

## The Limits of Differentiated Integration

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### **Abstract**

In an ever more heterogeneous and contested European Union, differentiated integration has facilitated substantially the deepening and widening of European integration. It has been particularly effective in kick-starting the integration of new policies and the admission of new member states. Differentiation proves less suitable, however, to address the main current challenges to the EU: the repair and reform of crisis-ridden highly integrated policies. Theoretically, the chapter argues that the supply conditions of differentiated integration are most favourable in a context of no or shallow prior integration of regulatory or distributive policies, in which a large group of states agrees on further integration and externalities between them and the outsiders are low. By contrast, demand for differentiation is most difficult to realize when constitutional and redistributive issues are at stake in deeply and uniformly integrated policies and differentiation threatens to shrink the size of the insider group and create significant externalities between them and the outsiders. To illustrate the difficulties, the chapter applies key theoretical and empirical insights from past differentiation to areas of EU crisis: the Eurozone, Schengen, Brexit, and the rule of law.

Chapter in Marc Dawson and Markus Jachtenfuchs (eds.) *Autonomy without collapse*. Oxford: OUP, forthcoming.

### **1. Introduction**

Since the mid-1980s, differentiated integration has become a core feature of European integration. Of their own accord or forced by negative referendums, individual governments have refused to sign up to new policy regimes such as Economic and Monetary Union (EMU), Schengen, and defence. Alternatively, the EU has refused states access to the Eurozone or Schengen area. As a result, the EU has developed from a system of (largely) uniform integration, in which integrated policies applied to all members (and members only) to a system

of differentiated integration, in which the territorial validity of integrated policy regimes is not congruent with formal membership.<sup>1</sup>

Differentiation has proved to be an important and often indispensable facilitator of integration. Major institutional and policy changes in the EU continue to require intergovernmental unanimity, the consent of the European Parliament, and domestic ratification in each member state, thus creating numerous veto points. At the same time, the heterogeneity of member state preferences and capacities and the domestic contestation of EU policies have grown and increased the probability that veto players use their powers. Under these conditions, agreement on the uniform introduction or reform of EU policies has become ever more difficult to achieve. Differentiated integration accommodates international heterogeneity, removes veto points, and thus reduces the probability that member states block agreement. It offers member states the possibility to opt out of EU policies they reject. In addition, it allows for exempting or excluding member states from demanding policies that exceed their capacity.

Differentiated integration thus appears to be a clever solution to the autonomy–collapse dilemma.<sup>2</sup> It protects the autonomy of member states, especially in domains of core state powers that some regard as the basis of national sovereignty and self-determination. At the same time, differentiation allows willing and able member states to deepen their integration without being blocked by veto or uniformity rules. Far from putting the European Union on a slippery slope towards collapse or disintegration, differentiated integration has been an

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<sup>1</sup> <<<REF:JART>>>Schimmelfennig, Leuffen, and Rittberger, ‘The European Union as a system of differentiated integration: interdependence, politicization, and differentiation’, *22 Journal of European Public Policy* (2015), 764–782<<<REFC>>>.

<sup>2</sup> Dawson and Jachtenfuchs, ‘Autonomy without Collapse: Towards a Better Union?’, Chapter 1, this volume.

indispensable instrument in the dynamic integration progress of the 1990s and 2000s. Counterfactually speaking, without differentiation, the EU would not have a common currency, a free-travel zone, or integrated justice and home affairs policies.

The challenges to European integration have fundamentally changed in the ‘polycrisis’ of the 2010s however. Rather than struggling to muster support for integrating new member states and policies, the EU has had to deal with old member states threatening to leave (Brexit) or crash out (Grexit) and with already highly integrated policies threatening to disintegrate (such as monetary union and asylum policy).

To cope with these crises, academics and policymakers have again brought differentiated integration into play, most prominently in the European Commission’s ‘White paper on the future of Europe’ which proposed ‘Those who want more do more’ as one of five scenarios for reforming the EU.<sup>3</sup> Given that the crises of the EU have exposed and reinforced the heterogeneity of integration preferences and capacities between member states, while at the same time demonstrating the need for far-reaching reform to prevent integrated policies from collapsing, differentiated integration may indeed appear to be the perfect solution.

However, I argue that differentiated integration is generally less helpful to facilitate reform in already highly integrated policy areas threatened with disintegration than it has been in the integration of new policies and new member states, especially if these integrated policies are constitutional or redistributive. Whereas international heterogeneity generates demand for differentiation in both contexts, supply conditions differ considerably. The differentiation of existing policies might generate subcritically small groups of member states. Splitting up highly integrated policy areas is also likely to lead to detrimental positive and negative externalities

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<sup>3</sup> COM(2017) 2025, ‘White paper on the future of Europe. Reflections and scenarios for the EU27 by 2025’.

between the groups. Moreover, EU decision-making rules, supranational actors, informal integration norms, high path dependencies, and constitutional as well as redistributive policy purposes reduce the efficiency, legitimacy, and feasibility of differentiation in highly integrated domains. In sum, for all its benefits in boosting the integration of new members and policies, differentiated integration is not the EU's silver bullet for coping with crises of advanced integration.

The chapter starts with a review of the demand and supply factors of differentiated integration.<sup>4</sup> It then applies these factors to the reform needs and prospects in major EU policy domains that have faced or are facing crisis: the Eurozone crisis, the migration crisis, Brexit, and the rule of law. In each case, I show that in spite of high demand and several proposals for differentiated integration, unfavourable supply conditions have thwarted attempts to overcome these crises through differentiation. The chapter concludes with general considerations on the limits of differentiated integration as a solution to the autonomy–collapse dilemma.

