

# Financial framework

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# PART 1: ASSESSMENT OF THE CURRENT SITUATION

It is striking that nothing had been foreseen in the Tampere conclusions regarding the funding of the new visa, border, migration and asylum policies. Generally, these policies have taken up only a small percentage of the general EU budget (1.4% in 2016), and this percentage has grown rather modestly over the budgetary periods.<sup>2</sup> This is partially due to the intergovernmental nature of these policies up to the adoption of the Treaty of Amsterdam.

A more ambitious budget for these policies is being contemplated under the upcoming 2021-27 Multiannual Financial Framework (MFF).<sup>3</sup> The previous experience of insufficient funding during the 2015-16 refugee influx, which led to the reshuffling of funds and significant use of contingency margins and flexibility instruments, is one of the factors to spur these developments.

However, the emphasis of the upcoming MFF is on the fight against irregular migration and smuggling, and border-control capacity building. Consequently, the proposal suggests a significant increase in allocations to the external dimension of migration management and asylum and a comparably smaller raise for their internal dimension. The fact that the budget for these policies is undergoing the highest increase in relative terms supports the argument that it is politically easier to negotiate a budgetary increase in this politically sensitive area than to agree on a change of EU migration and asylum legislation.

The new MFF also aims to strengthen flexibility in order to address emergencies, as a considerable share of the Asylum and Migration Fund (AMF) and the Integrated Border Management Fund (IBMF) would not be nationally pre-allocated, but instead allocated to the needs that are deemed most pressing in regards to future developments. Additionally, the new MFF attempts to increase complementarity and links with other funds. As an example, integration would be covered by the European Social Fund Plus (ESF+) and the European Regional Development Fund (ERDF), as part of the European Structural and Investment Funds (ESIF); whereas national allocations from the ESIF would be determined not only on the basis of a member state's GDP but also its level of migrant arrivals.

Finally, the problem remains that the general EU budget – including funds for migration, asylum and borders – remains too modest to cover the actual needs. Consequently, political will is needed to enhance the EU budget. This could be done by contemplating the forms of MFF resources and including new types of EU traditional own resources (currently limited to customs duties and sugar levies). A more radical reshaping of EU resources would allow for more profound redistribution. However, for the time being, the EU budget should be addressed as it now stands, with all of its limitations.

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

The newly proposed MFF is facing a number of challenges. The most pressing ones will be addressed in the following order:

A. solidarity, budget distribution and cost-sharing between the EU and member states;

B. flexibility tools and emergency measures;

C. a coherent external dimension of EU migration and asylum policies;

D. involvement of civil society and local authorities;

E. funding of asylum management and other activities that impact refugee rights; and

F. conditionality.

### A. Solidarity, budget distribution and cost-sharing between the EU and member states

Due to a combination of several factors – the most prominent being the member states’ different geographical positions and appeal to asylum seekers, and the impact of EU asylum rules on them –, the involvement of member states in asylum provision is varied. This has resulted in very diverse and uneven financial implications, putting significant pressures, especially on southern member states creating the EU’s external borders. It is therefore logical that EU asylum legislation – and the financial and other impacts it creates for different member states – is accompanied by the obligation of solidarity and the fair sharing of responsibility between states, as enshrined in Article 80 TFEU. Solidarity can be implemented in a myriad of ways, such as through joint EU funding, ‘sharing’ refugees in a relocation system or operational activities organised at the EU level, including the enhancement of the role of EU agencies.<sup>4</sup>

However, while acknowledging the fact that the EU budget only plays a complementary role and should not replace national expenditures in the areas of migration, asylum and borders, the fact remains that the current EU budget covers a very small part of national financial needs in this area, whereas most expenditure comes directly from national budgets. This is not likely to change with the new MFF, as EU allocations will only cover a minor part of national expenses. In addition, the current allocation of the Asylum, Migration and Integration Fund (AMIF) to member states is not always proportionate to the number of asylum requests they receive, because the criteria for distribution are outdated, thus calling into question the fairness of distribution across the EU. This suggests that the EU budget could be amended to promote solidarity and improve responsiveness to the member states’ needs.<sup>5</sup> This could be done through a number of structural changes, suggested below.

