EU Differentiation in Border, Asylum and Police Cooperation: Drivers, Effectiveness and Crisis

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Abstract

The leading policy objective in EU differentiation underlying border, asylum and police cooperation has been to achieve the abolition of internal border controls to create a borderless European single market. Germany has been the main proponent kickstarting and maintaining such agenda through differentiation. For roughly two decades, differentiation has proved effective to abolish internal border controls, integrate the related cooperation in EU structures, enlist the cooperation of non-EU member states, and produce joint policy outputs on asylum, external borders and police affairs. Yet, growing external migration challenges have undermined the effectiveness and legitimacy of existing arrangements, ushering in disintegration tendencies.

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Introduction

Cooperation in the European Union on internal and external borders, asylum and police matters – “Justice and Home Affairs” (J HA) – has moved from a peripheral aspect of EU intergovernmental cooperation to a key objective. Its core is the abolition of internal border controls inside the European Single Market. The deepening of EU competences to achieve this objective has not been uncontroversial. The variety of national preferences has prompted differentiation among EU member states and associated non-members has yielded undisputable results and fostered EU integration in a vast economic space without internal borders in Europe. However, it has repeatedly failed to achieve integration beyond a certain level. Over the last decade, some arrangements have even faced gradual erosion.

This paper reviews the dynamics behind this trajectory of differentiated integration (DI) in the fields of asylum, borders and police cooperation, applying the framework developed in the EU IDEA project (Lavenex and Križić 2019). We examine governance structures, their effectiveness and their legitimacy. Building on our research and existing accounts, this analysis also synthesises the four policy papers conducted within the EU IDEA project on asylum (Comte 2020), internal borders (De Somer et al. 2020), external migration (Okyay et al. 2020) and police (Mortera-Martínez et al. 2021) cooperation.

This paper makes four contributions to the existing literature on DI. First, regarding the triggers of DI, we emphasise the driving role of Germany as a weak Euro-centred hegemon promoting differentiation to achieve integration. This departs from classic explanations of DI which account for differentiation through the role of states not taking part in differentiated arrangements, that is, the role of “comparatively Eurosceptic countries opting out quasi-permanently from the deepening of integration in areas of high politics” (Schimmelfennig and Winzen 2014: 368; see also Schimmelfennig and Winzen 2020: 6-7). In J HA, the two primary Eurosceptic member states in the pre-Brexit EU were the UK and Denmark, and indeed both countries had negotiated a wide set of “opt-out” and selective “opt-in” arrangements in J HA. Based on a historical investigation of differentiation over border, asylum and police cooperation, this article shifts the focus from the non-members in differentiated arrangements to the proponents of these arrangements, to complement and reframe the debate on DI. This approach allows for a more comprehensive understanding of the mechanisms and dynamics behind differentiation.

Second, we clarify how these triggers of differentiation have left their marks on governance structures. Compromises in the rules, forms of commitment, degrees of participation and the strategic outreach towards non-EU states were essential to develop this cooperation, allowing the centripetal effects to play out and progressively incorporate partners who would otherwise favour other forms of international organisation. After reaching a critical number of participants, European institutions could take charge of the arrangement, gradually expanding and harmonising the scheme.
Third, has DI performed as an effective mode of governance in JHA in terms of differentiation has overcome, step by step, important obstacles to the abolition of internal border controls and has been resilient enough to result in de-differentiation, i.e., the gradual homogenisation of rules and legal commitments and the extension of participation to all EU members. Assessed in terms of the “relative improvement” caused by the presence of a DI framework compared to the “hypothetical state of affairs” that would have occurred if the differentiated institutions had not been reduced the barriers for border and asylum cooperation, and has facilitated policy outputs. External differentiation has enlisted third countries into the control of QMKVEXMSRWJERHKSMRKSJVIJKIIW30EJIXEP

On other measures of effectiveness, however, and in the longer run, DI has fared less well. Regarding policy outcomes, differentiation has allowed for a great scope of discretion for the member states, for instance regarding the determination of asylum status or the reception of asylum seekers. While facilitating the adoption of directives, differentiation has perpetuated the diversity of asylum standards within the EU, thereby failing to guarantee unified standards of protection and to reduce incentives for secondary movements of asylum seekers and refugees. Moreover, member states have shown increasing levels of non-compliance with EU obligations and the unsustainable burden placed on the points of entry in Greece, Malta or Italy have contributed to the collapse of national asylum systems and the regression of asylum standards in Greece, but also in Denmark, Hungary and Poland. Furthermore, the strains on the Common European Asylum System have resulted in some restoration of internal border controls. As in the early years of integration, Germany has sought to stabilise the system by taking in a vast share of asylum seekers from Syria in 2015. Yet, it has not succeeded in overcoming opposition to a relocation system to promote a more balanced distribution of asylum seekers and refugees in Europe.

