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EU Budgetary Responses to the 'Refugee Crisis'

Reconfiguring the Funding Landscape

Leonhard den Hertog

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Abstract

This paper analyses the EU budgetary responses to the 'refugee crisis' in Europe. The European Commission has proposed several changes to the EU budget as well as the establishment of new funding instruments. The paper explores what the announced funding consists of, what role it plays in policy-making and what issues it generates. Throughout these budgetary responses the search for flexibility has been dominant, motivated by the need to respond more swiftly to humanitarian and operational needs. In addition, the paper argues that beyond implementation or management, the role of funding is also symbolic and communicative. In light of limited competences that are difficult to exercise, funding represents a powerful tool enabling the Commission to shape policy-making in times of crisis. At the same time, the dominant search for flexibility also challenges established funding rules and procedures. It has furthermore led to reduced space for democratic scrutiny by the European Parliament.

More profoundly, EU funding for cooperation with third countries to prevent the inflow of refugees and asylum seekers has monetised questions over the responsibility for these individuals. As the EU–Turkey agreement shows, this has created a self-imposed dependence on third countries, with the risk of potentially insatiable demands for EU funding. This paper questions the proportionality and rule of law compliance of allocating funding for the implementation of this agreement. Moreover, it proposes that the Commission take steps to practically safeguard the humanitarian aid principles in the management structures of the new funding instruments, and it stresses the need for more scrutiny of the reconfigured funding landscape by the European Parliament and the European Court of Auditors.

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Contents

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Introduction

One of the major but under-analysed EU responses to the 'refugee crisis' has been its budgetary response. This response amounts to a partial reconfiguration of the EU funding landscape in migration, asylum and border policies, both internally and externally. This paper explores what the new funding initiatives are, what role they play and what issues they generate.

Announcing new funding is a crosscutting element of the proposed EU plans and schemes that seek to 'manage' the inflow of asylum seekers. On the internal side, the setting up of a relocation scheme has been the most salient proposal, entailing amendments to the EU budget. On the external side, the summits with African countries in Valetta and with Turkey in Brussels led to the establishment of new funding instruments. In all of these initiatives, the search for 'flexibility' – to ensure quick funding responses to address humanitarian and operational needs – has been dominant, thereby navigating and sometimes bypassing existing rules and procedures.

This paper argues that EU funding has been one of the European Commission's major instruments for policy-making throughout the refugee crisis. The 'emergency' atmosphere has allowed for a partial re-labelling, reorganisation and re-prioritisation of the EU budget and its funding instruments. Furthermore, the Commission's strategy to entice the member states to pool financial resources, e.g. in the Africa Trust Fund and Refugee Facility for Turkey, has had a knock-on effect on the budgetary priorities of member states. The continual recourse to the pledging of funding by the Commission can be understood as compensation for limited legal competences or those that are difficult to exercise over borders, asylum and migration, with respect to both the member states and third countries. Where policy and legal solutions are elusive for the Commission, funding can go a long way. The funding pledges can also be seen as effective communicative tools to reassure member states, third countries and the general public that 'management' actions and their 'implementation' are taking place. This symbolic role of funding decisions is key to understanding why they are presented upfront in the EU's responses.

The main issues emanating from this reconfiguration of the funding landscape stem from the dominant search for flexibility. Although this could allow for addressing pressing humanitarian and operational needs, it also poses challenges for existing rules and democratic scrutiny. The reconfiguration in times of 'crisis' risks leading to an instrumentalisation of EU funding for current priorities away from the long-term goals elaborated in the funding regulations and in the funds' programming. This mainly concerns the re-prioritisation of development funding and humanitarian aid for 'migration management' purposes, and gives rise to controversial questions over the conditionality for EU external funding.

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The increased use of funding in the cooperation with third countries to achieve the stated policy objective of preventing the inflow of asylum seekers additionally monetises questions over the legal responsibility for asylum seekers. This is arguably the case in the EU–Turkey agreement and sets a problematic precedence.[1] Adopting the policy objective of preventing the inflow of asylum seekers through outsourcing creates a self-imposed dependence on third countries. This risks potentially insatiable third-country requests for EU funding and hampers EU control over its budget. More profoundly, in as much as the agreement with Turkey itself is problematic under international and European law, the proportionality and rule of law compliance of the funding allocated for its implementation is also at stake.

1. Funding initiatives announced

The Commission proposed three types of responses in its communication of September 2015 on "managing the refugee crisis": "operational, budgetary and legal measures".[2] Although funding has been given ample attention by the Commission, most of the public controversy and academic analysis has revolved around the operational and legal measures, such as those proposed in the European Agenda on Migration.[3]

On the operational side, the increased activity of Frontex (the EU Border Agency) in its joint operations and the hotspots was presented as the building block of the EU's management of the crisis.[4] The role of Frontex is to be further enhanced through recent Commission proposals for a European Border and Coast Guard (EBCG).[5] The EU military operation, EUNAVFOR MED Sophia, is another form of operational action presented to respond to migration flows in the Mediterranean.[6] The EU–Turkey agreement negotiated at the European Council summits of March 2016 requires a further operational effort, mostly led by national authorities, EU agencies and the Commission.[7]

On the legal side, the Commission has proposed new EU law and is planning to propose more in the weeks and months to come. The Emergency Relocation Mechanism, which aims at covering the relocation from Greece and Italy of 160,000 asylum seekers to other member states, provides a

[1] Italy has already asked for a similar agreement – see "Italy wants Turkey-style deals to return African migrants", *EUobserver*, 5 April 2016 (https://euobserver.com/tickers/132916).

[2] See European Commission, Communication, Managing the refugee crisis: Immediate operational, budgetary and legal measures under the European Agenda on Migration, COM(2015) 490 final/2, Brussels, 29 September 2015(a).

[3] See European Commission, Communication, A European Agenda on Migration, COM(2015) 240 final, Brussels, 13 May 2015(b).

[4] See European Commission (2015a), op. cit.