## 2. Demand and Supply of Differentiated Integration

Demand factors create an interest in differentiated integration; supply factors facilitate or inhibit the realization of this demand. The literature shares the assumption that demand for differentiated integration results from international heterogeneity in a context of consensual decision-making.<sup>5</sup> In a homogeneous union, uniform integration is feasible; in a majoritarian

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<sup>4</sup> Schimmelfennig and Winzen, *Ever Looser Union? Differentiated European Integration* (Oxford University Press, 2020).

<sup>5</sup> <<<REF:JART>>>Holzinger and Schimmelfennig, 'Differentiated integration in the European Union. Many concepts, sparse theory, few data', 19 *Journal of European Public Policy* (2012), 292–305<<<REFC>>>.

system, heterogeneity can be overcome by voting. In the EU, however, where major decisions on integration require the consensus of an increasingly heterogeneous membership, differentiated integration helps to avoid negotiation deadlock.

Differentiated integration addresses two major types of heterogeneity: heterogeneity of state preferences and capacities. Heterogeneity of preferences refers to the desired level and scope of integration. Member states have always been differentially inclined to delegate and pool sovereignty in the Union, especially in the domain of core state powers such as defence, fiscal, and monetary policy. Differentiated integration has allowed member states concerned about national self-determination—such as Denmark and the UK—to opt out of supranational integration while allowing integrationist member states to move ahead.

Even if sovereignty concerns are not an issue, the heterogeneity of capacities may stand in the way of uniform agreement. On the one hand, affluent member states with high state capacity may have reservations about integration. When it comes to regulatory compliance in the internal market, budget discipline in monetary union, or effective border protection in Schengen, they may be concerned about the financial resources and bureaucratic quality of lower capacity states. For these reasons, they may make their participation dependent on the conditional entry or exclusion of such countries. Accession conditionality for new member states and the convergence criteria of the monetary union produce such capacity-based differentiation. On the other hand, low-capacity member states sometimes fear the costs of adaptation and participation in integrated EU policies and ask for temporary exemptions from the application of demanding regulations.

Heterogeneity of integration preferences and capacities thus creates demand for differentiation. This demand cannot always be realized, however. Whether differentiated integration is feasible, and acceptable to all relevant states, depends on several ‘supply conditions’.

First, the size of the integrationist group needs to be large enough to deal efficiently with the policy problem at hand. A small group of willing and able member states may not generate the economies of scale and the pooling of resources that would make the effort worthwhile. Moreover, a large integrationist group that spans different (regional or economic) groups of member states increases the legitimacy of differentiation against accusations of exclusion and discrimination.

Second, the feasibility and stability of differentiated integration depends on the externalities it produces between insiders and outsiders.<sup>6</sup> If differentiated integration creates positive externalities, outsiders can freeride on the integration efforts of insiders. For instance, the differentiated integration of ambitious climate policies would be costly for insiders but would benefit non-participants too. Substantial positive externalities thus reduce the likelihood that states agree on differentiation or create centrifugal tendencies later on. Why contribute to deeper integration if you can enjoy the benefits outside? By contrast, differentiated integration that imposes negative externalities on outsiders turns happy bystanders into dissatisfied integration losers. For instance, states that refuse to join, or are excluded from access to an integrated market, may find themselves disadvantaged in attracting foreign investment. Substantial negative externalities thus create centripetal tendencies: outsiders prefer to join in anticipation or after realizing the costs of exclusion. Either way, substantial intergroup externalities cause differentiation to be unlikely or short-lived.

Third, the suitability of differentiation depends on the policy type. In particular, differentiated integration is inappropriate to overcome international heterogeneity regarding constitutional and redistributive issues. Constitutional issues concern the fundamental values

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<sup>6</sup> <<<REF:JART>>>Kölliker, 'Bringing together or driving apart the Union? Towards a theory of differentiated integration', 24 *West European Politics*, 125–151<<<REFC>>>; Kölliker, *Flexibility and European Unification: The Logic of Differentiated Integration* (Rowman and Littlefield, 2006).

and norms as well as the basic organizational set-up and institutional rules of a polity. The differential validity of fundamental values and norms—such as human rights or the rule of law in the member states—is generally considered illegitimate even if it were technically feasible and did not create externalities. Moreover, EU-level institutional rules need to be uniform for all member states for reasons of political equality and the proper functioning of the institutions. Therefore, differentiated integration in institutional provisions is extremely rare and limited.

In redistributive policies, differentiated integration tends to be self-defeating. For instance, risk-sharing arrangements are most efficient if they consist of a large number of participants with a high diversity of risk profiles. If they bundle very low risks only, they are unnecessary. If they bundle only a few participants with extremely high risks, they are unsustainable. Likewise, burden-sharing arrangements need to join low-capacity and high-burden members with those that have high capacity or a lower burden so that redistribution produces manageable burdens for all participants. Voluntary arrangements that allow member states to opt out inevitably lead to the exit of the countries with the lowest risks and the lightest burdens, or to a significant reduction of their contribution.

Finally, the institutional context of negotiations on differentiated integration matter. Here I distinguish four typical contexts: no, low, uniform, and differentiated integration. These contexts differ with regard to bargaining power of the status quo countries, the normative legitimacy of differentiation, and the effect of path dependencies.

