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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” (JHA) – 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 reflected in heterogeneous rules, legal commitments or participation levels. Differentiation 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 (Okuy 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 JHA, 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 JHA. 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 existing accounts of differentiation in this policy area. We show that in JHA, Germany, as a weak Euro-centred hegemon, was the major driver of differentiated integration. Because the weak hegemon cannot drive and compensate all actors straightaway, it enacts change first with a few selected partners, in which it heavily invests (Pedersen 1998). The goal is that this first cooperation will create centripetal effects for the other players, who will gradually enter this cooperation.

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, allow 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 policy output, outcome and impact (Lavenex and Križić 2019: 12f.)? We find that 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 established (Lavenex and Križić 2019: 10, Underdal 2002: 7ff.), differentiation has reduced the barriers for border and asylum cooperation, and has facilitated policy outputs. External differentiation has enlisted third countries into the control of migration flows and the hosting of refugees (Okuy et al. 2020).

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 (Comte 2020). In the short term, strict controls and entry requirements at external borders, together with the enlisting of third countries such as Turkey, Libya or the Western Balkans have helped reduce migration pressure on Europe. Yet, the incapacity to handle refugee flows in accordance with EU and international legal standards 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 pressure does 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 in 2015. 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

Križić 2019:18, Okyay 2020, Tallberg and Zürn 2019: 585). 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 German elites (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”.¹ 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 of the Community, Herbert Pattberg, considered that “the administrative obstacles at borders [meant ...] a harmful waste of time and money that it [was advisable] to

1 Historical Archives of the European Union (HAEU), Réunion des ministres des Affaires étrangères, Messine, 2 June 1955 (CM3/NEGO-6).

eliminate as soon as possible”.²

Even though the movement for the abolition of internal border controls was transnational, the German export nation was the most active in promoting change and deepening European integration in this area. 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 checks. 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 flows” and “the locking of borders for illegal and new immigrants” (Benoit 1983).³

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)”.⁴ 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.⁵ 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.⁶ 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 question was at the planning stage. In practice, nothing would change at borders until further negotiations.⁷

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” (Lavenex 2018: 1201f.). The French realised the small Schengen framework could

2 HAEU, Liste Rouge 1842, Telex No. 074, 20 March 1984.

3 The French original text refers to “le verrouillage des frontières”.

4 Archives Nationales, Communication du ministre des Affaires européennes, Conseil des Ministres, 20 June 1984 (5 AG 4 CM 41, dossier 4, sous-dossier 2), 3 August 1984.

5 Archives Nationales, 5 AG 4 CM 41, 4, 2, Note à l’attention de M. Sautter, 19 June 1984.

6 Archives Nationales, 5 AG 4 EG 41, dossier 1: Ministère de l’Intérieur, Note signée Pierre Charasse à l’attention de Monsieur le Ministre, 20 June; Note envoyée par M. Daniel Bernard à Mme Guigou, 21 June 1985.

7 Archives Nationales, 5 AG 4 EG 68, dossier 1, Lettre du Ministre délégué chargé du Budget [Michel Charasse] à Monsieur le Président, 31 January 1989.

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 procedures. It was less a case of functionalist spillover from one field of integration to another (Niemann 2006) than a deliberate attempt by France, but also Germany and the Benelux countries, to influence the migration policies of other European countries (Lavenex 2001a). The denunciation of “*Europe 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 asylum standards within Europe to lodge multiple asylum applications (Bigo 1996, Lavenex 2001b: 862, Comte 2020: 6-7).

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.⁸ 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”.⁹ 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.¹⁰ He also wanted to have “mixed brigades at the external borders, to mutually ensure the quality of the controls carried out on behalf of all”.¹¹ In face of the French hesitation to give up controls, Germany had to insist that France complete the negotiations to implement the Schengen agreement.¹² On 15 June 1989, Helmut Kohl directly wrote to François Mitterrand to recall France’s previous commitments in the Saarbrücken and Schengen agreements. Kohl considered it “essential that the remaining questions [...] quickly find a practical solution”. “I highly value”, Kohl continued, “that our two countries [...] do their utmost to ensure that our common goals can be achieved as soon as possible”.¹³

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.¹⁴

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.

11 Archives Nationales, 5 AG 4 EG 69, dossier 1, Entretien du Ministre de l’Intérieur avec M. Krieps, Ministre luxembourgeois de la Justice, 21 April 1989.

