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Differentiated integration in EU migration and asylum policies

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Abbreviations

AFSJ	Area of freedom, Security and Justice
Benelux	Belgium, the Netherlands and Luxembourg
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
DI	Differentiated integration
EASO	European Asylum Support Office
ECB	European central bank
ECHR	European Court of Human Rights
EFTA	European Free Trade Association
EMU	European Monetary Union
EP	European Parliament
EU	European Union
Eurodac	European Automated Fingerprint Recognition System
IBM	Integrated Border Management
JHA	Justice and Home Affairs
OECD	Organisation for Economic Co-operation and Development
QMV	Qualified Majority Voting
SIS	Schengen Information System
TCNs	Third Country Nationals
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees
UK	United Kingdom

Riassunto

Negli ultimi decenni, il processo di integrazione europea si è espanso rapidamente. Tuttavia, l'integrazione non ha interessato tutti gli Stati nella stessa misura. Dati i continui allargamenti e la diffusione delle competenze dell'Unione Europea (UE) in aree tradizionalmente di competenza nazionale, gli Stati membri iniziarono a richiedere una certa flessibilità, agendo come freno ad una completa integrazione. Ciò che inizialmente poteva sembrare un'anomalia temporanea, oggi rappresenta una caratteristica standard dell'Unione Europea. A partire dagli anni '90, numerosi accademici si sono focalizzati sullo studio dell'integrazione differenziata, definita per la prima volta come un modello di strategie di integrazione che cerca di conciliare l'eterogeneità all'interno dell'Unione Europea e di consentire a diversi raggruppamenti di Stati membri di perseguire una serie di politiche pubbliche con accordi procedurali e istituzionali diversi.

Dagli anni '70 si inizia quindi a parlare di Europa a più velocità, proposta dall'allora primo ministro belga Tindemans, ovvero un'Europa in cui tutti gli Stati avrebbero perseguito lo stesso obiettivo, ma con differenti scadenze per raggiungerlo; o di un'Europa a geometria variabile, proposta dal presidente della Commissione Europea Jacques Delors, la quale permette agli Stati membri di proseguire l'integrazione in alcuni settori cooperando all'interno delle regole comunitarie, lasciando la libertà agli Stati dissenzienti di non aderirvi.

Per dimostrare come l'integrazione differenziata sia ormai una prassi consolidata nel processo di integrazione, la seguente tesi analizza il ruolo dell'integrazione differenziata nelle politiche migratorie e di asilo dell'UE. Facendo parte dei poteri fondamentali dello Stato, i paesi membri sono più riluttanti a cedere la loro sovranità a un ente sovranazionale e, di conseguenza, diversi Stati hanno negoziato con l'UE la possibilità di mantenere un potere decisionale in questo ambito.

Dalla revisione della letteratura si deduce come l'integrazione differenziata possa essere richiesta o imposta principalmente per due motivi: la capacità di uno Stato di raggiungere determinati risultati e di rispettare le scadenze prefissate, o, a causa di una forte identità nazionale e di un'opinione pubblica tendenzialmente euroscettica, la mancata volontà di uno Stato di avanzare nell'integrazione europea. Ciò dipende inoltre dall'interdipendenza tra gli stati, la quale favorisce l'integrazione, e dalla politicizzazione, che al contrario la ostacola.

L'integrazione differenziata può assumere forme differenti, ovvero la cooperazione rafforzata, scenario in cui alcuni stati decidono di avanzare lasciando la possibilità agli altri di unirsi, gli *opt-out*, che esentano uno stato dall'adozione di certe politiche comunitarie, e gli *opt-in*, i quali estendono delle politiche ad uno stato non membro dell'UE. Esiste inoltre un caso d'integrazione differenziata

non concordata con l'UE, in questo caso si parla di differenziazione *de facto*, per distinguerla dai casi sopracitati tipici della differenziazione *de jure*.

La politica migratoria europea è un'area politica in cui coesistono diverse forme di integrazione differenziata, rendendola quindi un caso studio «*par excellence*» (D'Appollonia, 2019, p. 194). La seguente tesi si suddivide in tre capitoli, ognuno dei quali analizza un caso studio diverso: la differenziazione costituzionale nel Regno Unito e in Danimarca, il regolamento di Dublino e le conseguenze della crisi migratoria del 2015.

La differenziazione costituzionale è motivata dalla resistenza all'integrazione sovranazionale dei poteri statali fondamentali tra gli Stati membri, nonché dall'euroscetticismo. I principali paesi che seguono questa logica in riferimento alle politiche migratorie sono la Danimarca e, pre-Brexit, il Regno Unito. Entrambi gli Stati furono inizialmente contrari anche agli accordi di Schengen, tant'è che la Danimarca firmò il trattato, ma negoziò un *opt-out* nella parte riguardante la sovranazionalità, e, successivamente, alla cessione di sovranità stabilita dai trattati di Maastricht e di Amsterdam (1997). Quest'ultimo integrò Schengen nel *framework* europeo e definì come obiettivo fondamentale il raggiungimento di una politica migratoria comune. D'altra parte, il Regno Unito negoziò un *opt-out* dall'area di Giustizia e Affari Interni, con la possibilità di scegliere caso per caso se partecipare alle politiche comuni. Nonostante gli *opt-outs*, il Regno Unito ha prevalentemente contributo in modo attivo alla costruzione delle politiche migratorie europee, mentre ha mantenuto per diversi anni una posizione più restia nei confronti del sistema di Dublino. La posizione della Danimarca rappresenta invece un caso particolare in cui l'*élite* al governo è generalmente favorevole ad una maggiore integrazione, mentre l'opinione pubblica ha dimostrati in quattro referendum una certa riluttanza. Per aggirare questo problema, i governi che si sono succeduti hanno adottato politiche migratorie molto simili a quelle adottate a livello europeo. Inoltre, non essendo vincolata dal regolamento di Dublino, la Danimarca ha stretto un accordo internazionale con gli stati partecipanti, in modo da essere soggetta solo dalla legge internazionale e non da quella europea, potendo quindi adottare politiche più stringenti. L'integrazione differenziata ha quindi permesso all'UE di adottare politiche migratorie comuni e una serie di standard minimi da rispettare, senza essere ostacolata dagli stati più riluttanti.

Il regolamento di Dublino, e più in generale il sistema europeo comune di asilo (CEAS), rappresenta un altro caso di integrazione differenziata per due motivi. Innanzitutto, le prime misure in merito sono state adottate tramite gli accordi di Schengen, accordi adottati al di fuori del quadro europeo, e di conseguenza rappresentano un caso di cooperazione rafforzata, in cui i cinque paesi promotori decisero di avanzare nell'integrazione, lasciando la possibilità ai paesi volenterosi di unirsi. Ad oggi, l'unico Stato che ha ottenuto un *opt-out* dal sistema è la Danimarca, ma il CEAS si estende al di fuori

dei confini dell'Unione, includendo la Svizzera, la Norvegia, l'Islanda e il Liechtenstein, i quali, avendo deciso di aderire al sistema di asilo, costituiscono un caso di differenziazione esterna. Inoltre, il sistema di Dublino è un caso di differenziazione *de facto,* intesa come non conformità e aggiramento deliberato e prolungato del diritto dell'UE. In questo caso, la differenziazione non avviene tramite una negoziazione con l'UE, ma solamente in fase di implementazione. Dato che il CEAS è regolato principalmente da direttive, le quali stabiliscono un obiettivo comune ma spetta ai singoli paesi definire le disposizioni nazionali per attuarlo, gli stati membri hanno un margine di discrezione. La Commissione Europea ha in più occasioni riconosciuto come la discrezionalità rappresentasse un ostacolo al pieno raggiungimento di una politica comune, e cercò di rimediare riformando il sistema in due occasioni: nel 2003 e nel 2013. Nonostante ciò, il CEAS rimane un sistema generalmente considerato inadatto, soprattutto dai paesi di primo approdo nel Mediterraneo, in quanto il carico di responsabilità non è equamente distribuito, e ciò ha scaturito varie tensioni tra gli stati membri. La mancata conformità alle direttive europee in materia di asilo è divenuta eclatante durante la "crisi dei rifugiati" nel 2015, quando, a parità di condizioni, il tasso di accettazione di riconoscimento di protezione variava drasticamente a seconda dello stato in cui si presentava domanda (dal 27% al 91%).

Infine, la crisi migratoria, meglio definita crisi della gestione dei flussi migratori, ha incrementato il livello di differenziazione già presente. Riconoscendo che il sistema di ricezione presentava vari difetti ed era inadatto alla gestione di un flusso così elevato, l'UE ha intrapreso diverse collaborazioni con i paesi di origine e i paesi di transito dei flussi, cercando al tempo stesso di avvicinare quest'ultimi a regolamenti europei e favorendo quindi la differenziazione esterna. Dato che la politica migratoria dell'UE è gestita su più livelli, ne consegue che anche i meccanismi di differenziazione sono messi in atto da attori differenti, ovvero dagli Stati Membri, dalle agenzie europee (in particolare Frontex e l'Ufficio europeo di sostegno per l'asilo) e dalle istituzioni stesse. Questo tipo di collaborazione cominciò negli anni 2000, promossa dalla Spagna nei rapporti con il Marocco e dall'Italia per quanto riguarda la Libia, oltre che dall'UE per le relazioni con i Balcani. Questi stati hanno collaborato per anni con l'UE nelle operazioni delle agenzie europee, ricevendo in cambio fondi economici e formazioni. La crisi del 2015 ha inoltre accelerato la cooperazione tra l'UE e la Turchia, iniziata a fine anni '90 quando la Turchia entrò nella lista dei paesi candidati all'accesso. A partire dai primi anni 2000, il paese ha adottato significative riforme interne per allineare le politiche di immigrazione e asilo a quelle dell'UE, grazie alla condizionalità che quest'ultima ha avuto sulla Turchia. In seguito alla crisi, la Turchia e l'UE hanno rafforzato la loro cooperazione tramite accordi vincolanti e non, come la Dichiarazione UE-Turchia del 2016, la quale prevede che per ogni siriano rimpatriato in Turchia dalle isole greche un altro siriano sarà reinsediato dalla Turchia all'UE. Questo accordo, così

come la cooperazione con la Libia e altri paesi dell'area MENA, sono stati aspramente criticati da ONG ed accademici, soprattutto per le violazioni dei diritti umani che ne sono conseguite. La differenziazione esterna ha quindi permesso all'UE di cooperare con vari paesi extracomunitari per diminuire i flussi migratori e, contemporaneamente, di influenzare le politiche di immigrazione di questi ultimi provocando un avvicinamento alle politiche europee tramite accordi internazionali e operazioni congiunte guidate dagli stati e dalle agenzie europee.

L'integrazione differenziata ha sempre fatto parte della storia europea e, dato che la sua intensità dipende dagli avvenimenti e dalle decisioni politiche che ne conseguono, si è adattata alle diverse crisis che si sono susseguite, come nel caso della crisi migratoria tramite cui ha rafforzato la differenziazione esterna.

Questa tesi dimostra come l'integrazione differenziata, nelle sue diverse varianti, sia ormai diventata una pratica abituale dell'UE e del processo di integrazione europea, al punto tale da non considerare più la differenziazione come una caratteristica accidentale e temporanea, ma un elemento essenziale e duraturo nel processo di integrazione europea.

Introduction

Since its early days, European integration has come a long way. From six members in the European Communities to the current 27 Member States in the European Union. However, integration has not affected all the countries to the same degree. Due to the spread of the Community's competencies in several policy fields and as a consequence of the enlargements, Member states started to demand for flexibility in specific policy areas, preventing the harmonisation of policies at the European level, and thus, acting as an obstacle to full integration between the Member States. The recent evolution of the European Union's policies has shown that differentiation and flexibility between the Member States can no longer be considered an anomaly of European integration, as they have become an increasingly familiar form of integration.

Differentiated integration has been first defined as «model of integration strategies that try to reconcile heterogeneity within the European Union and allow different groupings of Member States to pursue an array of public policies with different procedural and institutional arrangements» (Stubb, 1996). Eventually, more accurate definitions were given, which include the several way differentiated integration can manifest itself.

Today, the monetary union is the most well-known example of differentiated integration (DI) (see Verhelst, 2013 and Schimmelfennig, Leuffen, & Rittberger, 2015), as only 19 of the 27 Member States participate in the policy. However, it is not the sole and, perhaps, not even the most representative of the degree of flexibility the European Union has granted until now. Every time the Union faced an enlargement, new Member States negotiated their access, or yet-Member states imposed them a degree of differentiation. Moreover, considering that states are less willing to integrate into core state powers and that the level of politicisation of a topic is an obstacle to integration, the European Union and Member states have had to rely on differentiated integration multiple times to reach common agreements.

Among those core state powers, migration and asylum present one of the highest degrees of differentiation. Given the natural link between immigration and asylum policies with the Schengen area, this does not come as a surprise. The Schengen area itself was born outside of the EU framework as an agreement between a few Member States, and it has always had a different level of integration. It represents a case in which a group of Member States decided upon a specific project, leaving it open for others to join.

Likewise, flexibility was required to adopt the first Convention determining the Member state responsible for examining asylum applications (also known as Dublin Convention) to include the

most reluctant members. Eventually, with the Treaty of Amsterdam, minimum asylum standards were created, and the Treaty of Lisbon recast those directives. In this case, the so-called Dublin system entered into the *acquis communautaire*, so all Member States are bound to comply and to implement it. However, a few of them, namely Denmark, Ireland and the UK, demanded for special arrangements which authorised them not to be bound by these acts. These countries were granted opt-outs in the Area of freedom, security and justice, therefore EU policies in the field do not directly apply to them, however they often have the possibility to decide on a case-by-case if they would like to join a specific policy or not. Differentiation does not concern only common standards, but legal instruments as well. For instance, some intergovernmental procedures still apply to Denmark (as annexed to the Treaty of Amsterdam), while the other member states moved further to communitarian procedures.

Moreover, EU law still allows a wide margin of discretion to member states, especially considering that this policy area is mainly managed through directives. For instance, refugee recognitions vary from 25 to 70% across countries even when states have to pronounce on very similar cases, and an asylum seeker could take up employment immediately upon applying for asylum in Sweden, while they had to wait for nine months in France etc.

Furthermore, migration policies are often a case of external differentiation, whereby third countries are associated with the adoption and application of EU law (de Witte, 2017, p. 11), in two different ways. First, four non-EU countries – Norway, Iceland, Switzerland and Liechtenstein – joined the Dublin and Eurodac Regulations, and therefore they are bound by them, following the procedures and the relocation that the system entails. Secondly, both the EU and some Member States concluded agreements on border controls and readmission with non-EU states. This is the case of the Western Balkans countries or Turkey, where the EU itself promoted such agreements, or the case of Libya and Morocco, where the agreements have been promoted respectively by Spain and Italy. These countries cooperate with the EU in specific policies and operations carried out by Member States and by EU agencies, namely Frontex and EASO, on readmissions and border control.

Migration and asylum policies started with deep intergovernmental roots, but nowadays they can be considered quasi-integrated, even if several exemptions still apply. EU migration policies are one area of EU policy-making in which differentiated integration finds its clearest expression (InDivEU, 2022). Owing to its intergovernmental roots, DI has been considered the necessary compromise when Member States tried to harmonise their legislations in this policy field. Therefore, differentiated integration and these policies are strictly intertwined.

The objective of the study is to gain an understanding, describe and analyse the role of differentiated integration in migration and asylum policies. The main research question which will guide the study is

Which is the role of differentiated integration in the construction of migration and asylum policies in the European Union?

To conduct a thorough analysis of the chosen topic, this research study will mostly employ qualitative methods of inquiry. To support qualitative data, quantitative data in the form of official statistics and secondary analysis of data obtained by reliable institutions are employed. The textual data used for the analysis includes a large number of documents and legal acts produced primarily by the Commission, the Council and a number of European Agencies and International Organisations, as well as speeches and reports issued by other relevant actors.

Considering that imprecise vocabulary is linked to vague ideas, it is better to clarify a few concepts already at this stage, notably the following: European integration, harmonisation and Europeanization. The concept of 'European integration' does not have a sole definition, as there are different schools of thought, therefore it is a catch-all term for all sorts of cooperation between European countries and, mainly, the pooling of sovereignty from EU Member States to a supranational body.

The term 'harmonisation' has been used by EU institutions for a long time, without actually giving a unique definition of the phenomenon. However, for the scope of this work, harmonisation is defined as a process which starts with the deliberate construction of a concept at the European level by multiple actors and included in several normative instruments, with the goal and ability to evolve into a common European law. This is the harmonisation standard to which domestic law is to be approximated. In order to do so, policy makers use both secondary law and ECJ interpretation and Community law principles. Harmonization has a specific goal. This is to develop a legislation as uniform as it is needed for the aims to be reached. Most crucially, similarities in norms, such as texts and rules, is insufficient. Rather, the goal is to achieve a unified implementation of the notion across Europe. This is why a harmonisation procedure is required. In light of this, harmonisation can be defined as « a conscious process that has the aim to lead to the insertion of a concept into the national legal orders, which triggers a process of adaptation to form a European concept as uniform as required to serve the objectives of the European Union» (Lohse, 2012, p. 283).

Linked to the concept of harmonisation, it is also crucial to define the term 'Europeanization'. The latter comprises the creation of a new social arena (Fligstein, 2000). It can be interpreted both from a

top-up and a bottom-down approach. For the first one, Europeanization is defined as « a process involving a) construction, b) diffusion and c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures and public choices» (Radaelli, 2000, p. 4). From a bottom-up approach, which is more useful to the scope of this work, Europeanization occurs when Member States begin to influence EU policy in a particular area. In this sense, a process of re-definition of national, regional, and other identities within a European context begins, thanks to the institutional interaction of various policy actors at different levels of European governance (Harmsen & Wilson, 2000).

This research is structured as follows. Chapter 1 looks at the theories of differentiated integration. In particular, the literature review analyses the several categorisations of DI from its early stages until the more recent and complex ones. A second section is dedicated to the history of the implementation of DI in European policies and to the main risks and opportunities this tool may generate. Eventually, the last section highlights the reasons behind the use of differentiated integration in migration and asylum policies. The literature review reveals the lack of a shared and common definition of DI, as the concept of differentiated integration can be analysed from different perspectives, generating ambiguity. For the purpose of this study, differentiated integration will be analysed through three separate concepts, corresponding to the chapters.

The second chapter represents the first case study of this research. It focuses on the constitutional differentiation in migration and asylum policies. Constitutional differentiation originates from treaty adoption and/or revision among the Member States, which transfer additional competencies to the European Union (Schimmelfennig & Winzen, 2014, p. 355), and it is driven by concerns about national sovereignty and identity, and it is usually triggered by Eurosceptic Member States that are ideologically opposed to supranational centralisation of power. In migration and asylum policies, the most prominent cases are the United Kingdom and Denmark, which negotiated specific protocols during the treaty revision phase not to be bound by some provisions. The first case study focuses on the United Kingdom, because since its accession in January 1973, this state has on several occasions demonstrated its reluctance to be fully integrated into European policies. During the negotiations, the United Kingdom and the European Community reached compromises on a number of issues. These ranged from the export of sugar from the West Indies and butter from New Zealand (CVCE) to the role of the pound sterling. In addition, the UK negotiated four opt-outs during its membership (more than any other EU member state), and two of these involved migration issues: the Schengen opt-out and the opt-out from the area of freedom, security, and justice (AFSJ). The second case study focuses

on Denmark. The latter has indeed put national identity before European identity on a number of occasions, thus demanding derogations in the implementation of certain issues related to national sovereignty, such as the rules on visas, asylum and immigration. The main difference with the UK is that the opt-outs are the result of the will of the people. However, the elites are trying to circumvent these technical obstacles by adopting policies very similar to those of the EU.

The third chapter examines the so-called Dublin system. Here, DI is analysed through two separate concepts. First, by looking at the geography of the system, it appears clear that it has expanded beyond EU territories, including all the Member States and four associated countries, which signed individual agreements with the EU and opted-in the legislative documents composing the Dublin system. Therefore, the latter is a case of external differentiation. Eventually, the second concept through which DI will be analysed in migration and asylum policies is *de facto* differentiation, which corresponds to the third chapter. *De facto* DI results from «the flexible and unequal implementation of, or informal cooperation beyond, legal obligations» (Schimmelfennig, Leuffen, & de Vries, 2022, p. 4). In this sense, two important forms of *de facto* differentiation coexist in the migration and asylum policies. The first one is flexibility in implementation and non-compliance (Andersen & Slitter, 2006; Sczepanski & Borzel, 2023) and the second one is informal cooperation, including the *ad hoc* participation of countries that legally have an opt-out (Adler-Nissen, 2009a). This informal flexibility is evident in the Dublin System, which is mainly regulated by directives, leaving the Member States a vast margin of discretion.

Lastly, the fourth chapter will analyse external differentiated integration. External DI has become a widespread feature of the EU for migration and asylum policies, particularly after the 2015 management crisis of migrants. External differentiation can be defined as «extra-EU actors' selective participation in EU policies from the perspective of regulatory commitment and organisational participation» (Lavenex & Križić, 2019, p. 8). The crisis forced the EU to find common ground with both countries along the migratory route and with countries of origin. In this sense, the EU began or reinforced its agreement with, inter alia, the Western Balkans countries, Libya, Morocco and Turkey. The latter represents the last case study of this work. Working as a bridge between the Middle East and Europe, Turkey has always played a crucial role in migration routes. Cooperation between the EU and Turkey began in the 1990s and then intensified, promoting a rapprochement between Turkish and European policies until a few moments of rupture. In 2016, the two actors signed the EU-Turkey Statement, enforcing both binding and non-binding cooperation. Given the importance of the migration route, Turkey is the state where the EU has made the most efforts to include the country in EU policies and agencies' actions.

Chapter 1. Theories of differentiated integration

The past decade has been pivotal in the development of the European Union and in some unexpected ways. The single currency has been tested to the limits not once, but three times, with the financial crisis, debt crisis and a global pandemic. The migration crisis stressed the Schengen area and the Dublin regulation to the point of breakdown. The UK became the first country to leave the Union, while Hungary and Poland became the first to challenge its democratic and rule of law foundations. These crises have exposed weaknesses in the EU's part federal, part intergovernmental design, but also some of its strength through flexibility. This design of a demoicracy (Bellamy & Kroger, 2017), rather than a democracy, could be improved through DI. According to many scholars, this is not only necessary but normatively desirable given the pluralism of the European Union.

The Eurozone, the Schengen Europe, and the European Security and Defence policy (ESDP) represent only the tip of the iceberg of how DI is a consolidated tool within the European Union. Differentiated integration has been and still is one of the most valuable instruments to buy off the opposition while implementing integration policies and it is a concept that has been part of European integration since the Treaty of Rome (1957).

Differentiated integration has been defined in multiple ways through the years. One of the most straightforward definitions, also thanks to its generality, is the one provided by Holzinger and Tosun (2019, p. 646), by saying that DI can be defined as «any situation in which there is a temporary or permanent difference in the territorial validity of EU rules». This definition is helpful to have a general understanding of the concept, however, some scholars provided a much more detailed definition, such as Dyson & Sepos (2010, p. 4), who described differentiated integration as

> The process whereby European states, or sub-state units, opt to move at different speeds and/or towards different objectives concerning common policies. It involves adopting different formal and informal arrangements (hard and soft), inside or outside the EU treaty framework (membership and accession differentiation, alongside various differentiated forms of economic, trade and security relations). In this way, relevant actors come to assume different rights and obligations and share a distinct attitude towards integration.

Attention to the topic has increased since the 1980s, and now it is a common practice in EU policymaking. As stated in the Conclusions of the European Council of 26/27 June 2014 "Strategic agenda for the Union in times of change" the concept of ever closer union allows for different paths of integration for different countries. Eventually, DI came out as one of the five possible scenarios on the future of the EU in the White Paper on the Future of Europe outlined by the European Commission (2017a), stating that« the European Union allows willing member states to do more together in specific areas. […] The unity of the EU at 27 is preserved while further cooperation is made possible for those who want». As most of the recent stable features of the EU, DI has been both appreciated and criticised, as its use expanded to all the policy fields can be considered both a strength and a weakness sometimes creating or highlighting tensions, sometimes saving the EU from deadlocks.

In the following sections, it will be first illustrated how differentiated integration has been analysed by different scholars and which are the main categorisations of the phenomenon. Then, it will be briefly explained how DI has become a consolidated feature of the European Union through the history of its use and the dilemmas it has created, accentuating the risks and benefits this feature brings in the policy-making process. Lastly, it will be explained the logic behind differentiation in the Area of Freedom, Security and Justice (AFSJ), with a focus on migration and asylum policies.

