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External Differentiation in Migration: Boosting or Hollowing Out the Common EU Policy?

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Abstract

The growing weight given to external cooperation leads to increasing participation by non-member states in EU migration and asylum policy, in both regulatory and organisational terms, constituting instances of external differentiation. This paper analyses the causes, shapes and effects of external differentiation. By examining the cases of Libya, Morocco, Turkey and Western Balkan countries, we demonstrate that the multiplicity of actors, venues and levels governing EU migration and asylum policy plays a significant role in driving and shaping external differentiation. We argue that the effects of external differentiated integration (DI) mechanisms on migratory pressure are relative and limited to the short run. Increasing intergovernmentalisation and informalisation of external differentiation has, however, significant repercussions on the EU's internal normative standards. We conclude that external DI mechanisms should be a complement to and not a substitute for comprehensive internal policies; and that external DI should go beyond a narrow focus on migration control and ensure full compliance with the EU system of rules regarding human rights, asylum and international cooperation.

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Executive summary

Since the late 1990s, EU cooperation with third countries has steadily progressed, and following the large-scale migration flows in 2015/16 it has become one of the central elements of EU migration and asylum policy. This leads to increasing participation by non-members in the policy field of migration and asylum from both regulatory and organisational perspectives, constituting instances of external differentiation (see Lavenex and Križić 2019). Within the EU, external differentiated integration (DI) mechanisms are developed and implemented through various venues and by a multitude of actors, including central EU institutions, JHA agencies and member states.

Examination of the cases of Libya, Morocco, Turkey and Western Balkan countries shows that different combinations of supranational, intergovernmental and transgovernmental venues, and national as well as EU policy actors, are at play in driving and shaping external differentiation. Particularly in the aftermath of the governance crisis of 2015/16, member state initiatives, intergovernmental venues and informal arrangements that are legally non-binding have grown in importance in an effort to facilitate cooperation with third countries that have lower international or domestic legal safeguards against human rights violations. While such cooperation primarily aims at reducing the migratory pressure at the EU external borders, external DI mechanisms have relative success in this regard and their effects are limited to short-term migratory pressure. More importantly, sustaining such forms of external differentiation has unintended effects on EU internal legal standards. With regard to human rights and asylum, normative safeguards in EU and member state laws are being reduced to facilitate cooperation with third countries that do not fulfil required conditions, such as in the case of the asylum procedures directives. With regard to democracy and the rule of law, accountability is particularly hampered when external differentiation is pursued by instruments that are legally non-binding or that cannot be attributed to the EU and/or concrete actors in the EU.

Against the background of these mixed effects the paper puts forward four recommendations. Concerning the objective of reducing migratory pressure, we recommend that policies aiming to have an impact on the "demand" by prospective migrants and refugees be complemented by and linked up with internal instruments that would expand and better regulate the "supply" side. This necessitates investing in legal pathways for both asylum and non-asylum migration, while ensuring closer involvement by partner countries in both the design and the implementation of these measures. Second, addressing structural migration pressure would necessitate participation by third countries that transverse the different dimensions of EU migration and asylum policy, going beyond a narrowly defined agenda focusing on security and control. Third, the depth and breadth of external differentiation mechanisms should be commensurate to non-members' international or domestic legal safeguards against human rights violations in order to prevent such mechanisms from producing negative effects on the EU system of rules. External differentiation should aim at the approximation of partner countries with the EU human rights and asylum standards, and not the other way around. Finally, the trend towards increasing informalisation and side-lining of the EU system of rules governing external cooperation should be reversed, also with a view to fully restoring mechanisms ensuring accountability and judicial review. Ensuring oversight by the European courts as well as the European Parliament would be particularly important in this regard.

Introduction

EU cooperation with third counties on migration has steadily progressed since the 1999 Tampere Council Conclusions called for a more effective use of external action instruments in Justice and Home Affairs (JHA) (European Council 1999). Following the large-scale migration flows in 2015/16, external cooperation has further grown in importance and become one of the central elements of EU migration and asylum policy. This focus is also visible in the New Pact on Migration and Asylum (European Commission 2020c), which stresses the need to deepen cooperation with third countries. This shift towards external cooperation is well documented in the literature (see, inter alia, for an early account, Lavenex and Uçarer 2002; and for a recent one focusing on the normative and constitutional implications such shift, Carrera et al. 2019a). However, it has so far not been addressed from the perspective of differentiated integration.

The growing weight given to the association of non-EU countries with the EU system of mixed migration governance implies participation by non-members in the policy field of migration and asylum through regulatory commitments, organisational involvement or a combination of both. External cooperation arrangements therefore constitute instances of external differentiation, which we define as extra-EU actors' selective participation in EU policy "from the perspective of regulatory commitment and organisational participation" (Lavenex and Križić 2019: 8).

As both the extent and the content of participation by non-members in EU migration and asylum policy vary, differentiated integration of third countries takes diverse shapes depending on the case at hand. While acknowledging that interests, bargaining positions or institutional contexts of third countries are significant factors accounting for variation in external differentiation (Wunderlich 2010: 253), our analysis focuses on the internal dynamics of EU policy-making in driving and shaping (different forms of) external differentiation. The multi-level governance of EU external migration policy (Reslow 2019) implies that external differentiated integration (DI) mechanisms are developed and implemented through various venues and by a multitude of actors, including central EU institutions, JHA agencies and member states. This multi-actor, multi-venue and multi-level setting thus plays a significant role in bringing about different forms of external differentiation, in both regulatory and organisational terms.

A closer examination of the various actors, venues and levels making up the external dimension of EU migration and asylum policy is thus crucial in understanding the causes and (different) shapes of differentiated integration of non-members in EU mixed migration governance structures. Accordingly, Section 1 examines instances of external differentiation of Libya, Morocco, Turkey and the countries in the Western Balkans. In this analysis, we pay particular attention to the role played by the internal dynamics of EU policy-making and implementation in driving and shaping (different forms of) external differentiation in these four cases.