Fourth, we show that the failure of DI to effectively deal with external migration pressures in line with agreed standards necessarily impacts on its legitimacy. The Schengen acquis of internal freedom of movement and the Dublin system for allocating asylum seekers work well in relatively stable situations where external pressures do not mount (Börzel and Risse 2018). The fragile dynamic from differentiation to de-differentiation promoted by Germany and other pro-European member states started to falter from 2011 with the first external shocks induced by the Arab uprisings. The crisis of European asylum and migration policies reached a peak with uncoordinated moves targeted at advancing (e.g., Germany’s suspension of the Dublin regulation to take in Syrian refugees in 2015) or curbing common policies (e.g., Hungary’s rejection of refugee relocation schemes) and ambiguous deals with third countries with doubtful human rights records have undermined popular belief in the appropriateness of existing arrangements (Comte 2020, Lavenex and...
The legitimacy of those arrangements has eroded as a result.

The paper discusses successively first the triggers, second the governance and third the effectiveness and legitimacy of DI in asylum, border and police cooperation.

1. Triggers of differentiation

The impetus for resorting to differentiation in border, asylum and police matters originates in deeper economic integration objectives promoted most forcefully by the German government in the early 1980s: creating a vast economic space without internal borders in Europe. As few member states could accept this move, integration should progress via differentiation: starting with a limited group of states and forging compromises with reluctant counterparts, ultimately creating a centripetal dynamic towards de-differentiation.

This development could build on a longer tradition in the political thought of Germany (Brunazzo 2019). In 1955, German Secretary of State Walter Hallstein considered that European integration could not proceed satisfactorily within the broad framework of the Organisation for European Economic Co-operation, which encompassed all Western Europe, including the UK. He invited his five partners in the European Coal and Steel Community to proceed towards integration: “The federal government [...] is convinced that the progress to be made must be sought within the more restricted framework of the Six, where only close ties and solid forms of organisation are possible, for the moment”.

The notion of a “Core Europe” re-emerged throughout European integration, for instance in the 1994 report by German Christian Democratic Union politicians Wolfgang Schäuble and Karl Lamers. The core for Germany meant a focus on France and the Benelux countries to create centripetal effects counteracting centrifugal forces. The plan alarmed British Prime Minister John Major but received the support of French President Jacques Chirac. In May 2000, German Foreign Minister Joschka Fischer again declared that “further differentiation will be inevitable” (Brunazzo 2019: 11-13, 15). To some extent, differentiated integration in JHA followed this line of thought.

The proposal to abolish internal border controls came in response to the fall in international trade and cross-border investment within Europe following the second oil shock. Business associations, the German government, together with the Benelux governments, border region associations and, finally, the European Commission pointed towards the economic costs of persisting barriers between the national markets of EC member states (Bigo 1996, Comte 2018a: 144). In 1984, the German president of the Permanent Conference of Chambers of Commerce and Industry noted that “the administrative obstacles at borders [...] a harmful waste of time and money that it [was advisable] to...”
eliminate as soon as possible”.

Even though the movement for the abolition of internal border controls was transnational, the German export nation was the most active in promoting change. Eliminating internal border controls was a priority for Germany, as it was for its Western neighbours. In 1984, Germany started negotiating agreements to abolish border controls with all its Western neighbours, from Denmark to Austria.

The French did not share German and Benelux preferences for the abolition of internal border controls. Even though the movement for the abolition of internal border controls was transnational, the French did not share German and Benelux preferences for the abolition of internal border controls. France had stepped up its border controls throughout the 1970s and early 1980s to enforce its increasingly restrictive migration policies (Comte 2018b). When, in July 1982, the Commission and Benelux countries supported alleviating controls, the trend in France was for even more controls (Pudlat 2011: 307-308). At the beginning of August 1983, the French Socialist Secretary of State for Immigrants, Georgina Dufoix, announced in an interview with Le Monde a “total control of migration” and “the locking of borders for illegal and new immigrants” (Benoit 1983).

Yet, German calls for the abolition of internal border checks gradually led the French to flip their position. As France signed an agreement with Germany in Saarbrücken on 13 July 1984 to consider the gradual abolition of checks at the Franco-German border, the French Ministry for European Affairs' official communication nevertheless denied that there would be discussions on “dismantling the legal control and repression system (fight against drugs and terrorism, exchange control, fight against illegal immigration)” (Lavenex 2018: 1201f.). Internal sources in the Ministry also underlined that “it is very important to clearly show the public that the controls against non-citizens of the EC are fully maintained” – which was incompatible with the objective to abolish border checks. In the subsequent discussions, the French were clear that they could not accept to transfer competencies in this field to European institutions, including the EC Council of Ministers.

The Schengen agreement of 14 June 1985 between Germany, France and the Benelux states thus took place outside of the EC institutional framework, to attempt to simplify border controls. The fact that negotiations for France's north-eastern borders began with the Schengen members only was helpful to overcome French reluctance. In addition, the French understood that they could receive attractive compensation, including in negotiating “compensatory measures for the safeguarding of internal security”.