1.1 Categorisation of differentiated integration

Various scholars have ventured into the analysis of differentiated integration through the study of the variables involved and based on the main integration theories. Taking into account those analyses, it is possible to understand how the different facets of DI have been categorised in the last 40 years.

First, Lindberg and Scheingold (1970) assumed that European integration does not necessarily develop unidirectionally, and they had been among the first to analyse the concept and to provide a classification by focusing on two variables: extension and intensity. The first concept, extension – which is currently indicated as functional scope (Schimmelfennig, Leuffen, & Rittberger, 2015, p. 767) - concerns the policy field in which the EU can claim authoritative decision-making power, whereas intensity – the current level of centralization – is described as «the relative importance of Community decision-making processes as compared with national processes in any given area» (Lindberg & Scheingold, 1970, p. 68). According to them, integration and disintegration would

probably be on a case-by-case basis, with particular policy areas developing varying degrees of integration (Lindberg & Scheingold, 1970, p. 285).

However, the first mainstream categorisation appeared only a few decades later, when Alexander Stubb (1996) studied differentiation by analysing the three following variables: time, space, and matter. For the former, differentiation by time creates a temporary pattern, thus DI is only transitional, and it will eventually lead to uniformity, since all the states will pursue the same policies, just not simultaneously. It is not uncommon for the European Union to allow some initial exemptions in the integration phase of some policies and rules, however, these exceptions must expire over time. Scholars generally agree on calling this mode "multi-speed" integration. The major examples can be found in all the temporary derogations granted in the first years after an enlargement, when the new Member States have to adapt to the *acquis communautaire,* but they are allowed some time to adjust themselves and to reach the same level of integration as the core.

On the other hand, differentiation by space is permanent and creates two distinguished groups of states inside of which the level of integration is the same. This model allows an irreversible separation between the core and a lesser-developed group of countries. Evidently, it is a less ambitious kind of integration, as member states do not have common objectives (Stubb, A Categorization of Differentiated Integration, 1996). This pattern has been called in several ways: variable geometry, concentric circles, or multi-tier integration. Several examples can be illustrated for this kind of integration, but the most prominent is undoubtedly the Schengen area.

Lastly, differentiation by matter creates uniformity within each policy or policy area, however, the member states which participate vary for every policy. This pattern is the so-called "*Europe à la carte*", where states can decide in which policy they want to engage, and which to avoid (Stubb, A Categorization of Differentiated Integration, 1996). As for this pattern, examples can vary from the European Monetary Union (EMU), where Denmark and, before Brexit, the UK had a permanent right to remain outside of it, to the sale of *snus* (snuff)[1], of which the EU banned in 1992 with the exception of Sweden since the substance is deeply rooted in Swedish culture and tradition (Schimmelfennig & Winzen, 2020a).

The most recent forms of classifications include new elements, such as vertical and horizontal differentiation and the internal and external dimensions. Leuffen et al. (2022) define vertical differentiated integration as the variation in the level of centralization of a policy, indicating the

[1] Tobacco in the form of a powder for breathing into the nose.

transfer of power from the states to the EU, from intergovernmental to supranational. On the other hand, horizontal differentiation refers to the possibility of member states to not apply EU policies uniformly. It is the territorial expansion of policies to member states and beyond. A useful example to better explain this variation is the monetary union: it is vertically integrated, in the sense that the European Central Bank (ECB), an independent and supranational institution, has the exclusive competence for the monetary policy, thus it is strongly vertically integrated, however not all the member states have decided to join this policy, so it is weakly horizontally integrated.

Lastly, another classification has been brought up, which is the difference between internal and external differentiation. Internal differentiation happens when EU rules are not equally valid in all Member States and when individual member states do not participate in selected EU policies. This is mainly due to the failure of a negotiation and the EU is forced to allow some exemptions. On the other hand, with external differentiation, non-member states buy into specific policies, and they selectively integrate into the EU rules and policies without becoming members.

In addition to these categorisations, recent studies have also analysed what pushes for differentiated integration. However, instead of finding a one-size-fits-all solution, they understood that there are two main streams of logic behind DI, which are easily distinguishable with regard to policies and states. These two logics are instrumental and constitutional differentiation, which originate from the different preferences and bargaining settings in the negotiations. Schimmelfennig and Winzen (2014) consider instrumental differentiation as the result of accession negotiations and, consequently, the enlargements. Indeed, instrumental differentiation is driven by the heterogeneity of economic preferences and capacities, and therefore, it is driven by the separation of states with strong administrative, fiscal, and economic capacities from those with lower capacities. This logic puts these two groups of countries against each other, and, according to it, the less wealthy a state is, the more differentiated its membership becomes. This is due to accession treaties because, during negotiations, wealthier member states have the bargaining power, especially those who like the idea of enlargement the least. In the view of Bellami et al. (2022), this logic often corresponds to ‘capacity DI’, meaning that a Member State lacks the capacity to join certain EU policies, hence they are temporarily excluded or exempted from joining them.

The second logic behind differentiated integration is constitutional differentiation (Schimmelfennig & Winzen, 2014). It is not about economic preferences, but it is related to the idea of European integration itself. It concerns fundamental differences in the national identities

of the Member States. In this case, the debate is between wealthy sceptical countries (which usually can be identified in the northern Member States) and integration-friendly states (centre and southern Europe). As in the previous logic, the bargaining power in the negotiation lies in the *status quo*, therefore the states which do not want to integrate more into EU policies can either put a veto on the proposals or demand an opt-out. With the latter, a Member State with a solid national identity can be exempted from respecting some provisions. This case usually refers to the state's core powers, for instance, taxation, defence, migration, and borders (Schimmelfennig & Winzen, 2014) and it is strictly linked to what Bellamy et. Al (2022) call 'sovereignty DI', which, according to them, emerges when a Member State seeks an opt-out or an exemption from participating in a particular policy area because it does not wish to integrate further in that area, making this differentiation permanent, or at least, long-term.

Scholars, such as Schimmelfennig, Leuffen, & de Vries (2022) and Comte (2020b) have also questioned what factors lead to the emergence of differentiated integration, and to answer this question it is necessary to analyse the theories behind integration itself, as they explain under which circumstances the integration will foster or stall. For each theory of integration (intergovernmentalism, supranationalism, constructivism, and post-functionalism) it is possible to correlate a theory of disintegration or, at least, of differentiated integration.

For the first, according to intergovernmental integration, states are and will remain the key actors, therefore the extent of integration is limited by their interests. It is also limited in policy areas, as states will likely integrate into the economic field, but keep for themselves the core functions of the state. Hence, supranational organisations will never acquire an elevated level of power, remaining relatively weak. In more recent years, a new wave of intergovernmentalism has been developed, the post-Maastricht one, which considers the progress in EU integration as a consequence of the intensification of policy coordination between Member states, and not as the consequence of the delegation of power to supranational institutions, i.e., the Commission. To sum up, integration and differentiation are subjected to states' interests in preserving their autonomy and international interdependence.

Supranationalism (or neo-functionalism) considers integration as the outcome of transnational interactions. The key focus is on supranational institutions, such as the European Commission or the European Parliament, since their autonomy is constantly increasing, and they tend to direct the integration process in their preferred directions. According to this theory, and as expressed by Ernst Haas (1961) (1968), neo-functionalist integration follows the mechanism of 'spillover',

meaning a dynamic through which integration in one sector will create incentives for integration in other sectors. In this sense, supranationalism considers European integration as a self-reinforcing process. Patterns of differentiated integration in neo-functionalist theories can be triggered by mainly two factors: the different intensity of transnational exchange and the preferences of supranational actors. However, supranationalist expectations lead us to imagine an increase in integration due to the spillover effect and to the disadvantages or the marginalisation of states which did not transfer their power to specific policy sectors.

On the other hand, the constructivist perspective is based on the creation of a common European identity, values, and norms, and their dissemination determines the pace and strength of integration itself. According to this theory, the most crucial structures in International Relations (IR), and therefore in European integration, are social constructions, notably ideas. The idea in its broadest meaning comprises values, norms, identities, and cultures. European integration is triggered by a reciprocal force, meaning how the European identity and common ideas shape institutional integration and the effects of institutional integration on community-building. Since integration is fostered by a commonality of ideas, it becomes obvious that differentiated integration derives from a limited extent of consensus (the commonality of pro-integration ideas) and legitimacy (the institutionalisation of these ideas).

Lastly, post-functionalist integration argues that regional integration undermines the national one. European integration is indeed perceived as a threat to national identity and self-determination. As for constructivists, postfunctionalist analysis agrees on the importance of identities and ideologies, but they also mark the relevance of party ideologies, so they focus on domestic actors and interactions. Postfunctionalist theories share the idea of spillover with supranationalism, but while the latter is a positive spillover, for postfunctionalist «integration succumbs to a negative backlash process once it begins to seriously affect the national self-determination of the member states» (Leuffen, Rittberger, & Schimmelfennig, 2022, p. 152). In light of this, the rise of Eurosceptic parties does not come as a surprise, and their preference for intergovernmental agreements instead of supranational treaties does not contribute to the integration. Fostering integration in core state powers will likely lead status-quo-oriented member states to demand exemptions or use their veto power. Indeed, core state powers are the least integrated, more horizontally differentiated and the last ones to be integrated.

Even if these traditional integration theories can be useful to explain why states opted for more integration in specific sectors, they struggle to become real guides in understanding DI.

Intergovernmentalism attributes DI to the variation in international interdependence, but it cannot understand why the states pushing for further integration are not able to create incentives for hesitant members (Leuffen, Rittberger, & Schimmelfennig, 2022) (Bellamy & Kroger, 2017). Neo-functionalism sees DI as the variation of transnational exchanges, but it cannot explain why the spillover effect happens only in certain policy areas nor why DI is present only in some specific policy areas. Constructivism explains differentiation by the strength and weaknesses of community ideas, but it does not understand why the creation of European norms and identities had not prevented member states to exempt themselves from some policies. As for postfunctionalism, more than a theory of integration it is already a theory of disintegration, and it does not explain why in some policy areas integration has increased over the years. As a consequence, many scholars agree with the findings of Leuffen, Rittberger, & Schimmelfennig (2022), which report that «no single theory offers an exclusively valid, complete, or completely convincing explanation of integration and differentiation».

According to Bellamy and Kroger (2017, p. 628-629), traditional theories of integration cannot understand DI because they conceive the EU as a whole, instead of highlighting the heterogeneity among the Member States, which is one of the reasons why the EU is considered a demoicracy – a polity of policies, as put forward by Van Parijs (1997) or Nicolaïdis (2003). By doing so, scholars who have analysed DI through traditional theories believe that differentiation will be replaced by uniformity. Bellamy and Kroger suggested considering a third logic of differentiated integration, alongside instrumental and constitutional, which is the legislative one. The heterogeneity in member states, both socio-economically and on values, led to a system where « different regulations or standards apply to different states participating in a given common policy area» (*ibid*, p. 629).

Schimmelfennig, Leuffen, and Rittberger (2015) analysed European integration as a multi-dimensional process, using a three-dimensional configuration of authority: the level of centralization, the functional scope and the territorial extension. They found out the EU is a hybrid type of those already existing since it cannot be conceived as a federation nor a system of competing and overlapping jurisdiction. Considering the EU as a federation would avoid taking into account the different territorial extensions of EU policies (such as the Schengen area or the single market), whereas, on the other hand, categorising the EU as a system of multi-level governance would ignore the extent to which it has established an institutional centre and a membership core. By considering DI as an essential and enduring feature of the EU, they concluded their research by classifying the EU as a system of differentiated integration, which is

defined as « a polity that displays variance across policy areas and space, while maintaining an institutional core» (Schimmelfennig, Leuffen, & Rittberger, 2015, p. 770). According to them, it is also possible to explain what drives differentiated integration through two variables: interdependence and politicisation, where the first one has a positive effect on integration, while the latter tends to inhibit it. They argue that when both interdependence and politicisation are highly present, differentiation is likely to appear. Indeed, both intergovernmentalism and neo-functionalism consider interdependence one of the principal factors of integration: for intergovernmentalism, when unilateral policies do not reach the expected results, governments promote integration to jointly reach the benefits; whereas, for supranationalism, transnational exchanges generate demand for internal rules, making them both the cause and the effect of interdependence.

On the other hand, politicisation is considered to be an obstacle to European integration. Considering De Wilde's (2011, p. 560) definition of politicisation as « an increase in polarisation of opinions, interests or values and the extent to which they are publicly advanced towards the process of policy formulation within the EU», it appears clear how politicisation created a cleavage between integration-friendly views and eurosceptic opinions, a cleavage that has deepened since the Maastricht Treaty. To sum up, integration follows the demand driven by interdependence, then politicisation intervenes in this relationship: low interdependence will not create demand for integration so politicisation is irrelevant, strong interdependence and weak politicisation allow for more integration, however strong interdependence and strong politicisation obstacle integration, which will fail or become differentiated (Schimmelfennig, Leuffen, & Rittberger, 2015).

With this logic, it is possible to explain both internal and external differentiation. The most eurosceptic Member states are likely to contest or reject integration in core state powers, while non-Member states with a strong eurosceptic citizenry will carefully select only non-politicized policies, thus creating external differentiation.

1.1.1. Configuration and forms of DI

Many studies (see Schimmelfennig, Leuffen, & de Vries, 2022 and Dyson & Sepos, 2010) have also addressed the difference between *de jure* and *de facto* differentiated integration. Analysing *de jure* DI means to refer only to the case where a 'differentiation act' varies the validity of EU rules across Member states, while *de facto* DI refers to the different implementation of EU laws in national laws and/or policies.

De facto differentiation is therefore due to different models of EU implementation. Different levels of implementation concern mainly directives as, unlike regulations and decisions, they set out goals that all EU countries must achieve, but it is up to individual countries to devise their laws on how to reach the objectives. Therefore, the national outcomes could not reflect the preferences decided by policymakers at the EU level, since national governments might encounter different conformity costs, such as veto players or discrepancies with national legislation (Zhelyazkova, 2014). Furthermore, paragraph 7 of the Protocol on subsidiarity and proportionality added by the Amsterdam Treaty, although imposing certain constraints, remarks the freedom of Member states to choose the type of instrument to implement directives' aims. The choice of the measure is to leave as much as possible on national decisions, inevitably affecting the nature and the degree of the measure.

On the contrary, *de jure* DI refers to the situation where an EU act allows member states to not conform to EU laws. This type of DI can be distinguished both in primary and secondary law. Primary law differentiation, i.e., treaty-based differentiated integration, has constantly increased over the last decades as a result of the enlargements and revisions of the treaties. As Dominik Hanf (2001) analysed, a certain degree of differentiation was present already in the founding treaties, although most of those acts were only temporary and on a case-by-case basis. Indeed, the Treaty of Rome included some provisions which could be interpreted as flexibility clauses in three main categories: the territorial scope, specific derogations for some members and the safeguard clause. As for the territorial scope, for instance, Article 299 (1) EC[2] says the treaty applies to all Member States, which, according to international law, means all their territories, however, there are several exemptions: it did not apply to the British Overseas Territories, to some French overseas territories, to the Faroe Islands, Greenland and other smaller islands or exclaves. Moreover, specific

[2] Consolidated versions of the treaty on European Union and of the treaty establishing the European Community, 2002/C 325/01

derogations had been granted to member states at the primary law level, from the rules regulating the importation of bananas and sugar to the acts of accession with different deadlines. Lastly, the employment of safeguard clauses in international treaties is quite common, and they are present in EU treaties as well (Hanf, 2001). However, «since Maastricht and Amsterdam, one has to note that differentiation has become […] a 'constitutional' feature of the European Union», even if not without several criticisms. For instance, Jörg Monar (1998a, p. 320), by referring to the way differentiation is applied in the AFSJ, says «The amazing range of "flexibility" in justice and home affairs offers an unprecedented scope for accommodating the diverging interests of Member States. Yet the price to be paid for this "flexibility" is a plethora of new problems and risks» and especially the «major risk of legal fragmentation and political tensions». In a later stage, the level of acceptance of DI increased dramatically, and states began to take advantage of this form of integration, especially in the most critical policy area. Not surprisingly, DI mainly concerns core state powers, hence « More than 90 per cent of differentiations can be found in three policy areas: the internal market; Schengen; and monetary union» (Duttle, et al., 2016, p. 409). According to the EUDIFF1 dataset[3], differentiated integration in EU primary law has affected 13.3% of Treaty articles, considering the six opt-outs of Denmark, Ireland and Poland, and some temporary exemptions to individual articles (InDivEU, 2022).

For differentiation in secondary law, there are three types of legislative acts which can become sources of differentiation: regulations, directives and (rarely) decisions. Duttle et al. (2016) provided an analysis of differentiation in secondary legislation based on the EUDIFF2 dataset[4], and they realised that every year there is «a stable demand for differentiation in about 15 to 20 per cent of legislative acts». This demand varies over time, policies, and states, but the general line sees an increased demand for differentiation in core state powers. More precisely, from 1958 to 2012, 752 out of 4.456 new legal acts and 2.052 out of 58.439 articles were differentiated for at least one Member state. There is a gradual and constant rise over time, with a massive peak in 1990 and another peak in 2004.

[3] The EUDIFF1 dataset lists codes differentiation in EU treaties and accession treaties, plus six EU-related inter se agreements from 1952 until 2020.

[4] The EUDIFF2 dataset lists all EU legislation in force each year between 1958 and 2012 and codes differentiations for each member state.

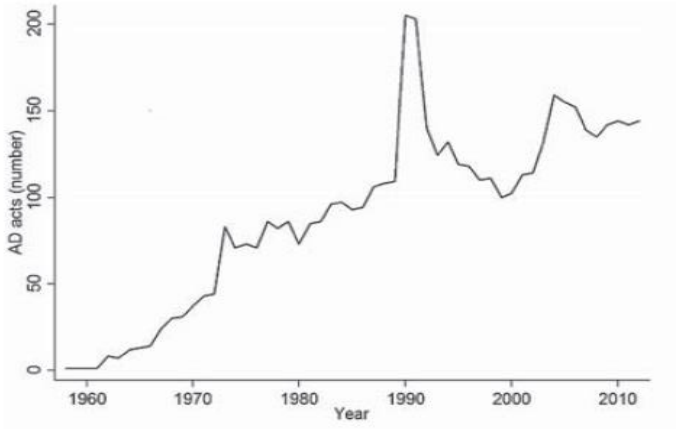

Figure 1: Number of actually differentiated legislative acts. Data collected from the dataset EUDIFF2. Source: (Duttle, et al., 2016, p. 413)

Since Figure 1 does not consider the difference between temporary and permanent differentiation, the two highest peaks coincide respectively with the German reunification (1990), when Germany had been granted ninety-eight temporary exemptions, and the Eastern enlargement (2004). However, in both cases the exemptions were mainly temporary, to allow Germany and the new Member States to adapt their legislation to the *acquis communautaire*. Nevertheless, the constant rise in differentiation acts shows that DI is part of the *modus operandi* of the European Union, and it constitutes a stable feature of EU law-making.

De jure differentiated integration can take mainly three different forms: enhanced cooperation, opt-outs and opt-ins.

Enhanced cooperation is a procedure through which a minimum of nine member states are allowed to further integrate or cooperate in a particular field within the EU legal framework when it is common knowledge that the EU as a whole cannot achieve that particular goal. It was first introduced with the Treaty of Amsterdam to maintain this process within the EU framework, and to keep a door open for hesitators to join if and whenever they wish. Eventually, the 'closer cooperation' in the treaty was renamed and extended with the Treaty of Lisbon. The provisions are now detailed in Article 20 of the Treaty on European Union [5](TEU) and from Articles 326 to 334 of the Treaty on the Functioning of the European Union (TFEU). Article 20 states that:

[5] Ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC

> Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competencies may make use of its institutions and exercise those competencies by applying the relevant provisions of the Treaties […]. Enhanced cooperation shall aim to further the objectives of the Union, protect its interests, and reinforce its integration process […]. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States.

As of now, it has not been used many times, and the classic examples are divorce law (European Union, 2003; Council of the European Union, 2010) and patents (European Parliament and the Council, 2012; Council of the European Union, 2012). Taking the case of patents, the protection of an invention can be granted at the national level or at the European level which will eventually be validated in every Member State, however, Spain and Croatia were strongly against it and never agreed on this regulation. Therefore, currently, if someone applies for a European patent, it is automatically valid in the 25 Member States which completed the ratification of the regulation.

A much more widespread practice than enhanced cooperation is the 'opting-out' of an EU Member State from a common policy or to some specific articles. This is known as internal DI, to distinguish it from external DI, which refers to a situation in which a non-Member State 'opt-in' to certain EU policies, so when EU policies are extended outside the territories of the EU. Opt-outs are the most used form of defection in the EU, and they can be divided according to primary (treaties) or secondary legislation.

For treaty-based opt-outs, member states negotiate with the EU on their special position, which is included in the treaty itself, and annexed in the protocols. As of now, only four states obtained this status: Denmark (two opt-outs), Ireland (two opt-outs), Poland (one opt-out) and, before leaving the Union, the United Kingdom (which used to have four opt-outs). According to Sion (2003), «Defections from international negotiations can generate two outcomes: a failure of the negotiations altogether, or the conclusion of a new agreement, only without the defecting country. Neither of the above has occurred so far in the EU». What happens in the EU negotiation is therefore to allow some treaty opt-outs. The process of opting-out allows the negotiating states to not start again negotiating a new agreement, but on the contrary, it allows member states which want to pursue the new policy to proceed with the ratification of the treaty, whereas, without this useful tool, veto power could have been used by the defecting state. The member states which obtain the opt-out are exempted from one or more policies, i.e., they are not obliged by the community legislation in the field. However, granting opt-outs is a form of facilitation which is

becoming questionable, mainly after the United Kingdom's withdrawal from the EU, since it was the member states which received the greatest number of concessions in the EU, and yet they voted against their permanence in the Brexit referendum in 2016.

According to the game theory developed by Holzinger and Tosun, in general, it is highly probable that DI through opt-outs is offered much more than necessary. For decisions taken unanimously, DI can potentially be allowed to any Member states, while for decisions through qualified majority voting (QMV), theoretically, integration-friendly countries can outvote those who are less favourable to further integration and constrain them to full integration. However, « the consensus culture of the EU […] renders it probable that DI is offered even to small minorities to avoid too much discontent with full integration» (Holzinger & Tosun, 2019, p. 652).

On the contrary, opting-in is strongly supported by the European Union, and it happens when the EU does not manage to export its policies to non-member states, and consequently, it induces them to join in for specific areas. Opting-in is a quite common phenomenon, clearly understandable in the European Economic Area (EEA), where the members of the European Free Trade Association[6] (EFTA) are required to apply several EU laws. Another example can be found in the European neighbourhood Instrument, through this tool the EU is providing financial incentives to neighbouring countries in exchange for an alignment with EU policies and values. Opting in can also be a unilateral process, as happened with Switzerland, which decided to transfer EU legislation into the national one, without the obligation or the incentives to do so. Opting-in does not refer uniquely to non-Member states, but also to Member states who decided to not participate in a common policy and to just opt-in in specific provisions, as it happened with the Directive defining the facilitation of unauthorised entry, transit, and residence (Council of the European Union, 2002b) where both Denmark and the UK had opted-in.

For opting in (or inducing in), the game-theoretic model proposed by Holzinger and Tosun finds that the EU is likely to over-compensate neighbouring countries for implementing EU laws in their national legislations. However, the overcompensation of non-member states during difficult economic periods may lead to a drop in public confidence, which might turn into a generalised scepticism towards further integration (Holzinger & Tosun, 2019, p. 656). At the same time, due to the possibility of non-participant member states or non-member states to join only specific policies, DI can result even more appealing than full integration.

[6] It is a regional trade organisation consisting of: Iceland, Liechtenstein, Norway, and Switzerland.

1.2 Dilemmas and history of DI

Differentiated integration has raised several issues on a legal aspect, as sometimes the line between what is legal and not is blurred.
DI stands in direct contrast to Article 1 of the Treaty on European Union (TEU), «creating an ever-closer union among the peoples of Europe», as well as to the principle of primacy of EU law, according to which EU law prevails to national law. Moreover, general and binding EU legal acts such as regulations are «designed to ensure the uniform application of Union law in all the Member States» (Bux & Maciejewski, 2022). However, sometimes regulations and directives may exempt specific Member states from certain provisions, or introduce new ones just to some members, increasing the level of differentiation.

