ReSOMA

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POLICY OPTION BRIEF

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MIGRATION

Crackdown on NGOs assisting refugees and other migrants

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ReSOMA identifies the most pressing topics and needs relating to the migration, asylum and integration debate. Building on the identification of pivotal issues and controversies in the ReSOMA Discussion Briefs, **ReSOMA Policy Option Briefs** provide an overview of available evidence and new analysis of policy alternatives. They take stock of existing literature of policy solutions on asylum, migration and integration, highlight the alternatives that can fill key policy gaps and map their support among various stakeholders. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG).

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Policy Option Brief

Crackdown on NGOs assisting refugees and other migrants*

1. INTRODUCTION

As outlined in the initial ReSOMA Discussion Brief (Vosyliute and Conte 2018), recent research has highlighted the major controversies and inconsistencies of the EU's current approach, law, policy and practice on fighting migrant smuggling with fundamental rights, the rule of law and democratic principles. (Carrera and Guild 2015, Bozeat et al. 2016, Carrera et al. 2016, Allsopp 2017, Gkliati 2016, Landry 2016, Fekete, Webber and Edmond-Pettit 2017, Heller and Pezzani 2017, Landry 2017, Zangh, Sanchez and Achilli 2018, Carrera et al. 2018, Fekete 2018, Carrera et al. 2019).

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

As highlighted in the initial ReSOMA Discussion Brief (Vosyliute and Conte 2018), the Facilitators Package contains several legal flaws that increase the risks of misguided criminal prosecution of NGOs and volunteers who provide humanitarian assistance to refugees and other migrants. The Facilitators Package is greatly criticised for its incoherence with international law standards, namely with the UN Protocol against Migrant Smuggling (UN General Assembly 2000). Its main shortcomings are 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 from criminalisation (FRA 2014, the UK House of Lords 2015, UNODC 2017; Carrera et al. 2016, Bozeat et al. 2016, Carrera et al. 2018, Fekete, Webber and Edmond-Pettit 2017). Civil society and academia, as well as various institutions, including the European Union Fundamental Rights Agency (FRA) and United Nations Office on Drugs and Crime (UNODC), widely agree that in

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addition to the above-mentioned legal flaws, the phenomenon of the criminalisation of solidarity has emerged partly due to an incorrect transposition, implementation and interpretation of the Facilitators Package at European and national levels, which is not in compliance with fundamental rights safeguards. However, so far there have been no infringements brought before the European Court of Justice by the Commission on this question (Carrera et al. 2018). ReSOMA task force participants propounded that political priorities have shifted in the aftermath of the so-called 'refugee humanitarian crisis' in Europe and a "restrictive and security-driven approach to migration management emerged as the 'common lowest denominator' on which EU Member States could agree and show some sort of solidarity at the EU level" (ReSOMA 2019: 17).

The very design of the EU Facilitators Package seems to be problematic – 'anti-smuggling' laws have not been framed in terms of criminal justice, but rather as migration management tools. This flaw is capable of seriously undermining the general logic of criminal justice that has numerous checks and balances, for example, to detect and prevent misguided prosecutions at a very early stage (The UK House of Lords 2015, Carrera et al. 2016, Bozeat et al. 2016, Carrera, Allsopp and Vosyliute 2018, Carrera et al. 2018, Fekete 2018). ReSOMA Task Force participants also highlighted that although "episodes of criminalisation of solidarity towards migrants were already taking place in Europe before 2015, during the following years the phenomenon was significantly amplified" (ReSOMA 2019: 19).

The crackdown on NGOs is a multifaceted phenomenon intrinsically connected with the protection of EU founding values, such as democracy, the rule of law and fundamental rights. The attack on NGOs assisting refugees and other migrants is therefore highly visible in national contexts of rule of law backsliding like in Hungary and Poland, and also in contexts where the governments were interested in speeding up returns, were trading fundamental rights and creating a 'hostile environment' towards refugees and other migrants, like in the UK, France, Italy and Belgium (Allsopp 2017, Youngs and Echague 2017, Szuleka 2017, Carrera et al. 2018, Carrera et al. 2019). The crackdown on NGOs can manifest as silencing critical civil society actors through limiting their access to public funding, and as imposing various disciplinary measures that limit NGOs' access to clients, thus raising a veil of suspicion about the organisations' activities – with EU agencies, law enforcement or local authorities subsequently being instructed to supervise these NGOs closely (Carrera et al. 2019).