[5] See European Commission, Communication, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No. 2007/2004, Regulation (EC) No. 863/2007 and Council Decision 2005/267/EC, COM(2015) 671 final, Strasbourg, 15.12.2015(c); see also S. Carrera and L. den Hertog, "A European Border and Coast Guard – What's in a name?", CEPS Paper in Liberty and Security in Europe, No. 88, CEPS, Brussels, March 2016.

[6] See Council of the European Union, Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED), OJ L 157/51, 23.06.2015(a).

[7] See European Commission, "Implementing the EU–Turkey agreement – Questions and answers", Factsheet, 6 April 2016(a).

change to the legal architecture in this field.[8] Especially the relations to the Dublin Regulation and the other constituent parts of the Common European Asylum System (CEAS) are thereby transformed, with more Commission proposals on this to follow.[9]

Not least impressive in quantitative terms have been the budgetary responses announced by the Commission. Almost every new proposal and communication is marked by the pledging of several millions or billions of euros from the EU budget, often with accompanying requests for member states to mobilise funding. This has been the case for the Africa Trust Fund, the Syrian Crisis Trust Fund and the Refugee Facility for Turkey.[10] Certainly, an emblematic example is the Facility for Turkey – marked by fierce negotiations with Turkey over the amount of funding to be made available, as well as between the Commission and the member states as to how the contributions to this facility should be allocated.[11] The Commission reflects the importance of funding not only in the official policy communications, but also in its outputs meant for public relations,[12] underlining the crucial nature of funding in the governance of the refugee crisis.

Before exploring the roles and difficulties of the pledged EU funding, Table 1 presents the most important initiatives that have been announced. The table only includes the activities that have been presented as new initiatives by the Commission.

Table 1. EU funding newly announced in response to the refugee crisis (€ million)

Initiative	Funding source	Period	EU budget (€ million)
EU Regional Trust Fund in Response to the Syrian Crisis – the 'Madad Fund'	European Neighbourhood Fund (ENI), Instrument for Pre-Accession (IPA II), member states, other donors	Until 2019	500 (+500 from member states, other donors)
EU Emergency Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa *(launched at the EU–Africa Valetta Summit)*	European Development Fund (EDF), Development Cooperation Instrument (DCI), ENI, Instrument contributing to Stability and Peace (IcSP), Asylum, Migration and Integration Fund (AMIF), Internal Security Fund (ISF), humanitarian aid, member states, other donors	Until 2020	1,800 (+1,800 from member states, other donors)

[8] See Council of the European Union, Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80, 24.09.2015(b).

[9] See European Commission, Communication, Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197 final, Brussels, 6 April 2016(b).

[10] See the Agreement establishing the European Union emergency trust fund for stability and addressing the root causes of irregular migration and displaced persons in Africa, and its internal rules, between the European Commission and Spain, 2015; see also the Agreement establishing the EU Regional Trust Fund in response to the Syrian crisis, 'the Madad Fund', and its internal rules between the European Commission and Italy, 2015; and also European Commission, Decision on the coordination of the actions of the Union and of the member states through a coordination mechanism – the Refugee Facility for Turkey, C(2015) 9500 final, Strasbourg, 24 November 2015(d).

[11] See Council of the European Union, "Refugee facility for Turkey: Member States agree on details of financing", Press Release, 25/16, Brussels, 3 February 2016(a).

[12] See European Commission, "EU budget for the refugee crisis", Brussels, February 2015(e).

Increased humanitarian aid	Humanitarian aid	2016	+445
Facility for Refugees in Turkey *(linked to the EU–Turkey agreement)*	DCI, IPA II, ENI, IcSP, humanitarian aid, partly through the EU budget amendment: flexibility instruments and redeployment	Until 2017	1,000 (+2,000 from member states, + a possible 3,000 by 2018)
Emergency funding for the AMIF and ISF	EU budget amendment: flexibility instruments and redeployment	2015, 2016	+173 for 2015 +464 for 2016
Increased non-emergency AMIF and ISF budget	EU budget amendment: flexibility instruments and redeployment	2016	AMIF asylum +190 AMIF return +38 ISF borders +82
Increased Frontex budget	EU budget amendment: flexibility instruments and redeployment	2015, 2016	+133
Increased budget for the European Asylum Support Office	EU budget amendment: flexibility instruments and redeployment	2015, 2016	+10
Increased Europol budget, and setting up the European Migrant Smuggling Centre	EU budget amendment: flexibility instruments and redeployment	2015, 2016	+4.25
Provision of emergency support within the EU	First 100 from AMIF, 2016	Permanent Council Regulation	700 (until 2018)
Emergency Relocation Mechanism, partly diverted to the resettlement of Syrians from Turkey	AMIF, EU budget amendment: flexibility instruments and redeployment	2015, 2016, possibly longer	780
Distribution of dairy products as part of the response to the humanitarian crisis	EU budget amendment: agriculture and rural development	2016	30

Source: Author's compilation.

2. Understanding the numbers

Some caveats should be expressed as regards these communicated numbers.

2.1 Funding periods

It should be underlined that these numbers concern amounts that will not be spent immediately, but will be spread over a number of years to come. For example, the EU–Africa Trust Fund is set up for the period until 2020 – as defined in its constitutive agreement (see Table 1 above).[13] Similar multi-year arrangements apply to the Syria Trust Fund and the Refugee Facility for Turkey. Such long-term funding pledges may not translate into actual implementation, as the political priorities of the day can divert funding away to new areas. An example of this is the funding foreseen for the

[13] See the Agreement between the European Commission and Spain (2015), op. cit.

160,000 relocations from Greece and Turkey. As implementation of the relocation scheme began to fall short of expectations,[14] and the EU–Turkey agreement was concluded, funding for 54,000 individuals to be relocated started to be diverted to the 'one-for-one' resettlement programme of Syrian nationals from Turkey.[15] This means that in budgetary terms, the Commission's commitment to the relocation scheme is faltering. Several other amounts – such as the increased funding for the AMIF and ISF or for the agencies[16] – may or may not involve structural increases.