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**EU financial contributions to member states should be calculated to optimise the fair implementation of EU solidarity and reflect the needs of the most affected states. In order to multiply the solidarity effect of the distribution between member states, relative figures based on their wealth (i.e. GDP) rather than absolute figures should be used.**

The proposal for the upcoming AMF<sup>6</sup> goes in the right direction by using a more nuanced distribution key which combines a fixed amount of €5 million per member state, with a variable amount calculated by weighing statistical information for each member state of the three years preceding the date the AMF is applied. The proposal suggests using different statistical data for each of the three AMF “specific objectives” (SOs) (asylum, legal migration and integration, and countering irregular migration):

1. The number of asylum applicants would serve as the dominant criterion of the SO *asylum*.
2. The number of third-country nationals (TCNs) who have obtained a first residence permit would serve as the dominant criterion (60%) of the SO *legal migration and integration*.
3. The number of illegally residing TCNs who are subject to a return order (50%) plus the number of TCNs who have left a member state voluntarily or under coercion following a return order (50%) would serve as the criterion of the SO *countering irregular migration*.

The proposal also advances an update of the distribution key on the occasion of the midterm review, which will take place in 2024. This review would enable a more informed insight into the efforts, needs and absorption capacities of the member states, which are subject to change with time.

### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

- What would be the best distribution key of the EU migration, asylum, and border budget to improve EU solidarity, not only in emergencies but also in regular funding policy?
- Should member states that are less involved in the implementation of policies contribute more in other ways, including financially (i.e. flexible solidarity)?
- Should the EU migration, asylum and border budget be increased to contribute more to national expenditures?

### **INITIAL SUGGESTIONS AND IDEAS:**

1. EU financial contributions to member states should be calculated to optimise the fair implementation of EU solidarity and reflect the needs of the most affected states. In order

to multiply the solidarity effect of the distribution between member states, relative figures based on their wealth (i.e. GDP) rather than absolute figures should be used.

2. Part of EU funding should be earmarked to enable actions that promote solidarity and mutual trust, such as relocations and joint actions.

3. The migration, asylum and border control budget should be increased in order to contribute with a higher share to national expenditures.

4. The mode of distribution of migration, asylum and border funding should ensure a fair subnational distribution so that allocations are more nuanced by being attributed to regions and cities that need them the most.

## B. Flexibility tools and emergency measures

The past few years have witnessed the importance of emergency measures and flexibility tools needed to respond to changing migratory inflows into the EU. This placed major financial pressure on the modest EU migration, asylum and border budget. Past experience has exemplified the importance of mechanisms that enable flexibility and allow for emergency assistance. During the 2015-18 period, the Flexibility Instrument was used four times and the Contingency Margin twice, and they jointly covered 46% (€4.3 billion) of the financing for migration, asylum and border control.<sup>7</sup> The MFF proposal increases flexibility in order to respond to emergencies.<sup>8</sup> To that effect, part of the AMF and IBMF budget would not be nationally pre-allocated, but be determined on the basis of future developments and needs.

### THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

► Should there be more flexibility in funding to enable quick and efficient responses to unexpected events and emergencies, and to ensure that the funding is directed to the member states and final beneficiaries who need it most?

► How can the right balance between flexibility and predictability be achieved in order to attain the long-term strategic objectives of funding? Should the emergency/flexibility measures evolve into permanent mechanisms?

### INITIAL SUGGESTIONS AND IDEAS:

5. The right balance should be found between the amount of the budget earmarked for emergencies and the pre-allocated budget in order to ensure the predictability of the spending and its coherence with the strategic objectives.