In a situation of no prior integration, institutional norms, rules, and path dependencies do not exist. The heterogeneity of preferences and material bargaining power is all that counts. Integrationist states can move ahead without the formal agreement of states that refuse or are refused to join. A context of no prior policy integration thus facilitates differentiation, *ceteris paribus*.

Once integration is established, it generates formal decision-making rules, informal norms, and common institutions. Supranational actors enter the stage, and path dependencies are likely

to develop. Specifically, the decision-making rule of unanimity weakens the institutional bargaining power of states interested in changing the status quo. If integrationist countries seek more integration, status quo states can threaten to use their veto. In addition, the EU has a normative bias in favour of ‘ever closer union’ and uniform integration. Unlike other constitutional principles such as proportionality, subsidiarity, and conferral (Art. 5 TEU), the Treaties do not mention, let alone approve, differentiation explicitly. Supranational actors such as the European Commission, Parliament, and Court favour uniform integration in principle, too. Finally, path dependencies of integration build up over time as integration creates sunk costs, triggers endogenous interdependencies, and raises exit costs.<sup>7</sup> To what extent these factors constrain differentiation depends on the level and type of prior integration.

As long as integration remains at a low level, supranational actors and path dependencies are absent or weak. Outsiders are less likely to object to differentiation in policy areas, in which they are only weakly invested. And even though uniform integration would be normatively preferable, differentiated integration is legitimate if it promises major progress in integration, especially if differentiation is limited in time and integration remains open to later joiners. For these reasons the institutional constraints on the differentiated integration of hitherto weakly integrated policies or states are minor.

By contrast, in deeply integrated policies, major institutional constraints on differentiation are in place. Supranational actors favouring uniformity are powerful. Path dependence locks in the existing membership and creates incentives for further uniform integration. The EU’s normative bias works in the same direction. In general, states have more incentives to block

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<sup>7</sup> <<<REF:JART>>>Pierson, ‘The path to European integration. A historical-institutionalist analysis’,

29 *Comparative Political Studies* (1996), 123–163<<<REFC>>>.

differentiation if they are part of a deeply integrated group and are heavily invested in the existing level of integration.

The institutional constraints are particularly high where states demand ‘differentiated disintegration’, i.e., seek to move to a lower level of integration.<sup>8</sup> In this situation, the integrationist states become defenders of the status quo and benefit from the unanimity requirement. Each integrationist government becomes a veto player, and the member state that is most averse to disintegration defines the limits of change. Veto threats do not preclude disintegration because states always have the option to exit the EU (under Article 50). Yet full exit may impose prohibitive costs on governments that only want to renegotiate the conditions of their membership and reduce their level of integration slightly. Moreover, demands for (differentiated) disintegration face opposition from supranational actors, trigger concerns about ‘cherry picking’, and are least legitimate in the perspective of ‘ever closer union’.

Finally, a context of pre-existing differentiated integration mitigates the institutional constraints on further differentiation. For one, differentiation enjoys higher legitimacy in domains in which it is already an established practice. In addition, if the insiders decide to move ahead with integration, they can do so more easily, because the most sceptical member states do not take part in the decision.<sup>9</sup> Moreover, supranational actors may be ‘differentiated’ too (as in the case of the European Central Bank). Furthermore, path dependence tends to lock in differentiated integration. It puts states on two divergent trajectories of integration and increases the costs of changing paths over time.

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<sup>8</sup> <<<REF:JART>>>Schimmelfennig, ‘Brexit: differentiated disintegration in the European Union’, 25 *Journal of European Public Policy* (2018), 1154–1173<<<REFC>>>.

<sup>9</sup> <<<REF:JART>>>Jensen and Slapin, ‘Institutional hokey-pokey: the politics of multispeed integration in the European Union’, 19 *Journal of European Public Policy* (2012), 779–795<<<REFC>>>.

In sum, the supply conditions of differentiated integration are most favourable in a context of no or shallow prior integration of regulatory or distributive policies, in which a large group of states agrees on further integration and externalities between them and the outsiders are low. By contrast, demand for differentiation is most difficult to realize when constitutional and redistributive issues are at stake in deeply and uniformly integrated policies and differentiation threatens to shrink the size of the insider group and create significant externalities between them and the outsiders.

### 3. Differentiated Integration in Crisis-Induced Reforms?

The supply conditions discussed in the previous section limit the general prospects of future differentiated integration in the EU. Few 'low-hanging fruit' are left to pick. The EU already covers all policy domains. In most policies, it has advanced beyond the initial stage of shallow integration, which facilitate differentiated integration progress. Defence policy is one of the few policy areas in which the current level of integration is still low. Correspondingly, Permanent Structured Cooperation (PESCO) is the only example in which the member states have successfully introduced new differentiations in recent years. Moreover, EU enlargement, a major source of differentiated integration in the past, has all but stopped since Croatia joined in 2013. One important reason is the stagnation or even backsliding in democratization in Eastern Europe: a constitutional issue that does not lend itself to differentiated integration.

Here, however, I focus on the integration crises that have defined the current period of European integration since the start of the Eurozone crisis in early 2010. I define an integration crisis as a situation in which an integrated EU policy is threatened with at least partial disintegration: the renationalization of policymaking competences, the disempowerment of supranational actors, or the loss of a member state. For instance, monetary union was manifestly threatened at least with the exit of Greece (if not the end of the euro). In the migration crisis of 2015, the breakdown of the 'Dublin' asylum regime and potentially the Schengen regime of

free cross-border movement was at stake. The Brexit vote of 2016 threatened the EU with the loss of a member state. In the ongoing rule of law crisis, several member state governments undermine a fundamental value and institutional backbone of the EU. To qualify, it is sufficient if the crisis threatens the integration of a single policy; it does not have to put in question the survival of the EU as an organization. Indeed, none of the recent crises has gone that far.