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3 The French original text refers to “le verrouillage des frontières”.
5 Archives Nationales, 5 AG 4 CM 41, 4, 2, Note à l'attention de M. Sautter, 19 June 1984.
offer them a say to restrict the migration policies of their neighbours, including
by giving France leverage on Italy and Spain, initially excluded from Schengen.
Achieving a borderless European economic space would mean lengthy negotiations
to set up common external border controls, visa policies, asylum policies and police
TVSGIHYVWX [EWPWTEGEXIS] YRGXMSPRMWXWXMPPZIIVJSQSRI0 IPHSJMRXIVE XERSLXILIZM?IQERRXLEREHPFIVEXEXIQTXF]*VERGIFYXEPWS+HVGER
ERHXLII&IRIPYGSRYXWVMXSRMQRVIRGLXLQMKVMSRTPMGMISJXSLXILYVSTI
GSYRXVMW0EZIRI\E8LIHIRTGYRGMEMSR SJ àEurope passoire” and “asylum-
shopping” dramatised the risks of unauthorised border crossings and spread the fear
that immigrants could exploit the absence of border controls and the different
EWJPQWXERHEVW[MXLMR]YVSTIXSPSHKIQYPXMTPIEWJOYQETTPMGEAXMRSW&MKX
0EZIRIF'SQXI

When the first negotiations to implement the Schengen project occurred in the late
1980s, immigration from third countries was at historically high levels: the inflow
of asylum seekers to Western Europe increased from 67,000 in 1983 to 537,000 in
1991, as the Eastern Bloc was opening.

The main French concerns were towards the south. In March 1989, the French Minister of the Interior, Pierre Joxe, asked Prime
Minister Michel Rocard: “What if tomorrow a serious political and social crisis in a
Maghreb country brought to us waves of asylum seekers for completely justified
reasons, both political and economic? […] We must […] avoid solutions that would
leave us helpless in the event of an acute crisis”.

In Schengen negotiations, Joxe asked for the obligation for third-country nationals to declare themselves as soon as
they entered French territory at the border.

For France, the possibility to force Mediterranean member states to adopt stricter
immigration policies was a key advantage of the small Schengen framework. France
was able to obtain an agreement on a hard external border, later to be imposed on
Mediterranean member states if they wanted to join the borderless European market.

8 Archives Nationales, 5 AG 4 EG 68, dossier 1, Note Isabelle Renouard, 18 April 1989.
9 Archives Nationales, 5 AG 4 EG 68, dossier 1.
10 Archives Nationales, 5 AG 4 EG 68, dossier 2, Rapport du Groupe ‘Circulation des personnes’, 1 December 1988; 5 AG 4 EG 68, dossier 1, Ministre de l’Intérieur à Président de la République, 7
December 1988; Ministère des Affaires étrangères, 17 April 1989.
12 Archives Nationales, 5 AG 4 EG 69, dossier 1, Ministère des Affaires étrangères, Note d’E. Cazimajou, 20 February 1989.
13 Archives Nationales, 5 AG 4 EG 69, dossier 1.
14 Archives Nationales, 5 AG 4 EG 69, dossier 1, Compte rendu de rencontre avec MM. Yanes et
Besides the fear of losing control over third-country immigration, France also feared those various French fears, Germany not only gave France a pre-eminent role in the definition of external border, asylum and police cooperation by starting negotiations with France in the Schengen framework of five members, it also acquiesced to the long-term French request for European monetary integration, which was decisive in leading France to side with Germany on Schengen matters (Comte 2018a: 146-148).

After the Schengen Implementation Convention was signed on 19 June 1990, Italy, Spain, Portugal and Greece were wary of taking up the obligation to step up external border controls and be responsible for examining more claims of asylum seekers. At the same time, however, these countries shared a strong interest in the Single Market and wanted to benefit from the abolition of internal border controls. Their consent was won through this simple issue-linkage: to have the five Schengen states (Germany, France and the Benelux states) abolish their border controls with them, they had to join the Schengen Implementation Convention, which entailed strengthening controls at the Franco-Italian border. Even then, the French police would continue, within a 20-kilometre demarcation line behind the border, controls that were mobile and “random” – in practice based on racial profiling (Casella Colombeau 2020: 2261-2262).

Neither compensation nor issue-linkages were able to overcome the opposition by Denmark and the United Kingdom. In the UK, reluctance on abolishing border controls originated in the fact that Great Britain is an island and controls at its ports and airports were effective in stopping “the movement of drugs, of terrorists and of illegal immigrants”, as Prime Minister Margaret Thatcher put it in 1988 (Thatcher 1988, Comte 2018a: 150-151). For Denmark a particular area of concern, besides the control of immigration, was that the German police could enter Danish territory uncontrolled without border checks. During the Maastricht negotiations in 1990 and 1991, Denmark and the UK were the leading opponents who “blocked German plans for the full Communitarisation of immigration and asylum policy” (Adler-Nissen 2014: 116).

This reluctance in those two countries was not only related to issues specific to border controls. It also matched a broader attitude towards European integration. According to the calculations of Schimmelfennig and Winzen, Denmark and the UK accounted for nearly half of differentiated arrangements in the European Union in 2014 (Adler-Nissen 2014: 366, see also Adler-Nissen 2020: 6-7). The UK never abolished its border checks and eventually left the EU in 2020. Denmark did abolish border checks but then restored them at its border with Germany spectacularly in 2011 – before removing them once more (Adler-Nissen 2014: 134). Ireland, which has no land border with EU members other than the UK, had to follow British steps.
to preserve their common travel area and kept its border controls with the rest of the EU. 