2.2 Budget appropriations

Linked to the observation about funding periods, the amounts that have been announced do not all immediately translate into corresponding amounts in the EU budget. Some of the amounts announced surface in the 2015 and 2016 EU budgets (as proposed and amended several times), only partially as 'commitment appropriations' and even more limited as 'payment appropriations'. The former concern those budgeted amounts that *can* be legally committed in the budget year, the latter those that are budgeted actually to be transferred to a third party to fund implementation. In other words, some of the communicated amounts are not yet reflected in the EU budget, as funding that will be spent on implementation.[17] Yet this could start to materialise as payment appropriations in the annual budgets to follow.

2.3 Re-labelling and redeployment

Although the announcements could suggest that the initiatives concern 'new' EU funding, such funding either represents a reorganisation or re-labelling of existing EU funds or a shift within the EU budget whereby amounts are "redeployed" among budget headings and from "flexibility instruments".[18] Table 1 above demonstrates these different options for the initiatives listed. Several of the amounts come from the emergency or flexibility mechanisms foreseen in the general EU budget structure or in the respective structures of the funds. As can be seen in the funding source column in the table, the Refugee Facility for Turkey is a 'coordination mechanism' that will attempt to coordinate the amounts to be spent under several existing EU funds and member states' contributions.[19] This entails the facility requiring regular meetings to enable such coordination. Concerning the EU budget contribution, however, it does not include funding that could not

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[14] For the latest numbers on the state of play, see European Commission, Member States' support to Emergency Relocation Mechanism, communicated as of 7 April 2016(c) (http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf).

[15] See European Commission, Proposal for a Council Decision amending Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM(2016) 171 final, Brussels, 21 March 2016(d).

[16] These increases have so far been included in the EU budgets for 2015 and 2016 – see European Parliament and Council of the European Union, Definitive Adoption (EU, Euratom) 2015/1769 of amending budget no. 5 of the EU for the financial year 2015, OJ L 261/80, 07.10.2015; see also European Parliament and Council of the European Union, Definitive Adoption (EU, Euratom) 2016/150 of the EU's general budget for the financial year 2016, OJ L 48/1, 24.02.2016.

[17] For an example of the difference between commitment and payment appropriations, see European Commission, Amending letter no. 2 to the draft general budget 2016 – Updating of the estimated needs for agricultural expenditure and fisheries; Managing the refugee crisis: Immediate budgetary measures under the European Agenda on Migration, COM(2015) 513 final, Brussels, 14 October 2015(e), p. 13. For a similar situation, see European Commission, Draft amending budget no. 7 to the general budget 2015 – Managing the refugee crisis: Immediate budgetary measures under the European Agenda on Migration, COM(2015) 485 final, Brussels, 30 September 2015(f).

[18] Ibid.

[19] See European Commission (2015d), op. cit.

already be budgeted under instruments that could benefit Turkey and its refugee reception capacities. By contrast, the trust funds involve transferring funds from existing EU funds into separate bank accounts – from that moment falling under the trust fund management structures.[20] This funding is thus reorganised or re-labelled.

It remains to be seen whether the expected or pledged member state contributions will materialise in the months and years to come. Currently, the contributions of several member states to the different trust funds and the Refugee Facility for Turkey have not yet been committed, let alone transferred.[21] For the Refugee Facility for Turkey, the contributions of the member states – as indicated in the contribution certificates – will be channelled through existing EU funds, approximately two-thirds through the IPA II and one-third through humanitarian aid.[22]

2.4 Double-counting

Lastly, it should be noted that there is a fair amount of double-counting in the numbers presented. It is possible that funding spent through the Syrian Crisis Trust Fund and spent in Turkey will also count towards the numbers included under the Refugee Facility for Turkey.[23] Some of the humanitarian aid announced, e.g. going to the World Food Programme and the UN High Commissioner for Refugees, may also be counted towards the Refugee Facility for Turkey. As also indicated in the table, the first €100 million for "emergency support within the Union" is to be funded from the increased AMIF funds,[24] highlighting that the amounts presented in the table cannot simply be added up to give a comprehensive picture.

3. The roles of funding beyond implementation

The broadly assumed role of funding is that it enables the implementation of policy and operational measures. In the course of the refugee crisis, the Commission has proposed funding at different points in time to address operational and humanitarian needs. This is the case, for example, with the recently proposed instrument for internal emergency support, which is partly envisaged to address the needs of the asylum seekers finding themselves in Greece after the de facto closing of the northward route through the Western Balkan countries.[25] This role of enabling the implementation of action is thus crucial in helping to address the perceived pressing needs, but it is not the only role. Additional roles are highlighted in this section.

3.1 Implementation and communication

Exactly because of the assumed strong link between funding and implementation, pledging funding serves the crucial symbolic and communicative role of conveying the message that the

[20] See in more detail, V. Hauck, A. Knoll and A. Herrero Cangas, "EU Trust Funds – Shaping more comprehensive external action?", ECDPM Briefing Note, No. 81, European Centre for Development Policy Management, Maastricht, November 2015.

[21] See, e.g. European Commission, Annex 7 to the Communication from the Commission to the European Parliament and the Council on the State of Play of implementing the priority actions under the European Agenda on Migration – Member States' pledging to Trust Funds – State of Play table, COM(2016) 85 final, Brussels, 10 February 2016(f).

[22] Derived from an interview with an official of DG NEAR, European Commission, April 2016.

[23] This is also indicated by the European Commission – see Preamble 12, European Commission (2015d), op. cit.

[24] See European Commission, Draft amending budget no. 1 to the general budget 2016 – New instrument to provide emergency support within the Union, COM(2016) 152 final, Brussels, 9 March 2016(g).

[25] See European Commission, "EU provides €83 million to improve the conditions for refugees in Greece", Press Release, IP/16/1447, Brussels, 19 April 2016(h).

'crisis' is being 'managed'.[26] Whereas legal and political plans are often seen as fraught with hurdles – such as finding consensus among member states or with third-country governments – funding announcements convey a message of 'true' commitment to managing a problem. The idea that spending money conveys one's real priorities on the ground beyond policy texts – whether that idea is justified or not – renders the funding announcements extremely powerful symbolic and communicative tools.[27] The continual pledging of funds during the refugee crisis can also be understood to play that role: namely, to convey the message that the Commission is managing and implementing initiatives to mitigate the crisis.