The level of attractiveness of DI is high for several reasons. As mentioned in the previous paragraph, opting in is overcompensated compared to full participation in the policy, and non-member states do not have the obligation to respect the *acquis communautaire.*
Complexity to the matter is given by the member states which decided to opt-out from a whole provision, just to opt-in to specific decisions in the respective policy areas. An interesting example can be seen in the Protocol 21 of the TEU (European Union, 1997b), which allowed the United Kingdom and still allows Ireland to be exempted from the provisions in the Area of Freedom, Security and Justice (ASFJ). According to article 3 of such protocol, Ireland «may notify the President of the Council in writing […] that it wishes to take part in the adoption and application of any such proposed measure». Hence, a sort of *Europe à la carte* is possible for non-participant states which wish to opt-in, as they can select in which provisions they would like to join by acting only in line with their interests.
Furthermore, member states can conclude intergovernmental cooperation outside the EU framework based on international law both with EU countries and with non-member states. Such intergovernmental cooperation is not regulated by the EU, however, they have to respect three conditions: DI is excluded in areas of exclusive competencies of the EU (such as trade policy), the respect of the objectives of EU treaties must not be infringed, and it cannot rely on the full involvement of the EU (Ondarza, 2013).
As for cooperation between Member states, many examples can be made, such as the Aachen Treaty[7], the recent version of the Elysée Treaty between France and Germany, or the Quirinal

[7] Formally the Treaty on Franco-German Cooperation and Integration, signed on 22nd January 2019

treaty[8] between Italy and France. However, not all the agreements are used to foster European integration, this is the case for example of the Treaty for Defence and Security cooperation between France and the United Kingdom[9], which has no ambition of "Europeanization".

According to Nicole Koenig (2015), DI entails three core dilemmas. The first one is the political dilemma, which is the contrast between flexibility and unity, and it is particularly salient when it concerns exclusivity due to strict accession criteria. The main example is the Eurozone, accessible only through compliance with the convergence criteria and where member states which are committed to joining will be bound by the policies elaborated by the core group.

The second dilemma is a legal one and concerns the question of whether DI should be organised inside or outside the European legal framework. Koenig points out that the procedural, political and legal barriers of enhanced cooperation might explain the reasons why so far it has been used only three times. Lastly, an institutional dilemma is raised: there is the possibility to continue with the current institutions in their full composition, and the existing institutions modified or create parallel structures. The former option is the one currently applying for the Eurozone and Schengen, which raised «legitimacy and accountability issues due to the misfit between decision-makers and decision-takers» since even countries who opted out have a say in the matters. The second possibility is the most unrealistic considering the Commission's opposition to institutional fragmentation, while the latter is an attractive option, but may raise legitimacy issues as well as lead to costly duplication (Koenig, 2015). The history of differentiated integration can be divided according to these three dilemmas.

The political dilemma started directly with the Treaty of Rome, despite Monnet and Schuman's vision of an equal and united Europe. Indeed, as found by Hanf (2001, p. 5), «Even the original Treaty of Rome […] contained some provisions which can be read as flexibility clauses. They may be divided into three groups: provisions limiting the territorial scope, provisions establishing specific derogations for some of the founding members and some of the successive Member States and safeguard clauses». The political dilemma increased during the 1960s due to President Charles De Gaulle's rejection of the UK application to the Community and by the so-called 'empty chair crisis'. According to a telegram sent by Cristopher Soames, the UK ambassador to France, de Gaulle «suggested that the EU adopt the form of a wide and somewhat loose association of

[8] Formally the Treaty between the French Republic and the Italian Republic for a Strengthened Bilateral Cooperation, signed on 26th November 2021.

[9] Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic for Defence and Security Co-operation, signed on 2nd November 2010.

countries […], a broad economic association, but with a limited council formed by France, West Germany, Italy and the UK» (Pine, 2004, p. 63). This proposal was just the beginning of a series of events which tried to split a core group formed by the most prosperous economic powers, and the periphery, a debate that has always been an integral part of the EU. In the well-known Tindemans Report, presented on 2nd April 1976 to the European Council in Luxembourg[10], when talking about the economic and monetary policy, the former Belgian Prime Minister declares « It is impossible at the present time to submit a credible programme of action if it is deemed absolutely necessary that in every case all stages should be reached by all the States at the same time», therefore he proposed the possibility, already used within the community, to progress according to the States' capacities. The Report explained that «This does not mean *Europe à la carte*: each country will be bound by the agreement of all as to the final objective to be achieved in common; it is only the timescales for achievement which vary» (Tindemans, 1976, p. 20-21).

A few years later, a founding father of the EU, Altiero Spinelli[11], drafted a proposal for a new treaty on the EU. On 14 February 1984, the European Parliament (EP) adopted his proposal with an overwhelming majority and approved the so-called 'Spinelli plan'[12]. In Article 82 of the Treaty, Spinelli *de facto* advocated for the creation of a core Europe, by stating « Once this Treaty has been ratified by a majority of the Member States of the Communities whose population represents two-thirds of the total population of the Communities, the governments of the Member States which have ratified shall meet at once to […] the date on which this Treaty shall enter into force», in order to circumvent the possible vetoes. A few years later, it was another key figure of EU history to revitalise the debate on DI. Jacques Delors, President of the EC from 1985 until 1995, « put forward the hypothesis of a concentric Europe with a federal heart or inner circle, a second circle comprising a European economic space, a third one consisting of a network of cooperation agreements and a fourth one made up of agreements with a more typical confederal variable-geometry nature» (Brunazzo, 2022, p. 23)

The legal dilemma concretized itself during the 1980s. The question of whether integration should proceed inside or outside the European framework became central with the Schengen Agreement signed on the 14th of June 1985 by the Benelux countries (Belgium, Luxembourg, the Netherlands),

[10] Leo Tindemans, Belgian prime Minister from 1974 until 1978, was commissioned during the Paris Summit 1974 to draw a report on how the term 'European Union" might be interpreted.

[11] Altiero Spinelli, Italian communist politician, member of the EC and eventually of the European Parliament, is considered as one of the 'founding fathers' of the European Union.

[12] Formally, the Draft Treaty Establishing the European Union.

France and West Germany, five of the then ten Member States. The agreement was signed outside of the European framework, but it remained open for any Member states to join. With the Treaty of Amsterdam (1997), the Agreement became part of the *acquis communautaire*, however, the Community granted a permanent derogation to the UK and Ireland. A few months later, in February 1986, the Single European Act was signed, and for the first time, a Treaty allowed Member States to proceed with integration at different speeds, as visible in Article 15 and Article 18 of the SEA. For instance, Article 15 states «When drawing up its proposals […] the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain during the period of establishment of the internal market and it may propose appropriate provisions». However, DI became an integral part of the treaties only with Maastricht. During the negotiations, Margaret Thatcher threatened the Community that the UK would have fought against the EMU, thus the other Member States came to the agreement that a Member State could avoid some treaty obligations, i.e., they created the premises for opting-out (Brunazzo, 2022). Hence, the Treaty of Maastricht created a new distinction in the field of DI. In Hanf's view (2001), it is now possible to separate objective and subjective differentiation. objective differentiation indicates Member States which do not meet the criteria to join the EMU, but once they do, they have the right and the obligation to participate, while subjective differentiation indicates states such as the UK or Sweden, which were guaranteed the right, but not the obligation, to participate in the EMU. However, what characterised and influenced the entire political debate in the 1990s was not the Maastricht Treaty, but how to proceed with the integration of the eastern European states into the EU without compromising the union itself. Being aware of the institutional and economic differences between the yet Member States, notably the UK, Germany, and France, and the new Member States in Central and Eastern Europe, the debate on DI shifted from the possibility of using it to which one was the best instrument needed to promote it. Nonetheless, the enhanced cooperation was introduced with the Amsterdam treaty just a few years later.

In more recent years, and particularly from the Lisbon Treaty (2007), the debate has been focused on the institutional dilemma. The main driving force behind this debate was the United Kingdom. For instance, the UK had an opt-out in the social policy field, as foreseen by the Protocol on Social policy annexed to the Maastricht Treaty, therefore they were excluded from the deliberations of the Council on the matter, however, the British commissioner could vote, and British MEPs could

participate in decisions on the matters of which their country was exempted. This has already created some divergences on an institutional level.

Furthermore, the flexibility granted by the Lisbon Treaty, such as an easier adoption of the enhanced cooperation, the promotion of structured cooperation for defence and the increasing number of protocols of derogations to specific countries, formalised the already existing differences in the Union (Brunazzo, 2017). Eventually, the economic crisis has exacerbated the differences, mainly in the economic field, to the point that also Angela Merkel, who has always been sceptical about the idea of a differentiated Europe, sent a joint letter with French President Sarkozy to the President of the European Council, in which they advanced a list of institutional reforms of the Euro Area, including the possibility to use enhanced cooperation to allow the adoption of sensitive matters (Sarkozy & Merkel, 2011). Eventually, the former President of the EC Jean-Claude Juncker seemed more open to the notion of differentiated integration, especially to the idea of a two-speed Europe, so it is not surprising that one of the five scenarios on the future of Europe presented in the Commission's White Paper was an EU based on differentiated integration.

In the last years, Brexit and the covid-19 pandemic increased the trend of differentiation, without causing an earthquake to the stability of the EU, as now DI is an integral and stable feature of the Union. It is very unlikely the EU will move to a *Europe à la carte* with no identity, or to a core-Europe leaving behind some Member States. As Vivien Schmidt (2020) put down, «The EU is here to stay as a differentially integrated supranational union of member-states, […][The EU is] a 'soft' core Europe constituted by different clusters of member-states participating in overlapping policy communities, the majority of which participate in most if not all such policy communities.»

Apart from dilemmas, several scholars analysed DI to better understand if differentiation is beneficial or it is not worth it. As Chopin and Lequesne (2016, p. 531) like to refer, DI is a «double-edged sword». Indeed, DI has been welcomed as a way for European integration to progress in the context of greater heterogeneity and growing contestation (or Euroscepticism) and it serves a dual process, that of reconciling economic, social, and cultural heterogeneity, on the one hand, but also that of accommodating the political disagreements about how much integration is desirable, that exists between the Member States.

Differentiation brings several benefits. The main positive effect of DI is apparent, it is its *raison d'être*, it supports the efficient functioning of the EU by working as a pragmatic compromise and it facilitates further integration when moving together is not an option. In this sense, DI can act as

a ‘veto-buster’ by creating a centripetal dynamic that can eventually bring initially reluctant Member states into the integration process (Thym, 2016). Secondly, DI respects legitimate diversity, as it does not impose the same decision on states whose national preferences might diverge, therefore it has been acknowledged as a way of protecting and respecting states’ will. By doing so, it performs a stabilising effect on European integration in times of growing Euroscepticism. Third, DI promotes fairness as it allows to proceed in diverse ways when the conditions are not the same for all, as the universality of the law might deepen the cleavages within the EU and among the Member States. Consequently, because equal laws imposed under unequal conditions can exacerbate rather than overcome inequality, allowing DI may actually help create equality in the long term and thereby also support integration (TEPSA - Trans European Policy Studies Association, 2021).

Likewise, several arguments have been made against DI. It is common knowledge that DI does not take into account the effects of national policies on the EU more broadly. If decisions are taken among a smaller group, it goes that Member states are affected by the policy to a different degree, and non-participant States may not see the incentives to negotiate for compromises on a common solution. Hence, DI can exacerbate the problem of collective action. Furthermore, DI sets Member states on different paths of institutional development and what might have initially been a small gap between those who decide to integrate the policy and those who decide to stay out will over time become a more significant gap, due to the creation of negative externalities as explained in the neo-functionalist spillover effect. Also, DI creates legal and institutional fragmentation. Institutional differentiation is created by accentuating the already existing differences, whereas legal fragmentation can be expressed for instance with institutions which do not represent anymore all the Member States, consequently undermining the EU’s legal authority. DI can create a fragmented economic and regulatory environment for businesses operating across the entire EU when some Member States are participating in a policy and others are not. That makes it more difficult for businesses to operate across the EU, rather than just in a few select Member States (Kröger & Loughran, 2022). There are a number of concerns related to the possibility of DI to undermine the equality of rights, domination, and fairness. Chopin and Lequesne (2016) consider that the extensive use of DI will lead to the creation of ‘A’ and ‘B’ citizens, which is already a high concern in Central and Eastern Europe, especially if it’s accompanied by a narrative of insiders, outsiders, us and them or pioneers and latecomers. As for domination, DI can create domination by undermining the conditions for democratic self-rule through non-participation or

self-exclusion from decision-making bodies. For instance, non-MS which participate in the single market are not represented in council meetings even if they are subjected to the decisions taken. Lastly, DI might undermine solidarity between Member states, as it created opportunities to impose negative externalities on others, by promoting a purely transactional understanding of the EU (Michailidou & Trenz, 2018) as if every Member States decide that they will just participate in what is best for them in terms of economic gain than solidarity also becomes much looser.

Lastly, in trying to assess DI, Schimmelfennig, Leuffen, & de Vries (2022) used the two criteria traditionally used to evaluate European governance: efficiency and legitimacy. As for efficiency, while recognising that uniform integration is more effective, they believe that, in a heterogenous Union, DI is « Pareto-improving in comparison with uniform integration or non-integration» and it can create homogeneous subgroups of States which can take decisions faster and make more ambitious policies. By contrast, they consider the main possible adverse effects as: the creation of such small subgroups that it becomes impossible to meet their policy goals, the generation of unanticipated externalities between the core and the periphery (which may incentivize core States to opt-out[13]), and it can reduce the chances of uniform integration if it becomes beneficial to both insiders and outsiders. As for legitimacy, it must be said that, procedurally, DI respects the sovereignty of Member States, but its legitimacy is complex and crucially depends on the ways in which it is decided – both at the EU level (exemptive or discriminatory differentiation) and domestically (if by national referendum or like Denmark or Ireland, or only by high-level negotiations) - and implemented (Schimmelfennig, Leuffen, & de Vries, 2022).

In light of this, and in order to obtain an evaluation of the benefits and risks of DI, Kröger and Loughran (2022) recently conducted an experts survey on the matter, reaching the conclusion that overall the benefits overweight the risks, even if scholars are quite divided on the matter based on their geographical location (Western Europe *vs* Eastern Europe) and on their approach (pragmatic reasons *vs* principled reasons).

[13] The authors explain that the unequal opening of old member state labour markets in the 2004 enlargement concentrated migration flows from Eastern countries in a few destinations, such as the UK, which perceived it as a burden that «fuelled the Leave campaign».

1.3 Differentiated integration in migration and asylum policies

For several years, studies on differentiation have been relegated to the economic field, as the Community itself was mainly concentrated on advancing integration in the matter (see Verhelst, 2013 and Schimmelfennig, Leuffen, & Rittberger, 2015). Since, as already mentioned, differentiation is a stable and consistent feature of the European Union, when the Community 'politicised' itself, differentiation unavoidably spread to new policy fields. Moreover, the intrusion of differentiation became even more needed when trying to make common policies or harmonise already existing policies in the areas of core-state powers.

The Area of Freedom, Security and Justice (AFSJ) – formerly known as Justice and Home Affairs – had hardly been on the official agenda before the 1990s, and it is now considered as one of the most outstanding achievements of the European Union. Indeed, the AFSJ is now indicated in the third Article of the TEU, even before the establishment of the internal market. The article set the aim by stating «The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime». Furthermore, the aim becomes more practical in the TFEU, as Title V (Articles 67 to 89) details how to reach the goal. Despite being so central in EU's policies, already one country does not take part in the adoption by the Council of the measures pursuant to Title V of the Treaty, Denmark is exempted from participating in the policy, as foreseen by the Protocol no 22 on the position of Denmark annexed to the Treaty. More than creating the already ambitious Area of freedoms, the EU aimed at the creation of common policies in the field of asylum and immigration. In Article 79 of the TFEU is set out that «The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings». However, as written by Guiraudon (2000, p. 251) «migration control is a domain rarely associated with 'multi-level governance' in the literature on the European Union since it remains an emblem of national sovereignty».

Even if the debate around migration policies started in the late 1980s, the EU still has not a common migration policy, but rather it has several sets of rules dealing with the management of external borders, the freedom of movement within the Union, asylum rules, and cooperation with neighbouring countries. Considering that the AFSJ already had exemptions and the

intergovernmental nature of the Schengen area, it was inevitable that migration and asylum policies of the Union would have exemptions, and thus be differentiated. Not only there are exemptions, but scholars such as D'Apollonia (2019, p. 194) and Comte (2020b) define respectively the migration policy as «a system of differentiated integration *par excellence*» and «a necessary case of differentiation». In this regard, while scholars agreed on the existence of different levels of differentiation in the field, not everyone supported the idea. For instance, Nadine El-Enany (2017, p. 362) argues that «the field of asylum should be entirely free from differentiated integration arrangements. As a field of law which directly affects the rights of individuals in a context in which their physical survival and psychological wellbeing is at risk, the field of asylum law is unlike other competences of the EU where there is scope for differentiated integration».

It can be considered as a case study *par excellence* because it combines all the major forms of differentiation (as described by the classification of Stubb and Schimmelfennig) into «a rather chaotic process of (dis)integration» (D'Appollonia, 2019, p. 194). The migration and asylum policy represents a perfect case-study as regular migration, dealing with other EU nationals and with third-country nationals (TCNs), combines vertical, horizontal, and external forms of differentiation. It is vertically differentiated as it deals both with highly integrated EU policies, such as the Schengen agreement and the Dublin system, and with policies which remain the preserve of the Member States, like admission policies for non-EU nationals. It is horizontally differentiated as the Schengen area does not include all the Member States, but only 22 Members, and four non-Members (Iceland, Norway, Switzerland and Lichtenstein), while Ireland and previously the UK have opt-outs. Finally, the Dublin regime also combines external differentiation (the four EFTA countries participate in the regime) with internal differentiation which is the result of the refugee crisis (D'Appollonia, 2019). When talking about migration and asylum policies, Comte (2020b, p. 3) says that «in a sector where member states' practices are highly heterogeneous, differentiation serves as the only available option in the short run to start cooperation».

Figure 2 presents the situation as of 2018 of legislative differentiation over the main policy areas.

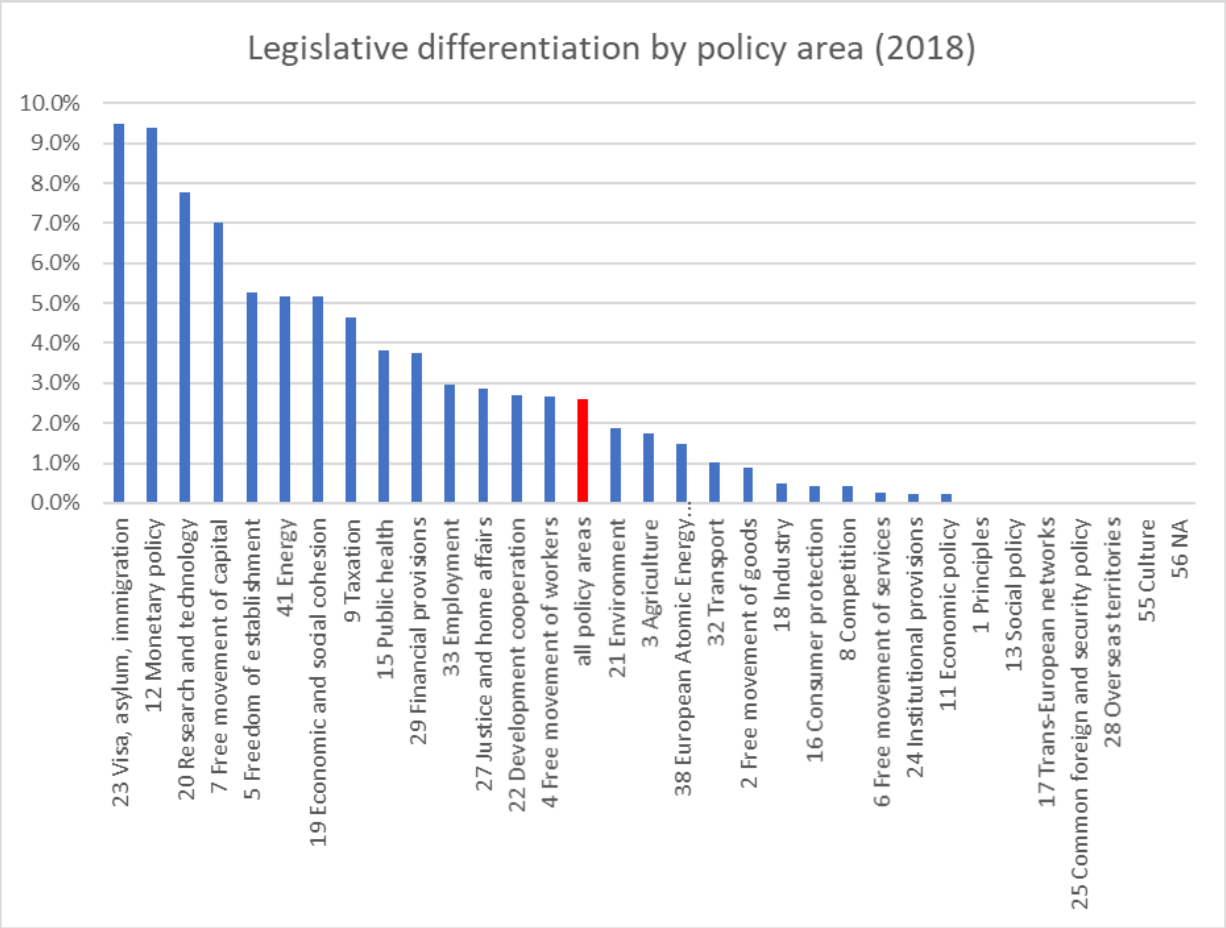

Figure 2: Legislative differentiation by policy area (2018). Source: (InDivEU, 2022)

Taking into account how differentiation has been deployed in different policy areas, the policies related to visa, asylum and immigration are actually the relatively more differentiated, as almost 10% of the acts present a form of differentiation, even though, ss reported by InDivEU (2022), the data overestimate the actual share of differentiation as it includes the temporary ones, and, on average, only 45% of them are actually permanent.

It is possible to identify three main reasons for the peculiarity of EU's migration policy, and its consequently prominent level of differentiation: the evolution of cooperation in the field, the will of Member States to prioritise their national interests, and the functioning of decision-making at European level.

One of the main differences with other policy areas is that, for migration and asylum, differentiation was not used because some Member states would not have been ready to cooperate,

as no group of states was ready to cooperate on the matter and to achieve harmonised cooperation or integration in the 90s (Monar J. , 2010). The cooperation is mainly due to historical contingencies, for instance the successive enlargements, the consequences of the USSR's collapse or the failure of national measures to tackle international issues. However, most of the new implementations were *ad hoc* institutional reforms, which only contributed to increasing the level of differentiation. Several initiatives were implemented after the 9/11, such as the Schengen Information System (SISI and eventually SIS II), the creation of the European Border and Coast Guard Agency (Frontex), the update of the Dublin convention into the Dublin regulations II (in 2003) and III (in 2013). By amending the previous treaties, the Treaty of Lisbon aimed at improving the coherence of this policy, however, it did not tackle the issue of the varying degree of participation of Member States, nor the fragmentation of the immigration policy into different policy areas which fall under all the three competences (exclusive, shared and supporting competences, according to the division made in Articles 3,4, and 6 of the TFEU). «As a result, different actors have different interests in pursuing different solutions, which in turn increases the legal and political complexity of differentiated integration» (D'Appollonia, 2019, p. 195).

Secondly, another reason for the use of DI in immigration and asylum policies is related to the motivation of Member States to protect their national interest when addressing common transnational issues (Koenig, 2015). For instance, the asylum policy is considered to be an explicative example of the ambivalence of functional federalism, as highlighted by Holzinger and Schimmelfennig (2012), indicating the creation of jurisdictions that are solely functional and independent of space and political borders. Indeed, the EU asylum policy is made of four different pieces of legislation: the Dublin III regulation (European Parliament and the Council, 2013a) - from which Denmark is exempted - the Reception Condition Directive (European Parliament and the Council, 2013b), the Asylum Procedures Directive (European Parliament and the Council, 2013c) and the Qualifications Directive (European Parliament and the Council, 2011). Member states agreed on this legislation to jointly tackle the asylum issue and avoid the 'asylum shopping'[14] typical of the pre-Dublin era. Due to its transnational nature, the Dublin regime's geographical extension exceeds the EU, by including four non-EU states, namely Switzerland, Liechtenstein, Norway and Iceland. In addition to this *de jure* differentiation, which is both internal, since Denmark has been exempted, and external, due to the inclusion of 4 non-Member States, asylum

[14] The term 'asylum-shopping' has no legal definition but is used in an informal sense and also in Commission Communications. It is often used with a negative connotation, as it implies an abuse of the asylum procedure through the lodging of more than one application for international protection in different EU Member States (choosing the EU Member State which may grant the most appealing social, humanitarian and economic standards).

policies present a *de facto* differentiation, caused by the flexibility in the implementation. Even though the decisions are based on the directives and regulations composing the Dublin system, the ultimate authority in deciding to whom should be granted asylum still resides in the State, therefore the EU Common Asylum policy dramatically varies according to the state in exam, as the acceptance rates and the conditions of reception diverge. For instance, considering the recent Afghan 'refugee crisis' caused by the overthrow of the Islamic Republic of Afghanistan in 2021, the recognition rate of Afghan citizens at first instance ranged from 9% in Bulgaria to 100% in Spain and Portugal (European Commission, 2022).