In short, differentiation in JHA affairs aimed to abolish internal border controls to deepen the internal market while ensuring compensatory measures at external borders and in asylum and police matters. Germany was the driver of this agenda, soon joined by France whose reluctance diminished due to German economic concessions and the joint interests in controlling immigration. Given their pre-existing open border arrangement and pro-European stance, the Benelux countries were also on board. Differentiation would then serve to proceed among those like-minded Euro-centred states, gradually deepening their cooperation and extending it to other partners. Having explained what triggered differentiation in JHA matters, we turn to the governance of differentiated integration and the role of EU institutions – the latter gradually replacing direct German interventions.

2. Governance of differentiation

2.1 Standards and legal instruments

The member states resorted to an array of differentiated arrangements to proceed towards the abolition of border controls and compensatory measures regarding the same provisions about asylum as in the Schengen Implementation Convention, of only one member state to examine an asylum claim implied that member states

necessary to include the most reluctant members. In the light of wide differences across countries (Adler-Nissen 2009: 73) this solution was not sustainable, however, and under the Treaty of Amsterdam the member states adopted directives to establish minimum asylum standards. Despite the recasting of these directives under the Lisbon Treaty, EU asylum law still conceded a wide margin of discretion to the composition of asylum seekers, refugee recognition rates have varied from 25 per cent to 70 per cent across countries (Leerkes 2015). Also, an asylum seeker could take up employment immediately upon applying for asylum in Sweden, whereas they had to wait nine months in France. Social security benefits for asylum seekers have been lower in Denmark than in other countries (den Heijer et al. 2016: 609, 614). The UK, which did not abolish border checks, joined because the criteria to allocate applicants meant it would receive further options to return them to their country of first entry in the EU (Asderaki and Markozani 2019).
The core of cooperation on abolishing internal border checks also included second Schengen agreements, a compensatory measure for reluctant members – PEXIV | SV QEP MWH RXL 7GLIR KIR & SVHIVW’ SHIS MJX WIP J WY FWIU Y I RXP | VIZ WIMIÅ EPPS | IHWXEXIWSXSVXSVIFSVHIVGSRVXSPWY RHIVWTIGM | GGSRMHXMSRW8LIWIMRQG | VXJSVIWEFP 3zxIRWYW GLEWWTXSXJIRXWGSRHVWMSYXWXLIEWXSXRX WIGYVMX | ERHXLMVH | VSOHI GMI RGMWXEXLII | IIVR EFSVHSVHJSXLI 7GLIRKR EVIE ’SRXVSPW GSY PHRSXIGIIHWM|QRSXLWM RXLI | VXGEWIX[SQRSXLWM RXLI WIGSRHERHX[S|EVWMRXLXLMVH(I7S4V 2)I XSSLIWISEVEMXMSRM R standards, some states could conclude special agreements allowing certain border TVEGXMGYW | SVMRWXERGIMXLXLI’ LEQF ÉV | FMPEXIVEPEKVIQIRXMWKRIHM3GXSFG | *VERGI XVEHIHM WX WF EFSPMXMSR SJ W|WXIQEXMG GLIGOW EX XLI-XEMERM FSVHIV JSV | -XEPJWGSQXMQIXR XS VIEHQM XTVWSRW [LSLEHX VERWXM XI HZEMXMXIVMVXS ] E | ’SPSFQIEY

& IWMHIWHMJ JIVRXMEXMSRM RXERHEHVWH | I MFMPMX ] E QSRKRXL IQFQIFIVWXEXIWE P differentiation in legal instruments. After British and Danish opposition prevented Germany from communitarising the compensatory measures to the abolition of border controls in the Treaty of Maastricht, the member states created a pillar structure in that treaty, with a third pillar devoted to ‘Justice and Home Affairs’.” It was intergovernmental, with initially little involvement of EU institutions. Resorting to intergovernmental agreements was a way to reassure those member states VI PYGXERX S EFS PMW LXLIMVGSRXVSPW | VERGI [EW GSR | HIRX XLEX MX GSY PH QSVI I exit such intergovernmental agreements and restore controls if it considered that SXLVIQIFIVW [IVIRSXVIWTIGXM RXL IQ SQXI (IRQEVOI ZIRXY EPP] joined Schengen cooperation on the abolition of internal border checks as the other QIQFIVW SJ XL2SVHMG4EWWTSTX9RM SR NSMRIH XL1 J9 SV XL 7GLIR KIR EVIE ‘X QEXXIXIHXS[IRQEVOXXSTVIWZIXLWMWRYRSMRERH0(IMFM PMX ] MRPKEPMR WXY QIRXW | IRWYVI|ERMWLT EVXMGMTX MSR% HPIV2MWWIR %W QIQFIVWEXI W|IXRIHIH Community procedures in this area with the Treaty of Amsterdam, they accepted that intergovernmental procedures would still apply to Denmark and, therefore, that different member states would be subject to different types of legal instruments. A “Protocol on the Position on Denmark” annexed to the treaty exempted Denmark JV SQ’ SQYRM X | TVSGIH Y VIW% HPIV2MWWIR4IVW