3.2 Compensating for competences

Funding is of particular relevance for the Commission in the areas of borders, asylum and migration, where EU competences are limited and difficult to exercise. These areas fall under "shared competence between the Union and the Member States",[28] entailing that the support of the member states is vital for legal acts to be adopted, and if required, to be transposed. It also entails that in many of the negotiations with third countries, within its range of competences the Commission has limited incentives to offer. The EU legal framework on labour migration is fragmented and the competence to determine the volumes of labour migration remains with the member states.[29] Moreover, the EU's jurisdiction on visas is restricted to the 90-day (in a 180-day period) Schengen visa.[30] This constrains the Commission's leverage vis-à-vis third countries.

As the EU has limited competences, funding is crucial for the Commission to induce policy change. We see the phenomenon of 'policy-making through funding' being employed by the Commission throughout the refugee crisis. For example, to convince the member states to participate in the Emergency Relocation Scheme, the Commission has offered a lump sum amount per relocated asylum seeker. On the external front, the Commission has announced funding for third countries, in an attempt to compel them to work with the EU's agenda. This has been clear in the case of Turkey and the African countries. Even though most of the funds concern a re-labelling

[26] See European Commission (2015a), op. cit.

[27] For more on the symbolic roles of funding in literature on the political sociology of public finances, see P. Bezes and A. Siné, *Gouverner (par) les finances publiques*, Paris: Sciences Po Les Presses, 2011.

[28] See Art. 4(2.j) TFEU (Treaty on the Functioning of the EU).

[29] See Art. 79(5) TFEU. The EU legal framework is furthermore fragmented between different legislative acts such as the Blue Card Directive, the Intra-Corporate Transferees Directive and the Seasonal Workers Directive – see respectively, Council of the European Union, Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.06.2009; Directive 2014/66/EU of 15 May 2014 of the European Parliament and Council of the European Union on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157/1, 27.05.2014(a); and Directive 2014/36/EU of 26 February 2014 of the European Parliament and Council of the European Union on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94/375, 28.03.2014(b). The Blue Card Directive will be revised with Commission proposals later this year. For the outcomes of the public consultation, see European Commission, Summary of replies to the public consultation on the EU Blue Card and the EU labour migration policies for highly skilled workers, Brussels, 6 April 2016(i).

[30] See Art. 77(2) TFEU; see also Regulation (EU) No. 610/2013 of 26 June 2013 amending Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No. 1683/95 and (EC) No. 539/2001 and Regulations (EC) No. 767/2008 and (EC) No. 810/2009 of the European Parliament and of the Council, OJ L 182/1, 29.06.2013. See also S. Peers, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press, 2011, pp. 290-291.

of existing funds, they have nevertheless allowed the Commission to present a certain degree of incentive to or exercise leverage with third countries. Under the 'more-for-more' principle – linking EU funding with cooperation, e.g. on return and readmission – this could also turn into 'less-for-less' or conditionality.[31]

3.3 Vertical and horizontal struggles

Funding in times of crisis also figures within the context of existing vertical and horizontal struggles over funding and may settle some of these struggles for years to come.

In the vertical dimension, there are struggles between the Commission and (coalitions of) member states over who is managing the refugee crisis and what the right approaches are. The Commission employs funding to name and shame the member states, as their contributions to the trust funds and facilities have not been forthcoming. The Commission publishes lists of member states' contributions almost daily, indicating which member states are falling behind, and always contrasting this status with the contribution from the EU budget.[32] The setting up of trust funds also allows for a renegotiation over who programmes, manages and monitors this pooled funding. By transferring bilateral funds to the trust funds, member states have to accept management by the Commission. In the governance arrangements of the trust funds and the Refugee Facility for Turkey, the Commission has the final say over the decisions taken.[33] This could explain why some member states are not over-enthusiastic about committing their bilateral funding to the trust funds. As the trust funds require a minimum €3 million buy-in for donors to have a say on the boards and operational committees, the member states that decide not to participate would see their influence on the EU budget decreasing. Whereas they are involved in the existing funds' committees under the comitology procedures, they will lose that influence over those EU funds transferred to the trust funds if they decide not to contribute €3 million, although they would have observer status.[34]

In the horizontal EU-level dimension, the new funding structures as well as the re-prioritisation of EU funds – as reflected in the redeployment of the EU budget headings – implies that more funding is available for certain Commission directorate-generals. This is most notably the case for DG Home (Migration and Home Affairs), DG NEAR (European Neighbourhood Policy and Enlargement Negotiations), DG ECHO (Humanitarian Aid and Civil Protection) and DG DEVCO (International Cooperation and Development), but also for the home affairs agencies, which have seen their staff levels rise throughout 2015 and 2016.[35] The reconfigured funding landscape thus entails a reconfiguration of the organisational landscape between Commission DGs and the European External Action Service (EEAS). However, as this reconfiguration does not increase the overall EU budget, this additional funding means reduced funding somewhere else. In the redeployment of the available funding, the Commission mostly identified available amounts in

[31] See Council of the European Union, "Conclusions on the future of the return policy", Press Release 711/15, Brussels, 8 October 2015(c); see also S. Carrera, J.-P. Cassarino, N. El Qadim, M. Lahlou and L. den Hertog, "EU–Morocco cooperation on readmission, borders and protection: A model to follow?", CEPS Paper in Liberty and Security in Europe, No. 87, CEPS, Brussels, January 2016, p. 12.

[32] See, e.g. European Commission (2016f), op. cit.

[33] See, e.g. Art. 5.5.1 of the Agreement between the European Commission and Spain (2015), op. cit.; see also Art. 6.6.1, second para., ibid. on the possibility for the Commission alone to approve actions up to €10 million. See also Art. 5(2), European Commission (2015d), op. cit.

[34] See Art. 6.1.2(a) of the Agreement between the European Commission and Spain (2015), op. cit.; see also Hauck, Knoll and Herrero Cangas (2015), op. cit.