The public funding is a particularly sensitive and indirect measure that some member states have used in order to silence human rights-watchdog or other critical NGOs, to make them 'play along' or even implement political decisions that are in opposition to their ethos (Szuleka 2017, Vosyliute and Conte 2018, Carrera et al. 2018, Westerby 2018a, Carrera et al. 2019). Various types of funding, including EU funds such as the AMIF and ESF that are aimed at supporting civil society projects, lack sufficient safeguards from such funds being misused by governments, and in particularly - in the context of rule of law backsliding. For example, one of

the recent reports assessing AMIF funds stresses that "there is an overall lack of transparency within National Programmes in areas such as priority-setting, project award decision-making and – in particular – the rate and nature of programme implementation (Westerby 2018a: 9).

Against this background, this Policy Options brief maps the policy recommendations proposed by the main stakeholders and researchers to remove hurdles for NGOs to operate freely and uphold the values of democracy, rule of law and respect for fundamental rights, as enshrined in Article 2 of the Treaty on European Union (TEU), and also as provided for in the Charter of Fundamental Rights of the EU (CFREU) - the respect for human dignity, freedom of association, freedom of speech, freedom of conscience, equality and non-discrimination.

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 Directive 2002/90 which allows Member States to decide whether civil society actors and family members acting without any profit motive should be exempted from criminalisation of facilitation of entry (FRA 2014, the UK House of Lords 2015, Carrera et al. 2016, Bozeat et al. 2016, UNODC 2017, Fekete, Webber and Edmond-Pettit 2017, Carrera et al. 2018, Vosyliute and Conte, 2018). The reports mentioned above also reached the conclusion that the EU Facilitation Directive is framed vaguely so as to allow Member States to criminalise any person who "intentionally assists a migrant to enter, or transit across, the territory of a Member State" (Article 1 para. 2 of the Directive).

The European Union Agency for Fundamental Rights (FRA) has noted that some Member States have declared exemptions on grounds of humanitarian assistance (FRA 2014). However, empiric research shows that prosecutions of volunteers and NGOs still take place even in those countries where official declarations have been made (Carrera et al. 2016, Fekete, Webber and Edmond-Pettit 2017, Heller and Pezzani 2017, Landry 2017, Carrera et al. 2018, Carrera et al. 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 in national laws in both Italy and Greece (Fekete, Webber and Edmond-Pettit 2017, Heller and Pezzani 2017, Carrera, Allsopp and Vosyliute 2018).

Empirical research shows that 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 (Landry 2017, Carrera, Allsopp and Vosyliute 2018, Carrera et al. 2018). The legal gaps and barriers to exempting humanitarian assistance have led to discussion on what constitutes 'genuine humanitarian' acts (European Commission 2018 k). Such discussion aims to exclude civil disobedience and activist citizen mobilisation from 'humanitarian exemption'. The question is essentially: Should the EU and its Member States have a wide margin of appreciation to criminalise any "intentional assistance" to refugees and other migrants to enter the EU, leaving out only the case that is explicitly permitted as 'genuine', or should the EU set the standard so that its Member States only investigate and prosecute behaviour that reaches the threshold of a 'crime' and has a clear element of 'harm' and/or 'criminal intent'?

The former type of discussion has been proposed by some governments and the European Commission with an argument that the EU's competences in criminal law are rather limited (2018k), while the latter type of discussion has been proposed by the European Parliament (2018a) recalling that the EU has competence to ensure how fundamental rights are protected. In addition, the EU has actually gained more competences in

the area of criminal law with the Treaty of Lisbon (Carrera, Hernanz and Parkin 2013), and on several occasions has exercised this new competence, for example to subsequently harmonise anti-human trafficking laws (Carrera and Guild 2015).

In academic research there has also been a proposal to better define the crime of migrant smuggling, so that limited law enforcement resources can be invested in criminal cases worth investigating for the purposes of public interest as opposed to in the preventive policing of civil society actors (Carrera et al 2016, Landry 2017, Fekete, Webber and Edmond-Pettit 2017, Carrera et al. 2018).

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

As summarised in earlier ReSOMA discussion briefs (Vosyliute and Conte 2018, Vosyliute and Joki 2018, Wolffhardt 2018), academia and think tanks have been increasingly interested in the issue of the criminalisation of migration and the criminalisation of solidarity (see for example, Fekete 2009, Portes, Fernandez-Kelly and Light 2012, Van der Leun and Bouter 2015, Provera 2015, Carrera et al. 2016, Gkliati 2016, Fekete, Webber and Edmond-Pettit 2017, Heller and Pezzani 2017, Landry 2017, Carrera, Allsopp and Vosyliute 2018, Carrera et al. 2018, Zangh, Sanchez and Achilli 2018, Fekete 2018, Carrera et al. 2019).