The last reason explaining why differentiation is an integral part of EU immigration and asylum policies relates to the assumption that flexibility is *per se* an unavoidable feature of the decision-making process and implementation of the EU integration. Broad exemptions have been granted to Denmark, as mentioned above, or to the UK[15] since the beginning, while other Member States have been granted *ad hoc* exemptions, as well as non-Member States have opted-in.

According to the intergovernmentalist framework analysed by Schimmelfennig (2019), DI is demanded by the heterogeneity of preferences, dependence and capacity of Member states. Heterogeneity of preferences can be explained by imaging there are two groups of states: one which favours the establishment of refugees and demands a fair sharing of the burdens of granting asylum, the other that completely rejects the idea, by considering it a threat to state sovereignty or national identity. Heterogeneity of dependence indicates the different degree to which Member states are affected by the problem, for instance geographically speaking Mediterranean Member States are much more affected by migration, thus they have an interest in fostering integration to ease the burden, whereas the non-affected would not benefit from integration. Lastly, heterogeneity of capacity is the difference between those states which can actually implement the policies and those which lack the financial or technological means to do so, thus integration is not entirely achieved as some states are unable to deliver the cooperation. If these heterogeneities become preponderant, uniform integration becomes impossible to achieve, yet there is potential for differentiation.

[15] See Article 10, Title VII of the Protocol 36 on transitional provisions annexed to the Lisbon Treaty.

Chapter 2. Constitutional differentiation in the UK and Denmark

Differentiation can follow two different logics: instrumental and constitutional. While instrumental differentiation means that a Member State lacks the capacity to participate in certain EU policies and is therefore temporarily excluded or exempted from joining them (Bellamy, Kroger, & Lorimer, 2022), constitutional differentiation is related to the reluctance of a Member State to further integrate in specific policy areas. According to Schimmelfennig and Winzen (2020b, p. 20), «constitutional differentiation arises in the context of EU treaty reforms and is driven by resistance to the supranational integration of core state powers among the Union's Eurosceptic and wealthy member states». In this case, the state has the capacity to adopt and implement a European policy, but it is not in its interest. This is mainly due to two factors: the desire to preserve its own national sovereignty, or the lack of trust in the capacity of other member states to implement the policy.

Constitutional differentiation has received a lot of attention (European Commission, 2017a). Some scholars assert that it boosts productivity by lessening intergovernmental disagreement, speeding up decision-making, and assisting in the adaptation of EU policies to diverse national preferences (Alesina, Angeloni, & Etro, 2005). On the other hand, others draw attention to the ways in which heterogeneity boosts legitimacy by shielding Member States from EU hegemony and meddling in crucial policy areas (Bellamy, Kroger, & Lorimer, 2022). According to Schimmelfennig and Winzen (2020b, p. 121-122), constitutional differentiation is resilient because it has policy consequences that strengthen the incentives for differentiation. First, constitutional DI makes it easier for the more federalist *ins* to integrate policies by eliminating the danger of veto from the sovereignty-minded *outs*. The difference between the degree of policy integration among the *ins* and the degree of integration that the *outs* widen, and, as a result, the political costs of reintegration rise. Second, constitutional DI reduces the functional benefits of re-joining by increasing the functional interdependence between the *ins* and lowering the functional interdependence between *ins* and *outs*: the *outs* no longer face the same policy challenges as the *ins*. This is not to suggest that there are no political or practical consequences associated with the exclusion of the *outs* (Wallace, At odds with Europe, 1997). In contrast to the benefits of exclusion, however, these costs are negligible and declining.

Sovereignty concerns become relevant when the EU is acting in the core-state powers, i.e., «the policy domains that have historically been under the exclusive control of the state or are essential for its identity and security» (Winzen, 2016, p. 103). Differentiation-seeking behaviour caused by sovereignty concerns is strictly related to the wealth of the country, since selectively participating in

EU policies raises the costs of implementation (Winzen, 2016). However, States that favour the *status quo* have more bargaining power in the decision-making process (Schimmelfennig & Winzen, 2014). Moreover, these States can resist compliance with costly EU law because they can afford EU sanctions, or they can deter EU enforcement authorities from imposing sanctions. This typology of differentiation has the tendency to last over time, or to become permanent, pushing towards the « end to the idea of an ever-closer Union with equal and solidary members» (Adler-Nissen, 2009a, p. 63). Constitutional differentiation through opt-outs is, however, at the heart of the integration dilemma. Foreign policy analysts share the general idea that Member States to which opt-outs are granted experience a loss of influence (Wallace, Flexibility: a tool of integration or a restraint on disintegration?, 2000) (Stubb, 2002). Indeed, «the integration dilemma assumption asserts that member states with opt-outs have chosen lower influence in order to safeguard higher autonomy» (Adler-Nissen, 2009a, p. 65), thus the influence of these states is attached to their capacity to be perceived as constructive Europeans.

In light of this, constitutional differentiation in migration and asylum policies is analysed through two case studies. First, the chapter highlights the triggers of constitutional differentiation in the policy area.

Then, the first case study analyses the constitutional differentiation of the UK. During the negotiations of the Amsterdam treaty, the UK secured itself an opt-out (with the possibility to opt-in) from the Title IV on visas, asylum and immigration. Eventually, the UK started to cooperate on the matter with the EU, opting-in when it believed to be better off. In more recent years, however, national identity and Euroscepticism prevailed, causing an increment of divergences between the two systems.

Lastly, the second case study focuses on Denmark. The country faced public opposition to deeper integration in migration policies, therefore governments had to negotiate opt-outs from specific provisions. However, due to the evolution of JHA and the fact that facts that decision-making was moved from intergovernmental to community method, Danish governments tried to reach a policy convergence through international agreements and by imitating EU laws.

In both cases, national identity plays a relevant role in the choice to demand or maintain opt-outs. National identity is defined as «the sense of one's belonging to the nation and the extent to which people believe being a member of the nation is important» (Mader, et al., 2018, p. 1), therefore it denotes a sense of attachment to the nation. Whereas conservative (right-wing) actors emphasise the value of national attachments in times of decreasing national borders, liberal (left-wing) actors tend to embrace a more European and global stance (Hooghe & Marks, 2009).

2.1 The triggers of differentiation

For some countries, national identity has always been considered the most essential thing to preserve, even inside the EU. This is for instance the case of the UK, whose position towards the EU integration did not change much from Churchill's era, when he said «We are with Europe, but not of it. We are linked but not compromised. We are interested and associated, but not absorbed» (Churchill, 1976, p. 184).

The integration reluctance in the area of Justice and Home Affairs (JHA) precedes even the creation of migration and asylum policies. During the 1980s, a few Member States, including Denmark and the United Kingdom, could not accept the creation of a vast economic space without internal borders, therefore integration had to progress via differentiation. Among the signatories of Schengen, the most reluctant was France, as its restrictive migration policies could have been threatened by migrants coming from the Mediterranean countries. Eventually, France managed to obtain an agreement on stringent external border controls, which would be imposed on any new Member State joining the Schengen Convention. When Italy, Spain, Portugal and Greece joined the Schengen area in 1990, they were forced to strengthen their border controls and accept the first-entry principle (as expressed in Article 30). Unlike France, no compensation could overcome the opposition of Denmark and the United Kingdom, reluctant to a common policy on immigration and asylum, which was also matching a broader attitude towards European integration. Indeed, these two countries, «together with the governments of Ireland and Greece, successfully blocked German plans for the full communitarisation of immigration and asylum policy» (Adler-Nissen, 2014, p. 116).

With the Maastricht Treaty, which was negotiated at the beginning of the 1990s, the EU advanced its objectives to establish a single currency, do away with national border controls, implement common asylum and immigration laws, as well as Union citizenship and a common foreign policy. The UK and Denmark were particularly reluctant to cede control in these areas, and they nearly killed the Treaty and halted the entire process of integration. In the UK, "Maastricht" came to be associated with the establishment of a federal super-state and led to the longest-lasting and perhaps the deepest rift in Britain's relationship with the European Union (before Brexit). Eventually, the UK managed to obtain an opt-out to the third stage of the European Monetary Union (EMU). As for Denmark, following the rejection of the Maastricht Treaty, Denmark and Member States agreed that any subsequent transfer of authority would require a referendum (Peers, 2011). The rejection of the Maastricht Treaty caused tremendous political turbulence among parliamentarians, resulting in the same autumn in a "National Compromise" on Denmark's four key opt-outs: the eurozone, the common

defence policy, EU citizenship provisions, and, lastly, the JHA, as agreed in the Edinburgh Agreement (European Council, 1992). In order to ensure that the supranational integration technique would not be used, the Danish government negotiated a political opt-in and a legal opt-out that retained its status as a member of the Schengen group, however the opt-out is based on «methodology rather than ideology» (Hedemann Robinson, 1994, p. 189). When the Treaty of Amsterdam was being negotiated by EU nations Ireland and the United Kingdom were the only EU members that had not ratified the Schengen Agreement. Ireland wanted to keep its Common Travel Area with the United Kingdom and its adjacent islands, which would have been incompatible with Schengen membership as long as the UK remained outside, while the UK did not want to join.

The first turning point in immigration policy, and consequently in the use of constitutional differentiation, came with the Treaty of Amsterdam (European Union, 1997a). The Treaty, signed in October 1997 and came into force on the 1st of January 1999, incorporated the Schengen *acquis* into the EU framework and defined immigration as a common EU interest. Furthermore, the signature of the Treaty dissolved the third pillar and brought the migration and asylum policies into the scope of the first community pillar. The Commission gained the right of initiative, albeit shared by the Council for at least five years[16], which helped place politically sensitive proposals on the agenda that some Member States could not endorse publicly (Moravcsik & Nicolaidis, 1998, p. 29).

However, the signature of the Amsterdam treaty should not lead to the conclusion that Member States had agreed unanimously to the communitarisation of migration policies, and even though «careful analysis of the new provisions for migration policies within the EU shows that the new provisions are 'an important step in the right direction, Title IV TEC ["Visas, asylum, immigration and other policies related to the free movement of persons"] is a carefully balanced compromise between supranational autonomy and Member States' control over this process» (Stetter, 2000, p. 93). The UK, Ireland, and Denmark's hostility to communitarization meant that consensus was far from evident until the last weeks before Amsterdam, despite the need to identify any area in which to announce "success" in the negotiations.

Flexibility through the Amsterdam treaty is not simply due to the incorporation of Schengen – and its exemptions - or its hybrid nature of supranational and intergovernmental power, as a few other elements increased the degree of differentiation.

[16] Until the 1st of January 2004.

More than any other country on the continent, Britain and Ireland were significantly better able to exert *de facto* control over movements across their borders, and they « rightly perceived less benefit and considerable cost imposed by international co-operation» (Moravcsik & Nicolaidis, 1998, p. 29). The new Title IV introduced mechanisms for the progressive establishment of an area of freedom, security, and justice, by laying down a general obligation to adopt the necessary measures on external border controls, asylum, refugees, and immigration. To secure British acceptance to the newborn Title IV, the Treaty granted a full opt-out to the United Kingdom and Ireland from the newly 'communitarised' areas of Justice and Home affairs, as well as the possibility to opt-in, i.e. the possibility to participate in a measure on a case-by-case basis, as stated in Article 3 of the Protocol on the position of the UK and Ireland (European Union, 1997b), which expresses that

> The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title IV of the Treaty establishing the European Community, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that shall be entitled to do so.

The opt-in possibility made the UK switching from a case of variable geometry to a *Europe à la carte.* Even considering the possibility of selectively opting-in, the new "area of freedom, security and justice" has been born with the assumption that both countries will not take part in the migration policy.

On the other hand, Denmark's position is ambiguous. The Member state signed the Schengen agreement in 1996, alongside the other countries of the Nordic Passport Union[17] because Finland and Sweden joined the European Union, however, when the Schengen *acquis* was integrated into the Treaty of Amsterdam, Denmark's position became paradoxical as it negotiated a protocol to keep participating in Schengen-related measures while opting-out from the 'supranationality' of the supranational Title IV. Article 4 of the Protocol on the position of Denmark (European union, 1997c) is the emblem of ambiguity, as it states

> Denmark shall decide within a period of 6 months after the Council has decided on a proposal or initiative to build upon the Schengen *acquis* under the provisions of Title IV of the Treaty establishing the European Community, whether it will implement this decision in its national law. […] If Denmark decides not to implement a decision of the Council […] the Member States […] will consider appropriate measures to be taken.

[17] The Union is composed of Iceland, Denmark, Norway, Sweden and Finland.

In other words, to safeguard its autonomy, Denmark participates in the negotiations but cannot vote on Schengen-related measures. Moreover, if it decides not to join the policy, Member States can implement specific actions against the country, and as Per Stig Møller[18] said: «appropriate measures is a euphemism for being thrown out of Schengen» (Adler-Nissen, 2014, p. 135).

The most effective Danish opt-out is related to asylum, migration, civil law and police co-operation, as it is supposed to imply that supranational integration won't threaten Danish sovereignty. However, Danish officials of the Ministry of Foreign Affairs interviewed by Adler-Nissen believed that the opt-out is turned against themselves, as it is not the result of a real problem and it harms their bargaining power (Adler-Nissen, 2014, p. 137-138).

According to Georgia Papagianni (2006, p. 29-30), «the flexibility clause introduced within the framework of Title IV should be regarded less as closer cooperation, and more as a communitarisation *à la carte*». As she argues: «The MS who mounted strong objections to any sort of communitarisation were given the possibility of participating to the extent and in the way that they preferred». Indeed, the importance of flexibility clauses lies in the institutionalisation of 'variable geometry', which for the first time appeared within the first pillar in the treaties, and deviates from the recommendations of temporary derogation and a 'multi-speed approach' suggested in the Reflection Group in December 1995 (Council of the European Union, 1995). The election of Tony Blair in the UK in 1997, alongside the Danish manageable 'exceptionalism', made the choice for flexibility less complicated. Because of this, the EU agreed on removing the term 'flexibility' from the final text of the treaty in favour of the term 'closer co-operation' (Philippart & Edwards, 1999, p. 88-89).

2.2 The best of both worlds? The UK's position

In the first years after the Amsterdam Treaty entered into force, the Blair administration remained hesitant to use the opt-in option. The British government, however, believed that it would be advantageous if issues of immigration and asylum could be addressed through the Europeanization of policy-making in order to ensure that other member states took on a greater share of the burden as there was an increase in the number of asylum seekers entering the UK via other EU states. A few years later, the House of Commons (2013) has declared that the UK participates «in measures selectively, deciding on a case-by-case basis whether opting in would be in its best interests». Indeed,

[18] Denmark's Minister of foreign affairs from 2001 to 2010

the UK has so far chosen to participate in the majority of civil law measures, all asylum measures, and the majority of measures addressing illicit migration, but it has opted out of the few safeguards relating to legal migration, visas, and border controls (Adler-Nissen, 2009b). In different words, the UK's conditional participation with EU cooperation has been contingent on whether the latter aligns with the domestic policy agenda's objectives and the principle that British parliamentary democracy stays unharmed.

According to Schimmelfennig and Winzen, constitutional differentiations are usually about a reluctance to integrate and «have a tendency to last for a long time and even remain in place permanently» (Schimmelfennig & Winzen, 2014, p. 355), however the differentiations can be only on a few issues, while generally cooperating in the field. While the Eurogroup has been effectively established by the eurozone nations, the JHA field, and as a consequence migration and asylum policies, is more difficult to categorise into insiders and outsiders, as it would be impossible to physically exclude delegates from opt-out states from the JHA Council, where new EU proposals that fall within those states' opt-outs are discussed alongside other measures that do not affect the UK or Denmark's opt-outs.

Because of this, a revisionist strand of constitutional DI literature suggests that the policy exclusion implied by constitutional differentiation may be only a façade. For instance, «evidence suggests that the Brussels-based representatives of opt-out countries remain well connected to colleagues from insider countries and routinely get involved in the policymaking of the *ins*» (Genschel, Jachtenfuchs, & Migliorati, 2023, p. 5). Indeed, constitutional DI does not always entail complete and permanent policy exclusion, and the UK’s position in migration and asylum policies is an apparent example. The former Member State has adopted several instruments to reintegrate. Reintegration, defined by Genschel et al. as «the effective inclusion of a member state into a field of EU policy-making from which it is formally excluded by a constitutional opt-out», has been promoted with the separate agreements, specific contracts that restrict the exclusionary impact of the general constitutional opt-out, paving the way for selective participation.

In light of this, the United Kingdom and Ireland have cooperated closely on asylum and refugee policy with other EU States since the beginning of the 1990s. Moreover, even though the UK was not participating in EU policies on the matter, it has worked on several domestic initiatives with the support of EU officials, such as the Asylum and Immigration Appeals Act (Joppke, 1999). Eventually, in March 1999, the UK and Ireland exercised their right to join EU policies and asked to participate

only in the policies related to mutual assistance in criminal matters, police cooperation and judicial cooperation, remaining outside of the asylum and immigration policies.

In an interview in 2004, Tony Blair described the UK's position in this way:

> With the Treaty of Amsterdam seven years ago, we secured the absolute right to opt-in to any of the asylum and immigration provisions we wanted to in Europe. Unless we opt in, we are not affected by it. And what this actually gives us is the best of both worlds. We are not obliged to have any of the European rules here, but where we decide in a particular area, for example to halt the trafficking in people, for example to make sure that there are proper restrictions on some of the European borders that end up affecting our country, it allows us to opt-in and take part in these measures (Blair, 2004)

However, this position has been severely criticised by the European Union, as put forward by the then Justice and Home Affairs Commissioner Vitorino, by saying that opt-outs in this area «undermine burden-sharing» (Morris & Castels, 2004).

According to existing research, opt-in decisions are made with the intention of influencing EU policy in a manner that is favourable to domestic interests (Ladrech, 2004, p. 57). In general, British officials and the government see the opt-in option as "justifiable" and agree that the UK "deserves" influence even though it is not always formally involved (Adler-Nissen, 2009a). The UK takes a different tack by distinguishing between immigration that is seen as being much more problematic, like asylum-seeking and unauthorised immigration, and economic migration, especially that of highly skilled individuals, for which doors have been opened but for which the policy response is still firmly national. The British government's signature on each of the seven EU measures on asylum adopted between May 1999 and May 2004 serves as an example of this distinction (Geddes, 2005). Therefore, during those years, even by maintaining the opt-outs, the UK's migration policy has become 'Europeanized', while, on the other hand, the EU migration and asylum policies have not encountered many obstacles caused by the legal agreements with the country. Overall, from the idea of 'safe countries' to mutual recognition, the UK had tried to both influence and imitate EU measures (Geddes, 2005, p. 734). These decisions were not always supported by the majority, however, since the Amsterdam Treaty, the management of borders and migration has acquired a European dimension, and so it had become much more complicated to self-isolate, even for an island.

For all these reasons, the Commission and the other Member States had pointed to the UK as one of the front-runners in JHA, which may be accounted for by the UK's many pace-setting initiatives

during the 2000s. The perception of UK authorities was not as negative as constructivists would have thought. Opt-outs may have posed a problem for the other Member States and the Commission in theory, but the UK was seen as a positive and influential player when it combined an ambitious approach to cooperation on asylum, illegal immigration, and civil law with the strategic use of its case-by-case exemption.

With the same attitude, the UK decided to selectively cooperate with the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), established in October 2004. For instance, since 2010, Britain had worked with Frontex to stop illegal migration along the Bulgarian-Turkish and Greek-Turkish borders in the *Operation Poseidon Land* and *Operation Poseidon Sea.*

As for asylum policies, the United Kingdom decided to join (opt-in) the main post-Amsterdam directives established in the early 2000s, namely the Temporary Protection Directive (Council of the European Union, 2001), and the three other directives which form the Dublin system, those on asylum procedures (Council of the European Union, 2005a), qualification (Council of the European Union, 2004) and reception conditions (Council of the European Union, 2003a). However, at first glance, it used its opt-out right when the second phase of the legislation has been agreed upon, establishing the so-called Dublin III. The UK specifically asserted that a number of reforms, regardless of the legitimacy of the claims made, improve the rights of all asylum seekers. The federal government said there were "severe worries" about enabling asylum seekers to work after six months (nine in the final accepted version), limiting the time that they may be detained without a decision, and limiting the use of fast-track processes (The Migration Observatory, 2014). Eventually, both Ireland and the UK adopted the new legal acts, as they opted-in to the Dublin III Regulation and the Eurodac directive.

In the year following the recast of the Dublin system, the EU adopted several directives to improve the life of migrants. The directive on Family Reunification, the directive on Seasonal Workers, the directive on Intra-Company Transferees and the Long-term Residents Directive were adopted. The latter is the most important measure in terms of resident security and freedom of mobility inside the EU. However, no one of these immigration directives had the UK's consent. The UK has been advised to sign up for both the Family Reunification Directive and the Long-term Residents Directive by the House of Lords EU Committee on several occasions, as a step like this would advance the rights of economic migrants in the UK and provide them parity with economic migrants elsewhere in the EU (House of Lords European Union Committee, 2012). Despite the continuous insistence with which the EU Committee have asked to opt-in to the Family Reunification Directive, the UK has not only

decided not to participate, but it has adopted further restrictions to asylum seekers who wish to apply for family reunification (such as minimum salary, language proficiency, and understanding of UK culture), increasing the divergences from the Common European Asylum System (CEAS). A few years later, when the so-called 'refugee crisis'[19] started, the UK could benefit from its geographically remote location, despite being a member of the Dublin system, not to have the burden of thousands of asylum seekers arriving at its coast. Since the UK and Ireland were voluntary Schengen non-members, they had no reason to reconsider their outsider status.

In 2015, the European Commission began forty infringement procedures in the area of asylum, most of which were centred on the weak (or the lack of) enforcement of European secondary law (European Commission, 2015b). Two council measures, established in September 2015, aimed at transferring 160,000 asylum seekers from Greece and Italy to other EU nations, in an attempt at more centralised cooperation, failed completely. By using their opt-out privileges, Ireland, and the UK avoided participating in the adoption of the second Relocation Decision (Council of the European Union, 2015). The crisis politicised even more the migration issue. In a YouGov study conducted at the end of 2015, 63 per cent of respondents ranked immigration as the top problem the UK was facing, outpacing the second issue, healthcare, by 24 percentage points (Clarke, Goodwin, & Whiteley, 2017, p. 11). As Schimmelfennig, Leuffen, & Rittberger (2015) explained, politicisation and a high degree of interdependence are likely to trigger differentiated integration. Since DI was already present in migration and asylum, the crisis has only contributed to differentiated disintegration, i.e., Brexit (Schimmelfennig F. , 2018).

However, The UK has not contributed significantly in recent years to the Dublin system. The UK lagged far behind the largest beneficiaries of Dublin transfers even in 2019, when there was a sizable excess of incoming Dublin transfers in the UK compared to outbound Dublin transfers. In terms of absolute numbers, it processed very few Dublin transfers, especially when compared to its size (Eurostat, 2020). Therefore, its contribution to the Dublin system is not essential, and its removal should not materially alter the efficiency of EU policies in that area. Moreover, there is no proof of a centrifugal effect in terms of the cohesiveness of the EU (Comte, 2020a).

Since the Brexit transition period ended on December 31, 2020, the UK is no longer bound to use the Dublin framework, the Eurodac fingerprint database, or any other European standards, in addition to

[19] In this study, for ease of understanding, and since the term has become commonly used in journalistic and academic circles, I will refer to the high flow of migrants and asylum seekers who arrived in Europe in 2015/2016 as a 'refugee crisis', in spite of my belief (shared with some academics and experts) to appoint the event as a 'management crisis' of migrants and refugees.

other crucial elements of the European migration and asylum system. The EU and the UK were unable to agree on migration and asylum policies, and after the UK unsuccessfully tried to conclude bilateral agreements with individual member states, as of today, there is no formal agreement that allows the UK to return asylum seekers to the EU. All the safe and legal routes to the UK under the Dublin system are closed, including those for family reunion for asylum seekers (Neidhardt, 2022).