As policies nurturing and sustaining external differentiation remain among the central elements of the EU migration and asylum policy, external DI mechanisms produce feedback effects on the EU system of mixed migration governance.[1] A quantitative reduction in irregular arrivals has become the main benchmark in policy and public debates assessing the effects of external cooperation. Another effect that tends to get less attention, despite being of crucial importance, is the repercussions from external differentiation on the EU's normative standards. Linking third countries that have lower legal safeguards against human rights violations to EU migration and asylum policy reverberates back onto the EU's internal human rights and asylum standards on the one hand, and its rule of law standards in external cooperation, on the other. These effects are discussed in Section 2, before we conclude with some recommendations for policy.

1. Causes and shapes of external differentiation

This section examines the forms external differentiation takes in the cases of Libya, Morocco, Turkey and the Western Balkan countries, and analyses the role played by EU policy venues and actors in bringing about (different forms of) external differentiation. Due to their geographical position along the main migration routes to the EU, these countries play a crucial role in sustaining the EU system of migration control. At the same time, they differ in their forms of association with the EU both in overall terms and with regard to migration and asylum. The depth and breadth of their bilateral relations with particular member states also vary. This implies that these relations condition their association with the overarching EU system of mixed migration governance in different ways.

Our analysis of external differentiation distinguishes three elements. First, we inquire into whether the DI mechanisms are developed and sustained mainly through supranational or intergovernmental and transgovernmental venues and actors, and the degree to which they are legally binding on the two parties. Second, we look into the role member state activism plays in triggering, brokering and conditioning external differentiated integration. And finally, we consider the involvement of Frontex, as the lead transgovernmental agency tasked with implementing external cooperation on border management and migration control.

1.1 Libya

Both in the 2000s and in the post-2011 era, bilateral cooperation between Italy and Libya has been a cornerstone of EU-Libya relations on migration management. Informed by complicated political relations, bilateral cooperation was characterised

1 It should be acknowledged that it is difficult to neatly decouple the effects of external differentiation from those of the "migration crisis" and the ensuing "crisis of governance" (Lavenex 2018), as they act in tandem.

by a significant degree of informality in the Gaddafi era (Paoletti and Pastore 2010: 11-16). The lack of a centralised state authority and the shifting balance of power among state and non-state actors post-2011 has led Italy to adopt once again a strategy of informally engaging a range of local actors, particularly since 2017–18 (Liga 2018: 35).

Despite Italy's efforts to embed cooperation in a supranational framework, for most of the 2000s the EU avoided officially engaging in this cooperation. Yet, the EU did not explicitly disapprove of cooperation between Italy and Libya, mainly due to the results it yielded in keeping irregular arrivals from Libya at bay (Paoletti and Pastore 2010: 16-23). In the post-2015 period however, the EU has shifted to openly supporting Italian initiatives and has incorporated them within the broader scope of EU-level cooperation. The fact that Libya is not a party to the 1951 Refugee Convention and does not dispose of a functioning system of public administration and judicial control has not prevented this cooperation from unfolding. For example, the European Council endorsed the Memorandum of Understanding between Italy and the Government of National Accord signed in February 2017 (Vincenti 2017). The Commission's suggestion for extending to other routes the strategy applied along the Central Mediterranean Route, based on the engagement with various actors on the Libyan coast and beyond, could be shown as another example of partial "Europeanisation" of the approach driven by Italy (European Commission 2018b: 2, 7). The funds provided to Libya through the EU Emergency Trust Fund for Africa have also been key to complementing Italian initiatives and expanding EU resources allocated for cooperation with Libya – even if the Trust Funds fall outside the scope of the EU budget, while also relying on a rechannelling of national funds.

Frontex's role in Libya has remained relatively limited, as was also informed by Libyan authorities' reluctance to develop technical and operational cooperation with the agency during the 2000s (Paoletti and Pastore 2010: 22). In the absence of a Working Arrangement up until today, Frontex seeks to develop cooperation on capacity building, training and operational matters through Common Security and Defence Policy missions, namely EUBAM Libya and EUNAVFOR MED (Frontex 2018b: 110-111, 198). The use of the security and defence channel also reflects the primarily security-oriented nature of cooperation with Libya. As it is the case with several African countries that have not concluded Working Arrangements with Frontex, the Africa-Frontex Intelligence Community (AFIC), a platform based on the principles of "informal nature, expert-level participation, flexibility, cooperation based on mutual benefits and trust among participants" (Frontex 2018a: 9), serves as the main venue for Libya's participation in information exchange activities.[2] In short, in the case of Libya, external DI mechanisms are sharply focused on migration control and law enforcement, embedded in the broader context of security cooperation. External differentiation is characterised by largely informal instruments that are sustained through intergovernmental and transgovernmental venues, in particular those promoted at the bilateral level by Italy. The fact that in the absence of a functioning

2 See Marin (2020: 168-171) for an extensive discussion of the AFIC and the implications of Frontex's cooperation on information with African countries through this platform and outside the scope of a working arrangement for transparency and accountability.

state, this cooperation has reached out to informal militias of doubtful standing in Libya has not prevented the EU from becoming officially involved.

1.2 Morocco

EU-Morocco cooperation dates back to the signing of the Association Agreement (2000). Cooperation on migration has been incorporated within the European Neighbourhood Policy since 2003, and rolled out within the framework of the 2005 Global Approach to Migration, later updated as the Global Approach to Migration and Mobility in 2011. Yet, engagement by "interlocutor" member states (Wunderlich 2010), particularly Spain, has significantly shaped Morocco's association with the EU system of migration control.