In integration crises, the dilemma of autonomy and collapse comes to a head. On the one hand, integration crises are either caused or reinforced by the pursuit of national autonomy. The desire to 'take back control' from Brussels and from independent supranational and national judiciaries has been at the origin of the Brexit and rule of law crises. In the Eurozone and migration crises, governments pursued national policies to cope with rising balance of payment deficits and rising numbers of asylum seekers. On the other hand, these autonomous policies intentionally threatened integrated policy regimes with collapse, or risked their breakdown as a side effect.

Differentiated integration could potentially solve the dilemma by providing individual member states with more autonomy without leading to the collapse of the integrated policy. The EU's integration crises revealed and reinforced international heterogeneity of preferences and capacities among the member states. Regarding preferences, they have aggravated ideological conflicts on issues of macroeconomic policy, migration, sovereignty, and liberal democracy. Regarding capacities, the Eurozone and migration crises in particular have exposed and widened gaps in economic and administrative burdens and capabilities. For these reasons the integration crises have led to increased demand for differentiated integration to reform the integrated policies in crisis.

At the same time, this demand has run into major supply-side obstacles. For one, differentiated reform would have reduced the membership size of the integrated policy and produced significant positive and negative externalities. In addition, the crises have focused on constitutional and redistributive issues. Finally, supranationally and uniformly integrated

policies generate important institutional constraints for reforms based on differentiation. Decision-making rules, integration norms, supranational actors, and path dependencies have worked in favour of maintaining uniform integration. To illustrate the dilemmas of differentiation in crisis-induced reform I briefly discuss the Eurozone crisis, the migration crisis, Brexit, and the rule of law crisis. In none of these cases have we seen differentiated integration in spite of pronounced international heterogeneity and academic as well as political forays in favour of differentiation.

### 3.1 Eurozone Crisis

Economic and Monetary Union (EMU) has been a differentially integrated policy area from the start. The British and Danish opt-outs from monetary union were codified in the Treaty of Maastricht, years before the Euro was introduced. These opt-outs resulted from heterogeneity of preferences. In addition, the Eurozone can exclude EU member states (which have a legal obligation adopt the euro) if they do not meet the economic and fiscal convergence criteria. On this basis, EMU initially excluded Greece (until 2000) and all new member states since 2004 based on heterogeneity of capacity.

In the Eurozone crisis the differentiation between euro-area and non-euro-area member states has remained stable. Yet the crisis has put in question uniform integration among the members of the Eurozone. Economists have asserted early on that the Eurozone was far from an ‘optimum currency area’, lacking in both labour mobility and fiscal integration.<sup>[10]</sup> Political economists have further pointed out that monetary union brings together countries pursuing opposite growth strategies: a supply-side or export-led growth strategy based on wage restraint,

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<sup>10</sup> Krugman, ‘Revenge of the Optimum Currency Area’, *New York Times*, 24 June 2012.

<https://krugman.blogs.nytimes.com/2012/06/24/revenge-of-the-optimum-currency-area/> (accessed 8 April 2021).

productivity, and competitiveness in the ‘north’ of the Eurozone, and a demand-led growth strategy based on fiscal expansion and wage inflation in the ‘south’.<sup>[11]</sup> The Great Recession exacerbated this heterogeneity by turning export-led Eurozone countries into surplus and creditor states and demand-led countries into deficit and debtor states with divergent preferences on crisis management. Whereas the northern countries sought to minimize their liabilities and financial assistance and called for austerity in the south, southern countries favoured the Europeanization or forgiveness of debt and financial transfers from the north. At the height of the crisis, the Eurozone member states were able to agree on the establishment of a rescue fund (the European Stability Mechanism), a fiscal compact, and a banking union. Yet north–south heterogeneity has blocked or whittled down further reaching reforms towards a fiscal union (before the Covid-19 pandemic).

The heterogeneity of state preferences and capacities in the Eurozone’s non-optimal currency area has inspired numerous recommendations for differentiated disintegration, i.e., for reforming the Eurozone through the exit or exclusion of a group of its member states. For instance, Roger Bootle won the Wolfson Economics prize by proposing a northern monetary union led by Germany.<sup>[12]</sup> Fritz Scharpf favoured a two-tier ‘European Currency Community’ composed of (predominantly northern) EMU members and other (predominantly southern) member states, with national currencies pegged to the euro according to the EU’s Exchange Rate Mechanism (ERM II).<sup>[13]</sup> Finally, Joseph Stiglitz regarded uniform reform of the Eurozone

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<sup>11</sup> <<<REF:JART>>>Hall, ‘The economics and politics of the Euro-crisis’, 21 *German Politics* (2012), 355–371, at 358–359<<<REFC>>>.

