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The European Asylum System: A Necessary Case of Differentiation

Emmanuel Comte



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Abstract

The European asylum system is based on the 1990 Dublin Convention and its revisions and developments in EU law. It is an instance of differentiated cooperation, as it initially only coordinated heterogeneous national asylum systems and offered flexible forms of participation with opt-outs for Denmark, Ireland and the UK. This paper investigates the triggers, nature and effects of this differentiated cooperation. By reviewing its evolution over the last thirty years, this paper concludes that differentiation has been decisive to starting European cooperation in a new policy area, that it has created a dynamic of progressive convergence, and that its impact on problem solving has been positive. Accordingly, this paper recommends the use of differentiation to kick-start European cooperation and suggests further differentiated integration to lead to a solution for the persisting problems of effectiveness of the European asylum system.

Emmanuel Comte is Senior Research Fellow at the Barcelona Centre for International Affairs (CIDOB).

Executive summary

Differentiation has been a valuable policy instrument in the field of asylum cooperation. In a sector where member states' practices are highly heterogeneous, differentiation serves as the only available option in the short run to start cooperation. Once cooperation has started thanks to differentiation, the connection of the differentiated arrangement with the EU institutional framework can in the long run trigger a process of convergence and de-differentiation. Member states can negotiate through directives or regulations ways to gradually harmonise their practices. Differentiation has overall had a positive impact on compliance with international agreements, because it has allowed states not to implement immediate and radical changes in their policies. In the field of asylum, differentiation has not had a negative impact on the protection of refugees, because it has allowed existing standards to continue. By starting cooperation on asylum seekers, differentiation has also created more favourable conditions for the absence of controls at the EU's internal borders.

This paper therefore recommends the use of differentiation to address similar predicaments. Currently, the European asylum system is under debate at the EU level. Policymakers are discussing alleviating the burden on front-line member states and relocating asylum seekers inside the EU. The difficulty for the EU to process asylum seekers has become a liability in its relations with Turkey. This paper recommends further differentiation inside the EU to address this challenge, through a move from *differentiated cooperation* to *differentiated integration*. In contrast to the differentiated cooperation that has so far happened, differentiated integration would consist in a group of member states unifying their asylum systems and transferring the management to the European level. Recognised refugees could thus move freely across the territories of the participating states. Accordingly, they would no longer have an incentive to reach specific member countries irregularly, to lodge their applications. The integrated system would thereby end the current Dublin transfers and contribute to more orderly movements of persons in the area without internal borders. The scheme would remain open to other EU member states and would be closely connected to EU institutions. It would solve the burden that front-line member states are currently facing. For the effectiveness of such a scheme, the participation of Germany is crucial, as it is the member state that has so far played the biggest role to stabilise flows of asylum seekers.

Introduction

In 1990, the Dublin Convention constituted the first significant milestone in European cooperation on asylum.¹ It was also the main turning point for differentiated cooperation in that policy area.

Cooperation refers to any arrangement between states over an issue of interdependence. By contrast, *integration* here refers more specifically to transferring the management of an issue of interdependence to the supranational level – as it happened in the European Union for trade (European Commission) and monetary affairs (European Central Bank). *Differentiation* refers to any modality of cooperation or integration that allows states to work together in non-homogeneous, flexible ways.

On 15 June 1990, the member states of the European Community signed the Dublin Convention outside the Community framework. This arrangement maintained heterogeneous asylum standards among member states but established a mechanism to identify which national system was responsible for any specific asylum application in the EU.

After this turning point, signatory states along with new members engaged in a process of de-differentiation. They gave increased importance to Community institutions with the Treaty of Amsterdam in 1997.² From the European Council of Tampere in October 1999 onwards, they negotiated to gradually harmonise their asylum standards. This led to new Dublin regulations in 2003 (Dublin II) and 2013 (Dublin III). Differentiated cooperation over asylum provides therefore an interesting case to study whether differentiated cooperation can be a way to achieve a fast breakthrough in European cooperation and create effects of progressive convergence.

This is all the more relevant since the European asylum system is currently a key challenge, in need of policy innovations. For a few years now, member states have been unsuccessfully trying to negotiate a Dublin IV system. The movements of asylum seekers have created a weakness: because the EU finds it difficult to organise such movements, it has become dependent on Turkey halting the flow of migrants towards Europe. The problem comes both from the burden that asylum applications create for front-line member states and from the preferences of asylum seekers to lodge their applications in other member states – in contradiction to the current rules of the European asylum system.