6. Part of the flexibility spending should be structurally included in the permanent pre-allocated EU migration, asylum and border budget in order to prevent the 'crisis' mode and emergency funding from becoming a regular modus operandi.

## C. A coherent external dimension of EU migration, asylum and border policies

The EU has been placing more emphasis on the external dimension of its migration, asylum and border policies, accompanied by a multiplication of external financial instruments that address these issues.<sup>9</sup> External measures have been allocated significantly more resources than internal ones. Between 2015 and 2018, 57% (€12.5 billion) of the total EU funding planned in response to the 2015-16 refugee influx was allocated to measures outside of the EU, whereas 43% was allocated to the internal dimension.<sup>10</sup>

The external dimension of asylum, migration and border policies is mostly taking place through the financing of cooperation with third countries, in order to reduce migration flows and enhance return and readmission. A number of instruments are in place under Heading 4 of the EU budget, “Global Europe”:<sup>11</sup> the Development Cooperation Instrument (DCI), which includes the Global Public Goods and Challenges (GPGC) programme; the European Neighbourhood Instrument (ENI); and the Instrument for Pre-Accession (IPA II). Additional instruments which are at least partly outside of the EU budget are also in place: the European Development Fund (EDF), the EU Emergency Trust Fund for Africa, the EU Regional Trust Fund in Response to the Syrian Crisis, and the EU Facility for Refugees in Turkey. The Trust Funds and the Facility are partly financed by the EDF, DCI and ENI and partly via additional contributions from member states. The mixed nature of these funds leads to a lack of transparency, accountability and democratic control over them. It is difficult to trace where and how these resources are used in practice.

The new instrument proposed by the European Commission – the Neighbourhood,

Development and International Cooperation Instrument (NDICI), with a proposed budget of €89.2 billion for the 2021-27 period – is intended to streamline the funding of the EU’s external action by merging ten existing regulations, including the ENI and DCI.<sup>12</sup>

### THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- ▶ Are the priorities of the external dimension of EU migration and asylum policies (i.e. the fight against irregular migration and border management) complementary to the basic premises of the internal dimension (i.e. accessing EU territory and requests for international protection as well as refugee rights)? Is the emphasis on the protection of the external borders creating an adverse effect on these premises of the internal dimension?
- ▶ Are the priorities of humanitarian aid and development cooperation (reduction or eradication of poverty) coherent with the priorities of the external dimension of EU migration and asylum policies or is the development aid being used as a tool to achieve the EU’s migration and border-control interests?
- ▶ Is the fact that major resources have been and will continue to be invested outside the EU creating a risk of excessive dependence on third countries in the management of migration, asylum and borders, and creating leverage in their relations to the EU?
- ▶ Is there sufficient coordination inside the Commission between the Directorate-Generals (DGs) – Migration and Home Affairs (HOME), International Cooperation and Development (DEVCO)

and Neighbourhood and Enlargement Negotiations (NEAR) – to ensure the coherence of their interests, priorities and measures? Is the division of tasks among these three DGs clear enough to prevent the funding of parallel structures and overlapping activities?

➤ Should the multiplication of instruments, particularly those that are (partially) outside the EU budget, be avoided due to the risk of fragmentation and lack of transparency, accountability and democratic control?

#### **INITIAL SUGGESTIONS AND IDEAS:**

7. Activities taken within the sphere of the external dimension of migration, asylum and border policies must be complementary to the basic premises of the internal dimension.

8. Better coordination should exist among the Commission DGs to ensure coherence and prevent the funding of parallel structures and processes.

9. The Commission should provide more comprehensive reporting on the funding of migration, asylum and border control measures outside of the EU in order to enhance transparency, accountability and democratic control, particularly in the case of mixed funding.

## **D. Involvement of civil society and local authorities**

NGOs have been some of the most important actors in supporting a fair asylum system, in promoting asylum seekers' and migrants' rights and in assisting their integration.<sup>13</sup> Their work on integration and social inclusion is important for all categories of TCNs, including family members and second- and third-generation migrants. They are crucial in improving the generally weak status of refugees and other TCNs in their respective host societies.