In this ReSOMA Policy Options brief we further develop four proposals that are not mutually exclusive and could be seen as complementary:

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

2.1.1 The criterion of 'financial gain or other material benefit'

The UN Protocol against the Smuggling of Migrants by Land, Sea and Air sets an international standard in the area (UN General Assembly 2000). Article 6 of the UN Protocol provides the international threshold to criminalise the behaviour as 'migrant smuggling' when it is done for

profit motives. The element of financial gain in this context is the crucial indicator of criminal intent on the side of smugglers (UNODC 2004, UNODC 2017). The European Union Agency for Fundamental Rights (FRA) underlines that all EU Member States, except Ireland, have ratified the UN Protocol against the Smuggling of Migrants (FRA 2018).

However, the EU Facilitators Package includes the criterion of 'financial gain or other material benefit' as a requirement to establish a basis of crime only for the facilitation of stay and residence, but not for entry and transit. Yet even for the situations of stay and residence, the profit element is transposed only in half of the EU Member States (FRA, 2014) and in addition, even where it is required, general accommodation or transportation fees can be considered as 'an element of profit' without requirement to prove 'unjust enrichment' from the situations of smuggled migrants (the UK House of Lords 2015, Carrera et al. 2016, UNODC 2017, Carrera et al. 2018).

2.1.2 The exemption on grounds of humanitarian assistance

The United Nations Office on Drugs and Crime (UNDOC) clarifies that the Protocol against the Smuggling of Migrants does not require states to criminalise or take other action against groups that smuggle migrants for "charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum seekers" (UNODC 2004).

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

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

The impact assessment of the Facilitators Package conducted by the ICF also highlighted that the Facilitation Directive does not effectively discourage Member States from criminalising civil society organisations and should therefore be amended so as to prohibit such attempts (Bozeat et al. 2016). The evidence for the

need to exempt humanitarian assistance as provided by civil society actors is also widely supported by research (for example, Portes, Fernandez-Kelly and Light 2012, Van der Leun and Bouter 2015, Carrera et al. 2016, Gkliati 2016, Fekete, Webber and Edmond-Pettit 2017, Landry 2017, Carrera, Allsopp and Vosyliute 2018, Carrera et al. 2018, Fekete 2018, Carrera et al. 2019).

By contrast, in its REFIT exercise, **the Commission** disregarded the most acute concern regarding insufficient protection of actors providing humanitarian assistance, which was expressed by more than 1 780 individuals and was prevalent among various categories of stakeholders, with the exception of Member States (European Commission 2017: see Annex II "Stakeholders Consultation", p. 49).

Research conducted after the Commission's REFIT exercise indicates that prosecutions of humanitarian actors continue to increase (Fekete, Webber and Edmond-Pettitt 2017, Carrera, Allsopp and Vosyliute 2018, Carrera et al. 2018, Carrera et al. 2019). This is happening despite the number of arrivals of refugees and migrants having substantially decreased to levels estimated before 2015.

2.1.3 Implementing firewalls

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

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

The concept of 'firewalls' was also discussed in the ReSOMA discussion brief as a key condition for the social inclusion of undocumented migrants (Vosyliute and Joki 2018). The firewalls have been also proposed by the Council of Europe, European Commission against Racism and Intolerance (ECRI) (2016) and considered at UN-level discussions on the Global Compact on Migration. The argument of setting up 'firewalls' has been recently extended to civil society actors, to protect their mandate, when cooperation with law enforcement is requested or necessary (Carrera et al. 2018, Carrera et al. 2019).).

2.1.4 The independent monitoring of implementation of the Facilitators Package

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

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

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

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

The 2018 update study reconsidered the approach in light of the political context and the rule of law backsliding in some EU Member States. It proposed **more independent and decentralised mechanisms** that could capture politically motivated misuse of the Facilitators Package to silence, intimidate and prosecute civil society actors to feed into a broader EU Rule of Law monitoring mechanism.