2.2 Opt-outs

The dominant form of differentiation on participation occurred when the member states integrated while allowing some of them to “opt out” of new arrangements. Even though opt-outs are the most emblematic aspect of EU differentiation, in border, asylum and police matters they have often resulted from attempts to de-HMJJIVIRXMEI TVIZMSYW HMJJIVIRXMEIHEVEVERKIQIRXW1SREV8IOM R-R EPP9QIQFIVWXEXIWLEHWM RKRIH XL1 7GLIRKIR‘SRZIXMRSRI GITX the UK and Ireland. The Parliamentary victory of the Labour government in the UK helped Schengen members incorporate their arrangement into the European treaties with the Treaty of Amsterdam. Granting the UK and Ireland a formal opt-out from the Schengen acquis[EWXLIRI1G111W VJ]GRSHXMMSR%HPIV2MWWIR8LITVXSXSGP
on the Schengen acquis\textsuperscript{8} Integrated border management and police cooperation measures on a case-by-case basis if they wished, subject to unanimous approval of the other participating states.\textsuperscript{16} Likewise, as previously mentioned, Denmark received an opt-out to continue participating in the cooperation in this area on an intergovernmental basis, while other states were bound under Community law. Denmark used this opt-out to diverge further from other member states regarding rights of residence and legal status.

85 EGMIZI HIHMJIVIRXMEXMSRXL8VIELSJ0MWFSRWMKRIHMRIHQIQFIV incorporated into EU law all border, asylum and police cooperation. All the powers of the Commission and the EU Court of Justice would accordingly apply. This was however the context of further differentiation in participation. Denmark extended its opt-out to diverge further from other member states regarding asylum standards in the following years (Comte 2020: 11).

To achieve de-differentiation the Treaty of Lisbon, signed in December 2007, incorporated into EU law all border, asylum and police cooperation. All the powers of the Commission and the EU Court of Justice would accordingly apply. This was however the context of further differentiation in participation. Denmark extended its opt-out for the entire area (Adler-Nissen 2009: 75). Likewise, the British and Irish opt-outs included this whole area, with an opt-back-in clause on a case-by-case basis.\textsuperscript{17} Protocol No. 19 annexed to the Treaty of Lisbon allowed Ireland and the UK to request at any time “to take part in some or all of the provisions of the Schengen acquis” (Art. (17)QIV 8L9MRSVQIHSLIJYSVSTIERSYRGMPSEXWXMWMXRSXIVGMIWEGSQTIXISTXYSXMR.YPJISVIXLIEVIEWYGGLHYPIHXGSQIJYPYRHIVXSLJYVSTIERSYVXSJ.YWXMGINYVMWHMXMSRSRQIQFIV

2.3 External differentiation

To proceed towards integration, the Euro-centred member states compromised not only on standards, types of legal instruments and internal membership, but also by taking in non-EU members where this could help integrate. They have included western European countries into the Schengen area, and have enlisted third countries at the eastern and southern periphery to expand the EU system of migration management.

- R XSLLEZI (IRQEVO7[IHIERH*MRPERHEFSPMWLXLIIMVGSRXVSPWXLIEXLVQIQFIVWXEXIWEGGITXIEXHRSMXSLI7GLIRKIREVIESEVR)ERH-GIPERH[LMGLEHFIIRTEVXSXLI25VHM4GEWWTXSV9RMSMRMXLSYMXRIVREPSVSHIVW[MMLXLIXLIXLIXLIXLVSLIVWWMRIMGOMI[MMLIRMERHLXIQLIQFIVWXEXIWEXIRMXKVEXIMRXSLI7GLIRKIREVIE7MXIVPERHERM0MILGXLIRWXMRXS[SGSYRXVMILEX][IVPSOGIHM[XLXMRLXLIX9FYXHMHRSX[ERXXSNSMRMXIRMXMDPOEZIRI4IIWVRXLIQMHHPIS[XLI]90VWMLIWXVIKMRSWXLI]IVIEQENVSQGQYRMGEXMSRSHIMRXLIIheart of Europe. Their borders could, therefore, not be transformed into hard external borders without seriously hampering the openness of the internal European market.

\textsuperscript{16} Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland, attached to the Treaty of Amsterdam, LXXTWIYV PIUYVSTEIYOI9V7IZ09V71VZHS#YVM!'10)()C("02,810

\textsuperscript{17} Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security, and Justice, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/PRO/21

\textsuperscript{18} List of Union acts adopted before the entry into force of the Lisbon Treaty in the field of police cooperation and judicial cooperation in criminal matters which cease to apply to the United Kingdom as from 1 December 2014 pursuant to Article 10(4), second sentence, of Protocol (No 36) on transitional provisions”, in Official Journal of the European Union (IGIQFIV LXTWIYVPI\IVYSTEIYPIKEPSGRXIRX28<8#YVM!'10)\<}
External differentiation has also extended to countries outside of this market located on migratory routes. Their enlisting into the fight against irregular immigration has facilitated the continued absence of border checks within the EU. This “external dimension” of EU cooperation in border and migration management, i.e., flexible cooperation with neighbouring countries of transit for migrants to the EU, has developed in parallel to internal cooperation since the early 1990s (Lavenex 1999, 2006a). While part and parcel of the EU’s “global approach to migration and mobility”, it has also been driven by single EU member states, leveraging on their respective diplomatic links (Okyay et al. 2020).