The involvement of NGOs in refugee integration has been twofold.<sup>14</sup> First, they provide resources and support to refugees, thus treating refugees as passive beneficiaries of their assistance. Second, NGOs are indispensable in building migrants' capacities through the promotion of their political

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and social empowerment by enabling their active participation in political processes and other activities. Their involvement in the context of integration is all the more important as member states preserve the competence to adopt integration measures, and the EU can only support member states' actions in this area (Article 79(4) TFEU). Consequently, the EU's competence to promote refugees' and other TCNs' social and political participation remains extremely limited. Member states enjoy discretion on whether to allow TCNs' political participation and other forms of formal self-organisation.

The involvement of civil society is highly important for all of these reasons and should be encouraged through provisions on the partnership principle in the AMF. The funding rules for AMIF have created significant barriers to the participation of civil society organisations. Furthermore, it is questionable whether the available funding is actually spent for integration purposes, as there is no publicly available data on actual spending patterns.

Lastly, cities and other local authorities have been playing an ever-growing role in the integration of TCNs, as the vast majority reside in urban areas and so their needs are best addressed locally.

## **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

- Are NGOs and local authorities sufficiently involved in the different stages of EU funding? If not, what should be done to improve their contribution to the planning and accessing of funding?

## **INITIAL SUGGESTIONS AND IDEAS:**

10. The involvement of civil society actors and local authorities in all phases of the funded projects, from planning to implementation, should be enhanced. The partnership principle should be included in the AMF to ensure the inclusive participation of NGOs, including migrant- and refugee-led organisations.

11. The application and participation criteria for the funding of projects should be altered to enable easier access by and the participation of civil society actors, including smaller NGOs and those with a more operational focus. This should be done by lowering the co-funding requirements and simplifying administrative and reporting requirements.

12. Checks should be made to ensure that the funding allocated to member states for the integration of TCNs is reaching and being spent mainly by regional and local authorities.

## **E. Funding of asylum management and other activities that impact refugee rights**

The current trend in the migration, asylum and border budget is to place more emphasis on the external dimension. This has led to investing more resources in cooperation with third countries regarding border controls. However, these efforts should not lead to the neglect of asylum management and refugee rights.

## **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

- Is a sufficient part of the asylum funding focused on refugee rights, by being earmarked for the enhancement of efficient human rights compliant asylum procedures, reception conditions and

refugee integration?

- Are adequate mechanisms in place to ensure that the earmarked funding for asylum procedures, reception conditions and integration is used most efficiently? Will the reduction of EU co-financing for integration as determined by the ESF+ (i.e. 70% for less developed regions, 55% for transition regions, 40% for more developed regions) have a negative impact on the socio-political inclusion of refugees, and will it create additional burdens on member states (see Part 2, A)?

#### **INITIAL SUGGESTIONS AND IDEAS:**

13. Funding aimed at refugees should not be redirected to other objectives, such as border control and the fight against irregular migration.

14. A sufficient part of asylum funding should be earmarked to enhance human rights compliant asylum procedures, reception conditions and refugee integration across the EU, thus obliging member states to preserve minimum standards in their allocations. Additionally, part of the total ESF+ allocation should be earmarked for the integration of TCNs, whereas a specific part of that funding should be earmarked exclusively for the integration of refugees. Adequate procedures should be put in place to ensure the most efficient use of the earmarked funding and address the needs of vulnerable persons.

15. Monitoring and training activities should be supported by sufficient funding in order to ensure compliance with EU asylum law. Such funding should be directed at national officials (e.g. training reception centres staff), NGOs and international organisations (e.g. monitoring return activities).

16. Higher EU co-financing rates should be introduced for member states' integration activities.

17. The programming documents (i.e. the Partnership Agreement and National Programme) should require member states to include independently sourced data and evidence on national needs and policy choices in order to prevent the funding of national priorities that diverge from EU priorities.