The update study proposed launching a **European Parliament's Inquiry** into misguided prosecutions of civil society actors, enabling civil society to put forward cases via the Strategic Litigation Fund. The inquiry would also support civil society via EU Values Funding "to collect evidence showing non-compliance with the EU's legal framework and submit it to the European Commission, so as to enable it to start infringement procedures against a Member State or EU institution/agency" (Carrera et al. 2018: 114).

In addition, a proposal was put forward to set up an **independent observatory** that would establish a scientifically rigorous method to collect and analyse early warning signs of 'policing humanitarianism' (Carrera et al. 2018: 114):

"The observatory could communicate the emerging signs of systemic and institutional cases to the European Commission, DG HOME and DG JUST, the European Parliament LIBE and PETI Committees and the EU Fundamental Rights Agency. The observatory could also collect evidence of risk or threat of serious and/or systemic breach of the EU's founding values and submit it before the rule of law mechanism that was earlier proposed by the European Parliament."

ReSOMA Task Force participants suggested that in addition to "independent observatory overseeing the free civil society space and the protection of human rights' defenders", the **EU agencies** that gather various types of data during their activities could use and analyse them in order to protect free civil society space (ReSOMA 2019: 20).

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

As explained in the ReSOMA Discussion Brief, national and EU funding can also be **misused to intimidate and silence** critical organisations that assist refugees and other migrants or that advocate for their human rights (Vosyliute and Conte 2018).

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

Empiric research has also found subtler forms of political pressure on civil society via public funding that result in self-censoring due to fears of losing public contracts and/ or access to clients also in countries where rule of law is not considered to be backsliding. For example, interviewees representing civil society organisations providing various types of assistance for asylum seekers in hot spots in Italy refused to comment on forced finger printing practices (Carrera et al. 2019). Similarly, organisations in Greece shared their experiences of not being allowed in refugee camps due to the organisations' critical reports (Carrera et al. 2019).

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

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

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

Also, the legislative framework has been changed in the context of rule of law backsliding in Poland and Hungary so as to restrict the access to funding for civil society providing humanitarian assistance (Szuleka 2018). In Hungary, the government initiated a campaign against the national operator of EEA/Norway grants in 2014, Lex NGOs, a 25% tax for civil society working in this field and blanket authorisation to withdraw any AMIF received funding (Szuleka 2018: 15). In addition, EU funding has been misused as to make civil society more obedient through funding:

"In Hungary, AMIF applicant organisations must sign a blanket authorisation allowing the Responsible Authority (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**. Both this requirement and rules preventing NGOs from charging management and core operational costs to AMIF projects means

many organisations are reluctant to submit AMIF proposals" (Westerby 2018 a).

Similarly, in Poland – "for example, in 2016, the Ministry of Interior announced that the call for proposals within the Asylum, Migration and Integration Fund (worth EUR 625,000) was annulled" and later the law on disbursing the national and EU funding was changed by the Polish Act on the National Institute of Freedom, that "creates a new administrative body which will work under the supervision of the government and without any meaningful participation of the civil society." (Szuleka 2018: 16).

The Venice Commission has raised its concerns on several occasions, notably as regards the Lex NGOs, stressing that "the context surrounding the adoption of the relevant law and specifically a virulent campaign by some state authorities against civil society organisations receiving foreign funding, portraying them as acting against the interests of society, may render such provisions problematic, raising a concern as to whether they breach the prohibition of discrimination, contrary to Article 14 ECHR" (Venice Commission: 2017 in Szuleka 2018: 16). The European Commission has also reacted to the latter case by already starting infringement procedures against Hungary in 2017. However, to date, Hungary has continued receiving EU funding.

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

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

To monitor the shrinking space for civil society and assess the respect of rule of law, researchers and stakeholders have proposed developing an **EU Civil Society Shadow Reporting** or Complaints Mechanism that feeds into the EU Rule of Law Mechanism and the work of EU Agencies in countering smuggling and migration/border management policies (Carrera et al. 2018).

In addition, research has also recommended that the disbursement of the AMIF and Internal Security Fund (ISF) should be subject to regular reports of the European Court of Auditors and European Ombudsman prior to their disbursement, and that their "disbursements for Member States should be conditional on the absence of political prosecutions against civil society" (Carrera et al. 2018: 114).

2.2.2. Direct financial support for NGOs and the monitoring of funding

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

Where the rule of law is not affected, 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, in line with the **Partnership Principle** (Westerby 2018a).

The introduction of **a systematic EU funding monitoring mechanism** has also been suggested. This would be operated by the Commission to assess how Member States comply with the requirements of transparency, communication and information sharing (Westerby 2018a).