<sup>12</sup> <<<REF:BK>>>Bootle, *The Trouble with Markets. Saving Capitalism from Itself* (2nd ed., Nicholas Brealy Publishing, 2011).<<<REFC>>>

<sup>13</sup> Scharpf, ‘Forced Structural Convergence in the Eurozone—Or a Differentiated European Monetary Community’ (2016) MPIfG Discussion Paper 16/15, 1–47.

as the best way forward, but advocated ‘amicable divorce’ in its absence, preferably by the exit of Germany and other northern members from the Eurozone.<sup>14</sup>

Yet the differentiated disintegration of a highly integrated policy area such as EMU would be confronted with the most adverse supply-side conditions. First, the resulting currency union(s) would be much smaller than the current EMU. The EMU might well cease to be the political core of the EU and produce too few returns to scale. Second, the negative externalities of the split would be massive. In the Eurozone crisis, in spite of their conflicting fiscal interests, north and south agreed that a break-up had to be avoided for the prohibitive economic and political risks that it would entail. Even a post-crisis ‘amicable solution’ would require massive transfers and debt forgiveness to stabilize former Eurozone countries.<sup>15</sup> It would also cause the currencies of the northern countries leaving the Eurozone to appreciate massively, with the likely effect of an export slump; and it would undermine the belief in the durability of the monetary union and invite speculative attacks by financial markets testing member states’ commitment to the single currency.

Finally, the institutional context makes differentiated disintegration difficult. The Eurozone is designed to be permanent and has no exit procedures. It features the European Central Bank (ECB), a highly independent and powerful supranational agency with a vital interest in preserving the Eurozone, which has played a decisive role in preventing a break-up during the Eurozone crisis. A split of the Eurozone would also go against the prevailing

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[http://pubman.mpdl.mpg.de/pubman/item/escidoc:2385226:5/component/escidoc:2479325/mpifg\\_dp16\\_15.pdf](http://pubman.mpdl.mpg.de/pubman/item/escidoc:2385226:5/component/escidoc:2479325/mpifg_dp16_15.pdf) (accessed 8 April 2021).

<sup>14</sup> <<<REF:BK>>>Stiglitz, *The Euro and Its Threat to the Future of Europe* (Penguin Books, 2016), p. 292<<<REFC>>>.

<sup>15</sup> Ibid., pp. 290–292.

integration norms and raise major legitimacy concerns, especially in case of a non-consensual break-up or forced exit (see the adverse political reactions to German Finance Minister Schäuble's proposal for a Greek 'time out' from the Eurozone in July 2015). In line with these considerations, the Eurozone crisis has not resulted in the differentiated disintegration of the Eurozone, in spite of the strong demand-based case.

Instead of differentiated disintegration, the Eurozone could have considered differentiated integration, i.e., a reform in which a group of member states moves ahead with fiscal integration without changing the monetary integration of the rest. Such a 'Eurozone Plus', including, for instance, a common bank deposit insurance, a back-up unemployment insurance, or Eurobonds could be sponsored either by the northern or southern group of Eurozone countries, each of which would have sufficiently homogeneous preferences and capacities to achieve agreement.

A Eurozone Plus would certainly be more acceptable than the 'Eurozone Minus' proposed by Bootle, Scharpf, or Stiglitz. It would not reduce the size, disrupt the institutions and interdependencies of EMU, or create significant externalities. A scheme for advancing integration differentially would also be more legitimate than one that reduces integration and expels member states.

Yet differentiated integration along the cleavage between north and south would defeat the basic purpose of fiscal union or risk-sharing. Whereas a Eurozone Plus of southern countries would not be sufficient to stabilize its members in a future economic crisis, a Eurozone Plus of fiscally healthy northern countries would not be necessary to stabilize its members and would not be helpful for stabilizing the south. Obviously, a fiscal union or risk-sharing community requires high- and low-capacity countries in a uniform regime to develop its potential. As with redistributive policies in general, differentiated integration is no recipe for overcoming lack of international solidarity. It is therefore small wonder that proposals for differentiated fiscal integration in EMU have remained absent from the policy debate. Rather, EMU reform has largely stalled after the Eurozone crisis had abated in 2015. It took the shock of the Covid-19

pandemic for the member states to agree on a recovery fund involving substantial international fiscal transfers. Yet this major (if temporary) advance towards fiscal union was designed as uniform integration across not only the Eurozone, but including non-euro area member states as well.

### 3.2 Migration Crisis

Like the Eurozone crisis, the 2015–16 migration crisis has exposed serious problems and heterogeneities within the EU. The so-called ‘Dublin rules’ of EU asylum policy normally allocate responsibility to the country where the asylum seeker first applies for asylum, i.e., in most cases the country of first arrival. Consequently, the migration flows from Northern Africa and the Middle East affected the Mediterranean member states almost exclusively. The front-line states were neither capable of blocking unauthorized migration at the external Schengen border nor did they possess the infrastructure to handle such a high number of asylum seekers. Yet the Schengen area lacks a system of burden-sharing among member states or supranational organizations that could effectively support the border countries.

The policy failure in the migration crisis prompted the European Commission to propose a major reform of the Common European Asylum System including the establishment of an EU asylum agency, a common asylum procedure, further harmonization of the qualification and protection standards, reception conditions, and a permanent resettlement framework. The most contested centrepiece of the reform, however, was a change to the Dublin rules that would allow for a permanent quota system for the allocation of asylum seekers across the member states and thus provide for a fairer sharing of the asylum burdens. However, the member states have not been able to reach agreement since 2015.

The intergovernmental preference heterogeneity mirrors variation in affectedness. Because of their geography, front-line states like Greece and Italy are affected most immediately by the migrant flows. In addition, destination states like Germany and Sweden, prosperous countries

with a comparatively liberal asylum regime, are strongly affected by secondary migrant movements. Both groups of member states have supported the corrective allocation system to alleviate their burden. By contrast, transit countries that lay on the migration routes from the front line to the destination states and bystander countries that were located off-route and therefore not directly affected oppose the quota system.<sup>16</sup> The most vocal and uncompromising opposition came from Central and Eastern European member states, not only because they were either bystander or transit countries but also because they were most ideologically and culturally opposed to extra-European migration.