Cooperation between Spain and Morocco has deepened since the mid-2000s, focusing mainly on countering unauthorised migration. The EU has complemented and fostered this cooperation, by, for instance, co-funding Spanish-Moroccan joint border control operations, or the SEAHORSE ATLANTIC network on border surveillance, promoted by Spain and involving Morocco among other countries on the West African coast (Carrera et al. 2016: 7-8). Engagement at the bilateral level has also fed into the EU's external migration policy agenda and funding priorities. Spain played an important role in accommodating Moroccan priorities on migration and development and labour mobility in the Global Approach to Migration framework (Wunderlich 2010: 260). Madrid's activism was also essential in the EU's allocation of 140 million euros to support Morocco's efforts for stemming irregular migration in 2018 (Abderrahim 2019: 19).

Besides bilaterally engaging with other member states particularly on readmission (El Qadim 2017), Morocco also participates in EU migration governance structures through the Mobility Partnership (MP) (Council of the European Union 2013). MPs are EU-led cooperation frameworks, in which member states voluntarily and selectively participate. Thus, while being supranationally defined, the instrument also allows for an intergovernmental and differentiated framing of cooperation. In the case of Morocco, this intergovernmental layer is added by the participation of Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain, Sweden and the UK in the MP. While being soft cooperation mechanisms, the MPs include the possibility of enhanced legalisation through readmission and visa facilitation agreements, which are binding for all member states regardless of their participation in the MP (Reslow 2019: 37). As Morocco has long resisted the signing of a readmission agreement (El Qadim 2017, Wolff 2014), the MP framework has not yet produced legally binding effects.

Partly as an effect of increasingly closed EU borders, Morocco has in the meantime turned into a migrant destination country itself. In contrast to Libya, Morocco signed up to the 1951 Refugee Convention early on, but despite some notable improvements, it has still not passed a genuine asylum law. Overall, the association of Morocco with the EU system of mixed migration governance has acquired a more developed and multi-dimensional form over the years, through the European Neighbourhood Policy

instrument, the MP framework and the support it receives from the Emergency Trust Fund for Africa (European Commission 2020a).

Morocco operationally cooperates with Frontex as part of Spanish-led joint operations and European Patrol Networks (Carrera et al. 2016: 9), and participates in the activities of the AFIC (Frontex 2018a). However, the agency's efforts to conclude a Working Arrangement with Morocco have remained inconclusive (Frontex 2018b: 198), which relatively limits the scope of Frontex's involvement in Morocco. In sum, Spain's privileged relationship with Morocco significantly informs the external differentiation of Morocco. While lacking regulatory elements and legally binding obligations, the external differentiation of Morocco takes a developed form, largely relying on soft cooperation instruments, informal networks and political dialogues with the EU, Frontex and the member states.

1.3 Turkey

After Turkey became a candidate for EU accession in 1999, the accession process instilled a period of growing cooperation between the two sides on migration issues among other policy matters. The most notable domestic reforms to align Turkey's migration and asylum policies with those of the EU took place between 2002 and 2013, when EU conditionality in Turkey was still relatively strong (Aydın-Düzgit and Tocci 2015). It is generally acknowledged that pre-accession conditionality contributed to a certain approximation of Turkish asylum and migration control standards with the EU, however with important exceptions, such as the maintenance of the geographical limitation to the refugee definition, which precludes refugees from outside Europe from full asylum status (Bürgin and Aşıkoğlu 2015). As regards visa policy, whereas in the first half of the decade policy shifts were largely in line with EU requirements, in the latter half Turkey began diverging significantly from the EU. Turkey and Frontex signed a Working Arrangement in 2012 and after a decade of deliberation, on 16 December 2013 the EU and Turkey signed the Readmission Agreement and the Protocol on the Initiation of the Visa Liberalisation Dialogue.

After the dramatic surge of migratory movement across the Aegean Sea in 2015, EU–Turkey relations reached a new level, focusing on increased cooperation to overcome the common challenges being faced by the growing Syrian refugee population in Turkey and irregular migration movements into Europe. To this end, on 18 March 2016 a meeting was held between the members of the European Council and Turkey where all parties agreed on the "EU–Turkey Statement". In a nutshell, the Statement aimed at deepening cooperation on curbing EU-bound irregular migration, enhancing EU financial support to improve the living conditions of refugees in Turkey, and accelerating the visa liberalisation roadmap with Turkey.

Germany, and in particular Chancellor Merkel, has been the main sponsor of the deal within the EU, by playing a key role in the negotiations leading up to the Statement as well as in the formulation of its specific content (Turhan 2016). In legal terms, the Statement is an intergovernmental agreement (albeit with considerable controversy over its compliance with international law) between the EU member states and

Turkey. Although the European Commission and the European Council have vocally "claimed ownership" of the Statement, the Court of Justice of the EU ruled that it lacked jurisdiction over what it considered a political statement (Carrera et. al. 2017, also see Section 3.2). Meanwhile, functional cooperation between Turkey and Frontex continued to grow with the latter playing a considerable role in the training of Turkish officials and the building up of Turkish border technologies. In sum, the external differentiated integration of Turkey takes the form of a complex combination of formal and legally binding supranational elements dating back to Turkey's efforts to comply with the EU *acquis* when it enjoyed the prospect of accession (2002–2013), and intergovernmental and informal arrangements which characterise the more recent migration cooperation between Turkey and the EU and the steady cooperation between Turkey and Frontex.

1.4 Western Balkans

As candidates and potential candidates to EU membership located on the land transit to the EU, the Western Balkan countries have been associated to the EU system of migration control since early on. This association has followed a dual track. The first track is the transfer of the EU asylum and immigration *acquis* via accession and policy conditionality. The second is based on more indirect means including the expansion of operational cooperation and the support for regional initiatives. Accession conditionality started with the EU's Stabilisation and Association Process launched in 1999. Legislative approximation is supported by strategic cooperation agreements and working arrangements with the European Police Office Europol and Frontex, as well as institution-building accession assistance under the EU's Twinning and Technical Assistance and Information Exchange Programmes.