This policy paper will develop the following points on what we have learnt so far regarding differentiated cooperation in the field of asylum.

1 *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention*, OJ C 254, 19 August 1997, p. 1-12, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:41997A0819\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:41997A0819(01)).

2 *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, OJ C 340, 10 November 1997, p. 1-144, <https://eur-lex.europa.eu/eli/treaty/ams/sign>.



The European asylum system is not a case of enhanced cooperation between a few member states of the EU because others would not have been ready to cooperate (Monar 2010: 289). No group of states was ready to achieve harmonised cooperation or integration in the field of asylum in 1990. Differentiated cooperation emerged in a field auxiliary to one in which only some member states were ready to deepen their cooperation – namely, the abolition of border controls – but all member states took part in the differentiated arrangement on asylum. Differentiated cooperation on asylum was decisive to move towards the abolition of border controls (El-Enany 2017: 381). If member states had rejected differentiation in the field of asylum and had made uniform cooperation or integration a pre-requisite, then negotiations on both asylum and the abolition of border controls would have almost certainly failed.

The above-mentioned problems of the European regime on asylum are not related to a drastic change in the migratory context in the years since its inception (Heijer et al. 2016: 614). Those problems have also little to do with differentiation. Rather, the basic nature of international cooperation between sovereign states is the major contributing factor (Wahlbeck 2019: 299-300). Even if member states were to reach identical standards regarding asylum and prevent flexible participation, such problems would probably persist as long as the management of the entire policy area has not been integrated at the European level.

To make these various points, this paper will identify the triggers of differentiated cooperation on asylum, its nature and its effects. It will devote two sections to presenting the effects: one investigating the long attempt at de-differentiation that followed the Dublin Convention and the other evaluating the impact of differentiation on the lack of effectiveness of the European asylum system. The paper will end with policy recommendations on differentiated integration in the field of asylum.

1. The triggers of differentiated cooperation

The reason why EU member states engaged in differentiated cooperation on asylum in 1990 had to do with the plan to abolish internal border controls (Comte 2018: 143-49). From the early 1980s onwards, the move to abolish border controls inside the European Community came as a response to the downturn following the second oil shock.

The share of intra-Community trade in member countries' total trade declined sharply and so did investment inside the Community. Business associations, the German government, governments of smaller states, border region associations and finally the European Commission pointed towards the role of customs barriers inside the Community to explain both trends (Comte 2018: 144). They compared the problems of the divided market of the Community to the dynamism of the larger and unified markets of the United States, Japan and some Latin American states. The rationale was that barriers between member states' territories slowed down cross-border exchanges and deterred large investment aiming to sell products across borders (Comte 2018: 144). In this context, border controls appeared costly and with

a detrimental effect on cross-border exchanges.

In March 1984, Herbert Pattberg, president of the Permanent Conference of Chambers of Commerce and Industry of the Community, considered that “the administrative obstacles at borders [meant ...] a harmful waste of time and money that it [was advisable] to eliminate as soon as possible”.³ In 1984, in an effort to promote exports and support the economic recovery, Germany started negotiating agreements to abolish border controls with all its Western neighbours, from Denmark to Austria. This trend culminated with the Schengen agreement of 14 June 1985 between Germany, France and the Benelux states to start simplifying border controls. In February 1986, the Single European Act between all the member states of the Community planned “an area without internal frontiers in which the free movement of goods, persons, services and capital [was] ensured”.⁴

Control of the movement of third-country nationals between member countries stood in the way of this project. As a result of relaxed border controls between member states’ territories, third-country nationals could move more easily across the EU. This was a sensitive issue and few member states were ready to proceed with abolishing internal border controls without coordinating their legislation on third-country nationals. France in particular was not as willing as Germany to abolish border controls to boost cross-border exchanges. A more protectionist member state, it was unwilling to forgo an important instrument to control third-country immigration (Comte 2018: 146-47). Member states agreed to cooperate on external border controls, visas and asylum law for third-country nationals (Comte 2018: 148).

There were significant differences among the standards applied by member states to asylum seekers. Those differences affected the access of applicants to the labour market: some states forbade it, others authorised it after various time limits, and some states restricted access to certain occupations only. Differences also affected access to housing, healthcare and subsistence assistance for asylum seekers and their family members.⁵ In addition, states applied different standards in refugee status recognition and there were significant differences in their recognition rates among the nationals of the same third countries (ECRE 2008). States also accepted different time limits to appeal negative decisions (Asylum Information Database 2019).