[35] See, e.g. European Commission (2016e), op. cit.

several agricultural and fisheries funds, the funds allocated for the EU's Galileo satellite project and in certain flexibility instruments.[36]

Apart from this redeployment, the new trust funds and facility also require new coordination mechanisms at the EU level, as these new funding structures draw from several existing EU funds. Each of these existing funds have their own Commission DGs for programming and managing them, with the EEAS and its linked EU delegations in third countries also having a role in the programming exercise. Setting up the new funding structures in response to the 'crisis' creates the space to renegotiate who programmes and manages funding. For example, as the Trust Fund for Africa is foreseen for a period until 2020, these renegotiated structures may have a lasting effect beyond this crisis.

4. The challenges of funding: The lasting impacts of flexibility

The budgetary responses to the refugee crisis have been guided by the search for more flexibility, enabling EU-funded actions to be more quickly identified and implemented. The trust funds, since 2012, have been instruments exactly allowing for more flexibility.[37] In the search for flexibility some of the pressing humanitarian and operational priorities could be addressed more swiftly. Challenges with respect to accountability and existing rules and safeguards, however, have also ensued.

4.1 Accountability

First, it should be underlined that issues of accountability in EU spending on migration, borders and asylum are long-standing. As the European Court of Auditors has found in its subsequent reports on the different EU (external) funds on migration, there are serious deficiencies, such as the lack of audit trails, unclear or unidentified objectives, the absence of overviews of funding and funds not supporting human rights.[38] Whether such shortcomings will be addressed by hastily setting up new structures is doubtful, as rules are relaxed rather than reinforced and lessons learned from existing programming and management may not necessarily be taken on board. Throughout this refugee crisis, there has also been a lack of impact assessments of the new 'emergency' instruments. For example, the internal emergency support initiative was proposed without any impact assessment issued, invoking limited time.[39] The proposal for the EBCG was also proposed by the Commission without the corresponding impact assessment.[40] Although this may be justified under the Commission's Better Regulation Guidelines and "Toolbox", and perhaps necessary in view of the 'emergency' situation, impact assessments could still be done for

[36] See, e.g. European Commission (2015f), op. cit.

[37] See Art. 187, Regulation (EU, Euratom) No. 966/2012 of 25 October 2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No. 1605/2002, OJ L 298/1, 26.10.2012; see also Art. 259, European Commission, Delegated Regulation C(2012) 7505 on the rules of application of Regulation No. 966/2012, 29 October 2012(a). For a helpful synthesis document, see European Commission, New Financial Regulation and its Rules of Application – Synoptic Presentation, Version 2, 19 November 2012(b).

[38] For the most recent, relevant, special report in this context, see European Court of Auditors, *EU external migration spending in Southern Mediterranean and Eastern Neighbourhood countries until 2014, together with the replies of the Commission*, Special Report No. 9/2016, Luxembourg, 17 March 2016. See also European Court of Auditors, *The External Borders Fund has fostered financial solidarity but requires better measurement of results and needs to provide further EU added value*, Special Report No. 15/2014, Luxembourg, 8 October 2014.

[39] See European Commission, Proposal for a Council Regulation on the provision of emergency support within the Union, COM(2016) 115 final, Brussels, 2 March 2016(j), p. 4.

[40] See European Commission (2015c), op. cit.

many of the initiatives that appear poised to remain in place in the long term or even permanently.[41]

4.2 Democratic debate

Second, the proposed emergency and crisis funding instruments have been adopted with little democratic debate in the European Parliament. For some initiatives requiring the shifting of amounts between budget headings, the Commission submitted an amending budget to the Parliament and the Council for urgent approval. Increasing the budget for AMIF and ISF was therefore accompanied by parliamentary scrutiny, albeit in a rushed fashion.[42] This differs from setting up a trust fund, which is done by adopting a constitutive agreement between the Commission and one or more member states, without it being subject to European Parliament consent. Also, the Refugee Facility for Turkey was adopted as a Commission Decision.[43] For the internal emergency support, the Council adopted a regulation on the basis of Art. 122(1) of the Treaty on the Functioning of the EU (TFEU), which figures in the chapter on "Economic Policy".[44] As the Commission indicates, this is a new, permanent funding instrument "not limited to the current refugee crisis", which could be used in the future for "other major emergencies with wide-ranging humanitarian impacts such as nuclear or chemical incidents, terrorist or cyber-attacks and epidemics".[45] However necessary and good this new instrument may be in enabling humanitarian aid to refugees,[46] it has lasting impacts beyond this refugee crisis and would hence merit democratic discussion on the medium- and long-term objectives and governance structures. The role of the Parliament in setting up these new funding instruments has thus been limited, in contrast to the fierce inter-institutional negotiations over, for example, the funding regulations for EU Home Affairs under the 2014–20 Multiannual Financial Framework.[47] This lack of involvement of the European Parliament is not only the case in funding. As regards the EU–Turkey 'statement' itself, questions have also been raised about whether the Parliament should not be involved under the procedure of Art. 218 TFEU on international agreements.[48]

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[41] The possibility to refrain from carrying out impact assessments is foreseen in the European Commission's Better Regulation guidelines and toolbox, granting a margin of discretion to the Commission to decide on the possibility or appropriateness of such an impact assessment – see European Commission, "Better Regulation Guidelines", Staff Working Document, SWD(2015) 111 final, Strasbourg, 19 May 2015(g).

[42] See European Parliament and Council (2015), op. cit.; see also European Parliament and Council (2016), op. cit.

[43] See European Commission (2015d), op. cit.

[44] See Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, OJ L 70/1, 16.03.2016(b).

[45] See European Commission, "Questions and answers: First projects of EU support to refugees in Greece under the new emergency support instrument", Factsheet, Brussels, 19 April 2016(k).

[46] See European Commission (2016h), op. cit.

[47] For an overview, see A. D'Alfonso, "EU Funds for asylum, migration and borders", Briefing, European Parliamentary Research Service, Brussels, 11 February 2014.