12 Archives Nationales, 5 AG 4 EG 68, 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 fiercer German competition if it abolished its internal border controls. To alleviate 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 their external borders, tightening immigration regulations and accepting the first-entry principle to allocate asylum seekers among members (Art. 30 Schengen II, Lavenex 2018: 1202). It would nevertheless take eight years after the Schengen Convention was signed before France would abolish its fixed and systematic 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

Pons, conseillers de Felipe Gonzales, à Madrid, 23 May 1989.

to preserve their common travel area and kept its border controls with the rest of the EU (Schimmelfennig and Winzen 2014: 367).

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 external borders, asylum and police matters. The Dublin Convention, signed on 15 June 1990 by all EC member states outside of the Community framework, included the same provisions about asylum as in the Schengen Implementation Convention, which the five Schengen members were to sign four days later. The determination of only one member state to examine an asylum claim implied that member states would mutually recognise each other's asylum decisions and avoid harmonising their heterogeneous asylum legislation (Lavenex 2018: 1201f.). Flexibility was 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 concedes a wide margin of discretion to the member states, allowing for differentiated implementation (Trauner 2016). For instance, adjusted for 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 the country of their first entry in the EU (Asderaki and Markozani 2019).¹⁵

15 Interview with a British expert, 27 April 2020.

The core of cooperation on abolishing internal border checks also included differentiation in standards to overcome French concerns. Following the first and second Schengen agreements, a compensatory measure for reluctant members – later formalised in the Schengen Borders Code of 2006, itself subsequently revised – allowed states to restore border controls under specific conditions. These included, first, foreseeable events, such as sports events; second, serious threats to internal security; and third, from 2013, deficiencies at the external border of the Schengen area. Controls could not exceed six months in the first case, two months in the second and two years in the third (De Somer 2020: 3, 8). Next to these variations in standards, some states could conclude special agreements allowing certain border practices. For instance, with the Chambéry bilateral agreement, signed in October 1997, France traded its abolition of systematic checks at the Italian border for Italy's commitment to readmit persons who had transited via its territory (Casella Colombeau 2020: 2262).

Besides differentiation in standards, flexibility among the member states also led to 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 reluctant to abolish their controls. France was confident that it could more easily exit such intergovernmental agreements and restore controls if it considered that other members were not respecting them (Comte 2018a: 148). Denmark eventually joined Schengen cooperation on the abolition of internal border checks as the other members of the Nordic Passport Union joined the EU or the Schengen area. It mattered to Denmark to preserve this union, and flexibility in legal instruments helped ensure Danish participation (Adler-Nissen 2014: 118). As member states extended 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 from Community procedures (Adler-Nissen 2009: 75, Peers 2017: 257).

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-differentiate previous differentiated arrangements (Monar 2010: 289, Tekin 2012: 27). In 1997, all EU member states had signed the Schengen Convention, except 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* was the necessary condition (Adler-Nissen 2009: 68). The protocol

on the Schengen *acquis* specified that both countries could request to participate in Schengen measures on a case-by-case basis if they wished, subject to unanimous approval of the other participating states.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 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.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. 4) (De Somer 2020: 6-7). The UK informed the European Council of its decision to exercise a complete opt-out in July 2013, before the area was scheduled to come fully under the European Court of Justice jurisdiction on 1 December 2014.¹⁸

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 when 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.

In 1996, to have Denmark, Sweden and Finland abolish their controls, the other member states accepted into the Schengen area Norway and Iceland, which had been part of the Nordic Passport Union without internal borders with the three others since 1952. Likewise, in 2008 and 2011 the member states integrated into the Schengen area Switzerland and Liechtenstein, two countries that were locked within the EU but did not want to join it entirely (Lavenex 2006b, Peers 2017: 255). In the middle of the EU’s richest regions, they were a major communication node in the heart of Europe. Their borders could, therefore, not be transformed into hard external borders without seriously hampering the openness of the internal European market.

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, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/55:EN:HTML>.

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>.

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*, C (430), 17, 1 December 2014, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014Y1201\(03\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014Y1201(03)).

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 (Okuy 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 (Okuy 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 treaties 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 integration (Adler-Nissen 2009: 69).