The capacity of asylum seekers to move across the EU territory without being controlled could then lead them to continue their journey until the country with the most favourable asylum standards – instead of submitting their application to the first EU state they reached. Such practice – referred to as “asylum shopping” – created the risk of overwhelming the asylum services of the countries with the most favourable asylum legislation. This risk was even more acute since from the

3 Archives centrales du Conseil de l’Union européenne (ACCUE), Liste Rouge 1842, Telex n° 074, 20 March 1984.

4 Article 13 of the *Single European Act*, OJ L 169/1-28, 29 June 1987, p. 1-28, <https://eur-lex.europa.eu/eli/treaty/sea/sign>.

5 ACCUE, CM4 DGH 1657.1, docs 11320/01, 11347/01, 5430/02.

late 1980s the number of asylum seekers pushing the external borders of the EU increased significantly under the effect of the collapse of the Communist bloc, the break-up of Yugoslavia and more numerous wars in the Middle East and North Africa. The inflow of asylum seekers to Western Europe increased from 67,000 in 1983 to 537,000 in 1991.⁶

Another risk was that asylum seekers would submit multiple applications over time in different member states, moving easily from one state to the other after each rejection. This created not only the risk of overburdening asylum services with a huge number of applications, but also the prospect of offering a long residency right to asylum seekers in the EU. Asylum seekers would stay in the EU as long as they had an application pending with a member state. This was at odds with member states' determination not to send any signal of easier immigration, which could lead more numerous migrants towards Europe. Member states then agreed that once an application had been rejected by one of them, it could not be resubmitted to another – thereby making even stronger the risk of asylum seekers targeting the most favourable states in the first place.⁷

There was no belief among policymakers at the time of the Dublin Convention that differentiated cooperation on asylum could be a viable option in the long run. The Netherlands, Greece and other member states advocated without ambiguity a joint commitment to harmonise standards towards asylum seekers and build common institutions (Comte 2018: 152).⁸ The reason why member states nevertheless resorted to differentiated cooperation has to do with the difficulty in reaching another agreement. Those with favourable asylum legislation were unwilling to undermine it. Their representatives considered such legislation an important aspect of their foreign policy, which mattered both for geopolitical and economic interests.⁹ French representatives also referred to the pressure of the United Nations on asylum issues.¹⁰ For such member states, only a scheme that would forcefully allocate asylum seekers to specific member states was acceptable. Other member states, such as Mediterranean member states, were unwilling to give more rights to asylum seekers in a context of intense migratory pressure, as it could undermine the protection of their labour markets or create additional costs for their social security systems. Reaching an agreement seemed particularly hard. Member states that would be the most exposed to the arrival of asylum seekers from third countries also opposed an arrangement that would place a major burden on the countries of first arrival. In March 1990, Spain denounced a scheme that “would force border states to transform into fortresses [... because of their] contiguity to sensitive countries or channels with regard to illegal immigration”.¹¹

6 Archives nationales, Paris (AN), 5 AG 4 EG 68, dossier 1, Note Isabelle Renouard, 18 April 1989.

7 ACCUE, Liste Rouge 1574, CIRC 3608/89, Declaration of E. Cazimajou, 17 March 1989.

8 ACCUE, CM2 WGI 77.2, SN/3143/88 (WGI 291); CM2 WGI 77.3, (WGI 468) (VI 33) Annex III.

9 Interview with a Swedish expert, 30 April 2020.

10 AN, 5 AG 4 EG 69, dossier 1, Telex E. Cazimajou, 15/11/1989, 5 AG 4 AH 18, dossier 1, 29/01/1990, Cresson-Dankert Meeting Preparation. ACCUE, Liste Rouge 1574, CIRC 3608/89, Liste Rouge 1575, Réunion du groupe des coordonnateurs, 15 September 1989.

11 ACCUE, CM2 WGI 77.5, SN 1833/90 (WGI 582) (AS 78); CM2 WGI 77.1, SN 2987/87 (WGI 133) (AS 8).

Two parallel negotiations were unfolding: one among the twelve EU member states inside the EU Council on the basis of the Single European Act, and another among the five signatories of the 1985 Schengen agreement on the basis of that agreement. Both looked for some form of cooperation in the field of asylum in order to create an area without internal borders among their members. British reluctance to abolish border checks impaired negotiations among the Twelve. For Spain, Italy and Greece, it mattered to make as much progress as possible among the Twelve in order to avoid being excluded from an area without internal borders that would take shape only among the Schengen Five. In that context, Mediterranean member states backed down and accepted the plan to sign among the Twelve on 15 June 1990 the same agreement on asylum that the Schengen Five were about to sign on 19 June (Paoli 2015).