[48] Parliamentary questions were asked in the European Parliament on this issue – see European Parliament, "Legal nature and binding nature of the so-called 'EU–Turkey Agreement'" (www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2016-000053+0+DOC+XML+V0//EN). See also a blog post by Maarten den Heijer and Thomas Spijkerboer on this issue, on the EU Law Analysis website (http://eulawanalysis.blogspot.be/2016/04/is-EU–turkey-refugee-and-migration-deal.html).

4.3 Compatibility with existing regulations

Third, questions arise about the compatibility of the newly proposed funding structures with the governance regimes of the existing EU funds from which they draw. Despite assurances that all the existing regulations will be complied with, it is sometimes unclear how these can be reconciled with the new instruments' management structures and processes. This is the case for the compatibility of the Africa Trust Fund governance structure with that of the EDF, from which the largest contribution for the trust fund is drawn.[49] As foreseen in the Cotonou Agreement concluded between the EU and the African, Caribbean and Pacific countries group, local ownership and co-management are important principles.[50] Whereas indicative programmes under the EDF are negotiated with the relevant third country or regional organisation, this is not guaranteed to occur under the Africa Trust Fund.[51]

As for the Refugee Facility for Turkey, Turkey has an "advisory" status, although in practice that will most probably involve Turkey having a significant say over EU funding allocations.[52] The intention to present a joint EU–Turkey strategic concept note for the 'programming' of the facility[53] reveals that Turkey does have an important say, if not a *de facto* veto. The Commission's claim that all the funds under the facility will be spent in accordance with the existing EU funding regulations should thus not make us overlook the fact that Turkey will have an empowered say over the coordinated funding amounts under the facility.

Linked to this, an important point concerns the involvement of humanitarian aid under the facility, as well as under the trust funds. EU humanitarian aid is governed by its own set of rules – based on a humanitarian needs assessment and guided by the principles of humanity, neutrality, impartiality and independence under the European Consensus on Humanitarian Aid.[54] The Commission Decision on the Refugee Facility for Turkey stipulates the "full respect" for this and excludes the otherwise "advisory" role of Turkey for "actions providing immediate humanitarian assistance".[55] Still, as some sort of programming of the facility is foreseen in an EU–Turkey strategic concept note, it is unclear whether this will include humanitarian aid.[56] The very concept of 'programming' normally does not apply to humanitarian aid, as it should work on the basis of a humanitarian needs assessment and not on the basis of political priorities. Interviews revealed that even though specific decisions regarding humanitarian aid will not need a green light from the Turkey Refugee Facility Steering Committee, it will need to agree on the Facility's overall

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[49] See Hauck, Knoll and Herrero Cangas (2015), op. cit.

[50] The Cotonou Agreement puts emphasis on 'ownership' – see the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L 317/3, 15.12.2000. For the latest amendments, see the Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, OJ L 287/3, 04.11.2010.

[51] See Hauck, Knoll and Herrero Cangas (2015), op. cit.

[52] See Art. 5(1), European Commission (2015d), op. cit.

[53] Derived from an interview with an official of DG NEAR, European Commission, April 2016.

[54] See the Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, The European Consensus on Humanitarian Aid ('Joint Statement'), OJ C 25/1, 30.01.2008. See also Council Regulation (EC) No. 1257/96 of 20 June 1996 concerning humanitarian aid, OJ L 163/1, 02.07.1996.

[55] See Recital 11, Art. 5(1), European Commission (2015d), op. cit.

[56] Derived from an interview with an official of DG NEAR, European Commission, April 2016.

priorities.[57] Open questions thus remain about how in practice the facility's governance structures and management processes will safeguard the specific rules applicable to EU humanitarian aid.

4.4 The space for NGOs

Fourth, there appears to be narrowing space for NGOs and some international organisations – especially the smaller and non-UN-family ones – to implement projects funded under the new instruments. The constitutive agreement of the Africa Trust Fund states that preference will be given to implementation by member states.[58] Also, the expertise needed for informed programming and management is preferred to come from the Commission, member states and donors.[59] Also, in the search for rapidity and flexibility, there will not be always time for engaging in open calls for proposals[60] – something that will hinder the inclusion of implementing organisations not necessarily closely associated with the EU institutions.

As regards the crucial question of whether the EU funds coordinated under the Refugee Facility for Turkey will be channelled mostly through NGOs providing humanitarian support to refugees or through Turkish official government channels, the picture is mixed. The first sets of projects announced include, e.g. €50 million for such organisations as the Danish Refugee Council, the International Organisation for Migration and the International Federation of Red Cross and Red Crescent Societies, "working in close cooperation with Turkish partner organisations".[61] Another €60 million is foreseen "to finance returnees" and will be "implemented by means of a direct agreement with the Turkish Ministry of the Interior".[62] In general, a substantial part of the funding available under the facility will be managed under "special measures", providing more flexibility but also doing away with some aspects of open competition.[63] Alongside the expectedly close cooperation with the agencies from the UN family, the involvement of the European Investment Bank may also contemplated under the Facility for Turkey, possibly where it concerns the financing of infrastructure projects in the education and healthcare sectors.[64]

4.5 Monetising responsibility for asylum seekers

Fifth, the increasing use of regrouping and re-labelling EU funding when seeking 'solutions' to the refugee crisis monetises questions over the responsibility for asylum seekers in international relations and international law. Offering funding in combination with the stated policy goals of limiting asylum seeker inflows and of increasing return and readmission – for which the EU is clearly dependent on third countries – creates a financial liability for the EU itself, as it becomes prone to continual third-country requests for additional funding. The request by Turkey for an

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[57] Interview with two officials, DG ECHO, European Commission, April 2016.

[58] See Art. 10 of the Agreement between the European Commission and Spain (2015), op. cit.

[59] Art. 6.6.3, ibid.

[60] See Hauck, Knoll and Herrero Cangas (2015), op. cit.

[61] See European Commission, "Facility for Refugees in Turkey: Commission delivers an additional €110 million under the implementation of the EU–Turkey agreement", Press Release, Brussels, 19 April 2016(l).

[62] Ibid.