In the absence of a clear time frame for accession the EU has resorted to another instrument of conditionality, that is, the incentive of visa-free travel (Trauner 2009). Agreements coupling legislative approximation with EU migration rules including readmission commitments with the perspective of visa-free travel entered into force with Serbia, Macedonia, Montenegro, Albania and Bosnia and Herzegovina in January 2008.[3]

With the collapse of the EU asylum system in 2015, the bilateral association of the remaining candidate and potential candidate countries has reached a new and particularly far-reaching stage of differentiated integration in the EU's system of border management and the operations of Frontex. This is assured through the conclusion of so-called status agreements signed between the EU and Albania, Montenegro and Serbia in 2019, while those with Bosnia and Herzegovina and Macedonia are pending ratification. These agreements are remarkable as they grant Frontex, upon invitation from the respective country, the competence to exercise executive powers on foreign territory, for instance performing border checks and preventing unauthorised entries, including use of force (Bossong 2019).

3 The case of Kosovo forms an exception because despite the European Commission's recommendation (after Kosovo fulfilled Commission's requests) to grant a visa-free travel regime, this was not granted due to disagreements among the member states within the Council.

In addition to the bilateral structures and association with JHA agencies, the EU and the member states – as part of accession conditionality – have supported the strengthening of regional cooperation among Western Balkan countries. Austria has been particularly active in this regard. In 2006 the Austrian Presidency supported the conclusion of the "Police Cooperation Convention for South East Europe" to promote Schengen-standard cooperation relating to border security, information exchange and police cooperation among the countries of Albania, Bosnia and Herzegovina, Bulgaria, former Jugoslav Republic of Macedonia, Moldova, Montenegro, Romania and Serbia. This Convention is backed by permanent institutional structures, which are said to be modelled on the institutions and practices of the EU. Another regional initiative is the Southeast European Cooperative Initiative's Regional Centre for Combating Transborder Crime including migrant smuggling and human trafficking. Modelled upon the example of the EU's Police Office Europol, the Regional Centre fosters cooperation between police and customs authorities in the region in the fight against organised crime (Trauner 2009).

During the height of the migration crisis in 2015/16, Austria also led more ad-hoc cooperation efforts between several EU members and the Western Balkans countries. In February 2016, a ministerial conference in Vienna thus gathered decision-makers from Austria, Bulgaria, Croatia, Slovenia and the six Western Balkan countries to finally seal the closure of the Balkan route. Their declaration "Managing Migration Together" included far-reaching steps such as the common "deployment of police officers to borders of particularly affected regions" (Ministerial Conference 2016). Most recently, in the Vienna declaration of July 2020, leaders from various EU member states, Schengen partners (e.g., Switzerland) and Western Balkan countries reiterated their determination to effectively combat irregular migration and instructed experts to build a "concrete set of coordinated operational measures" (Ministerial Conference 2020).

These regional structures complement the bilateral accession process in several respects. They provide for cooperation frameworks that link (new) EU member states with candidate countries and potential candidates. Next to their operational focus, they are firmly based on the EU JHA *acquis*. These networks can thus be seen as learning fora whose members belong to concentric circles with different degrees of proximity to the EU core (Lavenex and Wichmann 2009). In sum, the external differentiated integration of the Western Balkans thus takes a particularly developed form combining strong supranational elements such as legally binding obligations and very far-reaching competences for Frontex with consequential intergovernmental and transgovernmental networking at both the bilateral and the regional level.

2. Effects of external differentiation: Reducing short-term migratory pressure at the expense of normative standards?

Public and policy debates often focus on the impact of external cooperation arrangements on the number of unauthorised arrivals at the EU external borders. Yet, developing and sustaining these arrangements generates significant implications also for the EU's internal system of rules. We assess in what follows the effects of external differentiated integration mechanisms along two dimensions. First, we look into the effects of external DI mechanisms in terms of reducing the migratory pressure at the EU external borders in the short and the long run. Second, we inquire into how instances of external differentiation have impacted on the EU's internal system of rules. In our assessment of the normative effects, we focus on the human rights and asylum standards on the one hand, and the rule of law standards in external cooperation, on the other.

2.1 Do external DI mechanisms reduce migratory pressure?

The reduction of migratory pressures has been a major priority of EU external migration policy (Wunderlich 2010: 254), especially following the crisis situation of 2015/16. In policy papers and public debates, migration pressure is usually understood in terms of "the number of irregular arrivals" (European Commission 2018b: 2). If we apply this narrow definition, the EU's differentiated arrangements with third countries certainly had the effect of reducing (immediate) "migration pressure" (compared to if these arrangements had not been concluded). As documented in official reports and statistics, the number of irregular border crossings on the Eastern Mediterranean Route sharply decreased after the conclusion of the EU–Turkey Statement and the increased coordination and border closure policy pursued in Southeast Europe including the Western Balkans (European Commission 2019: 2, 2020b). While the numbers along the Eastern Mediterranean Route have decreased, spikes on other routes were observed, for example in Spain, which became the EU-wide top destination for irregular arrivals in 2018 (nearly 64,300). This peak on the Western Mediterranean Route was followed by an important decrease in 2019, which according to the Commission (2019: 4) was mainly linked to "the investment in EU-Morocco relations, including substantial EU financial support for border management and the fight against irregular migration". The differentiated arrangements have thus displayed a relative "success" in lowering arrival numbers, but they have come with several shortcomings, such as overcrowded hotspots and the EU's increasing vulnerability towards an increasingly authoritarian Turkey.