2. The nature of differentiated cooperation

Initially cooperation maintained intact the heterogeneity in member states' legislation on asylum. The Dublin Convention boiled down to allocating each asylum seeker in the EU to one specific national system. The rule included a series of criteria to be applied successively:

A member state had already granted refugee status to a family member of the applicant (Article 4 Dublin; Article 35 Schengen); a member state had issued the applicant with an entry visa or a residence permit (Article 5 Dublin; Article 30, para. 1(a) Schengen); or an applicant had reached the territory of the contracting parties by irregularly crossing the border of a member state (Article 6 Dublin; Article 30, para. 1c Schengen). (Comte 2018: 154)

A last criterion referred to the country where the application was introduced for the first time (Article 8 Dublin).¹² Despite being the last mentioned, the last two criteria risked placing an overwhelming burden on front-line Mediterranean member states.

Northern states had accepted two provisions to mitigate this risk. Despite Danish and Dutch reluctance,¹³ they agreed that if an asylum seeker had stayed for at least six months in a member state after having irregularly crossed the external EU border of another member state, the former state would be responsible for the application (Article 6 Dublin). In addition, France made sure¹⁴ that a member state could still decide to examine an application even if it was not responsible on the basis of the other criteria (Article 9 Dublin). The extent of legal commitment was therefore limited to coordination on an intergovernmental basis.

Resorting to intergovernmental agreements was, in general in the negotiations surrounding the abolition of border controls, a way to reassure those member states

12 ACCUE, CM4 DGH 1106.3, A5-0059/1999.

13 ACCUE, CM2 WGI 77.2, (WGI 351) (AS 37), Annex.

14 ACCUE, Liste Rouge 1575, Réunion du groupe des coordonnateurs, 15 September 1989.

particularly reluctant to abolish their controls. France was confident that it could more easily exit such agreements and restore controls if it considered that other members were not respecting the agreements (Comte 2018: 148).

Yet, even though the cooperation on asylum ended up as an intergovernmental agreement in the Dublin Convention, deposited with the Government of Ireland, it nevertheless included several connections with EU institutions from the very beginning. The preparatory negotiations took place inside the EU Council and France proposed that the secretariat of the Council could fulfil certain tasks under the Convention.¹⁵ It was open only to EU member states and all member states signed it. One year and a half later, the Treaty of Maastricht made asylum a “matter of common interest”.¹⁶ It was clear that any development of the scheme would take place through EU institutions. One early development was the creation of a database of fingerprints to register asylum seekers and exchange information about them. The scheme, known as Eurodac, was established within the European Commission (Council of the European Union 2000).¹⁷

Intergovernmentalism offered a flexible framework for a variety of participation schemes in this cooperation on asylum. Despite opting out of cooperation on the abolition of border controls, the United Kingdom (UK) and, to a lesser extent, Ireland remained members of the cooperation on asylum (El-Enany 2017). According to a British expert interviewed for this research, the reason was that British authorities considered that they could get further options to return asylum seekers by being part of the cooperation on asylum. Despite keeping controls at their borders, British authorities could use the Dublin Convention to return to the country of first entry in the EU asylum seekers who had managed to bypass their own border controls after having crossed the EU border illegally.¹⁸ The same expert also indicates that the UK would have used the flexibility of the scheme to exit, should the rules for the relocation of asylum seekers become less advantageous.

Non-EU members that joined the Schengen area without border controls also joined the cooperation on asylum: Norway and Iceland in 2001, Switzerland in 2008 (Council of the European Union 2001, 2004a). Denmark, which is part of the Schengen area, has kept the strictly intergovernmental framework of cooperation until today, opting out of some of the recent developments.

As early as the 1990s however, participating states engaged in a process of de-differentiation to transfer responsibility to European institutions, harmonise standards and build new auxiliary agencies.

