

# Editorial

## **The New Pact on Migration and Asylum: A Strong External and A Weak Internal Dimension?**

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On 23 September 2020 the European Commission proposed the New Pact on Migration and Asylum (hereinafter: the Pact) with an appended package of new legislative proposals.<sup>1</sup> As pointed out by a number of commentators, the Pact's primary focus is on managing mixed flows and countering irregular arrivals.<sup>2</sup> The current stalemate in the Member States' negotiations on the legislative proposals testifies that the Pact does not offer a satisfactory solution to bridge the divide between Member States on the issue of solidarity and responsibility-sharing in distributing asylum seekers and migrants who cannot be returned. Additionally, if adopted in its proposed form, the nature of the envisaged screening and border procedures, short deadlines and demanding operational, financial and human resource requirements set by the proposals will make it extremely difficult for Member States to put the new rules into practice without violating asylum seekers' rights.<sup>3</sup> Insufficient investment in operational, personnel and financial resources for screening and border procedures could result in the poor implementation of the Pact and in serious violations of

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<sup>1</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A New Pact On Migration And Asylum*, COM(2020) 609 final (23 Sept. 2020). For the Migration and Asylum Package see here, [https://ec.europa.eu/info/publications/migration-and-asylum-package\\_en](https://ec.europa.eu/info/publications/migration-and-asylum-package_en) (accessed 7 Dec. 2021).

<sup>2</sup> V. Moreno-Lax *A new Common European Approach to Search and Rescue? Entrenching Proactive Containment*, *Odysseus* blog (3 Feb. 2021), <https://eumigrationlawblog.eu/a-new-common-european-approach-to-search-and-rescue-entrenching-proactive-containment/> (accessed 7 Dec. 2021). See also P. Garcia Andreade, *EU Cooperation on Migration With Partner Countries Within the New Pact: New Instruments for a New Paradigm?*, *Odysseus* blog, 8 Dec. 2020, <, <https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/> (accessed 7 Dec. 2021).

<sup>3</sup> On the financial implications of the Migration Pact, see I. Goldner Lang, *Financial Implications of the new Pact on Migration and Asylum: Will the Next MFF Cover the Costs?* (27 Jan. 2020), <https://eumigrationlawblog.eu/financial-implications-of-the-new-pact-on-migration-and-asylum-will-the-next-mff-cover-the-costs/> (accessed 7 Dec. 2021).

individual rights, including the principle of non-refoulement, especially in the case of a new increase in the number of arrivals.<sup>4</sup> It might also trigger increased discontent and requests for stronger EU support to the most affected Member States and mutual accusations among Member States.<sup>5</sup> It is questionable how the Commission will react to such violations and whether it will try to compensate for the deficiencies of the proposed procedures by being reluctant to start infringement proceedings against the most affected Member States if they are not able to perform.

Due to the Pact's primary focus on countering irregular arrivals, its external dimension is one of its most prominent features. Over the past years, the EU has been placing more emphasis on the external dimension of its migration and asylum policies, accompanied by a multiplication of external financial instruments that address these issues.<sup>6</sup> External measures have been allocated significantly more resources than internal ones. Between 2015 and 2018, 57% (EUR 12.5 billion) of the total EU funding planned in response to the 2015/16 refugee influx was allocated to measures taken outside of the EU, whereas 43% was allocated to the internal dimension.<sup>7</sup> The external dimension of asylum and migration policies has been mostly taking place through the financing of cooperation with third countries, in order to reduce migration flows and enhance return and readmission. In the previous budgetary period, a number of instruments have been put in place under Heading 4 of the EU's 2014–2020 Multiannual Financial Framework (further in text: MFF) titled 'Global Europe':<sup>8</sup> Additional instruments which were at least partly outside of the EU budget were also in place.<sup>9</sup> The mixed

<sup>4</sup> I. Goldner Lang & B. Nagy, *External Border Control Techniques in the EU as a Challenge to the Principle of Non-refoulement*, 17(3) Eur. Const. L. Rev. 442–470 (2021).

<sup>5</sup> On the analysis of solidarity in the Migration Pact, see F. Maiani, *A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the new Pact*, *Odysseus* blog (20 Oct. 2020), <http://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/> (accessed 30 May 2021). For a discussion of solidarity in the context of the refugee crisis, see I. Goldner Lang, *The EU Financial and Migration Crises: Two Crises – Many Facets of Solidarity*, in *Solidarity in EU Law: Legal Principle in the Making* 133–160 (A. Biondi, E. Dagilytė & E. Küçük eds, Edward Elgar Publishing 2018).