In taking charge, European institutions delivered new policy *outputs* regarding harmonisation, the creation of new agencies and instruments to manage the area at the EU level. In 1995, the member states created the European Union Agency for Law Enforcement Cooperation, better known as Europol. After incorporating asylum cooperation in the Community pillar with the Treaty of Amsterdam, the European Council in Tampere gave the impetus for harmonising member states’ asylum policies (El-Enany 2017: 363). With two regulations, in December 2000 and February 2002, the Council created the European dactylographic system or Eurodac. In 2002, EU member states agreed on a European Arrest Warrant to prosecute criminals across borders and guarantee the continued absence of border checks inside the EU. In 2003 and 2004, the Council adopted directives laying down minimum standards for the reception of asylum seekers, the conduct of asylum procedures and the status of refugees. In 2004, the member states created what became later called the European Border and Coast Guard Agency, also known as Frontex. In 2008, they partly harmonised their return procedures and standards for irregular immigrants with the EU Return Directive. In 2011, they created the European Asylum Support Office to reduce the divergence in recognition rates across countries. To meet asylum seekers’ needs in a more homogeneous way, they created the European Refugee Fund, later called the Asylum, Migration and Integration Fund.¹⁹ While retaining a degree of flexibility for domestic implementation, all those steps facilitated and prepared the full integration of this policy area at the EU level.

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,

19 Interview with an Italian expert, 3 April 2020.

meant the new member states of the 2004 and 2007 enlargements had to accept this cooperation as part of the *acquis communautaire* and could not opt out (Adler-Nissen 2014: 123, De Somer 2020: 7).

In parallel, the Schengen Information System (SIS) acted as a “club good” to generate centripetal effects and bring in countries that had negotiated an opt-out: Denmark, Ireland and the UK. 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 (Adler-Nissen 2009: 69). To exercise the opt-out right under this treaty, the UK could only opt out of all previous legislation but immediately exercised the right to opt back into 35 EU measures, accepting the Commission’s enforcement powers and the Court’s jurisdiction over them. Examples of measures in which the UK participated include the European Arrest Warrant framework, the Schengen Information System, the Prüm Decisions on cross-border cooperation against crime and the EU Passenger Name Record. The UK even fought unsuccessfully in front of the European Court of Justice to participate in Frontex despite not abolishing its internal border checks. Such cooperation had become crucial to control immigration at British borders (Asderaki and Markozani 2019). Even though not taking part in the core of Schengen – the abolition of internal border checks – Ireland and the UK ended up opting into most of the compensatory measures to tackle irregular migration (De Somer 2020: 6-7).

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.

3.2 Integration stalemate and legitimacy crisis

Notwithstanding its initial success, the effectiveness of DI has encountered limits in border, asylum and police cooperation. The lack of compliance, divides among members, increasing difficulty of reforms and the ambiguous impact of common policies have spurred a sense of crisis over both the effectiveness and legitimacy of cooperation.

The first major challenge came after the Arab rebellions started at the end of 2010 and the beginning of 2011. They led to an escalation in the number of migrants from Tunisia to Italy and caused a first crack in the Schengen system (Casella Colombeau 2020: 2265-2268). On 5 April 2011, the Italian government of Silvio Berlusconi issued temporary residence permits to all the citizens of North African countries



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”²⁰ (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 augmented flexibility soon came to bear in the next crisis when member states again closed their borders facing the influx of refugees and asylum seekers in 2015–16 (Lavenex 2018). Such influx occurred as the military situation in both Libya and Syria was deteriorating.

The incapacity to find political agreement to reform the EU asylum system, which the Commission and Parliament have supported since 2015, is another indicator of the limits of current arrangements. The negotiations on harmonising asylum standards have been unable to proceed beyond a certain point (den Heijer et al. 2016: 609, Lavenex 2018). Yet, the Dublin system has put unsustainable pressure on the countries of first entry in the EU and has led to the collapse of asylum systems in Greece, Malta and partly also Italy and Spain. As early as 2011, the European Court of Human Rights and soon after the European Court of Justice ruled that asylum seekers found escaping Greece should not be sent back under the Dublin procedure, given the deplorable conditions in which they lived in that country and the lack of access to a functioning asylum system (ECtHR 2011).

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 based on a quota system. This attempt faced the resistance of the traditionally reluctant northern partners – Denmark, the UK and Ireland – and the Visegrád countries of central Europe – Poland, the Czech Republic, Slovakia and

20 Article 29.

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, such as Italy (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



that hit their goods transport sector (Than and Nasralla 2016). Southern European states – Cyprus, Greece, Italy, Malta and Spain (2020) – considered that:

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 both parties (Mortera-Martínez et al. 2021: 14).

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, flexibility in 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



inflow. Nevertheless, given the pressure Germany had to sustain under this strategy, 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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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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