Would differentiated integration offer a way out of non-agreement and confrontation over the reform of the Schengen area's asylum policy? Both the Visegrad countries and French President Macron have made suggestions that would amount to differentiation in the Schengen area. The Central and Eastern European opponents of corrective reallocation proposed 'flexible solidarity' as an alternative in 2016. Like its successor concept 'effective conditionality', however, it does not entail a formal differentiation of the Schengen area with two groups governed by different asylum rules. It rather means that each member state ought to decide individually 'on specific forms of contribution taking into account their experience and potential. Furthermore any distribution mechanism should be voluntary.'<sup>17</sup> In practice, 'flexible solidarity' would allow willing member states to engage in burden-sharing while unwilling countries opt out.

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<sup>16</sup> Biermann, Guérin, Jagdhuber, Rittberger, and Weiss, 'Political (non-)reform in the refugee crisis: a liberal-intergovernmentalist explanation', 26 *Journal of European Public Policy* (2019), 246–266.

<sup>17</sup> Visegrad Group, 'Joint Statement of the Heads of Governments of the V4 countries', 16 September 2016. <http://www.visegradgroup.eu/calendar/2016/joint-statement-of-the-160919> (accessed 8 April 2021).

In March 2019, President Macron addressed the ‘citizens of Europe’ ahead of the European elections and proposed to ‘rethink the Schengen area: all those who want to be part of it should comply with obligations of responsibility (stringent border controls) and solidarity (one asylum policy with the same acceptance and refusal rules)’.<sup>18</sup> The proposal leaves open how the differentiation would be implemented. Would it lead to a ‘Schengen Plus’, in which those wanting to participate would agree to a deepening of asylum and border control integration, or to a ‘Schengen Minus’, from which those refusing ‘obligations of responsibility ... and solidarity’ would be excluded?

In September 2020 the European Commission published its compromise proposal for a migration and asylum pact. On the one hand, the proposal keeps the Dublin rules of responsibility for asylum request in place and abandons mandatory reallocation. On the other hand, it introduces a quota-based mechanism to support overburdened member states that gives other member states a choice between relocation and ‘return sponsorships’. Where this choice introduces flexibility in implementation, it is not differentiated integration because the same rules apply to all member states. Yet several Central European governments immediately opposed any quota-based obligations, whereas a group of Mediterranean countries insisted on firmer relocation commitments.<sup>19</sup>

In general, like EMU, a differentiation of EU asylum policy faces adverse supply conditions. Both are highly integrated policy areas, but because asylum policy is less centralized

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<sup>18</sup> Macron, ‘For European Renewal’, Élysée, 4 March 2019. <https://www.elysee.fr/emmanuel-macron/2019/03/04/for-european-renewal.en> (accessed 8 April 2021).

<sup>19</sup> Zalan, ‘Visegrad countries immediately push back on new migration pact’, *EUobserver*, 25 September 2020. <https://euobserver.com/justice/149537> (accessed 8 April 2021); Nielsen, ‘EU “front-line” states want clearer migration rules’, *EUobserver*, 26 November 2020. <https://euobserver.com/migration/150196> (accessed 8 April 2021).

and interdependent as monetary policy, and covers a larger membership, some of the conditions are more favourable towards differentiation. In particular, asylum policy lacks powerful supranational actors like the ECB in EMU. Moreover, a split in the Schengen area would be less disruptive than a break-up of the Eurozone. Even according to the most pessimistic scenario, the annual ‘cost of non-Schengen’ would not have amounted to more than 0.2 per cent of GDP annually,<sup>20</sup> a hundred times less than even the most optimistic models forecast for a Eurozone breakdown.<sup>21</sup> Yet, as in the case of the Eurozone, the core conflict is about redistribution, and differentiation would defeat the purpose of reform: a burden-sharing and harmonization scheme that would stabilize the EU asylum regime. Schengen Plus would most likely bring together only those front line and destination countries that would benefit from relocation. Whereas Schengen Plus might provide for a fairer and more orderly distribution of migrants across the most affected countries, it would not lower their collective burden if transit and bystander countries remained outside.

Additionally, Schengen Plus would generate positive externalities. An improved asylum regime might make it even more attractive for migrants to seek asylum in one of the Schengen Plus countries. Unless the origin of the major migration flows shifted from the south to the east, the Eastern member states would fare best by remaining outside of Schengen Plus while benefiting from the current regime. A differentiated arrangement would thus not only

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<sup>20</sup> PE 581.383, ‘The Cost of Non-Schengen. Impact of border controls within Schengen on the Single Market’, April 2016.

[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581383/EPRS\\_STU\(2016\)581383\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581383/EPRS_STU(2016)581383_EN.pdf) (accessed 8 April 2021).

<sup>21</sup> <<<REF:JART>>>Schimmelfennig, ‘European integration (theory) in times of crisis. A comparison of the Euro and Schengen crises’, 25 *Journal of European Public Policy*, 969–989<<<REFC>>>.

institutionalize the freeriding behaviour of the non-affected countries, it might also create incentives for the insiders to defect.

In order to change the incentives of the opponents of asylum policy reform, the integrationists would therefore have to be able to threaten them credibly with expulsion from the Schengen free-travel area—amounting to ‘Schengen Minus’—in the hope that they value free movement more highly than migration control. If Schengen/Dublin was still regulated by an intergovernmental agreement, as it was until the mid-2000s, such a threat might work. Because it is an integral part of the EU Treaties, however, refounding the Schengen regime would require a renegotiation of the Treaties. The threat to exclude unwilling Schengen countries thus lacks credibility.