[63] This was confirmed in an interview with an official of DG NEAR, European Commission, April 2016. See Art. 2(1), Regulation (EU) No. 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, OJ L 77/95, 15.03.2014(c); see also, e.g. Art. 4 (allowing for grants without a call for proposals) of European Commission, Implementing Decision adopting a special measure on strengthening the response capacity of the most affected countries in the Western Balkans to cope effectively with increased mixed migration flows under the Instrument for Pre-Accession Assistance (IPA II) for the year 2015, C(2015) 6925 final, 7 October 2015(i).

[64] Derived from an interview with an official of DG NEAR, European Commission, April 2016.

additional €3 billion during the negotiations illustrates this hazard. When increasing amounts are allocated to such cooperation frameworks, questions about the proportionality of such allocations become ever more pertinent. Just as much as the EU–Turkey deal involves challenges under European and international rule of law frameworks,[65] allocating EU funding for its implementation is questionable. The outsourcing under this agreement conveys the problematic message that responsibility for refugees and asylum seekers can be offset through funding.

4.6 Redirection of funds towards 'migration management'

Lastly, the political context of 'emergency' and 'crisis' creates opportunities for the redirection of EU funds from development objectives to 'migration management' objectives. For the EU–Africa Trust Fund, its North Africa window mostly focuses on such management, as this region is considered to consist of "transit countries".[66] While the trust fund thus nominally addresses the root causes of migration in Africa, this is not unequivocally the case for all of its regional windows. From the available Commission factsheet on the trust fund's "Sahel region and Lake Chad" window, the adopted actions address a variety of objectives. These include development financing for a root-causes approach based on the questionable assumption that this will limit the 'push factors' for migration,[67] and linked to this are actions around 'migration and development', e.g. mobilising the diaspora of third countries for economic development,[68] as well as migration management actions financing national migration policies, police capacities and data exchange.[69]

The inherent logic of having rapid and flexible funding allocations leads to questions over whether such allocations will serve the long-term development interests of third countries or rather the short-term security interests of the EU. In relation to this there have also been signals that some member states would prefer their contributions to the Africa Trust Fund to be made conditional on the compliance of African countries with Article 13 of the Cotonou Agreement, which mentions readmission.[70] There are long-standing struggles in the EU over whether development funding can be made conditional on the cooperation of third countries on readmission. The October 2015 Council conclusions on the "future of the return policy" make clear that readmission is becoming an increasingly prominent objective in relations with third countries. Under the more-for-more principle, the relationship between cooperation on readmission and other areas of relations with third countries has been firmly established. Funding is one of the key instruments for leverage mentioned in those Council conclusions on return policy.[71] As highlighted in the recent special

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[65] See, e.g. S. Carrera and E. Guild, "EU–Turkey plan for handling refugees is fraught with legal and procedural challenges", CEPS Commentary, CEPS, Brussels, March 2016.

[66] See European Commission, "The European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa – Strategic Orientation Document", North Africa Window, Brussels, 2015(h), starting from p. 25, (http://ec.europa.eu/europeaid/sites/devco/files/EU–emergency-trust-fund-revised-strategy-15022016_en.pdf).

[67] In academic literature, the assumption that more development will result in less migration is questioned, certainly for the short and medium term – see, e.g. H. de Haas, "Turning the tide? Why development will not stop migration", *Development and Change*, Vol. 38, No. 5, 2007, pp. 819-841.

[68] For a critical review of migration and development in Africa, see O. Bakewell, "'Keeping them in their place': The ambivalent relationship between development and migration in Africa", *Third World Quarterly*, Vol. 29, No. 7, 2008, pp. 1341-1358.

[69] See European Commission, Fiche d'information, Description des nouvelles actions adoptées pour s'attaquer aux causes profondes de la migration irrégulière et du phénomène des personnes déplacées dans la région du Sahel et du bassin du lac Tchad, Brussels, 18 April 2016(m).

[70] See Hauck, Knoll and Herrero Cangas (2015), op. cit.; see also Art. 13(5.c.i), of the Cotonou Agreement (2000), op. cit.

[71] See Council (2015c), op. cit., pt. 12.

report by the European Court of Auditors on external migration funding, even though the Commission formally qualifies cooperation on readmission as part of 'migration management', third countries often perceive it as serving the EU's security policy.[72] In this report, the Court of Auditors also identified as a factor "hindering effectiveness" and limiting the "impact" the concern that "some projects appeared to have been more oriented towards Member States' interests".[73] A further redirection of funded projects towards these interests is thus not the best way to spend EU external funds.

Conclusions

This paper demonstrates that the EU budgetary responses to the refugee crisis consist of several new initiatives and entail a significant re-labelling, reorganisation and re-prioritisation of EU funding. This has partly allowed the EU to address humanitarian needs, implement operational plans and build support for policy and legal measures. For the Commission itself, funding has also been a key instrument for showing its commitment to 'managing the refugee crisis'. Owing to the pervasive assumption that funding will result in implementation, announcing funding initiatives is proving to be a powerful symbolic and communicative tool for the Commission at this time. This paper also reveals that funding initiatives are not merely following political, legal and institutional struggles, but that funding is a part of these struggles. On both the horizontal and vertical axes of EU governance, reconfiguring the funding landscape is an effective way to settle struggles over who manages funding and to compensate for limited legal competences or those that are difficult to exercise over migration, borders and asylum.

The refugee crisis has thus enabled this partial reconfiguration of the EU funding landscape, both internally and externally. It is crucial to recognise that this reconfigured EU funding landscape is here to stay, beyond this refugee crisis. For example, the trust funds have been set up to last until 2020, the internal humanitarian emergency support is a permanent instrument, and budgeting history in the EU shows that the Agency budget increases, such as for Frontex, will most probably become structural.[74] But more profoundly, there are lasting changes to the relationship between migration and development in EU external funding. This relationship is increasingly shaped by the more-for-more principle, under which third-country cooperation with the EU's external agenda on migration, borders and asylum is becoming dominant.[75]

The 'experimental governance'[76] that the Commission has employed in setting up and finding funds throughout the refugee crisis is generating issues concerning existing rules and accountability. This mostly concerns respect for the rules and objectives governing the existing EU funds that have been democratically formulated, through long and fierce negotiations on the 2014–20 Multiannual Financial Framework. Moreover, the objectives formulated through the programming exercises for the different existing EU funds are partially sidelined by the new

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[72] See European Court of Auditors (2016), op. cit., p. 41.