In the 1990s, Germany was a driving force extending JHA cooperation to the candidate countries of Central and Eastern Europe. In 2006, the Austrian Presidency of the EU Council supported the “Police Cooperation Convention for Southeast Europe” on border controls with Albania, Bosnia-and-Herzegovina, Moldova, Montenegro, North Macedonia and Serbia. Spain developed ties with Morocco, and the EU later co-funded the Seahorse Atlantic network of border surveillance, promoted by Spain and involving Morocco and other countries on the West African coast. The EU also endorsed agreements between Italy and Libya on external border controls and funded programmes that integrated Libya in managing the EU’s outer border. The EU–Turkey statement on migrants, concluded on German initiative in March 2016, has decisively prevented asylum seekers from Syria and Afghanistan from reaching the EU (Okyay et al. 2020: 6-10, see also Slominski and Trauner 2018: 111). This external dimension appears also in the dense web of cooperation arrangements and status agreements concluded by the EU’s agency for external border controls, Frontex, and third countries (Lavenex et al. 2021).

In short, an array of differentiated standards, legal commitments and participation levels among member states and non-member states have created a participation path to channel the centripetal effect of cooperation for more Eurosceptic member states, and have allowed reaching out to strategically important non-EU countries. In the next section, we will evaluate the effectiveness and legitimacy of this differentiation.

3. Effectiveness and legitimacy of differentiation

Effectiveness entails generating policy outputs whose outcome is to solve policy problems (Lavenex and Križić 2019: 10). In JHA, the basic measure of effectiveness in light of the leading policy objectives is the capacity of DI to ensure a sustained absence of internal border controls in the Single Market. This objective itself entails achieving gradual de-differentiation and developing common measures on asylum, borders and police cooperation. In this section, we will also evaluate legitimacy, which is a function of effectiveness, as well as the means used to solve policy problems and control by representative institutions.
3.1 De-differentiation and policy outputs

The case of JHA combines enduring differentiation with important instances of de-differentiation. Differentiation started with strictly intergovernmental agreements that gradually came under the responsibility of the Commission, the European Parliament and the Court. The first Schengen agreement exempted all EC nationals from border checks; the preparatory negotiations for the 1990 Dublin Convention took place inside the EC Council of Ministers, and France proposed that the secretariat of the Council could fulfil tasks under the Convention. The Treaty of Maastricht made asylum and immigration a "matter of common interest" (Comte 2020: 9). The transfer of responsibility to European institutions occurred in two steps, with the Treaty of Amsterdam, signed in October 1997, and Lisbon, signed in December 2007. Both episodes benefitted from the presence of a Labour government in the UK, more favourable to European integration – even though the UK opted out of MxIKVEXMSR%HPIV2MWWR.

In taking charge, European institutions delivered new policy outputs regarding harmonisation, the creation of new agencies and instruments to manage the area across borders and guarantee the continued absence of border checks inside the EU.

Another crucial aspect of de-differentiation was the extension of participation from the five initial Schengen members to most EU members. As previously mentioned, issue-linkage between the abolition of internal border controls and cooperation on external borders meant that the Mediterranean member states, initially excluded from the Schengen cooperation, eventually joined – even if it meant accepting border, asylum and police cooperation that placed a heavy burden on them (Comte 2020: 8). Likewise, the strategic inclusion of this policy area in the Treaty of Amsterdam and of significant parts in the Community pillar, ruled by qualified majority voting, prepared the full integration of this policy area at the EU level.
In parallel, the Schengen Information System (SIS) acted as a “club good” to generate cooperation as part of the acquis communautaire and could not opt out (Adler-Nissen 2014: 123, De Somer 2020: 7). Providing data valuable for security and law enforcement purposes, the SIS is excludable and has increasing returns as new members join, making non-participation increasingly costly (House of Lords 2007, Lavenex and Križić 2019: 15). In March 1999, the United Kingdom applied to participate in several areas of the Schengen acquis, including police and judicial cooperation (Council of the European Union 2000 and 2004). Ireland followed the UK in this move (Council of the European Union 2002). By the time the Treaty of Lisbon entered in force, the UK had opted into most civil law measures, asylum measures and measures concerning illegal migration at British borders (Asderaki and Markozani 2019). Such cooperation had become crucial to control immigration at their borders. Despite this cooperation, there was a sense of crisis over both the effectiveness and legitimacy of cooperation.