ReSOMA Task Force participants all agreed that "different instruments promoting and strengthening the respect of rule of law and fundamental rights should be prioritised and awarded with appropriate funding mechanisms" (ReSOMA 2019: 20). Discussion highlighted the need to protect critical civil society infrastructure at national level.

3. MAPPING THE DEBATE ON SOLUTIONS AT EU LEVEL

3.1 Revising the Facilitators' Package, adopting guidelines and ensuring monitoring

3.1.1. Revision of Facilitators' Package

As mentioned in the Introduction, the majority of research reports and studies analysed for this mapping exercise (for example, Portes, Fernandez-Kelly and Light 2012, Van der Leun and Bouter 2015, Carrera et al. 2016, Carrera, Allsopp and Vosyliute 2018, Carrera et al. 2018, and others) and various civil society actors (see for example, PICUM 2017, Social Platform 2016, and the Red Cross EU Office 2017, as well as many contributors of Civic Space Watch and the European Citizens Initiative "We are welcoming Europe, let us help!") provide evidence that NGOs assisting refugees and other migrants are experiencing unprecedented policing of their activities.

All very much emphasise that the lack of a "financial and other material benefit" requirement, as well as the lack of a mandatory exemption on the ground of humanitarian assistance under the Facilitation Directive, contribute to legal uncertainty and increase the risk of being prosecuted for helping refugees and migrants.

As a result, they propose revising the Facilitators Package in compliance with the UN Protocol against the Smuggling of Migrants. They also propose implementing this in line with the EU's founding values, such as democracy, fundamental rights and the rule of law and the Charter of Fundamental Rights of the EU.

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

In light of an increasing criminalisation of humanitarian actors, the **European Parliament** (2018a) adopted a resolution on 5 July 2018 to end the criminalisation and punishment of organisations and individuals who assist migrants in need. The European Parliament (2018a) expressed "concern at the unintended consequences of the Facilitators Package on citizens providing humanitarian assistance to migrants and on the social cohesion of the receiving society as a whole".

The resolution sets out that acts of humanitarian assistance should not be criminalised, as required by the international standards of the UN Protocol against the Smuggling of Migrants. It expressly emphasises that organisations and individuals who assist migrants play a crucial role in supporting national competent authorities and ensuring that humanitarian assistance is provided to migrants in need.

The European Parliament (2018a) has outlined that a very limited number of Mem-

ber States have transposed the humanitarian assistance exemption included under the Facilitation Directive, and has noted that "**the exemption should be implemented as a bar to prosecution**". The European Parliament (2018a) has therefore called on Member States to "ensure that prosecution is not pursued against individuals and civil society organisations assisting migrants for humanitarian reasons" and to monitor the compliance for this provision.

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

3.1.2. Adoption of guidelines

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

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

The Commission seems to be supportive of this policy option. For example, European Commission in response to the letter from Race International Institute, noted that it will "engage with relevant players, primarily civil society organisations as well as national authorities and EU agencies such as Eurojust and the FRA, to get a better understanding of the application of the existing rules, supporting both the effective implementation of the existing legal framework and a reinforced exchange of knowledge and good practice between prosecutors, law enforcement and civil society in order to ensure that criminalisation of genuine humanitarian assistance is avoided" (European Commission 2018).

However, ReSOMA transnational meeting participants, many of whom **are legal practitioners,** insisted on the legislative change as a key priority. In their view, accompanying measures only, as proposed by the Commission's REFIT, would not change legal interpretations by national prosecutors and judges (ReSOMA 2018).

By contrast, the policy recommendation to put firewalls in place between civil society and law enforcement does not seem to find strong political support in **the European Commission** with the exception

of Directorate-General for Regional and Urban Policy (DG REGIO) (2018). As mentioned in the Discussion Brief on "Social Inclusion of Undocumented (Vosyliute and Joki 2018), the **Council of Europe, European Commission against Racism and Intolerance** (ECRI) (2016) recommended European governments to implement firewalls between the service providers and immigration controls. The ECRI recommendations urge governments to "ensure that no public or private bodies providing services in the fields of education, health care, housing, social security and assistance, labour protection and justice are under reporting duties for immigration control and enforcement purposes" (ECRI 2016).