15 ACCUE, CM2 WGI 77.4, WGI 577 AS 77.

16 Title VI on cooperation in the field of Justice and Home Affairs.

17 ACCUE, CM4 DGH 1106.3, A5-0059/1999.

18 Interview, 27 April 2020.

3. A long attempt to de-differentiate

Despite engaging in differentiated cooperation, policymakers remained well aware of the shortcomings of a scheme that relied on the forceful distribution of asylum seekers among member countries against the preferences of asylum seekers to reach certain countries in particular. The United Nations High Commissioner for Refugees (UNHCR) highlighted that “it would not be unreasonable for an asylum seeker to seek out the most welcoming reception systems” or the one in which “the refugee status determination procedure [was] more likely to produce a positive outcome”.¹⁹ Differentiation was not considered as the new normal. It was a necessary step in the short term to achieve immediate objectives, but the ultimate goal was to harmonise.

Member states thus started a process of de-differentiation. In 1996, in the negotiations preparing the Treaty of Amsterdam, member states agreed to move the cooperation on asylum from the intergovernmental pillar to the Community pillar and therefore use Community procedures in that field. Government representatives put forward the goal of reaching more effectiveness by resorting to common standards. It was also a way to make the scheme more accountable. As underlined by Belgium’s Permanent Representative Philippe de Schoutheete in a letter to the Secretary General of the EU Council in November 1996, resorting to the Community method would ensure an “active participation of the European Parliament” and “uniformity of case law thanks to the intervention of the Court of Justice”. Both would lead to a better protection of individual rights.²⁰

After the incorporation of asylum cooperation in the Community pillar when the Treaty of Amsterdam entered into force on 1 May 1999, the European Council in Tampere in October 1999 gave the impetus to harmonise asylum standards (El-Emany 2017: 363). The heads of state and governments agreed on the goal of “a Common European Asylum System” with, “in the short term, common minimum conditions of reception of asylum seekers” (Council of the European Union 2003).

This step initiated a period of intense negotiations and legislative activity. Legislative acts were mostly directives, which leave member states some room of manoeuvre to reach the objectives agreed among them. The use of directives was not here a vector of differentiation – allowing member states to take different options on asylum. In the face of initially highly heterogeneous asylum standards, directives were a flexible way to harmonise standards by gradually narrowing down available options for member states. Legislative acts included in 2003 the second Dublin Regulation (343/2003) and a Reception Conditions Directive (2003/9/EC), in 2004 a Qualification Directive (2004/83/EC), in 2005 an Asylum Procedures Directive (2005/85/EC), in 2011 a new Qualification Directive (2011/95/EU) and in 2013 a new Reception Conditions Directive (2013/33/EU), a new Asylum Procedures Directive (2013/32/EU), a third Dublin Regulation (604/2013) and a new Eurodac Regulation (603/2013). Qualification directives dealt with the criteria to identify the persons in

19 ACCUE, CM4 DGH 1657.1, 11347/01.

20 ACCUE, Documents on the negotiation of the Treaty of Amsterdam, 1995-1997, letter of 13 November 1996, CONF/3857/96, and CONF/3976/96.

need of international protection, the assessment of applications on an individual basis and the content of international protection. Member states conducted the various negotiations with the objective of avoiding “asylum shopping”.²¹ They dealt with access to employment, self-employed activities, vocational training, social welfare, accommodation, the education system or integration programmes for asylum seekers or their children (Council of the European Union 2003, 2004b).

Member states also attempted to harmonise their responses to asylum requests by setting up common institutions. In 2011, they created the European Asylum Support Office (EASO) to provide information on countries of origin that all authorities in Europe could use.²² To meet asylum seekers’ needs in a more homogeneous way, the member states created the European Refugee Fund for the period 2008–2013. It was continued by the Asylum, Migration and Integration Fund (AMIF) for the period 2014–2020, with a planned budget of 3.1 billion euro. By the end of the period, the AMIF had spent 6.8 billion euro. It supported a variety of actions, including the relocation of asylum seekers under the Dublin criteria. The Fund allocated a lump sum for each person relocated (Baumgartner and Wagner 2018: 8). In 2016, member states also increased funding for the European Border and Coast Guard Agency to enforce the return of those whose applications were rejected (Slominski and Trauner 2018: 107).

Despite those developments, differences have subsisted among member states. There is still no common list of safe third countries.²³ All member states do not equally translate documents provided by applicants or do not have an equally independent judiciary.²⁴ In practice, recognition rates continue to diverge widely among member states for Iraqis – from 13 to 94 per cent depending on member states – Afghans – from 20 to 95 per cent – or Albanians – from 0 to 54 per cent (EASO 2015, ECRE 2015, Heijer et al. 2016: 609, 627). An asylum seeker also enjoys immediate access to the labour market in Sweden but must wait nine months in France (Poptcheva and Stuchlik 2015). Denmark used the fact it is not bound under Community law, but only under international law, to opt out of all directives. This allowed Denmark to reduce social security benefits for asylum seekers to become less attractive (Heijer et al. 2016: 614, UNHCR 2015).