3.2 Integration stalemate and legitimacy crisis

Differentiation had thus reached a high level of effectiveness, not only because most EU members gave up on their systematic internal border controls but also because it could be completed by a successful process of de-differentiation.
who had arrived since 1 January (Italian Ministry of the Interior 2011). These permits allowed them to travel freely in the Schengen area for up to three months if they could justify sufficient resources. In reaction, the French police first increased its staff at the French-Italian border (French Ministry of the Interior 2011) and, on 17 April, closed the border, interrupting all traffic. This episode heralded a decade of more frequent reintroductions of border controls in the Schengen area, undermining the effectiveness of differentiated arrangements. After this affair, the reform of the Schengen Borders Code in 2013 allowed member states to reintroduce internal border controls in the event of “serious deficiencies in the carrying out of external border controls” (De Somer 2020: 5-9) – thereby increasing the flexibility member states could use at internal borders, at odds with the plans of de-differentiation. This was deteriorating.

Until that point, Germany had taken a step back, hoping the normal working of the EU treaties and institutions would achieve de-differentiation and integration. Yet, the stalemate in which EU institutions found themselves in the migration crisis of 2015–16 led the weak hegemon to attempt to stabilise the system. It tried to do this in three ways: first, in a unilateral move taking more than a million migrants; then, in the attempt to fix the flawed Common European Asylum System by supporting relocation quotas for asylum seekers; and, finally, facing sustained opposition from member states, reverting to external differentiation – by sponsoring a migration deal with Turkey in March 2016.

By suspending the Dublin rules for Syrian refugees, Chancellor Merkel hoped to alleviate the situation in the overburdened entry points in Greece and Italy. Yet, the move alienated other member states that feared a potential pull-effect on other migrants and asylum-seekers. In parallel, Germany intensified efforts to develop a relocation scheme in the EU that would allocate asylum seekers to the different member states, reverting to external differentiation – by sponsoring a migration deal.
Hungary (Lavenex and Križić 2019: 20). The former used their opt-outs to avoid the scheme (den Heijer et al. 2016: 614). The latter, which did not enjoy such opt-outs, voted against it. As they were outvoted, the Council adopted two relocation decisions concerning a total of 160,000 asylum seekers staying in Greece and Italy on 14 and 22 September 2015 (Council of the European Union 2015a, 2015b). Although formally bound by the decisions, the Visegrád countries did not comply. Hungary and Poland did not relocate a single person. The Czech Republic stopped relocating after August 2016. In April 2020, the European Court of Justice ruled that by refusing to comply with the temporary mechanism for the relocation of applicants for international protection, Poland, Hungary and the Czech Republic had failed to fulfil their obligations under EU law (CJEU 2020). These proceedings show that differentiated cooperation proves incapable to solve serious tensions. Member states use voice or exit strategies to avoid cooperation (Goldner Lang 2020). Non-compliance is not limited to the Visegrád countries. As of 23 September 2015, the European Commission had launched 40 infringement procedures against 19 member states for failing to implement EU asylum legislation (den Heijer et al. 2016: 625). The Commission took these procedures a step further and by the end of 2016, there were overall 138 pending procedures in migration and home affairs, half of them on asylum cases (Goldner Lang 2020). In July 2017, the Grand Chamber of the Court of Justice confirmed that member states' creation and facilitation of the Western Balkans route violated Schengen and Dublin rules (CJEU 2017a, 2017b). The situation became even more problematic as Chancellor Merkel came under pressure from within. Faced with a significant inflow of migrants, Bavarian Finance Minister Markus Söder called to restore controls at German borders. On 13 September 2015, German Interior Minister Thomas de Maizière suggested reintroducing border controls temporarily. The German police started intensively checking incoming flights from Greece to prevent unauthorised arrivals. To avoid being turned into a dead-end, Austria reintroduced checks at its southern borders on 16 September. These decisions at the centre of the system triggered a domino effect, leading all countries on the migrants' route to barricade themselves. On 11 November, Slovenia started building a razor-wired fence at its border with Croatia. On 12 November, Sweden ordered border controls at ports in the south and west of the country and announced that it could also extend border checks at its land and air borders (De Somer 2020: 10). On 13 November, France declared a state of emergency following deadly terrorist attacks in Paris. As some perpetrators had used the migrants' route and others had come from Belgium, France reintroduced controls at all its borders. The French police could act as if French borders were external EU borders and could issue non-admission decisions, repressing irregular migrants towards neighbouring countries (Casella Colombeau 2020: 2269). Slovakia, Hungary, Norway, Denmark and Belgium also reintroduced border controls.

Even though these various controls concerned third-country nationals only and not the free movement of goods, capital and services, the internal market was also at stake. Peripheral countries dependent on the export of goods, including perishable agricultural commodities, towards more prosperous core European countries voiced serious concerns about this situation. Eastern European states denounced controls...
Reintroduction of internal border controls must revert to an extraordinary, proportionated and limited in time last resource. The image of traditional controls in our internal borders makes us go back decades in the European project and could jeopardize trust among member states. In order to reinforce security in our territory, less coercive and more efficient measures are possible.