### 3.3 Brexit Crisis

In his January 2013 Bloomberg speech, UK Prime Minister David Cameron promised to negotiate a new settlement for the UK, to be followed by an in–out referendum, in order to appease the EU opponents in the Conservative Party and to deflect the challenge posed by the UK Independence Party (UKIP). Initially, the referendum pledge bought Cameron time, but he had to make good on his promise after leading the Conservatives to victory in the 2015 general elections. In his November 2015 letter to Donald Tusk, President of the European Council, Cameron sought a legally binding opt-out from the Treaty obligation to ‘ever closer union’ and limits to the free movement of citizens within the internal market.<sup>22</sup>

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<sup>22</sup> Cameron, ‘A New Settlement for the United Kingdom in a Reformed European Union’, 10

Downing Street, 10 November 2015.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/475679/Donald\\_Tusk\\_letter.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf) (accessed 8 April 2021).

For many years Cameron had sought in vain to renegotiate the freedom of movement principle with the EU in order to take back national control over immigration. He knew that most member states considered a general opt-out from the freedom of movement non-negotiable<sup>23</sup> and did not want to be in a position in which he would have to recommend British voters to leave the EU because too far-reaching demands were rebuffed. Cameron therefore put forward measures that would limit the free movement for citizens of *future* new member states only, fight the abuse of free movement, restrict in-work benefits to EU citizens for a period of four years, and end the sending of child benefit payments overseas. Even with these limitations, the demands would have amounted to differentiated disintegration, which would have exempted Britain from existing Treaty obligations and discriminated against current and future member states. In contrast to the euro and migration cases, this is a case of heterogeneity of preferences only, and one in which heterogeneity pitted one country against the rest of the EU.

Even though the UK was a major recipient country of intra-EU migrants, these temporal, indirect, or future measures would probably not have led to major reductions or distortions in the free movement of persons across the EU. The size condition therefore did not stand in the way of agreement. Yet the British demands meant disintegration in a highly and uniformly integrated core policy area of the EU: the single market. The UK therefore faced highly adverse institutional conditions.

First, the UK suffered from weak institutional bargaining power when asking for disintegration. Whereas the UK has typically been the least integrationist member state, and therefore in a strong position to bargain for red lines and opt-outs in negotiations on integration progress, it now found itself in the position of requiring the consent of the other member states

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<sup>23</sup> Weiss and Blockmans, 'The EU deal to avoid Brexit: take it or leave', CEPS Special Report 131, 2016.

in the favourable bargaining position of status quo defenders. Unsurprisingly, the strongest opposition came from the new member states whose citizens benefited most from the freedom of movement to the UK.

Second, the UK attacked the integrity of the internal market. Not only is the internal market the single most important policy area of the EU; it is also the classic example of supranational and uniform integration. Even though the member states have regularly agreed to exempt or exclude new member states from provisions of the internal market, and the freedom of movement of labour in particular, these differentiations have generally been temporary and short-lived. Moreover, the integrity of the internal market, i.e., the adherence to all four market freedoms, is a cherished principle, firmly anchored in the Treaties and the jurisdiction of the Court. Whereas demands for differentiated disintegration are always likely to provoke resistance, it was bound to be particularly strong in this case.

Finally, concerns about cherry-picking ranked high. The UK was not the only country in which immigrants from other EU member states and their entitlement to social benefits were contested. In addition, the member states tend to benefit unequally from the different market freedoms. If the EU were to grant an opt-out from the freedom of movement of persons to one country, other countries would likely demand the same. And if the EU were to grant opt-outs from the freedom of movement of persons, other countries might ask for opt-outs from other market freedoms.

In line with these considerations, the EU decided to accommodate British concerns without agreeing to differentiation. The agreed measures, an ‘emergency brake’ for in-work benefits and the indexing of child benefits, affected secondary legislation but not the Treaties. They also applied to all member states and not just the UK; and they were exceptional and conditional measures to be authorized collectively (rather than decided by the UK alone).

In sum, the British renegotiation demonstrates the particular difficulties of agreeing on demands for differentiated *disintegration*. Even though the policy in question was neither

constitutional nor redistributive, the British demand affected a highly and uniformly integrated domain, raised concerns about positive externalities, violated informal norms about acceptable differentiation, and were constrained by weak UK institutional bargaining power.

### 3.4 Rule of Law Crisis

According to Article 2 of the TEU, ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.’ Adherence to these liberal democratic values is a key prerequisite for countries to be eligible for membership (Art. 49 TEU) and serious and persistent breaches justify the suspension of member states’ rights (Art. 7).

Such breaches have occurred in two Central European member states, in Hungary under the Fidesz government headed by Prime Minister Viktor Orbán since 2010, and in Poland under the PiS government since 2015. In both countries these populist radical right governments have launched massive attacks on the independence of the judiciary, a cornerstone of the rule of law. Together with curbing the rights of parliaments, the opposition, and minorities; expanding governmental control of the media; and changing electoral laws, these attacks served to ensure the dominance of the executive in the political systems and to safeguard the power of the incumbents.

The EU was slow to react to this democratic backsliding, especially in the Hungarian case, and when EU institutions finally decided to take action to protect their fundamental values, the available instruments turned out to be ineffective. Article 7 envisages tough sanctions against a rule-violating member but requires a consensus of all the other member states to impose them. Because Article 7 proceedings were launched against both Hungary and Poland, this consensus is out of reach.

