

EUROPEAN CONFERENCE

FROM TAMPERE 20 TO TAMPERE 2.0

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Background Note: Financial Framework

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Pre-Conference Version

DISCLAIMER

The draft of this note has been prepared by Iris Goldner Lang, Jean Monnet Professor of EU Law, University of Zagreb. The present document is, however, the result of a process during which some changes have been made following a preparatory workshop and in liaison with the author. This means that the author might not agree with all of the suggestions proposed in this note. Final versions of all the background notes, which will take account of the input provided by the conference, will be published and widely disseminated. References to authors quoted have been reduced to a strict minimum contrary to academic rules due to a lack of space. More details will be provided in the published version of this note.



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I. ASSESSMENT OF THE CURRENT SITUATION:

It is striking that nothing had been foreseen in the Tampere conclusions about the funding of the new visa, border, migration and asylum policies. Generally, these policies have taken a rather small percentage of the general EU budget (1.4% in 2016) and this percentage has grown rather modestly over the budgetary periods. 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 within the new Multiannual Financial Framework (MFF) for the period 2021-2026. Among the factors that spurred these developments is the previous experience of insufficient funding during the 2015-2016 refugee influx, which led to the reshuffling of funds and to the significant use of contingency margins and flexibility instruments.

However, the emphasis is on the fight against irregular migration and smuggling and on border-control capacity building. Consequently, the proposal suggests a significant increase in allocations to the external dimension of migration management and asylum, and a more limited increase 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 emergency situations, 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 allocated to the most pressing needs on the basis of future developments. The new MFF also 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 (ESI Funds), whereas national allocations from ESI Funds would be determined not only on the basis of GDP but also on migration to each MS.

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

II. IDEAS AND SUGGESTIONS FOR THE FUTURE:

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

- A. Solidarity, budget distribution and proportion between EU and national contributions
- B. Flexibility tools and emergency measures
- C. Coherence of the external dimension of EU migration and asylum policies
- D. Involvement of civil society and local authorities
- E. Funding of asylum management and other activities with an impact on refugees' rights
- F. Conditionality

A. Solidarity, Budget Distribution and the Proportion between EU and National Contributions:

Due to a combination of several factors – the most prominent being the difference in MSs’ geographical positions and appeal to asylum seekers, and the impact of EU asylum rules on them – MSs have been involved in asylum provision at variable rates. This has had very diverse and uneven financial implications for them, putting significant pressures especially on those MSs creating the Southern EU external borders. It is therefore logical that EU asylum legislation – and the financial and other impacts it creates for different MSs – is accompanied by the obligation of solidarity and the fair sharing of responsibility between Member States, as enshrined in Article 80 TFEU. Solidarity can be implemented in diverse ways, such as joint EU funding, sharing refugees in a relocation system, or operational activities organised at the EU level, including by enhancing the role of EU agencies.

However, only a very small part of national financial needs in the area of migration, asylum and border control has been covered from the EU budget, whereas most expenditure comes directly from national budgets. This is not likely to change with the new MFF, as the EU allocations will cover only a minor part of national expenses. In addition, the current allocation of the AMIF budget to MSs is not proportionate to the number of asylum requests in a number of MSs because the criteria for distribution are ancient, which calls into question the fairness of the distribution among MSs. This suggests that the EU budget could be amended to better promote solidarity and respond to MSs’ needs. This could be done through a number of structural changes suggested below.

The proposal for the AMF goes in this direction by using a distribution key which combines a fixed amount of EUR 5 million per MS, with a variable amount calculated by weighing statistical information for each MS for the three years preceding the date when the AMF becomes applicable. The proposal is to take 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 as the dominant criterion for the SO “asylum”;
2. the number of TCNs who have obtained a first residence permit as the dominant criterion (60%) for the SO “legal migration and integration”; and
3. the number of illegally resident TCNs subject to a return order (50%), plus the number of TCNs who have voluntarily or under coercion left a MS following a return order (50%) as the criterion for the SO “countering irregular migration”.