Nevertheless, controls persisted at the borders of Germany, Austria, France, Norway, Sweden and Denmark – the core European countries, which are also the main countries of immigration. After having reached the time limit of two years for those controls, they resorted to other articles of the Schengen Borders Code to open new time limits (European Commission 2021, Carrera et al. 2018). The global pandemic outbreak in March 2020 led 18 of the 26 Schengen member states to reintroduce border checks straightaway (De Somer 2020: 12, Rausis and Hoffmeyer-Zlotnik 2021).

To counteract this restoration of controls at internal borders, Germany intensified the search for external solutions. In March 2016, Chancellor Merkel negotiated an EU–Turkey deal, committing Turkey to retain Syrian refugees heading towards the EU. Austria sponsored cooperation with the Western Balkans, and Italy, France and Spain invested in cooperation with southern Mediterranean neighbours. The New Partnership Framework adopted by the Commission and Council to boost cooperation with third countries reinforced this external differentiation.

Whereas in the short term, these deals helped reduce pressure at external borders, this temporary relaxation came at a price. The EU and member states have become reliant on cooperation with authoritarian governments who would exploit the EU’s vulnerability. Moreover, the EU and its member states have not only become complicit in human rights abuses in third countries, but they have also downscaled their protection and rule-of-law standards (Okyay et al. 2020). These means to achieve EU goals have weakened the legitimacy of the scheme. Furthermore, the intermediary situation created by differentiation and de-differentiation has created uncertainty over the control by representative institutions. The scheme is still too differentiated to be under the control of the European Parliament. Yet, it has reached such a level of de-differentiation that national parliaments and even governments cannot have full control over what they accept – as the proceedings against Visegrád countries illustrate.

The concerns over both effectiveness and legitimacy have ushered in further disintegration. The blow came from the traditionally most reluctant partners, with Denmark and the UK taking even more distance under the scheme. During the negotiations for the Lisbon Treaty, the member states had tried to invite Denmark to de-differentiate by offering a flexible opt-in on a case-by-case basis, like the UK and Ireland had. If Denmark persisted in its complete opt-out, the other member states threatened, it would have to leave Europol – losing access to its databases.
Nevertheless, on 3 December 2015, in the middle of the migration crisis, Danish voters refused de-differentiation and were instead ready to leave Europol. Eventually, the Danish government and the European Union agreed on a deal maintaining cooperation with Europol that was signed in April 2017 – two days before Denmark would have been cut off from the agency (Denmark and Europol 2017). Under this agreement, the Danish police lost the capacity to interrogate Europol databases directly like the other member states, but could rely on Danish liaison officers stationed at Europol. As this procedure takes more time, the agreement is still less effective than the previous Danish membership (Mortera-Martínez et al. 2021: 9).

In June 2016, British voters decided to exit the European Union entirely. The move came for various reasons, but the apparent loss of control on migration during the migration crisis favoured the “Leave” vote. The hope that the EU record of differentiated cooperation would help mitigate the effects of Brexit has been dashed with the final Brexit agreement signed on 30 December 2020, which entered in force on 1 January 2021. The UK has exited Dublin cooperation, cooperation on migration flows in the Mediterranean and police cooperation in Europol (Comte 2021). The agreement plans that the UK and Europol should keep exchanging information and personal data, but the details of this cooperation remain vague, at the discretion of the UK and Europol.

Conclusion

Differentiated integration in border, asylum and police matters has evolved at the nexus of three dynamics: (1) the strategic interests and investments of a weak hegemon, Germany, gaining the support of the Benelux countries and, with more investment, France; (2) these countries’ capacity to attract other members through issue-linkages and network effects; and (3) the partial externalisation of the burden of migration control through external differentiation. In terms of governance, an array of differentiated instruments including the differentiation of legal commitments, standards, cooperation outside EU law and opportunities for opt-outs and opt-ins made differentiation effective in the absence of major external challenges. Cooperation on border, asylum and police matters progressively entered EU treaties, Community procedures were extended and more and more partners joined. Differentiated integration led to various policy outputs on border management, asylum legislation and police cooperation. The strategy succeeded in gradually de-differentiating until the EU’s periphery entered a period of political turmoil with the Arab revolutions in 2011, pointing to the limits of existing arrangements.

From 2011 and above all 2015 onwards with the Arab revolutions and the civil wars in Libya and Syria, member states’ reintroduction of internal border checks, rampant violations of EU standards and some member states’ open rejection of Council decisions and Court rulings undermined the effectiveness of common policies. Germany re-emerged as a weak hegemon mobilising its resources to save the Schengen area by opening up its borders to asylum seekers who could not be sent back, while sponsoring flexible arrangements with key external partners to stem the
eventually it had to partially withdraw from this regime by repeatedly enforcing controls at its borders – leading several other members to do the same and the most reluctant partners to take even more distance. Attempts to halt internal disintegration through the watering down of human right standards at external borders have provided only short-term relief and have heightened the EU's vulnerability towards cooperation with authoritarian regimes. This path has gradually undermined the legitimacy of existing arrangements. As of today, it remains unclear how, under the current state of division, the situation could eventually stabilise and de-differentiation resume.
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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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