In reaction to the failure of Article 7, EU institutions have proposed to reform the protection of fundamental EU values and the rule of law in particular. In 2014, the European Commission

launched a new Rule of Law Framework as a preventive mechanism based on dialogue with the member state in question and on assessments and recommendations of the Commission. The only time it was used—in relation to Poland in 2016 and 2017—it did not, however, produce any tangible results. The annual Rule of Law Report, published in 2020 for the first time, was again a preventive tool and put public pressure on the rule-violating member states at best. To increase the bite of the EU’s measure, the Commission proposed a rule of law mechanism in 2018 that would allow the EU to withhold payments from its budget in order to sanction rule of law breaches. The regulation codifying this mechanism was approved by QMV in the Council and by the European Parliament in November 2020. In return, however, the Hungarian and Polish government threatened to veto the EU’s budget and the own resources decision to establish the Covid-19 recovery fund. In the end, the member states reached a consensus that delays the application of rule of law conditionality until the European Court of Justice decides on Hungary’s and Poland’s action for annulment.<sup>24</sup>

Again, differentiated integration would hardly have been a suitable way to get out of the negotiation deadlock and to agree on a stronger text. For one, it could have followed the ‘Eurozone’ and ‘Schengen Plus’ options by bringing together a group of countries willing to subscribe to an effective rule of law mechanism. It is clear, however, that exactly those governments that cause the rule of law concerns, or that fear they might incur sanctions in the future, would opt out of such a mechanism. Differentiated integration of the rule of law would thus be as self-defeating as the other ‘Plus’ options, even though it does not raise concerns of size and externalities. The ability of a member state to respect the rule of law is not directly

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<sup>24</sup> EUCO 22/20, ‘European Council meeting (10 and 11 December 2020)—Conclusions’, December 2020. <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf> (accessed 20 April 2021).

affected by how well the independence of the judiciary is guaranteed in other member states or by how many other member states respect it.

Rather, the rule of law is a constitutional policy that relates to the fundamental values and collective identity of the EU and its overall functioning as a political system. It concerns a core component of what it means to be member state of the EU, and it represents the ‘integration through law’ that is a hallmark of European integration. The differentiation of such a policy would not only be normatively inappropriate but also disrupt the enforcement of EU law against national governments and administrations by national courts.

Alternatively, differentiated rule of law integration could exclude all member states that are unwilling to subject themselves to exacting monitoring and sanctioning mechanisms. Yet because the rule of law is a constitutional issue, it does not simply affect a single policy, from which a member state could be excluded. Rather, ‘Rule of Law Minus’ would be equivalent to exit from the EU. In other words, neither the Plus nor the Minus options have the potential to solve the EU’s rule of law crisis.

#### 4. Conclusions

Differentiated integration provides the EU with a powerful tool to facilitate and lubricate integration under conditions of increasing international heterogeneity among its member states. As European integration has expanded to countries with increasingly diverse integration preferences and capacities, and to the controversial integration of core state powers, differentiated integration has allowed the EU to overcome national vetoes by exempting or excluding member states from participating in individual EU policies. In the past, differentiated integration has struck a balance between preserving the autonomy of member states and facilitating the deepening and widening of the EU.

Differentiated integration is, however, unable to play a similarly constructive role in the present and near future. For one, differentiated integration is losing its traditional role of kick-

starting the integration of new members and new policies. It is unclear if and when the EU will admit new member states whose accession could be facilitated by transitional arrangements for differentiation. In addition, there are a few policies left, in which the EU does not already have some competence, and there is little appetite among the member states for Treaty revisions that might require differentiated integration to achieve consensus.

Rather, it has been the priority of EU policymakers to avoid the collapse of common policies in the EU's polycrisis. As I have argued in this chapter, however, differentiated integration is ill-suited for this purpose. A differentiated policy response to crisis in highly integrated policies risks pushing group size to unsustainable levels and producing major externalities between the differentially integrated groups. Crisis-induced reforms tend to take place in an institutional environment—decision-making rules favouring the status quo, sceptical supranational actors, and informal norms of uniform integration—that inhibits differentiated integration. Finally, the EU's crises have raised problems of risk-sharing, burden-sharing, and constitutional values, for which differentiated integration is counterproductive.

Correspondingly, the EU crises have generally not resulted in reforms based on differentiation, beyond already existing divides such as between euro area and non-euro area member states. There has either been uniform agreement or no agreement at all. Member states have concluded that differentiation would not produce a better outcome, or might even be worse, than non-agreement.

In the Eurozone, initial reforms at the height of crisis (such as the ESM and banking union) apply uniformly to all Eurozone countries. Far-reaching reforms aiming at a form of fiscal union have not produced any substantive agreement before the Covid-19 pandemic paved the way for the—uniform—'Next Generation' fund. The reform of the common asylum policy has foundered altogether in spite of a series of proposals for 'flexible solidarity'. Ahead of Brexit, the EU refused the UK's demand for differentiated integration into the internal market: a decision that has arguably contributed to, or at least done nothing to prevent, the British vote to

leave the EU altogether. Proposals for strengthening the EU's rule of law mechanisms have all been based on the uniform validity of the rule of law and have either failed or produced minimalist compromises.

Differentiated integration helped overcoming the dilemma between autonomy and integration when the EU faced the problem of reaching consensus on 'more integration'. The challenges of preventing 'less integration', however, demonstrate the limits of differentiated integration in working around the dilemma between autonomy and collapse.