The proposal also provides for an update of the distribution key on the occasion of the mid-term review which will take place in 2024.

This raises the following questions:

- What should be the best distribution key of the EU migration, asylum, and border budget to MSs to more fairly implement EU solidarity into the system, not only in emergency situations but also in regular funding policy?
- Should MSs that are less involved in the implementation of policies contribute more in other ways, including financially (flexible solidarity)?
- Should the EU migration, asylum and border budget be increased to contribute more to national expenditures?

Initial suggestions and ideas include:

1. EU financial contributions to MSs should be calculated to most fairly implement EU solidarity and to reflect the needs rather than the burden of the most affected MSs. In order to multiply the solidarity

effect of the distribution between MSs, relative figures based on the richness of MSs (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 by 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 of MSs where resources are most needed.

B. Flexibility tools and emergency measures:

The past few years have witnessed the importance of the emergency measures and flexibility tools needed to respond to changing migratory inflows into the EU, which has put major financial pressure on the modest EU migration, asylum and border budget. Past experience has proven the importance of mechanisms that enable flexibility and allow for emergency assistance. In the 2015-2018 period, the Flexibility Instrument was used four times and the Contingency Margin twice and they jointly covered 46% (EUR 4.3 billion) of the financing for migration, asylum and border control. The new MFF proposes increased flexibility in order to respond to emergency situations. To that effect, part of the AMF and IBMF budget would not be nationally pre-allocated, but would be left for disposal based on future developments and needs.

This raises the following questions:

- Should there be more flexibility in funding to enable efficient and fast responses to unexpected events and emergency situations and to ensure that the funding is directed to the MSs and final beneficiaries who need it most?
- How to strike the right balance between flexibility and predictability in order to achieve the long-term strategic objectives of funding? Should the emergency/flexibility measures evolve into permanent mechanisms?

Initial suggestions and ideas include:

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

6. Part of flexibility spending should be structurally included into 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. Coherence of the external dimension of EU migration, asylum and border policies:

The EU has been putting more emphasis on the external dimension of its migration and asylum and border policies, accompanied by a multiplication of external financial instruments addressing these issues. External measures have been allocated significantly more resources than internal ones. In the 2015-2018 period, 57% (EUR 12.5 billion) of the total EU funding planned in response to the 2015/2016 refugee influx was allocated to measures outside the EU, whereas 43% was allocated to the internal dimension.

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 “Global Europe” of the EU budget: 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 the EU budget are also in place: the European Development Fund (EDF); the EU Emergency Trust Fund for Africa; the EU Trust Fund for Syria; and the Facility for Refugees in Turkey. The Trust Funds and the Facility are partly financed through transfers from the EDF, DCI and ENI and partly from additional contributions from MSs. 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 actually used in practice.

The new instrument proposed by the European Commission – Neighbourhood, Development and International Cooperation (NDIC) – with a proposed budget of EUR 89.2 billion for the 2021-2027 period is intended to streamline the funding of the EU’s external action by merging ten existing regulations, among them the ENI and DCI.

This raises the following questions:

- Are the priorities of the external dimension of EU migration and asylum policies (the fight against irregular migration and border management) complementary to the basic premises of the internal dimension (accessing EU territory and requests for international protection, as well as refugees’ rights)? Is the emphasis on the protection of the external borders having an adverse effect on the above premises of the internal dimension?
- Are the priorities of humanitarian aid and development cooperation (reduction/eradication of poverty) coherent with the priorities of the external dimension of EU migration and asylum policies or is the development aid 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 DGs (HOME, DEVCO and NEAR) to ensure the coherence of 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 of those that are (partially) outside the EU budget, be avoided, due to risks of fragmentation and the lack of transparency, accountability and democratic control?