<sup>6</sup> For an overview of the funding instruments in the EU's external policies on migration, asylum and borders, see L. den Hertog, *Money Talks: Mapping the Funding for EU External Migration Policy*, CEPS Paper in Liberty and Security in Europe No. 95, Centre for European Policy Studies, 1–56 (2016).

<sup>7</sup> *Ibid.*, at 29.

<sup>8</sup> See European Commission, *EU Funding Programmes 2014-2020 Heading 4: Global Europe*, [https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/eu-budget-2014-2020/funding-programmes/heading-4-global-europe\\_en](https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/eu-budget-2014-2020/funding-programmes/heading-4-global-europe_en) (accessed 7 Dec. 2021). These instruments have been: 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).

<sup>9</sup> Additional instruments, partly outside of the EU budget, were: 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 have been partly financed by the EDF, DCI and ENI and partly via additional contributions from Member States.

nature of these funds has led to a lack of transparency, accountability and democratic control over them, as it was difficult to trace where and how these resources have been used in practice.

The aim of the Pact is to further enhance cooperation with third countries. This objective will be funded through the 2021–2027 MFF which foresees the highest budgetary increase in relative terms of EU migration and asylum policies in comparison to other budgetary areas. This supports the argument that it is politically easier to negotiate a budgetary increase in this politically sensitive area than to reach an EU-wide agreement on a change of EU migration and asylum legislation, as the one proposed by the Migration Pact. However, along the lines of Member States' primary objective of countering irregular arrivals, the new MFF foresees a significant increase in allocations to the external dimension of migration management and asylum and a comparably smaller raise for their internal dimension.

The new financial instrument that streamlines the funding of the EU's external action, by merging ten existing regulations and thus contributing to improved transparency and accountability of the funds spent on cooperation with third countries, is the Neighbourhood, Development and International Cooperation Instrument (NDICI), whose financial envelope amounts to EUR 79.5 billion.<sup>10</sup> 10% of NDICI's budget is earmarked for migration management projects in origin and transit countries. Interestingly, the 10% target has also been inserted in the Commission's Communication on the Migration Pact.<sup>11</sup> Considering the fact that the Communication was published on 23 September 2020, i.e., before the final agreement on the 2021–2027 MFF and before the adoption of the NDICI, the proposed Migration Pact could be viewed as a mechanism used to successfully steer multiannual budget negotiations in the direction of including the 10% target in the final MFF agreement.

As a result, 10% of NDICI funds will have to satisfy the migration and border management objectives.<sup>12</sup> This could be problematic, for several reasons. First, by providing development aid primarily to third countries on major migratory routes towards the EU, the NDICI makes the allocation of development aid conditional on the EU's political interests and not necessarily on the actual needs of the

<sup>10</sup> Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009, OJ L 209, 1–78 (14 June 2021).

<sup>11</sup> Point 6.1 of Commission Communication on a New Pact on Migration and Asylum, COM/2020/609 final (23 Sept. 2020).

<sup>12</sup> For a discussion on the emphasis on the border protection objective in the EU's external funding, see R. Cortinovis & C. Conte, *Migration-Related Conditionality in EU External Funding*, Discussion Brief, Research Social Platform on Migration and Asylum, 1–16 (Brussels 2018).

respective third country, as the priorities of the external dimension of EU migration and asylum policies are not necessarily coherent with the overriding aim of development aid, which is the reduction or eradication of poverty.<sup>13</sup> On the contrary, by making 10% of the EU's development aid towards third countries conditional on their cooperation in readmission and border management, the EU could change the objectives of its development aid, as stipulated by Article 208(1) TFEU.<sup>14</sup> In such situations development aid could end up being used as a tool to achieve the EU's migration and border-control interests.

Additionally, the investment of major resources outside the EU could create a risk of excessive dependence on third countries in the management of migration and asylum, thus creating a leverage in their relations to the EU. Finally, one should ensure that the aim of the activities taken within the sphere of the external dimension of EU migration and asylum policies – i.e., fight against irregular migration and border management – does not interfere with refugees' rights to request asylum, as the basic premise of the internal dimension of EU migration and asylum policies.

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<sup>13</sup> CONCORD – European NGO Confederation for Relief and Development, Recommendations on the NDICI migration spending target. [https://concordeurope.org/wp-content/uploads/2019/09/CONCORD\\_MFF\\_Migration\\_Spending\\_Recommendations.pdf](https://concordeurope.org/wp-content/uploads/2019/09/CONCORD_MFF_Migration_Spending_Recommendations.pdf) (accessed 7 Dec. 2021).

<sup>14</sup> For a discussion on conditionality in the external dimension of migration, see A. Knoll & P. Veron, *Migration and the Next EU Long-Term Budget: Key Choices for External Action*, Discussion Paper No. 250, European Centre for Development Policy Management, 1–27 (2019).