2.3 Denmark: a slightly pregnant country

Denmark was one of the pioneers to negotiate opt-outs since the Maastricht Treaty. However, the exemptions decided in Edinburgh were more a reflection of the electorate, rather than the one of the political elites. At the time of the Edinburgh agreement, formal opt-outs did not affect the participation of Denmark in JHA policy-making, since the exemptions would be applied under Qualified Majority Voting (QMV), but this was not yet the case (Migliorati, 2022, p. 1120). Whereas the British managed to have a cherry-picking option in the ASFJ, the Danes decided to adopt a more drastic position, at least at first sight, by saying no to the whole project. These opt-outs corresponded indeed to post-functional concerns of identity rather than of real concerns of governance-capacity. Moreover, since QMV was not used at the time, the opt-outs represent a case of reintegration by default, « the practical application of an opt-out contingent on conditions that are not presently met» (Genschel, Jachtenfuchs, & Migliorati, 2023, p. 2). As a result, the fundamental significance of the opt-out was to prevent Denmark from being bound by any future developments of the Area's measures, particularly under supranational governance.

In 1997, with the Treaty of Amsterdam, a new title was added for visas, asylum, immigration and other policies related to the free movement of persons (Title IV). Eventually, the Danish opt-out from the title was much less dramatic than the original one. This was probably due to the enlargement of the EU to the other Nordic countries, Sweden and Finland, which encouraged Denmark to surrender its national border controls and to sign the Schengen Agreement in 1996. However, when Schengen was included in the *acquis*, a protocol was drafted to maintain the Danish opt-out from supranational cooperation. Denmark has formally refrained from voting, but it was obligated to ratify all Council of Ministers decisions six months after the other members. This obviously goes against the notion that opting out ensures immunity from EU law. Therefore, the Schengen stance is «extremely awkward» (Adler-Nissen, 2014, p. 136) in the eyes of Danish officials.

In contrast to the UK, the Danish political and administrative body views the opt-outs as a «pain in the neck» (Adler-Nissen, 2014, p. 136). All Danish governments, right and left, have made it their policy to eliminate the opt-out. For this reason, four referendums have been held on EU-related issues since 1998, with the most recent one in 2015 which saw Danish voters reject the Rasmussen government's proposal to change the current justice and home affairs opt-out into a selective, case-by-case opt-in (Leruth, Ganzle, & Trondal, Differentiated Integration and Disintegration in the EU after Brexit: Risks versus Opportunities, 2019, p. 1388). The main issue, however, is for Danish governments to persuade citizens that eliminating the current opt-outs would be in the best interests of the nation, particularly in light of the fact that the Danish Eurosceptic movement has been well organised ever since the country's first vote on the Maastricht Treaty. As a result, it is preferable to view the Danish model of differentiation as a «quasi-permanent» one in which Danish governments attempt to convert opt-outs into opt-ins, but with little popular support (Leruth, Ganzle, & Trondal, Differentiated Integration and Disintegration in the EU after Brexit: Risks versus Opportunities, 2019).

As a solution, since the early 2000s, the Danish government started to adopt policies very similar to the ones chosen at the EU level, bypassing the formal impediments of the opt-outs. This mimicking was not only visible in the adoption of converging policies, but also by the conclusion of intergovernmental arrangements. Denmark has not implemented the core directives of the CEAS, which are the directives on qualification and status of asylum seekers, the one on asylum procedure and the directive on the reception of asylum seekers. However, instead of taking the chance of exposing an opt-in clause to the public's scrutiny, they negotiated parallel agreements on important matters including the Dublin System and the participation in the Eurodac Database (Council of the European Union, 2006b). However, the Union's desire to sign a parallel deal with Denmark is conditional on specific requirements. Given Denmark's desire to abandon the Protocol in the future, such agreements must be viewed as an unusual and temporary solution, and there must be a clear interest for the Union to complete such an agreement (Adler-Nissen & Gammeltoft-Hansen, 2010).

Denmark, whose participation in the Dubin regulation is not bound by the *acquis*, has not participated in the Dublin system until 2006 when it decided to conclude a special agreement with the European Community to take part in the programme, while not being a full member. This process allowed the country to be bound only by international law, and not by Community law. Not considering their legal agreements, it must be said that, in practice, Danish representatives have participated in the shaping of EU new legislation in the field and they have played the role of constructive insiders. For

instance, their contribution was crucial in the negotiation of the Directive on family reunification (see Adler-Nissen, 2009).

Nevertheless, its position allows Denmark to have stricter policies in specific areas. Taking the example fo the EU Qualification directive (and its recast), Article 15 enables subsidiary protection if someone is fearing the death penalty or torture «by reason of indiscriminate violence in situations of international or internal armed conflict» (Council of the European Union, 2004), however, Denmark has not adopted it. As a result, Denmark rejects a large number of asylum seekers, such as those from Afghanistan, Iraq, and Somalia, who frequently receive subsidiary protection in other EU member states. Danish asylum law likewise does not recognise sexual orientation as a social category that qualifies for refugee status, in contrast to the EU directive (Kreichauf, 2020). This is translated into the impossibility of another Member State to return a refugee belonging to these categories to Denmark. Concerning family reunion procedures in Denmark that are harsher than EU laws, Denmark has been pressured to relinquish its stringent restrictions, particularly for EU nationals, within the scope of free movement. The same goes for the definition of refugee, which, according to Denmark law, the person must be individually persecuted and prove s/he is personally in a specific danger. This is in contrast with the definition provided by the EU directives, which consider a refugee as a « third-country national who, owing to a well-founded fear of being persecuted […] is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country» (Council of the European Union, 2004). During the "refugee crisis", like the United Kingdom, Denmark did not participate in the relocation of the 160.000 asylum seekers who arrived at the Southern borders of the EU (Council of the European Union, 2015). Denmark, on the other hand, completely benefits from Schengen's visa-free zone and has an approximately 1:3 ratio of incoming to outgoing requests for Dublin transfers (Eurostat, 2021).

Denmark used the legal *escamotage* of being bound by international law and not by EU law to avoid de-differentiation, reducing social security benefits for asylum seekers, aiming at becoming less attractive to not be considered as a destination for asylum shopping. This behaviour is considered to be in violation of the Refugee Convention, but not of EU law (UNHCR, 2015), thus Denmark was not breaching European law.

Denmark's issues are not only related to the legal arrangements, but on the implementation side as well. In 2007, the European Commission, with the help of the Odysseus Academic Network for Legal Studies, coordinated a large-scale study entitled 'Conformity checking of the transposition by Member States of ten EC directives in the sector of Asylum and Immigration' (Odysseus Network,

2007) to assess how discretion was impacting the outcome of migration policies. Taking as an example the above-mentioned Directive 2004/83 on Qualification, the situation in October 2007 was as follows: 12 Member States had transposed the directive, 12 Member States were in the process of transposing it, while 2 Member States did not start the process. However, all the countries presented from a few (less than 6) to several (more than 20) transposition of the provisions causing legal problems. The study also showed that, compared to fully participating nations, selective participants are less likely to comply with EU requirements and produce more implementation issues. As a result, while participating in EU decisions, Denmark, Ireland, and the United Kingdom have a proportion of compliance issues that is 19% greater than fully integrated EU members. In light of this, Zhelyazkova (2014, p. 742) concludes that Member States prefer to participate for reasons that go beyond the preparedness or willingness to follow EU policies, such as reputational concerns and a desire to not be left out of crucial choices.

With the Lisbon Treaty, Denmark faced an *impasse.* In 1999 Denmark was excluded from participating only in a very few measures, whereas, as a consequence of the treaty of Lisbon, the consequences of the Danish opt-outs intensified to the point that the country was excluded from more than 200 measures (in the whole area of Justice and Home Affairs). According to several interviews conducted by Adler-Nissen (2014), Danish representatives in Brussels feel «awkward» about the opt-outs, and they do not understand the necessity, and this feeling goes both ways as «there is an understanding among the more experienced officials in the Council of Ministers, the European Commission and some member states that the opt-out is not the fault of the Danish officials. They feel sorry for the Danes» (Adler-Nissen, 2014, p. 137). Because of this, the Danish behaviour does not fit with the integration dilemma theory, according to which a state prefers the loss of influence over sovereignty, because the opt-outs do not have the support of the Danish political parties (apart from *Dansk Folkeparti*), but they represent the will of the people.

This Danish attitude, which is typical in the area of immigration and refugees where attachment to national sovereignty seems to prevail, was also demonstrated for example in Denmark's involvement in the Europol, and not every EU politician agreed with this dynamic. At the end of 2014, Danish political parties agreed on holding a referendum in December 2015 to convert the Danish opt-out in JHA in an opt-out-opt-in agreement similar to the UK’s. This idea was triggered by the Regulation 2016/749 establishing the European Union Agency for Law Enforcement Cooperation (Europol), which would have communitarized the Agency. While Denmark had the right to participate in the Agency in its intergovernmental form, since the rejection of the Danes in the referendum, the state was required to leave the Agency by 2017 after it was officially created as an AFSJ Agency from

which Denmark has an opt-out. Since the referendum result, the Danish government pushed for a "parallel deal" that would allow it to maintain some cooperation with Europol (Euractiv, 2016). European Commission Vice President Frans Timmermans wanted to be abundantly clear with his Danish audience: 'You can't be slightly pregnant, you're either pregnant or you're not. If you vote to be out of Europol, you're out of Europol. I don't see on the basis of the legal situation any alternative for that' (quoted in Genschel, Jachtenfuchs, & Migliorati, 2023).

To sum up the Danish position on migration and asylum policies, Denmark decided to never fully join common policies on the matter, starting from the Edinburgh agreement, which, even by not having immediate and practical repercussions, the public opinion opted for the rejection of greater integration. Given the rapid development of EU cooperation in JHA matters, and consequently in the migration field, since Amsterdam, where policies were moved from intergovernmental decision-making to the community method, Danish governments have sought policy convergence through a variety of means, including international harmonisation - through parallel agreements and the securing of "exemptions to the exemptions" (Adler-Nissen, 2009a) and by essentially imitating EU laws. Danish policymakers attempted to sidestep the customary postfunctional constraints with the Lisbon Treaty, believing that the public would be less resistant to a vote on the matter. However, convergence was pursued even after the failed attempt.

2.4 Conclusion

When it comes to constitutional differentiation - or sovereignty differentiation according to Bellamy et al. (2022) - in migration and asylum policies, the United Kingdom and Denmark represent the most explanatory cases. Both countries decided for the opt-outs because of ideological reasons linked to the concept of sovereignty and identity. And in line with Schimmelfennig and Winzen analysis (2014), on paper, the exemptions became permanent (or until the withdrawal from the European Union). DI, which began as a response to capacity issues in relatively poor Member States and in the Union's market, agricultural, and regulatory policies, has recently evolved into a result of Member State efforts to protect their sovereignty in response to Europe's efforts to integrate "core state powers" in justice, internal and external security, and monetary policy. In his analysis, Winzen found a correlation between DI and two variables: national identity and the wealth of a country (meaning the economic success and the country's regulatory and governance quality[20]). Therefore, instead of poor

[20] These values are measured by the GDP per capita and the World Bank governance indicators.

countries with limited capacity, «the new 'laggards' are wealthy and nationally oriented countries willing and able to safeguard their sovereignty» (Winzen, 2016, p. 101). Indeed, state elites in relatively rich and well-governed countries can claim that they already have successful policies and thus they are concerned about being locked into common rules with poorer countries and their state agents, whom they regard as inferior legislators (Winzen, 2016).

Opt-outs encourage efficiency by preventing the possibility that both Member States may stymie EU progress and compromise the *acquis Communautaire*'s constitutional integrity, respectively. Moreover, in this way, Denmark and the UK do not use noncompliance as a strategy to force the execution of EU migration and asylum policies (even if their compliance rate is lower than fully participating Member States), nor do they prevent the approval of measures that do not align with their wishes (Holzinger & Schimmelfennig, 2012).

On the other hand, the two cases present some differences. Both the countries decided to opt-out from these policies, however, the UK had the possibility to decide on a case-by-case basis, while Denmark limited itself to mimicking EU policies and stipulating international agreement on the matter. The differences were also related to the feelings the representatives of each country were sensing: while the British were quite satisfied with their agreement and their possibility to live «the best of both worlds» (Blair, 2004), the Danish representatives would like to get rid of this special treatment, which, according to them, is not beneficial.

In the absence of differentiated integration, their ideological position would not have allowed the harmonisation of asylum and migration policies and the approval of common minimum standards. DI was therefore necessary, and it fulfilled its primary purpose, to avoid deadlocks in the negotiation of new policies and to allow states to move forward in the construction of EU policies. Nevertheless, in an area of policy which saw a progressive de-differentiation and harmonisation over the years, countries cannot stand still. Both the UK and Denmark have subsequently started to cooperate playing the constructive insiders, but by making their right of exemption prevail when the policies proposed by the EU did not seem to favour them, such as for the redistribution of refugees during the crisis.

Denmark and the UK represent two cases where the exclusive national identity leads to internal divisions. National identity is related to, but distinct from, Euroscepticism. According to Hooghe and Marks (2008), Euroscepticism reflects both economic concerns and population identity conceptions. However, resistance to the integration of core state powers, which de-emphasize economic concerns and mobilises nationalist sentiment, should stem primarily from Euroscepticism's exclusive identity component (Schimmelfennig, Leuffen, & Rittberger, 2015). Euroscepticism, in general, only partially

captures the exclusive identity conceptions that underpin Member States' sovereignty-seeking behaviour in core state powers.

The instance of the United Kingdom is an instructive example of party-Euroscepticism, reflecting features of the country's islandic origins, that has supported European integration on an *à la carte* basis, until it started the process of leaving the EU. In the case of Denmark, the frequency of referendums on treaty ratifications and EU issues has kept EU integration at high levels of politicisation, fuelling national identity concerns, which result in differentiated integration.

Chapter 3. The Dublin system: from enhanced cooperation to de facto differentiation

The so-called Dublin system represents one of the most prominent examples of differentiated integration as it entails several forms of DI. At its early stage, the convention was signed outside of the European framework, and it could be interpreted as a case of enhanced cooperation, even though, at the time, the provision was not yet foreseen by the treaties, as the 'closer cooperation' entered into EU law only with the Treaty of Amsterdam. This policy method has been defined by Helen Wallace (2014) as 'intensive transgovernmentalism', indicating cases where EU Member States «have been prepared cumulatively to commit themselves to rather extensive engagement and disciplines, but have judged the full EU institution framework inadequate or unacceptable» (Wallace, An Institutional Anatomy and Five Policy Modes, 2014, p. 101). According to this policy mode, mainly used in issues of state sovereignty, the role of EU institution – if any – is marginal, as the main role is played by national policy-makers, and it includes the adoption of special arrangements for managing the cooperation. This is, indeed, the case of the Schengen Agreement, which constructed a separate treaty framework outside of the EU's one, until the Treaty of Amsterdam. Just like what will eventually be called 'enhanced cooperation', intensive transgovernmentalism often does not include the whole EU membership, as initially Italy, Denmark, Ireland, the UK and Greece were excluded.

Moreover, the Dublin system is a case of external differentiation. In its largest size, before the withdrawal from the EU of the UK, the system encompassed 32 states, the 28 EU Member States and four associated countries: Norway, Liechtenstein, Switzerland and Iceland. These four countries, since migration is by definition a cross-border phenomenon, decided to opt-in and adopted the directives and regulations that form the Dublin system.

Since the transfer of the Dublin regulation (and the related directives) into the *acquis communautaire,* the EU has worked towards a de-differentiation of heterogeneous national policies in the asylum system, however, in order to progress in the field, both formal and informal differentiation was needed. As for formal differentiation, the above-mentioned examples of the UK and Denmark are the most well-known cases, in which these States are exempted from adopting the measures related to the asylum policy area (unless they wish to). Nevertheless, DI in the field is not only related to *de jure* differentiation.

In its effort to establish the CEAS, whereby the same standards on qualification, reception and procedures apply to all Member States, the EU was forced to rely on the use of directives, due to their

sometimes vagueness and flexibility, which contain «numerous discretionary clauses leaving Member States wide scope in implementing diverse standards of protection» (El-Enany, 2017, p. 363). In this context, DI can be defined, in relation to the implementation phase, as a «considerable variation in national adaptation of EU policy, which reflects the different context and trajectories of integration» (Andersen & Slitter, 2006, p. 314). In their research, Andersen and Slitter classified DI through new concepts. The most noteworthy of these is the concept of deviant integration, which establishes differentiation by circumventing EU rules. Based mostly on noncompliance, this type of differentiation was envisaged to be the outcome of low state capacity and/or strong domestic opposition to the implementation of a certain EU policy. The phenomenon has been eventually defined by Schimmelfennig, Leuffen, & de Vries (2022, p. 4) as the result of «the flexible and unequal implementation of legal obligations». Another important aspect to consider is that *de facto* differentiation is primarily dependent on tolerance from the EU Commission. Its long-term viability is thus doubtful, as the legal difficulties raised by such an arrangement may be addressed sooner or later. In their analysis, Leruth, Ganzle and Trondal (2019) conclude, however, that unless the socioeconomic and political conditions for fuller integration are met, de facto DI may become permanent.

For this purpose, the Dublin system is analysed through two different definitions of DI. Firstly, the Dublin system is examined by looking at its territorial scope. In this sense, the Dublin system engaged in a series of *enlargements* starting from an agreement between five pioneer countries outside of the Communitarian framework, then it is extended to the whole Union and eventually it reached states beyond the territorial extension of the EU. The Dublin system is therefore a case of external differentiation, which results when non-member states buy into specific policies, and they selectively integrate into the EU rules and policies without becoming members (Schimmelfennig, Leuffen, & Rittberger, 2015).

Secondly, the Dublin system is analysed as a case of *de facto* differentiation in its implementation phase. For this scope, the system is examined through the directives adopted by the EU and the respective adaptation and implementation in national policies.

3.1 The geography of the Dublin system

The Schengen Agreement of 1985 set an ambitious agenda for the establishment of an area without borders, which served as the foundation for the cooperation that first began with a series of bilateral encounters. Consequently, after five years of negotiations, the Schengen Implementation Agreement, which was signed in 1990 but didn't come into effect until 1995, was added to the latter. The agenda of the five Schengen nations (France, Germany and the Benelux) included a long list of measures, such as the control of external borders, a common visa policy, coordination in the asylum area, police cooperation, and the creation of a network for the exchange of crime-related information known as the Schengen Information System (SIS). Eight more EU member states joined the original five Schengen members before the Schengen acquis was subsequently adopted into EU law through the Amsterdam Treaty, leaving only two of the then 15 Member States out: the UK and Ireland.

Southern European countries that requested to join Schengen had to comply with the 'Schengen acquis' and no concessions could have been granted, since the agreement could not be amended. As for migration and border controls, the main word in the text was ‘trust’, meaning to trust the border guards of the other Schengen States, but some States had to gain the trust of the founders. This is for instance the case of Spain, which, just two years after the signing of the Schengen Agreement, erected a massive fence in the Ceuta and Melilla enclaves (Guiraudon V. , 2018).

The 1990 Schengen Implementation Agreement included a working group on asylum. Indeed, four days before the Schengen Convention, Member States signed an intergovernmental convention in Dublin (European Union, 1990). The Dublin Convention defined the criteria to determine the responsibility for examining asylum applications[21], with the aim of avoiding asylum seekers to present a request in more, or each, Member State (the so-called asylum shopping).

In the beginning, the Dublin Convention was a case of cooperation between the Member States of the European Community established outside of the European legal framework to harmonise their asylum policies. Even if it was not provided by the treaties at the time, it could be defined as a case of closer cooperation outside of the EU legal framework. Indeed, it shares most of its features with the closer cooperation (since the Lisbon Treaty it is called ‘enhanced cooperation’), added with the Treaty of Amsterdam: it aims to further the objectives of the Union, it respects the principle of the treaties, it

[21] As stated in article 1.b of the Convention, with “asylum application” the document means a «request whereby any person other than a national of a Member State seeks from a Member State protection under the Geneva Convention by claiming refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol».

does not affect the *acquis communautaire*, nor the competences of those Member States which did not wish to participate and it was open to all Member States to join (as indicated in Articles 43 to 45 EC Treaty). Not surprisingly, in a short period of time, almost all the Member States decided to participate, and the EU included it into the EU migration and asylum policy.

For Schengen participants, the main benefit of these provisions was to reduce the number of applications, though not necessarily the number of applicants. Nevertheless, non-participants would not experience these good impacts, on the contrary, there was a real threat of serious adverse external repercussions. Refugees would increasingly seek asylum in non-Schengen nations because second applications within the Schengen region became impossible. The number of refugees applying in each specific Schengen country after being turned down in third countries outside of Schengen was also destined to decline with each rise in participants (Kölliker, 2001). In light of this, the Dublin Convention generated a centripetal effect. The Schengen participants allowed that the Dublin Convention, as a separate legal instrument, could have been signed independently from the Schengen Agreement. In the end, every EU member state signed the agreement. When, in 1995, Austria, Finland and Sweden joined the European Union, they also signed the Dublin Convention, bringing the number of participants to 15.

The EU Member States made compromises to advance toward integration by accepting non-EU Members when doing so could aid integration, in addition to standards, types of legal instruments, and internal membership. Indeed, opting-in has always been strongly supported by the EU. In 1996, to have Denmark, Finland and Sweden abolish their border controls, the Member States agreed on the entry into the Schengen area of Norway and Iceland, since they all had been part of the Nordic Passport Union since 1952 (Peers, 2017, p. 255).

In 1999, the Council of the EU made an Agreement with Iceland and Norway on the implementation and application of the Schengen *acquis* (Council of the European Union, 1999), which called for the conclusion of an appropriate arrangement on the criteria and mechanisms for establishing the State responsible for examining a request for asylum. This first agreement was followed by a second one just two years later (European Union, 2001), establishing the participation of the two countries in the Dublin Convention. However, the negotiation was concluded only in 2006, when the Council approved the Protocol with Norway and Iceland for the responsible state for asylum examinations (Council of the European Union, 2006a). Following the same path, Switzerland and Liechtenstein started their negotiations respectively in 2002 and in 2006. Eventually, Switzerland joined the Dublin

system in 2008 (Council of the European Union, 2008), whereas Liechtenstein joined it in 2011 (Council of the European Union, 2011).

The four countries, named 'associated countries', are bound by the Regulations of Dublin and Eurodac, even though they do not participate in the rest of the CEAS legislation. Their decision to opt-in expanded the territorial scope of the Dublin system beyond the EU borders, creating external differentiation, which results when non-member states buy into specific policies, and they selectively integrate into the EU rules and policies without becoming members (Schimmelfennig, Leuffen, & Rittberger, 2015).

In contrast to the access into Schengen, which requires longer bureaucratic time and the fulfilment of the conditions required to join the area[22] (failure to meet these requirements corresponds to capacity DI, meaning that a Member State lacks the capacity to join certain EU policies, hence they are temporarily excluded or exempted from joining them), the Dublin regulation has direct effect and no new Member States have been granted a derogation during the negotiations for the accession in the EU.

3.2 Harmonisation and *de facto* differentiation

By signing the Dublin Convention, Member States agreed that the first-entry State was responsible for dealing with the asylum application. However, this gave rise to the problem of arbitrariness, since Member states' differing standards of reception and varying interpretations of refugee status (Niemann, 2012).

Indeed, the Dublin Convention included the same provisions of the Schengen Convention and obliged Member States to mutually recognise each other's asylum decisions, which allowed to avoid the harmonisation of the heterogeneous national asylum systems and opened to flexibility between the most reluctant Member States (Lavenex, 2018). Already at the time, several Member States, such as Greece or the Netherlands, were aware of the infeasibility of differentiated cooperation on asylum as a long-term solution, and they started to advocate for a joint commitment based on common institutions (Comte, 2018, p. 152). Nevertheless, differentiation was necessary from the beginning as

[22] There are currently three countries which are not yet part of the Schengen Area: Romania, Bulgaria, Cyprus. After the last vote in December 2022, Croatia has joined the Schengen Area on the 1st of January 2023, while Romania and Bulgaria's accession has been blocked by the negative votes of Austria and the Netherlands on the 8th December 2022 (Liboreiro, 2022).

states with favourable asylum legislation did not want to undermine it, while Mediterranean countries were fearing that the intense migratory pressure could undermine their labour market or could create elevated costs for their social system. Moreover, states of first arrival, i.e., the countries sharing the major burden, were highly against this system. In March 1990, Spain denounced a scheme that «would force border states to transform into fortresses [… because of their] contiguity to sensitive countries or channels with regard to illegal immigration» (ACCUE, cited in Comte, 2020, p.7).