3.1.3. Independent monitoring of implementation of the Facilitators' Package

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

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

3.2 Access to funding for NGOs assisting refugees and other migrants

Various reports analysing EU funding schemes (Carrera et al. 2016, Westerby 2018, Šelih, Bond and Dolan 2017, Szuleka 2018, Carrera et al. 2018, Westerby 2018) support the proposal of empowering civil society organisations to carry out their role by **directly allocating** reasonable minimum percentages of programme funding or providing more possibilities for direct grants from the European Commission, as opposed to national agencies. This policy option is also promoted by stakeholders such 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 (see Westerby 2018a and 2018b).

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

3.3 Rule of law mechanism and funding conditionality

The policy option 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 2018, Pech 2017, Bárd 2017, Youngs and Echague 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 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 2018). By contrast, civil society organisations have not yet expressly endorsed this policy option that risks penalising the citizens and regions of the Member States concerned, which are greatly in need of financial support through EU funding.

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

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

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

4. MAPPING THE EVIDENCE BROUGHT

4.1 Evidence to change the Facilitation Directive

The evaluation of the Facilitators Package carried out under the Commission's Regulatory Fitness and Performance Programme (REFIT) carried out between 2014 and 2016 concluded that there was no sufficient evidence to amend the current legal framework 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 European Commission continues to argue that the revision of the Facilitation Directive was refused because of "the lack of evidence". During the hearing at the European Parliament's Committee on Petitions (2018), it was clarified that the European Commission only considers as evidence criminal cases on the grounds of migrant smuggling that ended with successful prosecutions of humanitarian actors. The recent report commissioned by the European Parliament's Committee on Petitions criticises such a requirement of evidence as it essentially implies failure of criminal justice systems – misguided prosecutions were not challenged by criminal justice checks and balances, and were judged to have enough evidence and/or political pressure to prosecute civil society actors (Carrera et al. 2018). Reports from academia and civil society oppose such a narrow interpretation of what constitutes the 'evidence' and that discussion is shifting from evidence-based policy making to the policy-based evidence making (ReSOMA 2019).

Civil society actors point out that the rising number of volunteers and humanitarian actors experiencing suspicion, intimidation, harassment, disciplining and criminal prosecutions 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, PICUM 2017, Social Platform 2016, CIVICUS 2016).

Moreover, **empiric research** illustrates how in a number of the EU Member States such cases have been escalating from suspicion to criminal prosecutions of humanitarian actors (Carrera, Allsopp and Vosyliute 2018, Carrera et al. 2018, Carrera et al. 2019). In addition, **legal analysis** indicated that national laws on facilitation are a "patchwork of different patterns of criminalisation and exemption" (Fekete, Webber and Edmond-Pettitt 2017). A research carried out by the Race Relations Institute reported the prosecutions of 45 individuals who provided humanitarian assistance under different anti-smuggling or immigration laws in the EU Member States (Fekete, Webber and Edmond-Pettitt 2017).

While the **European Commission** (2017) in its REFIT found the diverse transposition as a challenge to be remedied by better law enforcement cooperation, and not related to the Facilitators Package itself. However, various studies and reports point out that the lack of legal harmoni-

sation is still possible because the Facilitators Package is not yet 'Lisbonised' and therefore Member States are more free to implement a diversity of practices that contribute to legal uncertainty among civil society actors and service providers (Carrera et al. 2016, Carrera, Allsopp and Vosyliute 2018, Carrera et al. 2018, Carrera et al. 2019).

4.1.1. Financial or other material benefit

Various **institutional actors** such as the European Union Agency for Fundamental Rights (FRA 2014) and United Nations Office on Drugs and Crime (UNODC 2017) have been arguing that the EU Facilitators Package should be amended in line with the UN standards included under the Protocol against the Smuggling of Migrants so as to narrow and clarify the definition of the crime of migrant smuggling. According to the UNODC Legislative Guidelines (UNODC 2004), the reference to "financial or other material benefit" has been included in the UN Protocol against the Smuggling of Migrants so as to exclude from prosecution groups which pursue legitimate political or social aims, such as humanitarian search and rescue activities or civil disobedience. A requirement of 'profit motive' would therefore by default exclude such actors from criminalisation if they do not seek to obtain "financial or other material benefit" when assisting refugees and other migrants (UNODC 2004).

