality in EU external funding would be a success or failure in the long-term/longtime perspective.

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TOPIC 3

Return rates

Every year around half a million foreign nationals are ordered to leave the territory of the EU because they have entered or they are staying there irregularly. According to Eurostat (2016), in 2015 only 36% of return decisions were effectively implemented, raising the question about the efficiency of return procedures. The EU attempts to tackle the issue of irregular migrants by seeking to set up a more effective policy of return and detention and increasing international cooperation in detecting people at the borders. The comprehensive legal and institutional framework was developed within the EU to deal with the issue of return and readmission including the Return Directive (2008) which introduced common standards. The dedicated EU Action Plan on Return (September 2015) was introduced to increase the return rate, its aim is to implement more effective return procedures and more operational returns by the EU and MS to remove legal and practical obstacles in return proceedings. It is an ambitious set of measures such as promoting best practices on voluntary returns and the concept of uniform EU Travel Document to develop a more coordinated approach in the area of return and to ensure the return rates increase. Additionally, the recently updated Return Handbook (2017) providing guidelines to national authorities, best practices and recommendations for carrying out returns in an effective and humane way as well as Commission recommendation on making returns more effective (EC 2017) has

to be mentioned here. The role and budget of the institutional framework including EU Agencies FRONTEX and European Border and Coast Guard were also significantly strengthened as relevant bodies providing assistance for joint return operations and removal of irregular migrants from the EU territory.

Readmission policy: towards more informal modes of cooperation with third countries

A whole spectrum of formal and informal political tools addressing the return issue has emerged over the last decade or so. The readmission agreements are perceived as one of the most important instruments in this area (signed with countries of origin and transit countries) (Bouteillet-Paquet 2003, EC 2011b, Panizon 2014). However, readmission policy is also severely criticised since readmission agreements are considered as a tool that does not sufficiently consider the interests of partner countries and the proper protection of human rights (Alpes et.al. 2017, Billet 2010, Carrera 2016). Following the international relations approach, it has to be highlighted that readmission agreements as a political tool are characterised by asymmetry (they involve two signatory parties that differ significantly in level of developmental and political power) and inequality (in term of structural institutional and legal capacity of both parties). What is also important, the costs and benefits of readmission agree-

ments differ substantially for both sides: while the EU member states' advantage is related to effective removal of unwanted migrants, countries of origin interests' are more varied and consider their economic and political interests (including remittances) (Coleman 2009).

Moreover, there is a policy gap between readmission agreements signed on paper and the practical implementation of their provisions. This could be a result of administrative obstacles and a lack of cooperation from the authorities of the signatory countries (Cornelius et al.). It leads to the emergence of informal patterns of bilateral cooperation on readmission which include less formalising forms of mutual cooperation, which are by their nature difficult to detect and monitored by civil society organisations. The development of informal patterns of cooperation on readmission (so called gradual informalisation) is therefore portrayed in the literature by four characteristics: invisibility, flexibility, limited cost of defection and adaptability to security concerns (Cassarino 2007).

The problem of non-returnable migrants

The evaluation of return procedures showed several important shortcomings, among others, the lack or limited cooperation between the EU with some third countries in identifying and readmitting their nationals; insufficient coordination among all the services and authorities involved in the return process at the each member state and the EU level; long-drawn appeal process; and inadequate information about voluntary return options among migrants (EC 2017). One of the most important challenges is related

to third-country nationals who cannot be removed from the territory of the Member States and who are often repeatedly detained without any prospect of their case being resolved (so-called non-returnables). This problem is serious: it was estimated that almost 40% of detainees in the UK who spent more than three months in detention were eventually released with their cases still outstanding. The conclusion of the study is that early identification and timely release of these individuals would save the cost of their protracted and fruitless detention (which was projected as £377 million over a 5-year time period, Marsh et al. 2012). The situation of non-returnables migrants is one of those areas that is still mainly within national competence and is only marginally addressed by EU law (Cantor et al. 2017).

Return policy and human rights

The facilitation of the return of irregular migrants also entails important challenges for the protection of human rights at the EU and member states level. NGO partners and academics point out several faults related to the Return Directive and EU readmission policy implemented in practice (ACT Alliance EU et al. 2016, Baldaccini 2010, Caritas 2016). They underline the requirement of respecting the rights of the returnees and implementation of return procedures in line with fundamental and human rights and monitoring system of the removal process as well as impact assessments of reintegration programmes. The concerns include both legal aspects and practical issues such as arbitrariness of detention and return decisions which are issued at different points in the asylum procedure in different countries, as well as duration and condi-

tions of detention (PICUM 2015). The experience related to return law and practices varies greatly amongst member states which are perceived primarily as transit countries and those seen as final destinations, what means that one-size-fits-all approach may be in practice less successful (EC 2011a).

The critics conclude that together with making higher return rates a primary aim of EU policy, there is a risk of a narrow focus on numbers at any cost, leaving aside the ethical, legal and political implications and negative side effects of implemented measures (ECRE 2017).

Children involved in return procedures as a case requiring special attention

The issue of longer detention of third-country nationals included in the Return Directive as a tool to achieve higher return rates is also highly discussed (FRA 2010). A number of medical and sociological studies have proved that experiencing detention seriously affects physical and psychological health of migrants regardless of its duration (Steel et al. 2008). Particular criticism has been addressed towards the possibility of detain-

ing children and their families. Although children have always been part of migration flows (up to one third of migrants arriving in the EU since the summer of 2015 have been children, FRA 2017), there is a lack of official data of the number of children that are in immigration detention in the EU. It is difficult to obtain reliable figures also because the governments are rather reluctant to share these statistics with the public (Cornelisse 2010).

While the Return Directive allows for the detention of children during removal proceedings (as a last resort and the shortest appropriate period of time), the enforcement of such provisions depends significantly on their incorporation into domestic law (FRA 2017). There is a wide debate around how to balance the protection of migrants' rights (including children) on the one hand, and the need for more effective implementation of migration policy, on the other. The conclusions from academic studies, which are policy-relevant, underline the need of promotion of stricter legal control over detention process taking place in practice and development of effective alternatives to detention (Amaral 2013; Biel 2017, Bloomfield 2016, Marsh et al. 2012; Flynn, Flynn 2017).

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ReSOMA

RESEARCH SOCIAL
PLATFORM ON MIGRATION
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ReSOMA - Research Social Platform on Migration and Asylum

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

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