The Europeanisation of the policies was due mainly to the concerns created by the high number of asylum-seekers arriving from Eastern Europe after the dissolution of the Soviet Union, because between 1989 and 1992 the asylum applications more than doubled, passing from 320,000 to 695,000[23]. In light of this, an impetus to cooperation came along, which Guiraudon (2000) (2003) later explained through the 'venue-shopping' phenomenon, according to which national policy-makers in the field of asylum and migration moved policy-making on these matters to a new EU policy-venue, in a bid to circumvent the liberal pressures and obstacles that they faced at the domestic level.

In 1997, when the Amsterdam Treaty was signed, the Dublin Convention entered into force. As the system laid down only some common rules but Member States remained in charge of the final decisions, flexibility and divergences were present from the beginning. Because of the national heterogeneous approaches, Sandra Lavenex (2001, p. 853) wrote that «the EU is conceived as a dynamic multilevel system, where the development of supranational institutions goes hand-in-hand with the differential adaptation of domestic structures in the Member States». The implementation of the Dublin convention was therefore a case of *de facto* differentiation, since the adaptation in national legislation and the implementation differs remarkably from one Member State to another.

For instance, the average duration for the result of an asylum request varies considerably: in Sweden the average duration was three weeks, while in Germany it was 130 days, in Ireland eight months and in the United Kingdom was on average 18 months (European Commission, 2001). Moreover, since the Dublin Convention had not fully harmonised the very different national legislations, the overall recognition rate for each country varied dramatically. In Figure 3, it is possible to see the differences in the recognition rates between a few Member States for the decisions taken in 1998, the year following the entry into force of the Dublin system.

[23] The data are rounded up, and they include new asylum applications in the then 15 MS, Norway and Switzerland

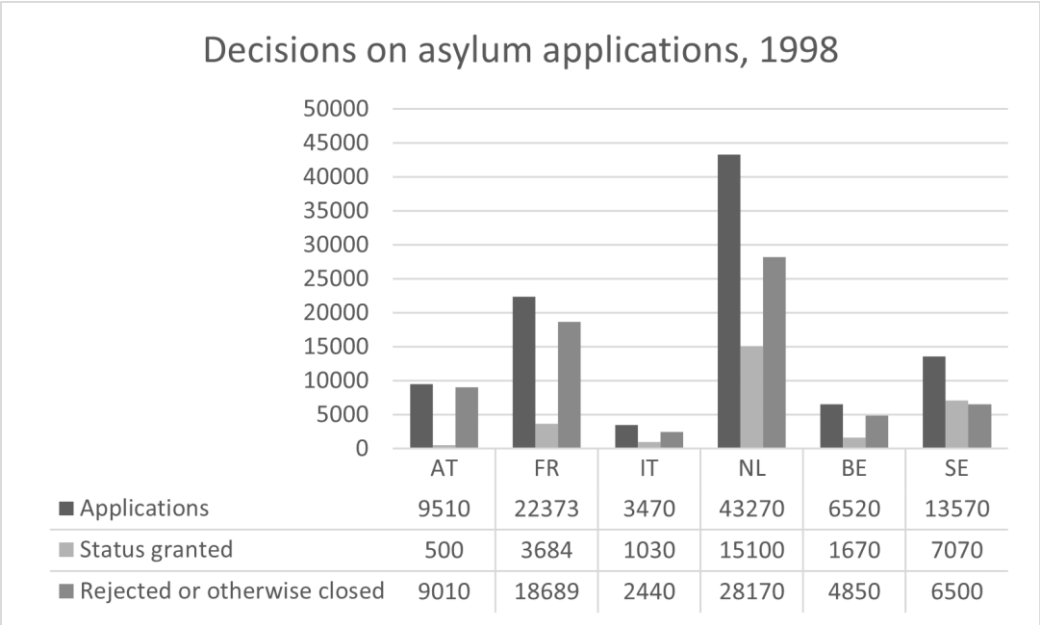

Figure 3: Recognition rate of asylum seekers in selected countries in Europe in 1998. Source (European Parliament, 2000)

It appears quite clear that Member states, even by respecting the principles of the Dublin Convention, have great discretion in their final decision in recognizing asylum seekers[24]. Between the selected countries, Austria (AT) granted the status to 5.2% of the requests analysed, Germany (DE) to 10.7%[25], France (FR) to 16.5%, Belgium (BE) to 25.6%, Italy (IT) to 29.7%, the Netherlands (NL) to 34.9% and Sweden (SE) to 52.1%. Considering this, evidence shows a dramatic level of flexibility as the recognition rate might vary from 5% to 52%. This is because the institutional framework for examining asylum claims, the substantive criteria employed, and the status accorded to refugees are still highly divergent, as underlined in different reports released by the EU institutions (Council of the European Union, 2000). The result is that an asylum-seeker's possibility to actually enter a procedure where his case will be examined on its merits will depend on which Member State they approach, therefore it was essential for them to 'choose' among the Member States where they should first lodge an asylum request the one with a more positive recognition rate, although of course in reality very few could do so. It is also for this reason that academics with a pessimistic view on differentiation, consider that «flexibility describes the EU's tolerance of the uneven or mal-

[24] The 'status granted' includes both the Convention status and the Humanitarian status, hence all subsidiary forms of status.

[25] Germany is not included in the graph to allow the differences between the other countries to be seen, as the number of asylum seekers is too high. Total applications: 149.928, of which 13.857 received a positive response.

implementation of agreed asylum standards» (El-Enany, 2017, p. 363), highlighting the contradictions a flexible system may generate.

On 15 and 16 October 1999, a special meeting of the European Council was held in Tampere to discuss the creation of an area of freedom, security and justice. The Council agreed «to work towards establishing a Common European Asylum System [CEAS], based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e., maintaining the principle of *non-refoulement*[26]» and it should have included

> a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection (European Council, 1999)

However, in the effort to create a CEAS, the EU has adopted several directives containing numerous discretionary clauses, hence leaving Member states with flexibility in the implementation, for instance, those dealing with family (re)unification (see Cholewinski, 2002). It can be said that the European Council in Tampere supplied the push to harmonise refugee standards following the inclusion of asylum cooperation in the Community pillar with the treaty of Amsterdam. Moreover, the agreement of Member States to reach common minimum conditions of reception of asylum seekers initiated a period of intense legislative activity aiming to de-differentiate the policy.

In 2003, the Dublin Convention was replaced by the Dublin Regulation (known as Dublin II) (Council of the European Union, 2003b). Dublin II brought the Dublin system fully within EU governance practices, while essentially maintaining but clarifying the grounds for assessing responsibility under the Dublin Convention. The main difference with the convention resides in its legal nature, as now the Dublin system is a European Regulation, thus it has a direct effect and it is binding on all Member States, and in the creation of the Eurodac Regulation (Council of the European Union, 2002a), which obliges each State to take the fingerprints of every person who lodges an application or irregularly crosses the external borders. These legal acts managed to reduce the differentiation between Member

[26] The principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm.

States, however a high degree of discretion was still in place, and hence implementation was diverging.

Those years saw the enforcement of the legal texts which constitute the basis of EU asylum law: the Reception Directive (Council of the European Union, 2003a), the Qualification Directive (Council of the European Union, 2004), and the Procedures Directive (Council of the European Union, 2005a). Although some progress has been made in the communitarisation of the asylum system, all these directives still allow for a high degree of discretion to Member States, and so to a possible *de facto* differentiation. A few examples can better identify the issue.

In the case of the Reception Directive, Article 4 states that « Member States may introduce or retain more favourable provisions in the field of reception conditions for asylum seekers and other close relatives of the applicant who are present in the same Member State when they are dependent on him or for humanitarian reasons», while Article 11 says that « Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market». Having the possibility to access the labour market in the shortest possible time can create an 'asylum shopping' effect, since one Member State can diverge dramatically from another. For instance, in Sweden and Norway the labour market is directly accessible to asylum seekers, in Italy they have to wait two months, in Germany and Austria three months, in the Netherlands and Spain six months and in France they have to wait nine months before applying for a job (OECD, 2016).

The following year, the Qualification directive was enforced. Despite moving a step forward in the Europeanization of the asylum system, as a directive, it only lays down definitions, principles and goals to reach. Analysing the text, it is evident that the main and ultimate role is relegated to the Member states, resulting in possible divergences in the interpretation and implementation of the directive.

The Procedures Directive raised another important issue in trying to avoid *de facto* differentiation. The directive introduced the concept of 'safe countries of origin' (Article 29 and 30), defining it as

> a country where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no

torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict[27].

The directive entrusted the Council with the establishment of a minimum common EU list of safe countries of origin, which would have harmonised the Member States, however, this particular provision was annulled by the CJEU (European Parliament v Council, 2008), leaving Member States without a common list.

With the Treaty of Lisbon, the initial Tampere objectives of «creating a uniform status of asylum […] [to be] valid throughout the Union» (European Council, 1999) became legal obligations. The Treaty, therefore, tries to tackle the issues highlighted in the policy plan on asylum published by the European Commission (2008). The policy plan identified as one of the main trends, and as a critical flaw in the CEAS, the « differences in decisions to recognise or reject asylum requests from applicants from the same countries of origin point» which survived from some legislative harmonisation and still present «a lack of common practice, different traditions and diverse country of origin information sources» (European Commission, 2008, p. 3). Moreover, the Commission recognised the problem of *de facto* differentiation between Member States, as it «identified a number of problematic issues largely due to the amount of discretion allowed to the Member States in a number of key areas» which was said to harm «the very objective of ensuring access to protection under equivalent conditions across the EU» (European Commission, 2008, p. 4).

In its conclusion, the Commission advocates for «a single, common asylum procedure leaving no space for the proliferation of disparate procedural arrangements in Member States, thus providing for a comprehensive examination of protection needs under both the Geneva Convention and the EU's subsidiary protection regime» (European Commission, 2008, p. 6).

3.3 Dublin reforms and de-differentiation

From December 2010, the Middle East and North African countries[28] underwent a series of anti-government protests and uprisings, which forced thousands of people to flee to Europe. The 2011 Arab uprisings presented the first significant obstacles to Schengen integration and, consequently, to migration and asylum policies. The Schengen system began to crumble as the flow of migrants from

[27] Annex II, Designation of safe countries of origin for the purposes of Articles 29 and 30(1), Council Directive 2005/85/EC
[28] In particular Tunisia, Libya, Egypt, Yemen, Syria and Bahrain.

Tunisia to Italy increased. The Dublin Convention's inadequacy was visible in the absence of clauses on solidarity and burden sharing, which had already been a source of contention within the Council. Following the Arab Spring, both Italy and Greece advocated for a halt to Dublin transfers back to the first entry state and both countries insisted that a provision for mass inflows should have been incorporated in the Dublin recast. Such a mechanism had already been proposed by the Commission, but it was opposed by North-western states.

On the 5th of April 2011, all immigrants from North African nations who had arrived in Italy since January 1st received temporary residency permits from the Berlusconi administration (Paoletti, 2014). This meant that, if they could show they had the necessary funds, they may use the licences to travel unrestrictedly inside the Schengen area for up to three months. In response, the French police first raised the number of officers stationed at the Italian border, then closed it completely on April 17. This episode «heralded a decade of more frequent reintroductions of border controls in the Schengen area, undermining effectiveness» (Comte & Lavenex, 2022, p. 134). Indeed, the Franco-Italian affair triggered the reform of the Schengen Borders Code, which permits to re-establish checks at the borders in case of «serious deficiencies in the carrying out of external border controls» (European Parliament and the Council, 2013d).
Moreover, the affair triggered the reform of the Dublin system for the second time, and in 2013 the Regulation Dublin III (European Parliament and the Council, 2013a) was enforced. The Dublin III Regulation introduced some new rules on how asylum seekers have to be treated. From the recast, among other improvements, asylum seekers must be informed about the Dublin process as they have the right to appeal against a Dublin decision, they cannot be detained if there is no «significant risk of absconding», and unaccompanied minors are more protected against unwanted transfers.

Nevertheless, the phase of de-differentiation began even before the second recast of the Dublin regulation. A few years earlier, Member States made significant steps towards the establishing of shared institutions and they progressed in the harmonisation of their responses to asylum requests. For instance, in 2011, they established the European Asylum Support Office (EASO), to give all European authorities access to data on asylum seekers' countries of origin. However, as part of the JHA policies, Denmark maintains its opt-out, so it did not become a member of the management board and has no voting rights, even if a Danish representative is invited to the management board meetings. Likewise, Schengen-associated members have been granted the observer status (Jachtenfuchs et al., 2022). Furthermore, the European Refugee Fund was established by the member states for the years 2008 to 2013 in order to meet the needs of asylum seekers more uniformly, later

renovated as the Asylum, Migration and Integration Fund (AMIF) for the years 2014 to 2020. Denmark, the UK and Ireland did not opt-in, therefore they did not contribute to the fund.

In spite of these attempts, the asylum system was affected by another feature of flexibility, as another visible trend in those years was the mal-implementation of directives, which required the CJEU to clarify Member State obligations under them. The CJEU has had comprehensive jurisdiction over the whole Area of Freedom, Security, and Justice ever since the Lisbon Treaty was approved and the preliminary reference procedure is now open to all national courts and tribunals. However, the Court's jurisdictional expansion did not result in the consistency and full enforcement of the asylum directives. According to Peers (2013, p. 8), the problem of mal-implementation:

> [...] should have been ameliorated somewhat by the increased jurisdiction for the Court of Justice on asylum matters following the Treaty of Lisbon, but the increase in its caseload has only been modest and reportedly a number of Member States' authorities and courts are finding ways to refuse to implement the Court's judgments properly

Despite the Commission's pressure on Member States, this phenomenon has not faded over time and mal-implementation and/or non-compliance with directives remained a common issue. An example is the application of the Returns Directive, published in 2008, which tried to lay down some common standards for returning illegally staying third-country nationals. According to the Directive, states are now obliged to either issue a return decision or to grant the person concerned a residence status. The Directive became particularly famous because of the various legal disputes that followed, mainly against Italy - out of the 17 references to CJEU in 2011, 14 requested the interpretation of this single Directive - which never complied with it, but it just acknowledged that TCNs could rely on it before national courts (see Acosta Arcarazo & Geddes, 2013). The wilful non-compliance is not to be considered as part of DI, even though it increases the degree of differentiation of a policy. However, non-compliance, which is a unilateral alternative strategy for member states which are unwilling to accept further integrative steps, can be perceived as a demand for DI, as suggested by Scicluna (2021), and, on the other hand, granting opt-outs or other forms of DI may diminish the degree of non-compliance.

Always in 2011, the European Court of Human Rights (ECHR) made a watershed ruling for asylum policies. The case concerned an Afghan national who arrived in the EU through Greece but who filed an asylum application once he reached Belgium. Greece was the responsible country according to Dublin II, therefore Belgium transferred the person back to Greece, where he was detained in terrible

conditions. The Court concluded that, according to the sovereignty clause, i.e., the article 3(2) of the Dublin Regulation, Belgium should have examined the application, because « by sending him back to Greece, the Belgian authorities exposed the applicant to risks linked to the deficiencies in the asylum procedure in that State» (Case of M.S.S. v. Belgium and Greece, 2011). With the ruling, the member state in which the asylum seeker was present would be forced to assume responsibility for its application, if their right would not be respected in the responsible Member States. However, like for the 'safe countries of origin', the choice to trigger the clause is based on the discretion of Member States in deciding if the responsible state will respect asylum seekers' rights. Following the ruling, the transfers of asylum seekers to Greece have been suspended indefinitely. The Court's conclusion of the M.S.S. v. Belgium and Greece case entered into the Dublin III Regulation, even if it remains a duty of the Member State to decide if «there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in [the responsible] Member State» (European Parliament and the Council, 2013a). The European Council on Refugees and Exiles, while calling for the dismantlement of the Dublin system because of its «harmful effects», considering that this particular made clear the different levels of protection across the Member States (ECRE, 2009).

A project involving harmonisation requires at least a level of cooperation that allows member states to advance in the same direction, ideally at similar pace. However, in the period after the Lisbon treaty, in the area of asylum, we observe Member States claiming to be in favour of the harmonisation project, but reluctant to change their domestic legal systems or to grant the supranational institutions a sizable amount of jurisdiction. Moreover, states are wary of enforcing court rulings that support a legal interpretation or attempt to enforce a legislation that the Member States do not want. In light of this, El-Enany interpreted it by saying that « if there were more opportunities for Member States to be accommodated through formal differentiated integration measures we could find that more Member States would follow the example of the UK[29]» (El-Enany, 2017, p. 374), i.e., having the possibility to decide when to opt-in and when not to be bound by the legal acts.

Starting from early 2000s, the European Commission strengthened the need to harmonise the different national systems, in particular it identified as one of the main critical flaws the difference rates of recognition from applicants from the same countries of origin among the Member States (European Commission, 2008, p. 3). Indeed, even though the European Commission, in its various reports on

[29] The author states in a note that the chapter was published before the referendum on the withdrawal from the European Union.

the implementation of the Dublin regulations, pushes for greater harmonisation among Member States, especially in ensuring that regardless of the country in which one applies for asylum the standards applied are the same and therefore the likelihood of having one's application accepted or rejected is unchanged, Member States have failed to accomplish this task. In 2021, after years of harmonisation attempts and the creation of a Common European and Asylum System, divergences between Member States are still one of the main sources of worry of EU institutions. Instead of looking at the general picture, Figure 4 compares the acceptance rate of a few selected EU countries with respect to the two countries where most asylum seekers come from: Syria and Afghanistan. Out of the 630.890 asylum applications received in 2021, asylum seekers from Afghanistan were 112.204, whereas asylum seekers from Syria were 115.470 (Council of the European Union, 2022).

	Syrians				**Afghans**			
	Total	*Accepted*	*Rejected*	*Positive decisions*	*Total*	*Accepted*	*Rejected*	*Positive decisions*
DE	71.946	38.169	33.777	53,05%	26.319	12.157	14.162	46,2%
FR	4.964	3.838	1.126	77,32%	20.893	15.231	5.662	72,9%
EL	7.621	3.336	4.285	43,77%	19.306	8.176	11.130	42,3%
SE	1.650	802	848	48,61%	1.426	390	1.036	27,3%
BE	2.165	1.495	670	69,05%	2.360	1.170	1.190	49,6%
NL	4.467	3.602	865	80,64%	2.989	2.715	274	90,8%

Figure 4: decisions on asylum applications of Syrians and Afghans in 2021. Source: (UNHCR)[30]

From the table, it appears clear that the recognition still varies dramatically from one country to another, even by evaluating similar cases. In particular, both Syria and Afghanistan are facing a serious political and social crisis that started years ago, in which respect for human rights is lacking.

Despite the same premises, meaning the same country of origin and (most likely) the same reasons for fleeing the country, the total positive decisions (recognition and complementary protections) vary from 43,77% to 80,64% for Syrians and from 27,3% to 90,8% for Afghans, according to in which country they "decide" to lodge their application. This proves that, even by all the harmonisation that national asylum systems underwent, and despite the pressure posed by the Commission, Member

[30] Accepted indicates both the recognition and the complementary protection, while 'rejected' indicates both rejected applications and those otherwise closed.
DE = Germany, FR = France, EL = Greece, UK = United Kingdom, SE = Sweden, BE = Belgium, NL = Netherlands

States tend to not conform with the CEAS. These enormous differences can still be explained through *de facto* differentiation, through the «flexible and unequal implementation» (Schimmelfennig, Leuffen, & de Vries, 2022) of the directives regulating the asylum systems.

Being aware of these differences, the EU Commission has pushed multiple times to convert the main directives of the system into regulation, in order to have a binding act which must be applied in its entirety. The first time was just after the management crisis of 2015, and then again in 2020 (European Commission, 2020c), stating that «By replacing the Qualification Directive with a regulation, protection standards will be harmonised across the EU, by creating greater convergence of recognition rates and forms of protection». However, both the proposals were unsuccessful.

In September 2020, the Commission proposed the New Pact on Migration and Asylum, defining it as a «fresh start on migration» (European Commission, 2020d), which contains a holistic approach to all CEAS measures. While the New Pact defines solidarity as necessary, it welcomes the concept of flexible solidarity, legalising the use of differentiation in asylum policy.

Article 45 of the proposal states that Member States should participate in "solidarity contributions", choosing freely from the options proposed by the Commission. The first of these measures is participation in the relocation of asylum seekers based on quotas defined by the state's population (50%) and GDP (50%). The EU would also provide financial support for the relocation (€10.000 per relocated individual) (European Commission, 2020e). If a Member States does not want to accept any migrants, it can contribute through «other measures to facilitate returns», specifically through «return sponsorships», which include dialogues with third countries for the identification and readmission of irregular migrants (Article 55). In this way « “Flexible solidarity as a form of differentiation was promoted in order to not have to participate in a specific initiative [the relocation scheme] while not preventing others from doing so, again in a bid to assume the identity of a constructive actor» (Aydın-Düzgit, Kovář, & Kratochvíl, 2020). The Commission's proposal encourages national governments to differentiate and be flexible in determining the number of asylum processes and solidarity with which they choose to proceed, opting out of measures that are incompatible with their interests (Carrera S. , 2020). This proposal of mandated flexible solidarity was the compromise the Commission came up with to bridge over the reluctance of the Visegràd countries – Czech Republic, Hungary, Poland, and Slovakia – to an obligatory scheme of relocation and the rejection of Western countries of a voluntary scheme of relocation.

This proposal was adopted at the end of September 2020, and it is, as of today, the main document setting out the EU’s agenda on migration policy for the years to come. Even by not increasing

differentiated integration, the Commission had to increase the level of flexibility (already elevated) in the field, allowing for Member States to decide to what extent they want to commit, while keeping the solidarity mandatory.

Flexibility has not only been granted by the EU, as recently some states have been 'granted themselves opt-outs'. For instance, in October 2021, Poland approved a law for expelling migrants entering through the Polish-Belarusian border. «Local guards were granted powers to reject any application without examination and ban people from re-entering the country» (Huemer, 2021), in total breach of EU law. Even though a lack of compliance is generally tolerated in the EU[31], a deliberate and sustained non-compliance and circumvention of EU law is considered *de facto* differentiation.

In conclusion, the Dublin system has been affected by differentiated integration since its early stage, both externally and internally. As for external DI, in the two decades following its entry into force, the system managed to englobe four non-EU States in the management of this transnational issue. In this case, opting-in was not overcompensated and it did not foster Eurosceptic thoughts as foreseen by Holzinger and Tosun (2019), as the real nature of the issue forced the non-Member States to integrate on their own.

With regards to internal DI, the Dublin system is considered as a case of *de facto* differentiation. Even if Member States should legally comply with the same provisions, the system presents a high level of flexibility and divergences due to the unequal implementation and wilful non-compliance (Schimmelfennig, Leuffen, & de Vries, 2022) (Hofelich, 2022), which managed to survive over time because of the EU's tolerance (El-Enany, 2017, p. 363). According to Professors Asderaki and Markozani (2022), *de facto* DI is a «permanent characteristics of integration in this particular policy field, responding to seemingly enduring needs to preserve (undivided) national sovereignty over core state powers».

[31] For example, the EU tolerates Sweden refusal to adopt the euro despite having all the requisites, and being bound to do so.

Chapter 4. The “refugee crisis”

The management crisis of 2015 and 2016 constitutes a watershed in migration and asylum policies. The arrival of more than one million asylum seekers in the space of a few months has exposed the flaws and problems of a common policy which has been «under construction for twenty years» (Pinyol-Jiménez, 2019). Concerned about the consequences of such a high influx of arrivals, Member States initially opted for individual responses, followed by an attempt at coordination by the European Commission. However, the management of the migratory routes is considered unsatisfactory and has increased tensions between the first-entry states and the rest of the EU.

As for differentiated integration, Schimmelfennig and Winzen (2022) recently analysed how this phenomenon impacted the use of differentiated integration in the Union. The results indicate that internal DI did not increase drastically due to the crisis. According to them, this is due to the fact that DI is path-dependent, meaning a process in which previous events or decisions constrain subsequent events or decisions. However, DI is usually granted before the implementation of a policy, therefore it is much more likely to see an increase in the use of DI when new policies are adopted. Nevertheless, the crisis did not affect the treaties, nor it has a strong impact on secondary-level laws, therefore during the crisis and in its aftermath, DI did not rise to an unprecedented level. It is also unlikely that the migration influx could have postponed the expiration of existing treaty differentiation. The British and Irish opt-outs from the Schengen agreement, as well as the British and Danish opt-outs from interior policies, had existed long before 2015. Moreover, by being path-dependent, DI will increase if Member States decide to integrate more, but since this was not the case, DI did not rise dramatically.