[73] Ibid., p. 35.

[74] The budgets of Frontex can be compared over the years, for which they show a steady increase – see the Frontex website (http://frontex.europa.eu/about-frontex/governance-documents/).

[75] See Carrera et al. (2016), op. cit., p. 12.

[76] For other references to experimentalist governance in the EU, see, e.g. J. Pollack and P. Slominski, "Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders", *West European Politics*, Vol. 32, 2009, pp. 904-924; see also C.F. Sabel and J. Zeitlin, "Learning from Difference: The new architecture of experimentalist governance in the EU", *European Law Journal*, Vol. 14, No. 3, 2008, pp. 271-327; and E. Szyszczak, "Experimental governance: The open method of coordination", *European Law Journal*, Vol. 12, No. 4, 2006, pp. 486-502.

funding structures. In addition, there is narrowing space for parliamentary scrutiny, with some of the new instruments and agreements escaping a debate and vote in the European Parliament.

The implications of the current re-labelling, regrouping and re-prioritising of the various EU funds require closer scrutiny, by both the European Parliament and the European Court of Auditors. Such scrutiny should focus on the compatibility of the new funding instruments with the existing funding regulations, the long-term implications of this reconfiguration for the relationship between migration 'management' and development cooperation, the ownership and conditionality associated with the funded actions in third countries and the proportionality of the funding amounts in light of the objectives pursued with third countries. The latter point is particularly pertinent to the EU–Turkey agreement, where legitimate questions arise as to whether a potential €6 billion is a proportional allocation of EU funding for dealing with the 'refugee crisis'. In light of the rule of law challenges posed by the EU–Turkey agreement under European and international law, the allocation of such an amount under this agreement is problematic. Instead of funding the outsourcing of refugee reception and protection to third countries, funding action to bring the EU's own CEAS up to standard would constitute a more forward-looking and autonomous response.

Recommendations

On the basis of the analysis above, this paper proposes the following policy recommendations:

1. **The Commission and the member states should further increase the necessary spending to address humanitarian needs, in line with the principles guiding EU humanitarian aid.** The European Consensus on Humanitarian Aid is leading in this regard, stipulating the fundamental humanitarian principles of humanity, neutrality, impartiality and independence. As acknowledged in the European Consensus, humanitarian aid should not become a "crisis management tool".[77] Where the trust funds or facilities draw on different funding sources including humanitarian aid, the governance and management structures should clearly isolate decision-making on humanitarian aid from that applicable to other funding sources.
2. **The Commission should strive to find the necessary responses as much as possible within the existing possibilities for flexibility and emergency in the EU budget and in the different EU funding instruments.** The existing rules already allow for flexibility and emergency responses, and they are democratically established and governed by accountability mechanisms established through decades of lessons learned. They should thus be preferred for any necessary emergency budgetary measures. Where setting up new funding instruments proves unavoidable, and especially where these also constitute medium-, long-term or even permanent instruments, the Commission should follow the regular procedures, such as carrying out *ex ante* and *ex post* evaluations (including impact assessments) on the EU's added value and the principles of economy, efficiency and effectiveness.[78]
3. **The Commission should avoid agreements with third countries where EU external funding is directly tied to limiting asylum seeker flows towards the EU.** As we have seen in the EU–Turkey agreement, this outsourcing monetises questions over the responsibility for refugees and asylum seekers under international law. It also risks greater and potentially insatiable third-country demands for EU funding. The proportionality and the rule of law compliance of these funding allocations and of the agreement itself are at stake.
4. **The European Parliament should ensure further democratic scrutiny of the budgetary measures taken.** Parliament's role has sometimes been limited regarding these budgetary measures, but it has tools available for further scrutiny. For example, the discharge procedure

[77] See the Council and the Representatives of the Governments of the Member States (2008), op. cit., pt. 15.

[78] See Arts. 30(4) and 140(2.f) of the European Parliament and Council (2012), op. cit.

(Art. 319 TFEU) should be fully exploited by the Budgetary Control Committee for *ex post* democratic scrutiny.[79] Although the Parliament considers the Syrian Crisis and Africa Trust Funds and the Refugee Facility for Turkey "neither inside nor outside the EU budget",[80] the discharge procedure for the existing, contributing EU funds could be a powerful tool. A particular area of attention should be the indirect management of EU funds by Turkish governmental entities under the Turkey Facility. The Parliament should also focus on the discharge for the EU agencies that have received budget increases, most notably Frontex and its likely successor, the EBCG.

5. **The European Court of Auditors should ensure rigorous auditing of the reconfigured funding landscape.** As the Court's special reports have proven valuable in the past, the Court should issue a special report with a comprehensive analysis of the different existing and new instruments, concentrating on the compliance of the latter with existing rules and on whether they perform better than existing funding instruments. In the annual statement of assurance on the EU budget, the Court should also prioritise scrutiny of these budgetary changes. For the funds under shared management, such as the AMIF and the ISF, the Court should pay special attention to the quality of the member states' audit and control procedures.

[79] For more detail, see A. D'Alfonso, "Discharge procedure for the EU budget – Political scrutiny of budget implementation", Briefing, European Parliamentary Research Service, Brussels, April 2016.

[80] See European Parliament, Resolution ROJ L 298/1 on general guidelines for the preparation of the 2017 budget – Section III, 2016/2014(BUD), 9 March 2016, pt. 22. The resolution also mentions that the Parliament finds that the Trust Funds and the facility lack "the necessary accountability and democratic process prescribed by the Community method, and intends therefore to closely monitor the setting up of the funds and facility and their implementation; underlines that the above actions are a clear infringement of Parliament's rights as an arm of the budgetary authority".

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