**The Commission should provide more comprehensive reporting on the funding of migration, asylum and border control measures outside of the EU in order to enhance transparency, accountability and democratic control, particularly in the case of mixed funding.**

**A sufficient part of asylum funding should be earmarked to enhance human rights compliant asylum procedures, reception conditions and refugee integration across the EU.**

**Conditionality should be politically supported within the member state it is directed to. Efforts should be invested to promote the values supported by the conditionality rules to obtain political and societal support within the member state concerned.**

## F. Conditionality

In addition to the enabling conditions contained in the Common Provision Regulation (CPR) for EU funds, the new MFF relies on conditionality more than ever.

First, the MFF proposal links cohesion funds (i.e. the ESF and EFDF) with the number of refugees taken in each member state, with the aim of integrating them. This link should not be viewed as conditionality *stricto sensu*, but as an element of the distribution key of cohesion funds whose purpose is to incentivise member states and reflect the situation on the ground. The proposal has opened the debate on the objectives of the structural funds, as well as spurred some opposition from several member states.

Second, conditionality is becoming the EU's dominant approach towards third countries, thereby linking funding to the latter's cooperation in readmission and border management.<sup>15</sup> While the EU conditions its aid on cooperation, third countries in turn demand more funding by threatening to open the doors to migration flows. This redirects the development aid objectives to interest-driven migration and border management objectives.<sup>16</sup>

Third, the rule of law conditionality – which applies not only to migration and asylum but to the entire EU budget – is embodied in the newly proposed Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the member states.<sup>17</sup> The proposed Regulation establishes a link between a member state's violation of the rule of law and the suspension of EU payments.<sup>18</sup>

The EU approach to the rule of law enables the establishment of common norms that can increase its power and legitimacy as well as the protection it provides across the EU by creating common standards for

defining the rule of law and common criteria and mechanisms for the establishment and sanctioning of its violation. However, the suspension of payments is only acceptable under EU law provided that there is a sufficiently strong causal relation between a member state's violation of the rule of law and the risk that this would impact the successful implementation of the specific operation supported by its respective EU funding. This might not always be the case, as not all generalised deficiencies as regards the rule of law are susceptible to impacting the member states' effective use of EU funds. One may also wonder to what extent the rule-of-law conditionality will lead to the transformation of anti-rule-of-law trends in the concerned member state, which opens up the question of whether it will do more harm than good by creating a climate prone to anti-EU positions.

### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

- How can the negative consequences of the rule of law conditionality approach be avoided, while at the same time reaching its aims?

### **INITIAL SUGGESTIONS AND IDEAS:**

18. Conditionality should be politically supported within the member state it is directed to. Efforts should be invested to promote the values supported by the conditionality rules to obtain political and societal support within the member state concerned.

<sup>1</sup> Jean Monnet Professor of EU Law and UNESCO Chairholder, University of Zagreb. The author is grateful to all the comments and suggestions she received from a wide range of actors at the preparatory workshop in Brussels, during the consultations in autumn 2019 and at the Tampere 2.0 conference in Helsinki, which have been incorporated into the final text.

<sup>2</sup> For an analysis of the use of EU funds for migration, asylum and integration in the 2014-20 budgetary period, see Darvas, Zsolt; Guntram Wolff; Francesco Chiacchio; Konstantinos Efstathiou and Inês Gonçalves Raposo (2018), [EU Funds for migration, asylum and integration policies](#), PE 603.828, Brussels: European Parliament. See also Westerby, Rachel (2019a), [Follow the Money II: Assessing the use of EU Asylum, Migration and Integration Fund \(AMIF\) funding at the national level 2014-2018](#), Brussels: United Nations High Commissioner for Refugees and European Council on Refugees and Exiles.