Indeed, the EU maintained, or rather failed to radically change, the same asylum and migration policies even after the crisis, as the topic was too polarised and politicised to reach a common agreement, even though most policy makers and academics agreed on the failure of the policies in place (Scipioni, 2017) (Trauner, 2016).

On the other hand, the management crisis forced the EU to externalise the issue beyond its borders. Stronger cooperation, which includes degrees of external differentiation, was needed with several countries due to their geographical position along the main migration routes to the EU: the Western Mediterranean route from Morocco and Algeria to Spain, the Central Mediterranean route from Libya to Italy, and the Eastern Mediterranean route from Turkey to Greece and the Western Balkan countries - Serbia, Macedonia, Montenegro, Albania and Bosnia and Herzegovina. Moreover, since more than 800 thousand asylum seekers arrived in Greece through the Eastern route, mainly by crossing the sea

between Turkey and the Eastern Aegean Greek islands, the EU realised that strengthening cooperation with Turkey had to be one of the top priorities to overcome the crisis.

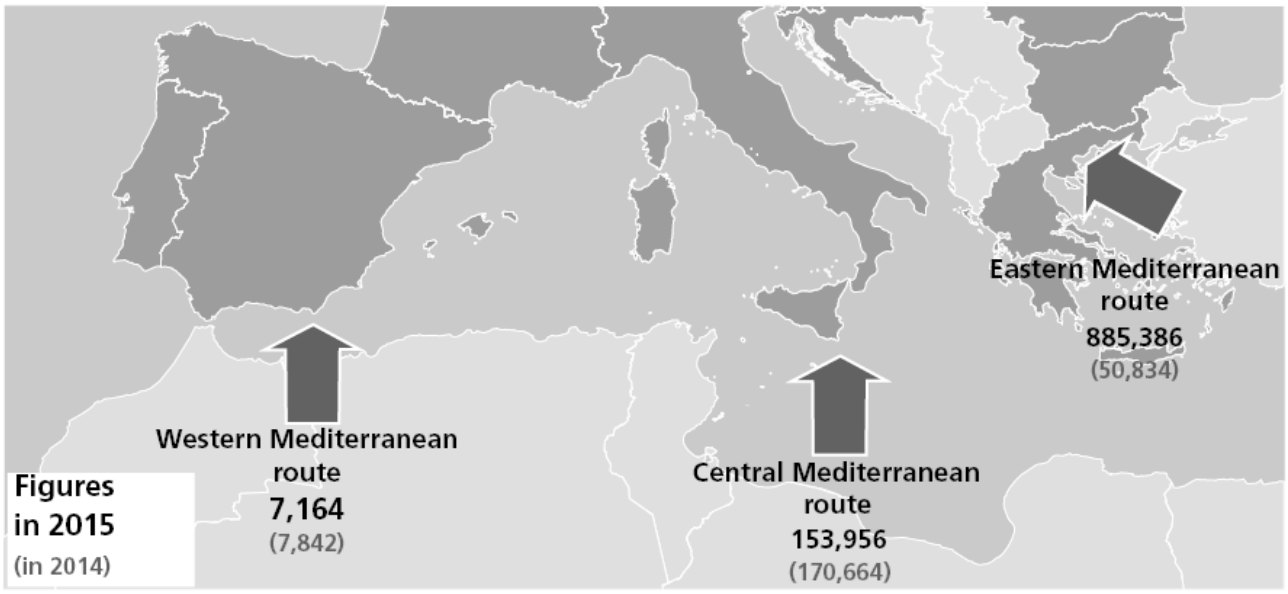

Figure 5: Comparison of arrivals in 2014 and 2015 in the three main migration routes (Parliament.uk, 2016)

In this sense, the EU– Turkey relationship represents a unique case of external differentiation. On the one hand, as a long-term accession candidate, Turkey had already aligned itself with a large part of the EU acquis before the crisis. At the same time, Turkey's weakening membership prospects do not undermine its status as a vital partner of the EU in areas of common interest that necessitate further policy convergence and, since the crisis, the bargaining superiority of the actors is rebalanced in favour of Turkey (Turhan & Yildiz, 2022).

In light of this, this chapter examines external differentiated integration, focusing on the external governance point of view and on the EU's ability to diffuse its norms to the European periphery, established or reinforced because of the so-called 'refugee crisis'. The non-EU countries adopt the EU norms and rules when there is a significant financial incentive for them to do so, especially when there is an asymmetry in economic and political power, or when, because of a specific situation such as their capability to lower the migratory pressure, their bargaining power is higher than usual. Indeed, as Holzinger and Tolun (2019) demonstrated, the EU can 'induce' these third parties/non-members into EU policies through tangible incentives, i.e., financial compensation in exchange for adopting EU policies.

While external differentiated integration explains non-EU member states' alignment with EU rules, laws, and institutions in specific policy areas, it takes many different shapes and forms, such as

international agreements, cooperation, or participation in EU bodies and agencies. As for the latter, third-country participation in EU bodies and agencies is a standard feature in the constituent acts of EU agencies, as it is usually stated that «The agency shall be open to the participation of third countries which have concluded agreements with the European Community which provide for the adoption and application by these countries of Community law in the area covered by the basic act» (European Commission, 2006). According to Lavenex (2015, p. 837), «A third country's inclusion in a specific regulatory body is not a goal in itself but is an instrument in a foreign policy that is based on the extension of the EU's acquis communautaire». In this regard, it is possible to observe an externalisation of the acquis communautaire, and, therefore, a case of external differentiation if outsiders adopt EU rules. As a result, «the EU dominates the associated non-members-it turns them into 'rule takers' due to the agreements' inherent asymmetries» (Eriksen, 2018, p. 1000).

4.1 The 'refugee crisis'

In 2015, as the Syrian conflict entered its fourth year, the EU received an unprecedented total of more than 1.3 million asylum applications—roughly twice as many as the year before. Generally speaking, this trend persisted until April 2016 (Eurostat, 2016). Out of the 1.3 million, more than one million travelled to Greece (Clayton, 2016), and approximately 200.000 to Italy (UNHCR). However, the vast majority of refugees arriving in Greece and Italy did not stop there and continued their journey to Western and Northern Europe. Several countries in southern Europe (mainly Italy, Greece, and Malta) reaffirmed that their detention and 'processing' facilities could not handle these arrivals. Migrants then travelled north through internal Schengen borders. Returning them to the first EU country, as foreseen from the Dublin agreement, no longer looked like a plausible alternative. Moreover, returns were not possible because the Greek system collapsed and, since 2011, the transfers of asylum seekers back to Greece have been suspended indefinitely, so migrants had the freedom to lodge their application to a different Member State.

To minimise the impact, the German federal government unilaterally suspended Dublin returns for Syrian refugees in the late summer of 2015 in response to images of large groups of asylum seekers arriving in Hungary and Slovakia and in light of mounting evidence of structural reception capacity problems there and in other states of first arrival. However, two weeks later, Germany reinstated checks at the land border with Austria in response to domestic political pressure as large numbers of arrivals were noted in Bavaria. Asserting that «when the EU's external borders are not protected, the German government needs to think about how it will protect German borders», Bavarian Finance

Minister Markus Söder had called for such checks (Der Spiegel, 2015). This created a domino effect. Beginning with Austria and Slovakia in September 2015, other States also reinstated border controls to prevent becoming the destination where stranded asylum seekers might end up. France, Hungary, Sweden, and Norway also reinstituted border checks between October and December 2015. Early in 2016, Denmark and Belgium followed, bringing the total number of nations with reinstituted border controls to nine. Since that time, six of these nine States—Germany, France, Austria, Norway, Sweden, and Denmark—have continued to re-extend controls (Guild et al., 2015), justifying themselves mostly by citing concerns brought on by so-called “secondary movements" of asylum seekers from Greece and other states at the EU external border into north-western Europe as a reason for reintroducing border controls. Other justifications for frequently reinstating border inspections allude to broader «shortcomings at the external borders» (European Commission, 2020a).

Apart from this ‘border crisis’, the initial response of Member States brought even more complexity to the issue. As D’apollonia wrote, «What was already a multi-layered system became even more chaotic when EU member states reacted to this crisis by abusing existing legal elements allowing flexibility» (D'Appollonia, 2019, p. 196). For instance, in their attempt to contest the criteria and mechanisms determining which Member State is responsible for examining asylum applications, a few Member States have indeed violated the core principles of the Dublin III regulation. In June 2015, Hungary allowed potential refugees to continue their journey to other EU countries rather than dealing with an overwhelming number of applications. In turn, Germany decided in August to invoke the "sovereignty clause" in order to assume responsibility for processing the asylum applications of Syrians who should have applied in Hungary. In September, the Czech Republic joined Hungary in defying the Dublin Regulation by encouraging Syrian refugees to transit through the country before applying elsewhere.

At the communitarian level, in late September Member States reached an agreement on a comprehensive package of joint temporary measures aimed at managing incoming refugee flows and "sharing the responsibility" for refugees who had already entered EU territory (Council of the European Union, 2015). The adoption of a common list of safe countries of origin, the relocation of 160.000 persons in clear need of international protection, the establishment of additional hot spots in Italy and Greece, and several billion euros for various funds were among the core measures. Other necessary actions include the allocation of additional funds to support Member States and third countries in managing and accommodating migration flows. However, a fair share of the burden for «registering and processing people in need of protection and who are not returning to their home countries or safe third countries they are transiting through» (European Commission, 2016a, p. 3) has

not been reached as part of the coordinated European response. Member States have not sent the promised numbers of extra experts to Frontex or the European Asylum Support Office, nor have they fulfilled their various funding commitments (EASO). Moreover, in the 3 years following the management crisis, only 33,846 asylum seekers (11,999 from Italy and 21,847 from Greece) out of the 160.000 have been relocated to other EU+ Member States (Börzel & Risse, 2018). This happened as some EU Members, namely the Visegràd group, were strongly opposed to the relocation. In 2017, the Commission prosecuted Poland, the Czech Republic, and Hungary for refusing to take their quota of refugees from the relocation scheme. Nonetheless, the CJEU's reaction and the threat of fines have not been enough to sway the Visegràd group's political preferences (Asderaki & Markozani, 2022). In this period, due to the unwillingness or inability of some states to cope with the crisis, EU circles advocate a two-speed Europe, with only a few Schengen states moving forward on immigration, refugee, and border concerns (Guiraudon V. , 2018).

Renationalization of EU priorities by non-cooperative nations has really become a common "integration through crisis" strategy, with the exception of tighter border controls (D'Appollonia, 2019). The idea of tailored integration first surfaced as a "pragmatic strategy" to resurrect integration just before the 2015 migration crisis, which provided additional justifications for Eurosceptic countries. The Council, for instance, in its conclusions from June 2014 acknowledged that « the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further» (European Council, 2014, p. 11). In May 2015, the Commission adopted the European Agenda on Migration (European Commission, 2015c) to tackle the new challenging issues of the high flows of asylum seekers. Eventually, the then President of the Commission Jean-Claude Juncker, praised the Agenda and, although he did not emphasise that significant problems still needed to be solved (such as money and burden sharing for asylum seekers), he questioned if flexible cooperation in migration management was «systematic and effective or not» (European Commission, 2017b). It is worth noting that the main decisions adopted by the EU Council since the inflows of TCNs have not been taken with the Community method, but rather as intergovernmental deals typical of the pre-Lisbon era, therefore the main role was not played by the EU Commission, but by national Ministers (Guiraudon V. , 2018).

The Commission once more pushed for supranational centralization in response to Member States' non-compliance with current EU laws and decisions. To do so, in less than one year the Commission proposed and managed to turn the EASO into the 'European Union Agency for Asylum', entitled to more powers to monitor and evaluate Member States' policies, and it replaced Frontex with the EU

Border and Coast Guard Agency[32], and tripled its annual budget (European Commission, 2016c). Member States were able to gather additional information on stateless people, third-country nationals, and asylum seekers who were irregularly situated on EU territory thanks to the 2016 revisions to the Eurodac regulation. Additionally, the EU Commission has pushed for several new readmission arrangements with a number of third countries in order to speed up the return of those to whom asylum requests have been denied, such as Pakistan or Ukraine. However, these initiatives to supranationalise the EU's approach to the refugee crisis have so far largely failed. The Member States opted for domestic solutions as the widespread disregard of EU rules in the context of the crisis became louder. They also called for the amendment of the Treaties, which would exempt the asylum and migration laws from the Common European policy.

The management crisis, or 'refugee-crisis', did not have a direct impact on differentiated integration, since according to Schimmelfennig and Winzen (2022, p. 3), «differentiated integration is path-dependent and contingent on the crisis response». In this sense, DI will depend on Member States' response to the crisis, i.e., if they decide to integrate more, the crisis is likely to produce more differentiation and vice versa, however, crises, in general, do not produce a 'cascading' DI scenario, which refers to the rise in differentiation to the point of disintegration among the insiders (Jensen & Slapin, 2012), nor they induce member states to reintegrate. Along with domestic politicisation, the migration crisis was also marked by pronounced distributive conflict between countries that were more and less affected. Furthermore, unlike the European Central Bank during the Euro Crisis, the EU's asylum and border management regimes lacked strong supranational bodies promoting and facilitating an integrative crisis response (Schimmelfennig, 2018). Because the UK and Ireland are voluntary Schengen non-members and are geographically far from the source of the migration flows, they have no reason to reconsider their outsider status. As a result, the less affected Schengen area member states refused to agree to further integration. To sum up, outsiders lacked a reason to join, and insiders lacked the support to further integrate (Schimmelfennig & Winzen, 2022).

As for the crisis effect at the treaty level, there have not been any new interior policy treaties. It is also unlikely that the influx of migrants could have prevented the existing treaty differentiation from expiring. Long before the crisis even started, the British and Irish opt-outs from the Schengen agreement as well as the British and Danish opt-outs from interior policies already existed. The crisis may have had an impact on the Danish referendum in December 2015, but it was about restructuring

[32] Even after changing the official name, the abbreviation for the Agency remains 'Frontex'.

rather than getting rid of the opt-out (Migliorati, 2022). Overall, Schimmelfennig and Winzen's findings suggest that the migration crisis had little effect on internal differentiation.

Nevertheless, this critical situation has triggered closer cooperation with many non-EU countries mainly involved in the migration routes. Indeed, when it comes to asylum and the implementation of the CEAS, the EU is fully aware that it cannot achieve its own asylum goals unless it effectively engages and assists third countries to align (to the greatest extent possible) their own asylum systems with the European one for international protection (Damjanovski & Nechev, 2022). To counteract the flow of migrants, the EU has concluded the main agreements with the Western Balkans, Morocco and Libya on border management and cooperation in migration policies, and it has succeeded in partially harmonising the policies of these states with the *acquis* through conditionality. Among those, the greatest impact has been reached with the cooperation with Turkey, bordering Greece, which represents the main land route that asylum seekers take to reach the EU. The crisis has deepened an already existing differentiation with Turkey, which thanks to the cooperation on border management and the flow of refugees due to the crisis reached a new level of interdependence.

4.2 The crisis as a trigger of external differentiation

Since the 1999 Tampere Council Conclusions called for a more effective use of external action instruments in Justice and Home Affairs (European Council, 1999), EU cooperation with third countries on migration has steadily improved. External cooperation has become one of the key components of EU migration and asylum policy as a result of the significant migration flows in 2015 and 2016. Moreover, also the New Pact on Migration and Asylum (European Commission, 2020d) shares this focus and emphasises the necessity of strengthening cooperation with third countries. After decades of national restraint, the discussion on the external dimension of migration policies has increasingly moved to the international level in 2015, still triggering the 'venue-shopping' effect (Guiraudon V. , European Integration and Migration Policy: Vertical Policy-making as Venue Shopping, 2000). This is mostly owing to a surge in flows along the Western Balkan route into northern European countries previously protected by the Italian-Greek "buffer zone" and the breakdown of the Dublin Regulation. As a result of this expanded interaction, a variety of proposals have been made, including both internal burden sharing and more joint responses at the external level. Due to the significant failure of the former, there has been a greater emphasis on the latter, with collaboration with foreign nations to stop the flows as one of the top priorities of the EU (Palm, 2016). As Federica Mogherini, High Representative/Vice-President of the European Commission from 2014

to 2019, said «Migration […] concerns the EU as much as countries of transit or origin ...Our approach is a new one, based on a win-win partnership» (European Commission, 2016d), introducing the Migration Partnership Framework, a new approach which fully includes migration into EU's foreign policy.

The growing importance of non-EU nations joining the EU's mixed migration governance system implies that non-members started to participate in the field of immigration and asylum policy through organisational involvement, regulatory commitments, or a combination of both. Therefore, agreements for external cooperation may be examples of external differentiation, which can be defined as extra-EU actors' selective involvement in EU policy «from the perspective of regulatory commitment and organisational participation» (Lavenex & Križić, 2019, p. 8).

Even by emphasising the importance of external DI in the policy area, it is impossible to use the same formula for all the countries involved, because of the different relations and agreements already in place, the will of some states to integrate further with the EU acquis, the bargaining power during the negotiations etc. Given that the EU external migration policy is governed at multiple levels, it follows that external DI mechanisms are developed and put into place by a wide range of parties, including Member States, JHA agencies, and central EU institutions. Since the 'refugee crisis' there has been a gradual increase in these institutional actors' competencies, which function as decentralised agencies with their own legal identity. They are all settings for adaptable cooperation ranging from information exchange to full-fledged operational actions. In this perspective, the EU's JHA agencies can be viewed as hubs for differentiated integration, here defined as «any modality of integration or cooperation that allows states (members and non-members) and sub-state entities to work together in non-homogeneous, flexible ways» (Lavenex & Križić, 2019, p. 3). Thus, this multi-actor, multi-venue, and multi-level setting contributes significantly to the development of various forms of external differentiation, both in terms of regulation and organisational structure (Okyay et al., 2020).

External DI in migration management actually started before the 2015 crisis. For instance, after Spain and Morocco tied their bilateral relationship in fighting irregular migration, the EU decided to endorse this cooperation and induce Morocco to participate in some specific policies. When, in 2005, at least 15 people died in Melilla during protests against the inhuman conditions they were kept, the EU realised that the securitarian approach had its limits and eventually the European Council launched the Global Approach to Migration (European Commission, 2011). Since then, Morocco has participated in EU migration governance mechanisms through the Mobility Partnership - frameworks of cooperation led by the EU in which member states participate voluntarily and selectively in some

policies - in addition to bilateral engagement with other member states, particularly on readmissions. In light of this, Morocco can be considered the pioneer of this form of integration and cooperation, but it was not the sole. Apart from the external differentiation triggered with Turkey, to which is dedicated the next section of this study, it is possible to briefly analyse the relationship with Libya and the Western Balkans before and after the watershed of the 'refugee crisis'.

With regard to migration management, the relationship between the EU and Libya is based on both implicit and explicit support for cooperation between Italy and Libya. Despite Italy's efforts to embed cooperation in a supranational framework, the EU avoided officially engaging in this cooperation for the majority of the 2000s. Nonetheless, the EU did not explicitly condemn Italy-Libya cooperation, owing to the results it produced in keeping irregular arrivals at bay (Paoletti & Pastore, 2010). However, the crisis brought a turning point in the EU's view of this relationship as the Commission has openly supported Italian initiatives and incorporated them into the broader scope of EU-level cooperation. The support is also due to the fact that the Central Mediterranean route has become the main gateway to Europe after the EU managed to reduce the arrivals from Turkey. This route counted for around 181.000 asylum seekers' arrival in 2016, not considering the thousands of people who lost their lives in attempting the crossing[33]. The fact that Libya is not a signatory to the 1951 Refugee Convention and lacks a functioning system of public administration and judicial control has not prevented this collaboration from taking place. For instance, the European Council endorsed the Memorandum of Understanding[34] signed in February 2017 by Italy and the Government of National Accord (Vincenti, 2017). One day after the signing of the Memorandum, European leaders met in Malta to discuss the management of the migration pressure. During the meeting, they adopted the Malta Declaration (European Council, 2017), through which they agreed to train, equip and support Libyan coastguards and other agencies to stop people smugglers and increase search and rescue operations. Furthermore, they agreed to engage Europol and Frontex in enhanced operation actions to support the country and they also agreed to mobilise €200 million in favour of Libya. In short, in the instance of Libya, external DI mechanisms are sharply focused on migration restriction and law enforcement and are entrenched in a broader context of security cooperation. External differentiation is characterised by mostly informal tools that are supported through intergovernmental and trans-governmental venues, particularly those promoted at the bilateral level by Italy.

[33] According to the Missing Migrant Projects, 4055 people in 2015 and 5136 people in 2016 died or went missing. Data represent minimum estimates (IOM, s.d.).

[34] Officially named "Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic".

Likewise, the relationship between the EU and the Western Balkans (Albania, Bosnia and Herzegovina, Montenegro, Kosovo[35], North Macedonia and Serbia) intensified as a consequence of the crisis. These countries started to implement the EU asylum and immigration *acquis* in 1999, following the accession conditionality started with the EU's Stabilisation and Association Process. Between 2006 and 2008, agreements combining legislative conformity with EU migration laws, including readmission pledges with the prospect of visa-free travel, were signed with Serbia, Macedonia, Montenegro, Albania, and Bosnia and Herzegovina[36] (Liperi, 2019). With the collapse of the EU asylum system in 2015, the bilateral association of the remaining candidate and possible candidate nations has entered a new and particularly far-reaching stage of differentiated integration in the EU's border control system and Frontex operations (Okyay et al., 2020). Moreover, the management crisis has increased the asymmetrical interdependence in favour of the Western Balkans countries, since the success of EU migration management depended on the cooperation with them. This is ensured by the signing of so-called status agreements between the EU and Albania (European Union, 2018a), Montenegro (European Union, 2019), Serbia (European Union, 2018b) and North Macedonia (European Union, 2022a) while those with Bosnia and Herzegovina and Macedonia are still undergoing ratification. These agreements granted the EU some external powers in the countries' territories, *inter alia* the possibility to perform border checks and prevent unauthorised entries. During the peak of the crisis, Austria coordinated *ad hoc* cooperation efforts between many EU members and Western Balkans nations. A ministerial summit in Vienna in February 2016 brought together decision-makers from Austria, Bulgaria, Croatia, Slovenia, and the six Western Balkan nations to ultimately seal the closure of the Balkan route. Their "Managing Migration Together" proclamation contained far-reaching initiatives such as the deployment of police officers to borders of particularly affected regions.

The EU supported the Balkan states with considerable financial contributions to support border control activities and limit the transit of asylum seekers. Through different projects promoted by the EASO from 2016, the Western Balkan countries' asylum and reception systems have been reinforced, identification and registration methods for mixed migratory flows have been strengthened, certain asylum practices have been harmonised, and national law has been further harmonised with EU requirements. However, the EU agency commitment in the area does not come as a surprise, both in 2014 and in 2019, the EASO released the External Cooperation Strategies in which it is stated that

[35] Only 22 of the 27 Member States recognise the Republic of Kosovo as an independent state. The EU states that do not recognise Kosovo's independence are Spain, Slovakia, Cyprus, Romania, and Greece.
[36] Due to disagreements among the member states within the Council, Kosovo is excluded from the visa-free regime.

the Western Balkan countries, Turkey and the MENA region are the main priorities of its external actions (EASO, 2019). Since then, the cooperation between the Western Balkans and the EU in migration and border management has only increased, as proven by the recent EU Action Plan on the Western Balkans released in December 2022, which enhanced the role of the JHA agencies in the area and it reinforced the EU commitment «to strengthening the asylum capacity of Western Balkans partners … [the EU] is supporting reception across the region through an ongoing Instrument for Pre-accession Assistance programme across the region» (European Union, 2022b). To summarise, the Western Balkans' external differentiated integration takes on a highly developed form, integrating strong supranational features such as legally enforceable commitments and extremely broad Frontex competencies.

The management crisis was therefore the main trigger of the intensification of the cooperation and the harmonisation of asylum policies with both Libya and the Western Balkans. However, these two examples are part of a more extensive list of countries where the EU is involved, including, in general, all the countries which are part of the European Neighbourhood Policy[37], which are already subjected to DI in different policy areas (Schimmelfennig F. , 2017). The EU managed to align the policies of these countries to the communitarian one through conditionality and financial incentives, even if the main role was played by the JHA agencies. Surprisingly, as Lavenex et al. (2021, p. 442) realised, «even in the event of politicisation, EU agencies maintain and even enhance their external relations», emphasising the persistence of external differentiation.