Moreover, from a longer-term perspective, migratory pressure is not simply cleared away by lowering acute migration numbers. While differentiated arrangements such as the EU–Turkey deal have kept a high number of migrants away from the

EU territory, the potential of these people seeking access to the EU is still real, as illustrated by the orchestrated gathering of migrants at the Greek-Turkish border in early 2020. The European Commission accordingly assessed that "[a]rrivals are now at a lower level than before the crisis but structural migration pressure remains strong" (European Commission 2018b: 2). Such structural pressure is acknowledged in academic research, where migration pressure has been defined as the difference between the level of demand from foreigners to move to the EU, and the opportunities for entry provided by the EU (Böhning et al. 1991, Schaeffer 1993). This definition implies that (structural) migration pressure may be reduced by increasing on the EU side the supply of entry opportunities for migrants, and/or by lowering the demand or willingness of people from abroad to enter the EU.[4] What effect have DI mechanisms had on these two dimensions?

The EU's external DI frameworks have had limited implications in terms of entry opportunities for migrants. The 2016 EU–Turkey Statement contains a one-to-one resettlement scheme, through which nearly 27,000 Syrian refugees had been resettled to EU member states as of March 2020 (European Commission 2020b). While this effort must be acknowledged, it does not significantly reduce migration pressure against the background of several million refugees located in Turkey. In addition, as stated in the EU–Turkey deal, part of these resettlements were allocated under commitments made by EU member states already in July 2015 independently from the differentiated arrangement with Turkey, which reduces the effect of the DI mechanism as such. Beyond resettlement, channels for legal migration have become important topics in EU relations with countries of origin and transit, e.g., in the MP framework (Reslow 2017). For instance, Morocco, which has concluded an MP with the EU, has become the EU's main partner in the legal migration pilot projects conducted since 2017, which seek to help would-be immigrants in transit and origin countries to qualify for an eventual access to the EU labour market (European Commission (2018a, Hooper 2019: 7, European Commission 2019: 19). While this scheme holds some prospects to ease migration pressure, it does not provide new legally binding pathways for immigration, as these are still in the competence of the member states (Hooper 2019).

Regarding the second dimension, there are arguably two ways through which DI mechanisms may reduce people's demand/willingness to migrate to the EU. The first is to improve the living conditions of potential migrants in countries of origin or transit. This is, for instance, one of the main aims of the financial contributions agreed in the EU–Turkey arrangement, which according to the Commission (2019: 1) have allowed "supporting almost 1.7 million refugees on a daily basis and building new schools and hospitals". Also, legal migration pilot projects conducted in Morocco and elsewhere can be seen as a tool to reduce demand for long-term EU-bound migration. This is, for instance, because of the projects' circular approach, where people are to be trained to work in the EU for a certain period, and finally return to their countries of origin with an improved skill set, making them more fit for integrating into local labour markets and improving living conditions in countries of origin.

4 These two dimensions may be interrelated, e.g., when higher entry opportunities generate higher demand to enter the EU.

The second way of reducing demand would be to disincentivise potential migrants from seeking to enter the EU. This aspect is not directly addressed in DI mechanisms but seems to arise out of some of them, as either an intended or an unintended effect. For instance, overcrowding and difficult sanitary situations in reception centres in Greece have certainly contributed to the fact that between June 2016 and January 2020 over 18,000 migrants have returned voluntarily from Greece to their countries of origin under the Assisted Voluntary Return and Reintegration Programme (European Commission 2020b). While such an approach of deterring EU-bound migration may bear some results in reducing migration pressure, it is questionable in terms of the EU's normative standards, as discussed in the next section.

2.2 Does external differentiation undermine EU normative standards?

The specificity of EU external differentiation in asylum and migration policy is that it takes place in a context of asymmetric interdependence. EU outreach is guided by member states' concerns over immigration pressure, and is addressed towards countries that are at the source or on the transit routes of these migration flows. The interests of the EU in reducing these flows therefore do not naturally coincide with these countries' own priorities. Next to interests, also normative standards differ. While the EU, also in connection with the Council of Europe, has developed quite ambitious human rights and asylum standards in its internal system of rules, the countries addressed in its external differentiation for the most part do not abide to or cannot ensure equivalent levels of protection. On the one hand, it is exactly this normative gap that facilitates cooperation in spite of interest asymmetries: lower human rights and asylum standards render compliance with EU priorities on curbing undesired immigration flows less costly. On the other hand, external differentiated integration focusing on migration control without the accompanying normative safeguards risks undermining these standards not only in the third countries concerned but also in the EU itself.

Of course, important variation exists also within the EU in terms of how protective national legislation is with regard to the rights of migrants and asylum seekers, and legal obligations do not always coincide with practical implementation on the ground. The normative gap with the third countries associated with the EU's expanding system of migration control however applies to both *de jure* standards and *de facto* policies. Apart from the enlargement countries from the Western Balkans, none of the priority countries discussed here is a full member of the international refugee regime based on the 1951 Geneva Convention. Turkey has maintained the original geographical limitation to the Convention, thus excluding non-European asylum seekers from refugee status. Morocco was the first African state to ratify the Convention as early as 1956, yet, and despite launching some important reforms in 2014, it has still not adopted a national asylum law codifying these commitments. Libya, finally, has never ratified the Convention, and obviously has neither the legislative nor the institutional, administrative and judicial means to guarantee, let alone promote human rights standards on its territory.

Notwithstanding important differences between these countries, serious human rights violations against migrants, lack of access to legal protection, and breaches of the allegedly customary norm of non-refoulement are regularly reported for all of them. In some cases, such as the much-regarded Hirsi judgement of the European Court of Human Rights (ECHR 2012), EU member states have been held accountable for human rights violations taking place outside their territory (in this case international waters in collaboration with Libyan officials), provided that the migrants were "*de jure* and *de facto*" under the "control of the Italian authorities" (ECHR 2012: para 81). In other cases, however, "the legal link" to European courts cannot be established (Müller and Slominski 2020), leaving the EU and its member states "complicit" even if not necessarily legally accountable in human rights abuses (Dastyari and Hirsch 2019).