Similarly, various **civil society** actors, for example, PICUM (2017), Social Platform (2016), CIVICUS (2016), the Red Cross EU Office (2017) and FEANTSA (2017) have been advocating the exclusion of humanitarian assistance and other services for persons in precarious situations, as these services do not seek to profit from the vulnerabilities of smuggled migrants. Rather, their aim is humanitarian, even when fees may be required from clients, for example for shelter and food or transport (the UK House of Lords 2015). An assessment of the EU's anti-migrant smuggling policies and impact assessment conducted by ICF (Bozeat et al. 2016) also came to a similar conclusion on the need to revise the EU Facilitators Package and to insist on 'for profit' motives so as to reduce legal uncertainties among civil society actors and various service providers.

Research further proposes that the profit element should be qualified to cover only **"unjust enrichment or profit"** and exclude "bona fide" shopkeepers, landlords and businesses" (Carrera et al. 2016, Bozeat et al. 2016, Carrera et al. 2018). The concept of 'excessive gain' has been 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 Austria was not judged to be a smuggler because of the application of standard fees for the service provided (Schloenhardt 2016). The financial gain therefore did not constitute personal benefit in the sense of unjust enrichment.

Due to the absence of such 'unjust enrichment' criteria, civil society and service providers across the EU applying standard fees for shelter or food, and even EU citizens who send donations to organisations that provide humanitarian assistance, are not sufficiently protected from criminalisation on the grounds of migrant smuggling (Carrera et al. 2018, Bozeat et al. 2016, Carrera et al. 2019).

4.1.2 Lack of humanitarian exemption

As mentioned in the Introduction, one of the main concerns highlighted in the empiric research is that criminal prosecutions of volunteers have taken place in countries where 'humanitarian exemptions' are formally declared, but not respected in practice (Carrera et al. 2019). For instance, civil society organisations conducting proactive search and rescue operations have been investigated and even prosecuted in Italy and Greece (see below), and other countries, despite their humanitarian exemptions (Carrera, Allsopp and Vosyliute 2018).

Repeated criminalisation of Humanitarian actors in Greece

Greek law on facilitation of illegal entry does not criminalise rescue at sea, in line with 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, the humanitarian exception has failed to protect volunteers in Greece for the second time. In May 2018 five Team Humanity and PROEM AID volunteers were prosecuted and eventually acquitted from charges of migrant smuggling. However, in August 2018, the Greek police arrested a Syrian refugee, Sarah Mardini, along with a Greek and an Irish volunteer, who were accused of helping migrants enter the country illegally and detained at high security prison (Carrera et al. 2018).

A study commissioned by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) on the implementation of the Facilitation Directive precisely outlines that civil society actors (including individual volunteers) should be protected on the grounds 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" (Carrera et al. 2016). Another study 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 2017). As discussed earlier, the humanitarian exemptions also may be overly narrow (see examples from the UK and France below).

Limited humanitarian exemption in the UK

In the UK, humanitarian motivation is relevant only to sentencing and does not exclude guilt. For example, 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, Webber and Edmond-Pettitt 2017). This judgment was merely suspended on the grounds that the volunteer had embarked on 'misguided humanitarianism'.

Limited humanitarian exemption in France

In France, 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 2018). However, the principle of 'fraternity' was not extended to the humanitarian facilitation of entry. On 8 of November 2018, two of seven volunteers involved in NGOs that help migrants (referred to as the 'Briançon 7') were charged with "12-month sentences, of which four months are to be carried out behind bars", while the other five volunteers were issued with "six-month suspended sentences" for providing humanitarian assistance to migrants entering France via the French Alps (Clatot 2018). Research indicates that

delineations between the 'facilitation of stay' and 'facilitation of entry' in practice are also blurred and add to legal uncertainty (Carrera et al. 2018).

The **European Parliament** (2018a) in reaction of ongoing criminalisation of humanitarian actors has called on the European Commission to develop guidelines to ensure that humanitarian assistance is not criminalised. However, the humanitarian exemption needs to be defined.

In its REFIT exercise, **the European Commission** argued that it is hard to exempt humanitarian assistance since the definition is not clear and may differ across the EU (European Commission 2017). However, the recent study commissioned by the European Parliaments Committee on Petitions suggests that the European Commission should draw on the definition of 'humanitarian assistance' as provided by the conclusions of the High-Level European Consensus on Humanitarian Aid, signed by the Council of the EU, European Parliament and European Commission in 2007 (Carrera et al. 2018).

High-Level European Consensus on Humanitarian Aid

The Consensus aims at improving the quality of the EU's humanitarian response and clarifies the meaning of humanitarian aid. It 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 on Humanitarian Aid clarifies that the objective 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" (Council and the Representatives of the Governments of the Member States 2008). Humanitarian aid encompasses 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" (Council and the Representatives of the Governments of the Member States 2008).