4.3 The case of Turkey

With regard to Turkey, where accession negotiations are essentially on hold and new forms of reciprocal relations are actively sought, differentiated integration appears to present an opportunity for the stalled enlargement policy. Turkey underwent an evolution from differentiated integration logic as a non-member to accession logic as a potential member. However, in this instance, the uniformity principle was never the foundation of the accession framework. The Council's negotiating framework allowed for the possibility that Turkey would be permanently excluded as an EU member state from some cooperation areas, including the free movement of people, structural policies, and agriculture. This possibility was included because the framework always aimed for broad forms of

[37] ENP-East countries: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. ENP-South countries: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria and Tunisia.

internal differentiation, as evidenced by "long transition periods," "derogations," and "permanent safeguard clauses" (Council of the European Union, 2005b). The accession process for Turkey has effectively been suspended or closed, despite neither being officially done so. However, the process brought about a period of expanding cooperation between the two sides on migration issues among other policy matters after the candidature of 1999.

Before the Syrian refugee crisis broke out, Turkey already had signs of a differentiated regime. Turkey's emerging (multi-layered) migration governance needs to be contextualised and conceptualised as an expansion of the control and humanitarian dynamics of border externalisation, which had already begun in the early 2000s. Indeed, between 2002 and 2013, significant domestic reforms were made to bring Turkey's immigration and asylum policies in line with those of the EU, thanks to the impact EU conditionality had on the country. It is generally acknowledged that pre-accession conditionality helped Turkey's asylum and migration control standards to approach those of the EU, but with significant exceptions, such as the preservation of the geographical restriction on the definition of a refugee, which disqualifies refugees from outside of Europe from full asylum status (Bürgin & Aşıkoğlu, 2015). After this period, Turkey started to move further away from the European Union, but migration is one of the few policy areas where it has continued to make progress toward compliance with EU standards (European Commission, 2018;2020b).

The EU has made the transfer of its border management standards and guidelines the focal point of its communication and collaboration with Turkey in an effort to combat irregular migration. The effects of the Syrian conflict spreading to the EU in late 2015 in the form of a so-called "European refugee crisis" strengthened the Union's efforts to improve the security of its external borders and its initiatives to bring Turkey's border regime into compliance with the relevant *acquis*. The cooperation between Turkey and the EU on border controls has moved closer to the forefront of bilateral affairs since the release of the EU-Turkey Statement in March 2016 (European Council, 2016), anticipated by the EU-Turkey Action Plan in October 2015. The alignment of Turkey with the EU *acquis* also shows differences in regard to specific border regime policy issues. Of specific interest is the heterogeneity of integration in the three issue areas of priority from the EU and Turkey's perspective: the implementation of the Integrated Border Management[38] (IBM), cooperation with Frontex and the

[38] Defined as «National and international coordination and cooperation among all relevant authorities and agencies involved in border security and trade facilitation to establish effective, efficient and coordinated border management at the external EU borders, in order to reach the objective of open, but well controlled and secure borders» (European Commission, s.d.)

cooperation on border controls and on combating irregular migration within the context of the joint Statement (Turhan & Yildiz, 2022).

As for IBM, a strategic partnership with Turkey started in 2006. The main drivers of Turkey's compliance have been the EU incentives. Indeed, the "accession conditionality" and the "financial and technical assistance programmes" have gained prominence in relation to the external incentive mechanisms the EU introduced for the sectional extension of the EU acquis on border management to Turkey. However, the intensely politicised nature of Turkey's border created an obstacle to full management of the issue, and it culminated in Turkey's selective adoption of IBM regulations that would increase its border security while impeding its alignment with those standards that were seen as a potential threat to national sovereignty within Turkey (Okyay A. , 2017).

The collaboration between Frontex and Turkey's border enforcement agencies is a strong example of how sector-specific, functional coordination enables horizontal policy transfer. Due to the asymmetrical operational capacity between the two parties and Turkey's exclusion from decision-making as a non-EU member, the Turkish authorities were hesitant to cooperate with FRONTEX until 2012. This was despite the Commission giving Frontex a mandate in 2009 to sign an operational agreement with Turkey (Dimitriadi et al., 2018). After Frontex and Turkey signed a Memorandum of Understanding (MoU) in May 2012, things quickly started to improve. The agreement primarily called for increased information sharing, including that concerning best practices for border control and a joint risk assessment of mixed migration flows (Frontex, 2012). The working relationship with Frontex has generally strengthened Greek-Turkish communication regarding the management of irregular migration flows from Turkey to the EU, notwithstanding some downfalls during the refugee crisis and in 2020. Despite rising and political tension in the dialogue between the EU and Turkey, technical and operational cooperation with Frontex has earned recognition over time as a "positive" and "resilient" driver of Turkey's external differentiated integration with the EU in the field of migration governance (Dimitriadi et al., 2018).

According to Carrera et al. (2019), the so-called 'refugee crisis' and the reluctance of many EU Member States to implement an EU-wide solution for the relocation and resettlement of Syrian refugees made it urgent for the EU to improve its operational cooperation with Turkey on border controls and the management of irregular migration flows. In accordance with the joint Statement, all unauthorised immigrants and asylum seekers who crossed into Greek islands after March 20, 2016, and whose applications are found to be inadmissible or unfounded, must return to Turkey (European Council, 2016). Thus, the Statement has been one of the tangible results of the EU's externalisation

of its immigration and border policies through deterrence and containment. The Statement offered Turkey a broad range of previously jointly negotiated incentives in exchange for its promise to manage its borders and stop unauthorised entry into EU territory. The reward package included alluring material incentives, such as reviving Turkey's accession negotiations, offering a visa-free travel policy for Turkish citizens - provided Turkey meets all 72 benchmarks, and starting talks on modernising the EU-Turkey Customs Union. It also included EUR 6 billion in financial assistance to improve the standard of living for Syrians living in Turkey (European Council, 2016). These powerful inducements have been crucial in Turkey's cost-benefit analyses and have led to the importation of EU standards for preventing irregular migration. Additionally, it was decided that such issues of shared concern would be discussed at routine bilateral summits between the EU and Turkey (EU Turkey High Level Dialogues). These summits «indicated a new pattern of a differentiated integration between the EU and Turkey» (Müftüler-Baç, 2017) outside of the conventional EU negotiations and enlargement policy.

Since the EU-Turkey Statement, statistics show significantly fewer irregular crossings at the external EU borders with Turkey. Even during the summer, when arrivals are usually higher, arrivals via the Eastern Mediterranean route have significantly decreased. In particular, Frontex's risk analysis reveals that the number of irregular entries from Turkey fell by 80% from the prior year, from a total of 885,386 in 2015 to 182,277 in 2016.

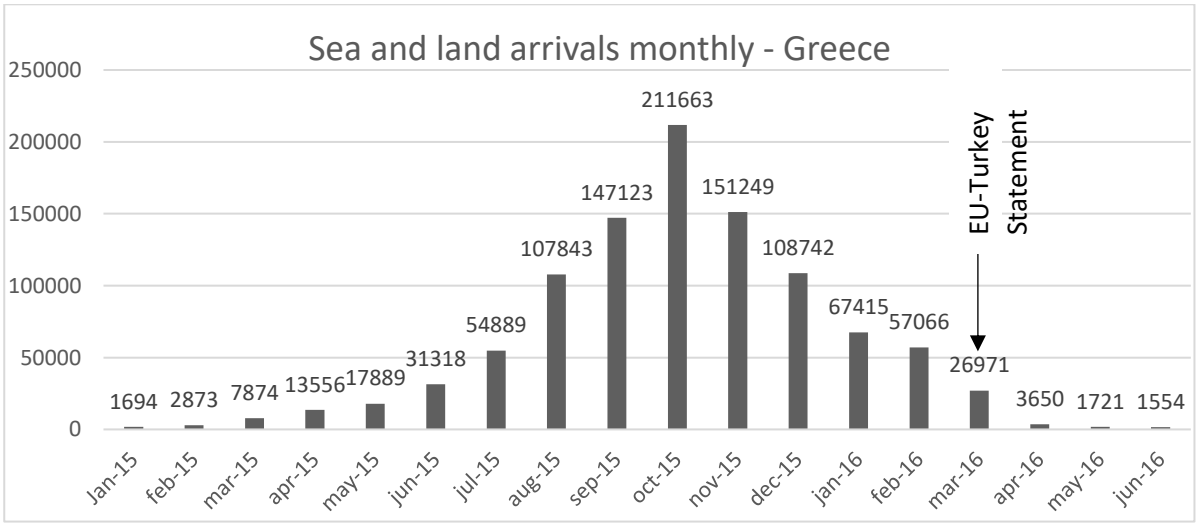

Figure 5: Total arrivals per month in Greece. Source: *(UNHCR)*

Although the numbers were already declining before the joint Statement, the latter has contributed greatly to limiting arrivals via the route since March 2016. Figure 4 shows how arrivals have fallen from almost 27.000 to 3.650 in just one month, subsequently returning to 'pre-crisis' numbers since May 2016.

However, the Statement did not come without criticisms. First, the negotiation with Turkey did not follow standard EU procedures, as listed in Article 216 TFEU, and the EU Parliament was not consulted (Guiraudon V. , 2018). Moreover, it should be noted that the return policy applies to all unauthorised immigrants, regardless of their country of origin, not just Syrian refugees. As a result, every immigrant sent back from Greece should be covered by the appropriate protection and *non-refoulement* policy implemented by Turkey. Nevertheless, the EU-Turkey Statement has stimulated several considerations on the legal issue of which country is considered by the EU a "safe country" for refugees. Indeed, several NGOs released reports concerned about the risk of Syrians being returned to Syria once they have been sent back to Turkey (International Rescue Committee, 2022). For instance, a few weeks after the release of the joint Statement, Amnesty International stated that "It seems highly likely that Turkey has returned several thousand refugees to Syria in the last seven to nine weeks. If the agreement proceeds as planned, there is a genuine risk that some of those the EU sends back to Turkey will suffer the same fate" (Amnesty International, 2016).

The Statement was also legally challenged. Two Pakistani and one Afghan refugees decided to bring actions before the General Court of the European Union with a view to challenging the legality of the 'EU-Turkey statement'. However, the CJEU concluded that it lacks jurisdiction to determine the legality of the Statement (NF, NG and NM v European Council, 2017). Indeed, by presenting the Statement via a press release and not as an official agreement, the EU circumvented the democratic check and balances laid down in the Treaties (Carrera, den Hertog, & Stefan, CEPS Policy Insights No. 2017/15, 2017). In light of this, academics agreed that to overcome the flaws in the management of migrants, the EU uses external DI by systematically overlooking the backsliding of Turkish democracy. For instance, Müftüler-Baç (2017, p. 177) stated that «EU-Turkey strategic cooperation following the crisis came at the expense of the EU's foundational democratic principles that had hitherto conditioned the flow of EU-Turkey interactions».

According to Yildiz (2016), the Statement reflects the tendencies of a top-down hierarchical relationship based on "reverse interdependence" in favour of Turkey between the EU and Turkey. Since the Syrian civil war's escalation, the EU and its Member States have been utterly dependent on Turkey's efforts to control its borders, contrary to what might be predicted given an asymmetrical

power relationship in the context of accession. On the contrary, adhering to EU standards and demands would only benefit Turkey in a limited number of ways, the main ones being securing the EU's promise to resettle some of the Syrian refugees currently residing in Turkey to its member states and facilitating EU-Turkey coordination on the post-conflict reconstruction of Syria. This reverse interdependence has increased Turkey's bargaining leverage with the EU and given it more room to demand alluring incentives before taking additional steps to control irregular migration. As foreseen by Holzinger and Tosun (2019), the EU tends to over-compensate neighbouring countries for implementing EU laws in their national legislations, but, in this case, the EU was forced to do so since it did not have the bargaining power. The Statement between the EU and Turkey was indeed a case of reversed conditionality. Given that the EU's priority was to control migration, Turkey gained a more strategic position from which to negotiate, and the partnership was not one-sided. Because of this, it managed to take over the bargaining initiative and to request financial aid in return for cooperation.

In conclusion, Turkey's external differentiated integration takes the form of a complex combination of formal and legally binding supranational elements that date back to the country's efforts to adhere to EU acquis while it had the chance to join (2002–2013), as well as intergovernmental and informal agreements that characterise the more recent migration cooperation between Turkey and the EU and the consistent cooperation between Turkey and Frontex.

4.4 Conclusion

To counteract the poor management of the migration flow during 2015 and 2016, the European Union sought to increasingly include neighbouring countries and the main countries of departure of the flow within its migration policy. This gave rise to different forms of external differentiated integration, which may range from more or less binding agreements, the integration of specific policies that are part of the *acquis*, or the co-operation with major EU agencies, first and foremost Frontex. The decisions taken in the EU as a result of the migration crisis were and are geared towards two main objectives: reducing the flow of migrants and security. As Guiraudon (2018, p. 155) says, «All the declarations during the 2015 'refugee crisis' evoked solidarity. This notion is absent from the vocabulary of the Justice and Home Affairs community», as the main scope is to curb the number of arrivals. To reach this goal, DI played an important part. The EU's diversified arrangements with third nations almost definitely reduced immediate migration pressure (compared to if these arrangements

had not been concluded). According to official reports and statistics, the number of irregular border crossings on the Eastern Mediterranean Route significantly decreased following the signing of the EU-Turkey Statement and the increased coordination and border closure policy pursued in Southeast Europe, including the Western Balkans (European Commission, 2019). While arrivals from the Eastern Mediterranean route decreased, Western (Spain) and Central (Italy and Malta) Mediterranean routes became the main routes to the EU. Because of this, the EU engaged in differentiated arrangements with Libya and Morocco, which effectively helped in the short run. As the EU stated in one report, the number of arrivals from Morocco lowered due to «the investment in EU-Morocco relations, including substantial EU financial support for border management and the fight against irregular migration» (European Commission, 2019, p. 4). The diversified arrangements have thus demonstrated relative "success" in lowering arrival numbers, but they have come with significant drawbacks, including overcrowded hotspots and the EU's growing vulnerability towards a more authoritarian Turkey (Okyay et al., 2020). However, beyond the short term, there is a policy inertia in migration and border control, mainly because of the reluctance of some Member States to further integration in the field and the fact that the policy goal has never been changed since the first Schengen Agreement. Since the ‘90s, there has been a monopoly on the topic by Interior ministries, which oversee the decision-making process and « whose aim was to filter out persons considered to be ‘migratory risks’» (Guiraudon V. , 2018, p. 154). With the crisis, the community method was sidestepped by intergovernmental deals, which favoured the ministries’ logic rather than a more holistic approach.

Nevertheless, external differentiated integration in the aftermath of the management crisis was fundamental and paved the way to a period of strong cooperation with third countries in the field, as visible from the several reports and action plans released by the Commission (for instance, see European Commission, 2020c), in which the EU try to convince or impose through conditionality its common standards to non-Member States.

Conclusion

From the very beginning, European integration had to find a compromise between two cardinal principles of the EU, on the one hand, the motto 'united in diversity', on the other hand, the slogan 'ever closer union'. In the early stage of the construction of the EU, European integration was viewed as a never-ending process that would naturally branch out into new areas of cooperation, and policy areas that had not yet been integrated were viewed as 'soon-to-be communitarized'. Today, however, European integration is considerably more concerned with differentiation, its management and its consequences (Leruth, Gänzle, & Trondal, 2022).

Differentiated integration has therefore become an integral part of European Union studies, as well as an intrinsic feature of the latter. In this work, I borrowed the definition developed by Dyson and Sepos (2010, p. 4), generally defining DI as

> The process whereby European states, or sub-state units, opt to move at different speeds and/or towards different objectives concerning common policies. It involves adopting different formal and informal arrangements (hard and soft), inside or outside the EU treaty framework (membership and accession differentiation, alongside various differentiated forms of economic, trade and security relations). In this way, relevant actors come to assume different rights and obligations and share a distinct attitude towards integration.

DI has increased in interest since the Maastricht Treaty, mainly due to the willingness of Member States to ‘communitarize’ sensitive policy areas, such as core state powers, where sovereignty concerns remained high. One of these areas is the European migration and asylum policy, which is a catch-all term used by EU institutions to include all the different aspects of migration and asylum. In particular, in this research, the term is used to indicate the main legislative acts regulating the Common European Asylum System, the agendas and action plans proposed by the Commission and the external action aiming at better management of the migration flow. In this work, I have tried to answer the question

Which is the role of differentiated integration in the construction of migration and asylum policies in the European Union?

In order to do so, first I have analysed in depth the concept of DI and then, by taking advantage of some case studies, I have explained how DI has been used to foster integration in this policy area.

The analysis of the literature reveals how the concept of differentiated integration can take on different nuances depending on the type of analysis one wishes to make of it. Starting from a basic classification, differentiated integration can be divided according to three elements: time, space and object, respectively corresponding to different forms of integration, the so-called 'multi-speed Europe', variable geometry and *Europe à la carte.* However, the concept has been extended and it now includes different forms of differentiation: both formal and informal agreement, as well as *ex-ante* and *ex-post* differentiation – which corresponds to *de facto* differentiation. Since scholars could not agree on a sole definition, this research has analysed the phenomenon by using three different definitions, related to more specific cases of DI.

Firstly, this work has analysed constitutional differentiated integration, through which Member States, even if they have the capacity to join a specific policy, they prefer not to do so to preserve their sovereignty or because of a lack of trust in other Member States' capacity. It is the consequence of the resistance to the supranational integration of core state powers among the Union's Eurosceptic and wealthy member states» (Schimmelfennig & Winzen, 2020b, p. 20). For migration policies, Denmark and (before Brexit) the UK are the most suitable examples of this differentiation. Given their veto power, the EU has succeeded in advancing integration by providing these states with opt-outs. Both the United Kingdom and Denmark are examples of states with distinct national identities and growing Euroscepticism. Indeed, public Euroscepticism in Denmark has stifled all efforts by successive governments to increase Danish participation in EU integration, as public opinion voted against it in multiple *referenda*. While the UK followed a "cherry-picking" approach to cooperating with the EU on migration and asylum policy, Brexit has limited its bargaining leverage, depriving it of the advantageous position of choosing according to its preferences. In both cases differentiation was essential. Without differentiated integration, these two countries could have stalled the whole project, or could have reduced its (already limited) goal, since it was highly unlikely that they would have accepted to fully join the project. The future relationship between the EU and the United Kingdom on migration and asylum, as well as the role of the latter in the form of this policy, remains open for further study. In order not to rule out any possible development, one option, although it does not seem to prevail at the moment, could be the use of external differentiation to include the UK in certain policies on migration and asylum.

The third chapter focuses on the Dublin system. The system presents a unique occasion of analysis, as it is an example of multiple forms of differentiation. The Dublin system was conceived outside the EU framework, as an intergovernmental agreement between a few Member States, but with the possibility for others to join. This decision-making process, analysed by Wallace (2014) as 'intensive

transgovernmental', is one of the first examples of enhanced cooperation, even if, at the time, the treaties did not foresee this option. Moreover, the asylum system has geographically expanded beyond EU borders, including four 'associated countries' (Iceland, Liechtenstein, Norway and Switzerland) which decided to opt-in, to selectively join these policies. Lastly, the Dublin system is a case of *de facto* differentiation, meaning the structural wilful protraction of non-compliance and the circumvention of EU law. Through the latter, Member States managed to maintain different levels of integration in the CEAS. Even after the policy field was communitarized, the restriction on integration was promoted in order to suppress domestic politicisation and sovereignty concerns by keeping national resources under the jurisdiction of member states (Genschel, Jachtenfuchs, & Migliorati, 2023). This structural pattern, however, has resulted in the non-harmonisation of national asylum systems and poor implementation of EU standards, compromising the political and practical efficiency of EU asylum policy. Scholars such as Scicluna (2021), agreed that wilful non-compliance to some acts should be considered as a demand for more differentiated integration.

Lastly, differentiated integration has been analysed through the so-called 'refugee crisis'. While the crisis did not alter dramatically internal policies, it triggered external differentiated integration, meaning when third countries are associated with the adoption and application of EU law (de Witte, 2017). The unprecedented arrivals did not change the main goal of EU policies in the field, i.e., to reduce the flow of migrants arriving at its external borders, but, on the other hand, it understood that the only way to return to manageable numbers of arrivals was the cooperation with both the countries of origin and the countries on the migratory route. In light of this, both the EU and single Member States (eventually endorsed by the former), started to collaborate with several countries, primarily with Turkey, Libya, Morocco and the Western Balkans. While fostering cooperation with these countries, the EU tried to harmonise the asylum standards of these countries to the communitarian one through conditionality and both binding and non-binding agreements, and also through their inclusion in different operations of JHA agencies, namely Frontex and the EASO. External DI paved the way for a time of substantial cooperation with third countries in the field.

On the other hand, while allowing Member States to progress in the field and to cooperate with international partners, differentiated integration did not come without criticisms. From the theoretical point of view, scholars such as El-Enany (2017, p. 382), consider that differentiated integration should not be tolerated in asylum policies, since it is a field «which directly affects the lives of vulnerable individuals and is heavily regulated by international and human rights». Taking into consideration the granting of refugee status or the living conditions in different Member States, the use of DI puts in question the integrity of the system itself, by allowing for non-equivalent protection among

Member States. Moreover, the collapse of the system during the 2015 crisis led to internal conflicts and polarization over migrant redistribution, resulting in a stalemate in the Council negotiations over the CEAS reform. In an effort to bring the opposing camps together, the Commission's 2020 proposal for the New Pact on Migration normalises and formalises flexibility in EU asylum legislation through the proposed solidarity mechanism, returning control of implementation to Member States. The evaluation of the New Pact on Migration, which welcomes the concept of flexible solidarity, formalising the use of differentiation in asylum policy, should be the subject of future research.

The European migration and asylum policy made it possible to analyse DI and its relevance in the integration process. While DI constitutes a 'normal' state of affairs because of the Union's institutional architecture and character as a composite polity (Leruth, Gänzle, & Trondal, 2022), there is no agreement on whether differentiation is intrinsically positive or negative, owing to a few factors. First, as this thesis outlined, DI is an umbrella term. There are different typologies of differentiation, and each of them produces distinct effects. Second, because the EU is becoming more diverse, the future impacts of differentiation remain ambiguous and controversial. Third, differentiation has normative consequences relating to the very essence of European integration, which is to find an effective balance between unity and variety. In general, both influential political leaders (such as Emmanuel Macron or David Cameron) and EU institutions have welcomed controlled kinds of DI while opposing an *à la carte* Europe, since it may undermine the European project itself. For instance, Emmanuel Macron's speech on Europe's future in 2017 stressed the benefits of flexibility in the EU., since Europe is already moving at different speeds, therefore we should embrace the differences. At the same time, while no country should be excluded from the process, also no one should be entitled to block those who wish to further integrate (Macron, 2017).

As a result, claiming that differentiation in general is either beneficial or harmful for the EU would be a mistake. Each model has its own set of risks and opportunities. Furthermore, pre-existing assumptions of what the European integration should look like influence opinions and perceptions of differentiation. Allowing for additional flexibility may be important for some to overcome capacity or sovereignty problems. For others, it increases the risks of laggards and adds to the complexity of the EU's existing institutional procedures for short-term political advantages. However, DI can be, and generally it is, used to 'rescue' the integration process and the EU from the increasing weight of complexity and heterogeneity.

We assume that the EU will continue to create diverse policy responses in different sections of the EU politics, with some policies undergoing more significant transformation than others, as suggested

by the concept of DI. Being a highly varied system may be one of the reasons why the EU as a whole has been able to functionally deal with both differentiation and crises. According to some scholars, it is now possible to frame and explain the EU's evolution as a "system of differentiated integration". Rather than viewing differentiation as a passing, accidental, or non-systematic component of European integration, (Schimmelfennig, Leuffen, & Rittberger, 2015) experts contended that it is a fundamental and, most likely, enduring feature of the EU.

It is worth noting that the institutional 'break-down' in one policy sector does not automatically spread to other policy fields. The management crisis of migrants in 2015 is an example of this. Even while the EU has not been able to adequately respond to and deal with this problem on the basis of its CEAS, it has muddled through or moved forward in many other policy areas. Taking Brexit as an example, despite their differing views on migration, Member States remained mostly unified during the negotiations. In light of this, the EU's ability to deal with future kinds of EU differentiation requires further studies. Another research area would be to investigate how the EU deals with the impact of differentiation in both member and partner countries, focusing on the impact of differentiation in EU integration.

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