Insofar as the policies sustaining external differentiation in the field of EU asylum and immigration constitute a major and increasingly important part of the EU *acquis* (Lavenex 2006, 2018), this complicity in ensuing human rights abuses strikes back on the EU as a whole, and becomes increasingly incompatible with its alleged legal standards. The opposition between what the EU aspires to do in its internal migration and asylum *acquis* and what it actually does in its external policies has been interpreted in terms of "organised hypocrisy": a decoupling of words and deeds in reaction to irreconcilable demands resulting from the EU's liberal roots on the one hand, and the priorities of its political constituency on the other hand (Lavenex 2018). Although some efforts are being made to reduce hypocrisy by promoting normative standards in partner countries, in the absence of leadership and deep commitment these efforts have remained tentative at best.

In the meantime, we might be seeing a reduction of the gap on the other side of the equation – through a lowering of EU internal standards. Two observations corroborate this possibility. The first is the reduction of human rights safeguards in the EU's internal legislation, and the second is the subversion of rule of law standards in external cooperation. An example of the first development is the proposed revision of the "safe third country" clause of the EU's Asylum Procedures Directive.[5] This clause defines as safe a country in which an asylum seeker encounters "*the possibility* […] *to request refugee status* and, if found to be a refugee, to receive *protection in accordance with the Geneva Convention*" (Art. 38(1)e, emphasis added). Yet Turkey, which by function of the 2016 deal has been defined as safe third country, manifestly does not fulfil these conditions. In reaction, the reform proposal for an Asylum Procedures Regulation tabled in 2016 (European Commission 2016) significantly waters down the criteria for determining a country as safe and merely stipulates "the possibility […] to receive *protection in accordance with the substantive standards of the Geneva Convention*" (Art. 45(1)e, emphasis added) – and no longer the formal refugee status guaranteed by the Geneva Convention. This reformulation opens the door to the designation of all those countries in the EU's neighbourhood as "safe" although they have not ratified or implemented the 1951 Convention but where safety is presumed on other grounds.

5 Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, http://data.europa.eu/eli/dir/2013/32/oj.

The EU–Turkey deal, alongside other deals such as the informal cooperation with Libya, shakes up the EU's normative foundations also in a second sense. Concluded by an unidentified set of actors as an explicitly non-legally binding instrument, the EU–Turkey deal has been found by the EU Court of Justice to be "not attributable" to an EU institution and therefore impossible to adjudicate before the Court (Court of Justice of the EU 2017). The downgrading of EU normative standards regarding both human rights and the rule of law thus constitutes – intended or not – a hitherto neglected consequence of external differentiated integration in migration and asylum policy.

Conclusions

The involvement of multiple and overlapping actors, venues and governance levels in the making of external DI mechanisms plays a significant role in leading to diverse forms of external differentiation. The examination of the cases shows that different combinations of supranational, intergovernmental and transgovernmental venues are at play in driving and shaping external differentiation. Engagement led by interlocutor EU members has largely conditioned differentiated integration of Libya and Morocco from the onset. A multi-layered web of association and cooperation relations has extended to candidate countries like Turkey and the countries of the Western Balkans. Following the "crisis" of 2015/16, member state initiatives, intergovernmental and transgovernmental venues, and arrangements that are legally non-binding have grown in importance in all instances, albeit to differing degrees. "'Crisis labelling'", by justifying "urgent and exceptional actions" has contributed to this trend of intergovernmentalisation and informalisation of external migration policy (Carrera et al. 2019b: 7-8).

With crisis management dominating policy-making, reducing (short-term) migratory pressure at the EU external borders has become one of the main policy objectives requiring urgent action. Deepening differentiated integration of key third countries in the EU system of migration and border control has become a key strategy in pursuing this objective. Our analysis shows that in the post-2015/16 context, these mechanisms helped reduce acute migratory pressure. Yet, acting in tandem with internal EU policies, they also produced negative externalities, such as overreliance on external actors or substandard reception conditions in the EU.

Beyond the short term, the capacity of external differentiation to reduce structural migratory pressure has been limited. This is not peculiar to the EU. Whether and to what extent migration policies alone could have an impact on the complex drivers and processes of migration – and hence, on migratory pressure and movement – is widely questioned in the literature (Castles 2004, Czaika and de Haas 2013, among others). While the EU pays increasing attention to having an impact on the "demand" side through addressing the so-called root causes of migration or providing support to host countries for improving the living conditions of migrants and refugees, it is difficult to measure the impact of such measures on (and their potential for) reducing

structural pressure in the long run. On the "supply" side, legal pathways for both asylum and non-asylum migration have remained limited.

A better balance between "demand" and "supply" would necessitate improvement in the internal as well as the external dimensions. The EU and its (willing) member states would need to expand the scope of legal channels for both categories. Ad-hoc pledges for resettlement and humanitarian admission should be replaced by predictable schemes that benefit from closer involvement of refugee-hosting countries in both their design and their implementation. Labour migration policies should better reflect the variety of skill levels the EU economy needs, while taking into consideration the needs of labour markets in partner countries. In overall terms, this suggests that participation of third countries should not be limited to migration control only, but should transverse the different dimensions of migration management beyond the narrow and securitised sense of the term. The emphasis placed by the New Pact on expanding legal channels for both categories and deepening dialogue with partners on these issues (European Commission 2020c: 22-24) presents potential for improvement. Yet, political will and collaboration on the side of the member states would be crucial in the materialisation of such potential.

While the effects of external DI mechanisms on reducing migratory pressure occupy central stage in EU policy debates and considerations, their normative implications receive less attention. As our analysis shows, however, external differentiation has significant repercussions on EU normative standards. The implications of external differentiation vary depending on whether non-members participate in EU migration and asylum policy mainly through supranational or intergovernmental venues, and through formal instruments or informal arrangements not entailing legally binding commitments. Supranationally framed external DI mechanisms help reduce the normative gap between the EU standards by approximating partner countries to the EU legal framework, and not vice versa. When non-members participate mainly in intergovernmental venues, soft cooperation mechanisms and informal instruments, partners' approximation with EU and international legal standards takes a backseat – providing ample space for human rights abuses by various actors on all sides.