National courts in Europe also could be inspired by the landmark decision of the Supreme Court of Canada in the case of *R. v. Appulonappa (2015 SCC 59)*.

Case: R. v. Appulonappa (2015 SCC 59)

This judgement provides for a significant legal precedent that clarifies the smuggling prohibition (Landry 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) asylum-seekers who provide each other mutual aid (including aid to family members). In this regard, three categories of conduct 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 smug-

gling. It might help identify material conduct 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 a reduction in the fear and intimidation of the social organisations in their work with irregular migrants, and should 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. (Carrera et al. 2018).

4.1.3 The lack of firewall

Some authors argue that the EU Facilitation Directive is disproportionate and unethical as its purpose is to control migration by targeting not only criminal networks but also those who act in solidarity and provide social services due to the lack of firewall (Guild 2010, Allsopp 2012, Provera 2015, Vosyliute and Joki 2018).

Therefore, setting up of a 'firewall' would prevent the different modes of 'policing humanitarianism', such as the imposition of fines and administrative sanctions, prosecution for migration-related criminal offences, arrest and detention (Carrera et al. 2019). A recent study commissioned by the European Parliament's Committee on Petitions (PETI) has called for "strict separations between immigration enforcement, public services and civil society mandates" (Carrera et al. 2018). ReSOMA Task Force participants also suggested "the establishment of 'firewalls' between civil society and law enforcement authorities" that could be accompanied by necessary training and legislation to delineate the civil society free space (ReSOMA 2019).

In the case of healthcare services provided to irregular migrants, the moral and legal, argument is that health care is a human right (Portes, Fernandez-Kelly and Light 2012). Researchers also emphasise that the criminalisation of humanitarian assistance produces direct and indirect negative consequences at the local and regional level that are tasked to respond to the immediate needs of their residents without discrimination (Ambrosini 2015, Van den Durpel 2017, Ryngbeck 2015, see also ReSOMA discussion briefs on Social inclusion of undocumented migrants – Vosyliute and Joki 2018, and Cities as providers of services to migrant populations –Wolffhardt 2018). 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 2015; see also ReSOMA Discussion brief on 'Cities as providers of services to migrant populations – Wolffhardt 2018).

Policymakers should also 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 humanitarian assistance, this undermines social trust in public institutions and criminal justice systems, and thus civil disobedience and civic mobilisation may follow, as shown in examples in Greece, Italy,

Belgium, the UK, Hungary, France (Carrera, Allsopp and Vosyliute 2018, Carrera et al. 2018, Carrera et al. 2019).

The criminalisation of solidarity may undermine social cohesion and trust in national and EU institutions as well as the legitimacy of the EU law. Citizens may disapprove of the work of the institutions by contesting and violating certain laws that are putting into a question fundamental rights, democracy and the rule of law. The process of resistance against criminalisation of solidarity is built on the grounds of the EU's founding values.

4.2 Facilitated access to funding for NGOs assisting refugees and other migrants

Civil society representatives such as UNHCR and ECRE (see Westerby 2018a and 2018b), PICUM (2017) and Social Platform (2016) suggest that EU funding schemes should better enable civil society organisations to carry out their work in the next MMF by granting civil society certain percentages of AMIF programme funding or having more possibilities to obtain direct grants from the European Commission as opposed to from national agencies and ministries.

The improvement of accessibility to EU funds, such as AMIF and ESF, for civil society organisations is crucial as NGOs play a significant role as providers of basic services for refugees and other migrants and in particular for those in an irregular situation. NGOs and cities often step in where the state directly or indirectly refuses to provide essential services and basic rights to irregular migrants (Vosyliute and Joki, 2018; Ambrosini and Van der Leun 2015).

4.3 Rule of law mechanism and conditionality for funding

Researchers (Halmai 2018, Pech 2017 and Bárd 2017, Westerby 2018, Šelih, Bond and Dolan 2017) bring forward that financial instruments are among the main EU 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 Member States' respect for the rule of law and rights (ECRE 2018).

The suspension of EU funds in case of violation of EU fundamental values would be a deterrent mechanism to ensure the respect of the rule of law where other instruments have failed (Šelih, Bond and Dolan 2017). By linking the respect for the rule of law to disbursement of EU structural and investment funds, the EU will have more powerful instruments to ensure that European taxpayers' money is spent effectively and in line with EU fundamental values (European Parliament 2018b).

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