The attempts to harmonise standards have also been faced with more numerous infringements. In September 2015, the European Commission launched forty infringement procedures in the field of asylum – mostly related to the lack of enforcement of European secondary legislation (European Commission 2015, Heijer et al. 2016: 625). An attempt at more centralised cooperation failed with a scheme set up in September 2015 by two Council decisions to relocate 160,000 seekers from Greece and Italy to other EU countries. Denmark, Ireland and the UK used their opt-outs to avoid taking part (Heijer et al. 2016: 614, Goldner Lang 2020). Four other member states – the Czech Republic, Hungary, Romania and Slovakia – voted

21 ACCUE, CM4 DGH 1763.4, CES 683/2002.

22 Interview with an Italian expert, 3 April 2020.

23 Interview with a German expert, 6 March 2020.

24 Interview with a Swedish expert, 30 April 2020.

against the scheme, but were outvoted by qualified majority in the Council. Two years later, a report by the Commission decided to launch an infringement procedure against two of those states – the Czech Republic and Hungary – plus Poland for failing to implement the scheme (Goldner Lang 2020). An attempt to resort to a more compelling scheme therefore resulted in a higher level of infringement.

In the face of lasting differentiation in the field of asylum, to what extent is the persistent lack of effectiveness of the European asylum system related to differentiation?

4. The impact of differentiation on effectiveness

The European asylum system was designed to solve two problems: protecting international refugees (Problem 1) and achieving an orderly movement of asylum seekers to support the absence of controls at the EU's internal borders (Problem 2). To evaluate the impact of differentiation on the capacity of the European asylum system to solve those problems, we cannot just compare the situation now with that before the differentiated arrangement was introduced.

Indeed, the main turning point of differentiation is thirty years old and since then, there has been a process of de-differentiation, which requires care in discerning what kind of impact can be attributed to differentiation in a gradually de-differentiated arrangement. Our assessment will focus on the two main effects of differentiation: first non-homogeneous standards and then flexible forms of participation.

As far as Problem 1 is concerned, it is fair to think that, compared to an ideal imaginary scenario where member states would have entirely harmonised their standards by following those most favourable for asylum seekers, differentiation has let lower standards subsist. The Norwegian government, courts in Germany and Belgium and the European Court of Human Rights (ECHR) have in several cases highlighted deficiencies in the Greek or Italian reception systems and advised against the returns of asylum seekers to those countries under the Dublin criteria (ECHR 2011 and 2014, HRW 2008). Some asylum seekers tried to avoid being returned to Greece or Italy by cutting or burning their fingerprints, which had been registered at their arrival for the Eurodac database (Aus 2006: 12).

Yet, there is no evidence that a non-differentiated scenario would have converged towards the most favourable standards and, compared to a scenario without European cooperation, which differentiation started, the problematic standards would have equally subsisted. There is also no evidence that accessing high-standard countries would have been easier for asylum seekers without European cooperation. This would have meant more border controls, and determination on the part of states to use various pretexts or lists of safe countries to return asylum seekers would have been as high in a context of high demand for asylum.

Could differentiation itself have encouraged a downgrading of standards? Higher-standard countries face more inflows than lower-standard countries. For instance, in 2019, Sweden – with high asylum standards – received almost 27,000 applications for asylum, whereas nearby Denmark – with lower asylum standards – received ten times fewer (Eurostat 2020).²⁵ When some states stop Dublin returns to lower-standard countries, as mentioned above, the latter actually benefit (Goldner Lang 2020). It looks therefore as if the system disadvantages higher-standard countries. Yet, again, without cooperation, flows may have taken the same direction and the question of stopping Dublin transfers would not exist. Dublin transfers rather protect higher-standard countries, by avoiding a situation where they become overburdened. As a result, if differentiation is to be considered the condition of European cooperation, as we have shown earlier, it did not have a negative effect on the protection of refugees.