These effects are not limited to the territory of the third countries, but feed back on the normative basis of the EU itself. External cooperation in migration control faces the dual challenge of asymmetric interests and differing normative standards between the EU and partner countries. To overcome this challenge, the EU and its member states have increasingly resorted to informal external DI mechanisms based on non-members' participation in legally non-binding agreements and intergovernmental and transgovernmental venues in contrast to legally binding cooperation sustained by supranational procedures and checks and balances. Policies that aim at sustaining the former kind of mechanisms lead the EU to lower or subvert its internal legal standards, and raise significant questions in terms of accountability. Accountability is particularly hampered when external differentiation is pursued by instruments that are legally non-binding or that cannot be attributed to the EU (e.g., the EU–Turkey Statement) and other informal arrangements that are not traceable to concrete actors in the EU. Furthermore, normative safeguards in EU and member states' laws are being reduced to facilitate cooperation with third countries that do not fulfil

required conditions, such as in the case of the asylum procedures directives.

It is not external differentiation *per se* that hampers the EU's normative consistency and accountability – and hence the internal dimension of European integration. It is the increasing use of policy instruments that circumvent or water down the EU system of rules on human rights, asylum, the rule of law and on institutional competences in external relations. Basing external cooperation increasingly on extra-Treaty instruments raises significant constitutional challenges, hampering accountability, judicial oversight and human rights safeguards (Carrera et al. 2019b).

Policies aiming at deeper involvement of third countries should therefore take into serious consideration the normative gap between partner countries and the EU. Cooperation in border control and return in a context of mixed migration flows has particularly severe implications for compliance with human rights and asylum standards. This implies that the depth and breadth of external differentiation should be commensurate to non-members' international or domestic legal safeguards against human rights violations. External differentiation should aim at the approximation of partner countries with the EU human rights and asylum standards, and not the other way around. Finally, the trend towards informalisation and side-lining of the EU system of rules governing external cooperation, which has been accelerating in the post-2015/16 period, should be reversed. Presumed political benefits of a pragmatic approach based on informal arrangements between a blurred set of EU actors and third countries should be carefully weighed against the costs these generate in terms of the accountability and legitimacy of EU policies and external cooperation mechanisms, as inscribed in the Treaties. Ensuring oversight by the European courts as well as the European Parliament would be particularly important in this regard.

References

Abderrahim, Tasnim (2019), "Pushing the Boundaries: How to Create More Effective Migration Cooperation across the Mediterranean", in *ECFR Policy Briefs*, January, https://www.ecfr.eu/publications/summary/pushing_the_boundaries_effective_migration_cooperation_across_Mediterranean

Aydın-Düzgit, Senem and Nathalie Tocci (2015), *Turkey and the European Union*, London/New York, Palgrave Macmillan

Böhning, W.R., Peter V. Schaeffer and Thomas Straubhaar (1991), "Migration Pressure: What Is It? What Can One Do about It?", in *ILO MIG Working Papers*, No. 55, October, https://ideas.repec.org/p/ilo/ilowps/992848833402676.html

Bossong, Raphael (2019), "The Expansion of Frontex: Symbolic Measures and Long-term Changes in EU Border Management", in *SWP Comments*, No. 47, December, https://doi.org/10.18449/2019C47

Bürgin, Alexander and Derya Aşıkoğlu (2015), "Turkey's New Asylum Law: A Case of EU Influence", in *Journal of Balkan and Near Eastern Studies*, Vol. 19, No. 2, p. 121-135

Carrera, Sergio et al. (2016), "EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?", in *CEPS Papers in Liberty and Security*, No. 86, January, https://www.ceps.eu/?p=9256

Carrera, Sergio, Leonhard den Hertog and Marco Stefan (2017), "It Wasn't Me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal", in *CEPS Policy Insights*, No. 2017-15, April, https://www.ceps.eu/?p=9981

Carrera, Sergio, Juan Santos Vara and Tineke Strik, eds (2019a), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered*, Cheltenham/Northampton, Edward Elgar Publishing

Carrera, Sergio, Juan Santos Vara and Tineke Strik (2019b), "The External Dimensions of EU Migration and Asylum Policies in Times of Crisis", in Sergio Carrera, Juan Santos Vara and Tineke Strik, eds, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered*, Cheltenham/Northampton, Edward Elgar Publishing, p.1-19

Castles, Stephen (2004), "Why Migration Policies Fail", in *Ethnic and Racial Studies*, Vol. 27, No. 2, p. 205-227

Council of the European Union (2013), *Joint Declaration Establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States*, ST 6139 2013 ADD 1 REV 3, 3 June, http://data.consilium.europa.eu/doc/document/ST-6139-2013-ADD-1-REV-3/en/pdf

Court of Justice of the EU (2017), "Orders of the General Court of the EU in Cases T-192/16, T-193/16 and T-257/16: NF, NG and NM v European Council", in *CJEU Press Releases*, No. 19/17, 28 February, http://curia.europa.eu/jcms/jcms/p1_291245

Czaika, Mathias and Hein de Haas (2013), "The Effectiveness of Immigration Policies", in *Population and Development Review*, Vol. 39, No. 3, September, p. 487-508, https://doi.org/10.1111/j.1728-4457.2013.00613.x

Dastyari, Azadeh and Asher Hirsch (2019), "The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy", in *Human Rights Law Review*, Vol. 19, No. 3, November, p. 435-465

ECHR – European Court of Human Rights (2012), Judgment of the Grand Chamber on the Case of *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09), 23 February, http://hudoc.echr.coe.int/eng?i=001-109231

El Qadim, Nora (2017), "De-EUropeanising European Borders: EU-Morocco Negotiations on Migrations and the Decentring Agenda in EU Studies", in Marc Woons and Sebastian Weier, eds, *Critical Epistemologies of Global Politics*, Bristol, E-International Relations Publishing, p. 134-151, https://www.e-ir.info/?p=69518