Initial suggestions and ideas include:

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

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

9. The Commission should provide more comprehensive reporting about the funding of migration, asylum and border control measures outside 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. NGOs' work on integration and social inclusion is important for all categories of third-country nationals, including family members, as well as second and third generations of migrants. They are crucial in improving the generally weak status of refugees and other TCNs in the host societies.

The involvement of NGOs in refugees' integration has been twofold. First, they provide material, legal and other support to refugees, thus treating refugees as passive beneficiaries of their assistance. Second, NGOs are crucial in building migrants' capacities by promoting their political 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 MSs preserve the competence to adopt integration measures, and the EU can only support MSs' actions in this area (Art. 79(4) TFEU). Consequently, the EU's competence to promote refugees' and other TCNs' social and political participation remains extremely limited. MSs have discretion on whether to allow for TCNs' political participation and other forms of formal self-organisation.

For all these reasons, the involvement of civil society is highly important 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. Further, it is questionable whether the amount available is actually spent for integration purposes, as there is no publicly available data on actual spending patterns.

In addition, cities and other local authorities have been playing an ever-growing role in TCNs' integration, as the vast majority of TCNs live in urban areas and TCNs' needs can be best addressed locally.

This raises the following questions:

- Are NGOs and local authorities sufficiently involved in 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 include:

10. The involvement of civil society actors and local authorities in all phases of the funded projects, from planning to implementation, should be enhanced.

11. The application and participation criteria for the funding of projects should be altered to enable the easier access and participation of civil society actors, including smaller NGOs and NGOs 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 MSs for the integration of TCNs is reaching and being spent mainly by regional and local authorities.

E. Funding of asylum management and other activities having an impact on refugees' rights:

The current trend in the migration, asylum and border budget goes towards putting 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 neglecting asylum management and refugees' rights.

This raises the following questions:

- Is a sufficient part of the asylum funding focused on refugees' rights, by being earmarked for enhancing efficient and human-rights compliant asylum procedures, reception conditions and integration of refugees?
- Are adequate mechanisms in place to ensure that the earmarked funding for asylum procedures, reception conditions and integration is used in the most efficient way? Will the reduction of EU co-financing for integration under the ESF+ (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 MSs (see heading A on solidarity, distribution and coverage of the EU budget)?

Initial suggestions and ideas include:

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 for enhancing human-rights compliant asylum procedures, reception conditions and integration of refugees across the EU, thus obliging MSs to preserve minimum standards in the allocations. Additionally, a separate part of the funding earmarked for the integration of TCNs 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.

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

16. Higher EU co-financing rates should be introduced for the integration activities of MSs

17. The programming documents (the Partnership Agreement and National Programme) should require MSs to include data and evidence from independent sources on national needs and policy choices in order to prevent the use of funding for national priorities which might diverge from EU priorities.

F. Conditionality:

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

First, the proposal is to link cohesion funds (ESF and EFDF) to the number of refugees taken in each MS with a view to integrating them. This link should be viewed not as conditionality stricto sensu, but as an element of the distribution key of cohesion funds, whose purpose is to incentivise MSs and reflect the situation on the ground. The proposal has opened up debate on the objectives of structural funds, as visible from the opposed reactions to the proposal by some MSs.

Second, conditionality is becoming the dominant approach towards third countries, linking funding to their cooperation in readmission and border management. While the EU is conditioning its aid on their cooperation, third countries are threatening the EU with opening the doors to migration flows in order to obtain more funding. This alters the development aid objectives in the direction of interest-driven migration and border management objectives.

Second, the rule of law conditionality – which is applicable not only to migration and asylum but to the whole 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 (COM(2018) 324). The

proposed Regulation establishes a link between a MS's violation of the rule of law and the suspension of EU payments.

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 establishing and sanctioning its violation.

One may however wonder to what extent the rule of law conditionality will lead to the transformation of anti-rule-of-law trends in the concerned MS, which opens up the question of whether it will do more harm than good by creating a climate prone to anti-EU positions.

This raises the following question:

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

Initial suggestions and ideas include:

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.