As far as Problem 2 is concerned, it seems fair to think that the persistence of non-homogeneous standards in the EU could have led asylum seekers to refuse to remain in certain countries under the Dublin arrangement and target instead other countries with more favourable standards. This affects negatively the orderly movement of asylum seekers inside the EU and, accordingly, the continued absence of controls at internal borders. In September 2015, the Hungarian police got bogged down for four days in a stand-off with groups of asylum seekers. The police were trying to enforce the Dublin regulation and process those asylum applications in Hungary, while asylum seekers preferred to continue their journey towards Austria and Germany.²⁶ After the subsequent inflow from Hungary, Germany decided to restore temporary controls on its border with Austria on 13 September. As asylum seekers eventually targeted particularly Sweden, which had the most favourable asylum standards in the EU, the Swedish government restored temporary controls at its border with Denmark on 24 November 2015 (Crouch 2015). Random controls by the police have continued until today in the trains between Sweden and Denmark, with the number of trains being also reduced.²⁷

Again, compared to a scenario where member states had entirely harmonised their standards, one might think that differentiation has contributed to disorderly movements, thereby putting in danger the absence of controls at internal borders. Yet, in a scenario without cooperation, asylum seekers would have been tempted to follow the same routes. Without European institutions to help organise movements and individual states acting more selfishly in the absence of a cooperation framework, the potential for the absence of controls at internal borders would have been even lower. Therefore, and again, if differentiation is to be considered the condition of European cooperation, it had a positive effect on the potential to remove controls at internal borders.

25 Danish population is nearly 60 per cent of Swedish population.

26 “Migrant Crisis: Hundreds Force Way Past Hungarian Police”, in BBC News, 8 September 2015, <https://www.bbc.com/news/world-europe-34180378>.

27 Interview with a Swedish expert, 30 April 2020.

As far as the flexible forms of participation allowed by the differentiated arrangement are concerned, the question is whether they could have amplified the detrimental effects of non-homogeneous standards. As already mentioned in Section 3, Denmark used its opt-out to avoid the de-differentiation process and to lower its asylum standards in an attempt to deter asylum seekers. Denmark has achieved the return of three times as many asylum seekers to other Dublin members (outgoing Dublin transfers) than it has received from such members (incoming Dublin transfers) (Slominski and Trauner 2018: 110, Heijer et al. 2016: 614). Denmark therefore offers lower asylum standards, which may lead asylum seekers to target other countries, thereby contributing to less orderly flows. Yet the fact that this negative effect has been limited to Denmark implies that it should not be overestimated. For other opt-out countries – the UK and Ireland – there is no evidence of a serious imbalance between incoming and outgoing Dublin transfers.²⁸ Furthermore, compared to a scenario without European cooperation, which differentiation made possible, the exact same problem of countries trying to become unattractive for asylum seekers would have occurred.

Let's now assume that differentiation is not a condition of cooperation and that a non-flexible cooperation with homogeneous standards is possible. Would such assumption modify our assessment of the impact of differentiation on the problem-solving capacity of the European asylum system?

Even considering the scenario where states would entirely harmonise their standards, it is not clear whether the above-mentioned problems of effectiveness would disappear. As far as Problem 1 is concerned, it is actually unlikely that a non-differentiated scheme would converge towards the most favourable asylum standards. As far as Problem 2 is concerned, especially given the process of de-differentiation that has already taken place, we should take into consideration that what asylum seekers are looking for when they target specific EU countries is not only – and probably not mainly – a favourable treatment. They are also looking for high wages, high benefits and a vibrant labour market to increase their living standards. Accordingly, asylum seekers have targeted Germany, the UK and Nordic countries. For these reasons, perfectly harmonised cooperation on asylum would probably not have a higher problem-solving capacity than the current cooperation with its leftovers of differentiation.

5. Policy recommendations: differentiated integration

The persisting problems of the European asylum system have less to do with what is left of differentiation than with the basic predicament created by intergovernmental cooperation in this policy area. By contrast, an *integrated* asylum procedure, carried out no longer by national states but by the EU, could solve those persisting

28 Interview with a British expert, 27 April 2020.



problems. *Integration* means the transfer of the management of this policy area to the supranational level. Individual member states would no longer be in charge of the asylum procedure, which would be executed by a European body. Only such an integrated system could allow recognised refugees to move freely across the territories of participating member countries, thereby decreasing the importance for asylum seekers to lodge their application in a particular country (Heijer et al. 2016: 611-12). The burden to handle applications would no longer fall on front-line member states, but on a European body. Infringements would be less likely when the policy is no longer executed by individual member states but driven by an EU body. Less differentiated cooperation would do nothing to solve these problems and may even increase infringements. As we have seen above indeed, the main cases of non-compliance did not affect the differentiated arrangement, but the attempts at de-differentiation (Goldner Lang 2020).