European Commission (2016), *Proposal for a Regulation Establishing a Common Procedure for International Protection in the Union and repealing Directive 2013/32/EU*, COM/2016/0467, 13 July, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016PC0467

European Commission (2018a), *Concept Note. Pilot Projects Legal Migration*, 12 February, http://data.consilium.europa.eu/doc/document/ST-6020-2018-INIT/en/pdf

European Commission (2018b), *Managing Migration in All Its Aspects: Progress under the European Agenda on Migration*, COM/2018/798, 4 December, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0798

European Commission (2019), *Progress Report on the Implementation of the European Agenda on Migration*, COM/2019/481, 16 October, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0481

European Commission (2020a), *EU Support on Migration in Morocco*, EUTF Factsheet, 27 October, https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/eutf-facsheet_27102020-morocco.pdf

European Commission (2020b), *EU-Turkey Statement. Four Years On*, 18 March, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf

European Commission (2020c), *On a New Pact on Migration and Asylum*, COM/2020/609, 23 September, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0609

European Council (1999), *Presidency Conclusions, Tampere European Council*, 15-16 October, https://www.europarl.europa.eu/summits/tam_en.htm

Frontex (2018a), *Africa-Frontex Intelligence Community Joint Report 2017*, Warsaw, February, https://op.europa.eu/s/otmA

Frontex (2018b), *Programming Document 2019-2021*, Warsaw, 18 October, https://frontex.europa.eu/assets/Key_Documents/Programming_Document/2019/Programming_document_2019-2021.pdf

Hooper, Kate (2019), "Exploring New Legal Migration Pathways: Lessons from Pilot Projects", in *MPI Reports*, February, https://www.migrationpolicy.org/node/16430

Lavenex, Sandra (2006), "Shifting Up and Out: The Foreign Policy of European Immigration Control", in *West European Politics*, Vol. 29, No. 2, March, p. 329-350

Lavenex, Sandra (2018), "'Failing Forward' towards Which Europe? Organized Hypocrisy in the Common European Asylum System", in *Journal of Common Market Studies*, Vol. 56, No. 5, July, p. 1195-1212

Lavenex, Sandra and Ivo Križić (2019), "Conceptualising Differentiated Integration: Governance, Effectiveness and Legitimacy", in *EU IDEA Research Papers*, No. 2, November, https://euidea.eu/?p=762

Lavenex, Sandra and Emek M. Uçarer, eds (2002), *Migration and the Externalities of European Integration*, Lanham, Lexington Books

Lavenex, Sandra and Nicole Wichmann (2009), "The External Governance of EU Internal Security", in *Journal of European Integration*, Vol. 31, No. 1, p. 83-102

Liga, Aldo (2018), "Playing with Molecules: The Italian Approach to Libya", in *Études de l'Ifri*, April, https://www.ifri.org/en/node/14480

Marin, Luisa (2020), "The Cooperation Between Frontex and Third Countries in Information Sharing: Practices, Law and Challenges in Externalizing Border Control Functions", in *European Public Law*, Vol. 26, No. 1, p. 157-180

Ministerial Conference (2016), *Managing Migration Together. Declaration*, Vienna, 24 February, http://data.consilium.europa.eu/doc/document/ST-6481-2016-INIT/en/pdf

Ministerial Conference (2020), *Vienna Declaration on Effectively Combating Irregular Migration along the Eastern Mediterranean Route*, Vienna, 22-23 July, https://data.consilium.europa.eu/doc/document/ST-9909-2020-INIT/en/pdf

Müller, Patrick and Peter Slominski (2020), "Breaking the Legal Link But Not the Law? The Externalization of EU Migration Control through Orchestration in the Central Mediterranean", in *Journal of European Public Policy*, 24 April, https://doi.org/10.1080/13501763.2020.1751243

Paoletti, Emanuela and Ferruccio Pastore (2010), "Sharing the Dirty Job on the Southern Front? Italian-Libyan Relations on Migration and Their Impact on the European Union", in *IMI Working Papers*, No. 29, December, https://www.migrationinstitute.org/publications/wp-29-10

Reslow, Natasja (2017), "'Not Everything That Counts Can Be Counted': Assessing 'Success' of EU External Migration Policy", in *International Migration*, Vol. 55, No. 6, December, p. 156-169

Reslow, Natasja (2019), "Horizontal and Vertical Diversity: Unintended Consequences of EU External Migration Policy", in *The International Spectator*, Vol. 54, No. 1, March, p. 31-44, https://doi.org/10.1080/03932729.2019.1548840

Schaeffer, Peter V. (1993), "A Definition of Migration Pressure Based on Demand Theory", in *International Migration*, Vol. 31, No. 1, January, p. 43-72

Trauner, Florian (2009), "Deconstructing the EU's Routes of Influence in Justice and Home Affairs in the Western Balkans", in *Journal of European Integration*, Vol. 31, No. 1, p. 65-82

Turhan, Ebru (2016), "Europe's Crises, Germany's Leadership and Turkey's EU Accession Process", in *CESifo Forum*, Vol. 17, No. 2, June, p. 25-29, https://www.cesifo.org/en/node/27240

Vincenti, Daniela (2017), "EU Leaders Approve Plan to Curb Migration from Libya, Africa", in *Euractiv*, 3 February, https://www.euractiv.com/?p=1087334

Wolff, Sara (2014), "The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey", in *European Journal of Migration and Law*, Vol. 16, No. 1, 69-95

Wunderlich, Daniel (2010), "Differentiation and Policy Convergence against Long Odds: Lessons from Implementing EU Migration Policy in Morocco", in *Mediterranean Politics*, Vol. 15, No. 2, p. 249-272

EU IDEA

EU Integration and Differentiation
for Effectiveness and Accountability

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

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

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

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