<sup>3</sup> See *European Council*, [“Multiannual financial framework for 2021-2027: negotiations”](#) (accessed 06 November 2019). For an analysis of the proposal for the new Multiannual Financial Framework, see Westerby, Rachel (2019b), [“The Way Forward: A Comprehensive Study of the new Proposals for EU funds on Asylum, Migration and Integration”](#), Brussels: United Nations High Commissioner for Refugees and European Council on Refugees and Exiles; Westerby, Rachel (2018), [“The way forward: A reflection paper on the new proposals for EU funds on Asylum, Migration and Integration 2021-2027”](#), Brussels: United Nations High Commissioner for Refugees and European Council on Refugees and Exiles.

<sup>4</sup> On different facets of solidarity, see Goldner Lang, Iris (2018), [“The EU Financial and Migration Crises: Two Crises – Many Facets of Solidarity”](#) in Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Edward Elgar Publishing, pp.133-160.

<sup>5</sup> For the discussion on the economic benefits of promoting solidarity and improving asylum management in the EU, see van Ballegoij, Wouter and Cecilia Navarra (2018), [The Cost of Non-Europe in Asylum Policy](#), PE 627.117, European Parliamentary Research Service.

<sup>6</sup> European Commission (2018a), [Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund](#), COM(2018) 471 final, Strasbourg.

<sup>7</sup> D’Alfonso, Alessandro (2019), [“External border control and asylum management as EU common goods: a budgetary perspective”](#), Badia Fiesolana: European University Institute, p.24.

<sup>8</sup> For a discussion on flexibility in the proposal for the new Multiannual Financial Framework, see Knoll, Anna and Pauline Veron (2019), [“Migration and the next EU long-term budget: Key choices for external action”](#), European Centre for Development Policy Management.

<sup>9</sup> For an overview of the funding instruments in the EU’s external policies on migration, asylum and borders, see den Hertog, Leonhard (2016), [“Money Talks: Mapping the funding for EU external migration policy”](#), Centre for European Policy Studies.

<sup>10</sup> *Ibid.*, p.29.

<sup>11</sup> See *European Commission*, [“EU funding programmes 2014-2020 > Heading 4: Global Europe”](#) (accessed 06 November 2019).

<sup>12</sup> Immenkamp, Beatrix (2019), [EU Legislation in Progress: 2021-2027 MFF. A new neighbourhood, development and international cooperation instrument: Proposal for a new regulation](#), PE 628.251, Brussels: European Parliamentary Research Service.

<sup>13</sup> On the importance of civil society in promoting migrants’ integration, see European Council on Refugees and Exiles and Platform for International Cooperation on Undocumented Migrants (2019), [“Promoting socio-economic inclusion of migrants and refugees in the next EU budget \(2021-2027\)”](#), Brussels. See also Beirens, Hanne and Aliyyah Ahad (2019), [“Money Wise: Improving how EU funds support migration and integration policy objectives”](#), Brussels: Migration Policy Institute.

<sup>14</sup> Goldner Lang, Iris (2019), [“Self-Organisation of Third-Country Nationals in the EU: Polycentric Governance by the ‘Other’”](#) in Josephine Van Zebe and Ana Bobic (eds.), *Polycentricity in the European Union*, Cambridge: Cambridge University Press, pp.186-207.

<sup>15</sup> For a discussion on conditionality in the external dimension of migration, see Knoll and Veron (2019), *op.cit.*

<sup>16</sup> For a discussion on the emphasis on the border protection objective, see Cortinovia, Roberto and Carmine Conte (2018), [“Migration-related conditionality in EU external funding”](#), Research Social Platform on Migration and Asylum, Brussels.

<sup>17</sup> European Commission (2018b), [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](#), COM(2018) 324 final, Brussels.

<sup>18</sup> For an analysis of the proposed Regulation, see Goldner Lang, Iris (forthcoming), [“The Rule of Law, the Force of Law and the Power of Money in the EU”](#), *Croatian Yearbook of European Law and Policy*, Volume 15.