There are obstacles to integration in the field of asylum. For reasons of national sovereignty, a number of member states are likely to reject this prospect. Sweden, for instance, considers that international protection must remain a national prerogative – that there is a specific tradition of international protection in Sweden that must continue.²⁹ That is why differentiation can be useful. Differentiated integration would include initially only those member states that are ready to integrate their asylum systems and transfer the responsibility to the supranational level.

The scheme would be open to all EU member states as a form of enhanced cooperation. As German support has been essential to maintain the current system, the participation of Germany would be a pre-requisite for any integration including front-line member states (Slominski and Trauner 2018: 101, 108-9). Such a scenario may not prove more costly for Germany than the current one, given the already large increases in financial commitments and the large number of applications in Germany.

The EU Council would set up a European Asylum Office as an EU agency under the supervision of the Directorate-General of Migration and Home Affairs in the European Commission. EU member states so willing could opt out of the Council decision and of the new body. The European Parliament and the participating states in the Council by qualified majority would define in two regulations the exact standards and procedures applied by the new body.

The European Asylum Office would take up asylum services and integrate existing bodies in participating countries. It would receive and handle all asylum applications in participating countries. When a third-country national lodges an application for asylum in one participating country, national authorities in that country would transfer this person to the European Asylum Office service in the country. Since there would be only one asylum system, there would be no need to transfer that person to another country. The European Asylum Office would handle the application where it was lodged. If the Office recognises the status of refugee, that person would remain administratively connected to the member state where the application has

29 Interview with a Swedish expert, 30 April 2020.

been lodged but would be free to move elsewhere in another participating country to look for employment. If the Office does not recognise the status of refugee, it would indicate to the authorities of the country to return the applicant to his or her place of origin – with the support, if applicable, of the European Border and Coast Guard Agency. This integrated system would remain part of the differentiated cooperation under the Dublin regulation. That is to say that the new body would apply the current Dublin criteria as if it was one single entity. This would make it possible to maintain cooperation with those EU member states that do not take part in the integrated scheme, and continue with them the gradual process of de-differentiation.

The Migration and Home Affairs DG would monitor the European Asylum Office and ensure compliance with the regulations. The European Court of Justice would be competent in this matter.

Conclusion

To conclude, differentiated cooperation was a successful instrument to start European cooperation on asylum and thereby abolish internal border controls in the mid 1990s. Differentiated cooperation also triggered a dynamic of de-differentiation in the field of asylum that has lasted for about twenty years. If member states had wanted to achieve uniform cooperation immediately, not only would they have almost certainly failed, they would also have almost certainly had to give up the abolition of internal border controls.

There is no evidence that differentiated cooperation has had any negative impact in solving the problems the European asylum system is meant to address.

The solution to the remaining problems of the European asylum system is not to be found in un-differentiated cooperation, but in further differentiated integration among those member states that are willing to transfer the management of this area to the supranational level. Only such a scheme would allow refugees to move freely among participating countries and thereby would put an end to the various Dublin transfers and to the difficulty the Dublin system has faced in managing the movements of asylum seekers.

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EU Integration and Differentiation
for Effectiveness and Accountability

Differentiation has become the new normal in the European Union (EU) and one of the most crucial matters in defining its future. A certain degree of differentiation has always been part of the European integration project since its early days. The Eurozone and the Schengen area have further consolidated this trend into long-term projects of differentiated integration among EU Member States.

A number of unprecedented internal and external challenges to the EU, however, including the financial and economic crisis, the migration phenomenon, renewed geopolitical tensions and Brexit, have reinforced today the belief that **more flexibility is needed within the complex EU machinery**. A Permanent Structured Cooperation, for example, has been launched in the field of defence, enabling groups of willing and able Member States to join forces through new, flexible arrangements. Differentiation could offer a way forward also in many other key policy fields within the Union, where uniformity is undesirable or unattainable, as well as in the design of EU external action within an increasingly unstable global environment, offering manifold models of cooperation between the EU and candidate countries, potential accession countries and associated third countries.

EU IDEA's key goal is to address **whether, how much and what form of differentiation is not only compatible with, but is also conducive to a more effective, cohesive and democratic EU**. The basic claim of the project is that differentiation is not only necessary to address current challenges more effectively, by making the Union more resilient and responsive to citizens. Differentiation is also desirable as long as such flexibility is compatible with the core principles of the EU's constitutionalism and identity, sustainable in terms of governance, and acceptable to EU citizens, Member States and affected third partners.



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