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Abstract

The Schengen area represents a textbook example of differentiation in the European Union. Not all EU member states are part of Schengen whilst others have opt-outs. At the same time, the common free movement area also embeds several non-EU states. Aside from the varied membership of the Schengen system, differentiation can also be observed in the internal rules that govern it. These rules, and particularly the option to reintroduce internal border controls, provide states with a failsafe option to return to national borders in high-pressure situations. As the paper argues, Schengen's differentiated integration mechanisms, and the flexibility they provide, are part of its strength. They enable joint solutions to shared cross-border challenges in this highly sovereignty-sensitive area. However, there are risks attached to this flexibility as well. As recent crises highlight, an over-use of the system's flexibility risks instilling fragmentation among states or can lead to situations where temporary controls become semi-permanent. Against this background, the paper proposes a set of three recommendations: (i) strengthening coordination mechanisms, (ii) strengthening common rules around the reintroduction of internal controls and (iii) promoting a stronger use of the Commission's control and coordination competences.

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Executive summary

The Schengen area represents a textbook example of differentiation in the European Union. Not all EU member states are members of Schengen, while some non-EU members are. Internally, Schengen's governance arrangements have been designed in a way that allows for flexibility. The Schengen Borders Code (SBC) enables members of the Schengen area to temporarily reintroduce internal border controls in the event of a serious threat to public policy or internal security. However, such reintroductions must remain an exception and limited in time.

The abolition of internal border controls is intrinsically intertwined with a series of transnational challenges, which have initially pushed member states to seek common and effective solutions at the supranational level. Yet, ever since the migration governance crisis of 2015–2016 and further sources of pressure such as the COVID-19 pandemic, states have increasingly returned to policies that preserve national sovereignty when it comes to the governance of their borders. As a result of such “sovereignty reflexes”, intra-Schengen differentiation has materialised through the reintroduction of border controls in the last five years. Whilst temporary reintroductions are allowed under the SBC, an over-use of the system's flexibility carries risks as well.

First, border controls reintroduced as exceptional measures tend to stick. The controls that have been continuously extended since 2015–2016 are a case in point. The longer such controls remain in place, the more they risk being seen as “the new normal”. Consequently, the risk emerges of overstressing Schengen's flexibility and of actually eroding the *acquis*. Second, the flexibility with which the common rules are applied risks instilling fragmentation among member states. For instance, following the COVID-19 outbreak, states applied and then lifted numerous measures in an uncoordinated way.

Against this background, the paper advances a set of three recommendations aimed at improving coordination and joint crisis-management within the Schengen governance structure while safeguarding the system's flexible functioning:

- First, we argue that current governance gaps within the *coordination mechanisms* around Schengen need to be closed, while existing coordination structures have to be *strengthened*. On an operational level, efforts towards enhancing information-exchange mechanisms need to continue receiving high priority. On a political/institutional level, merit can be found in the idea of establishing a “*Schengen Council*” within the Council structures.
- Second, we argue that the SBC needs to be revised in order to provide *clear rules on the time range in which states reintroduce and lift border controls*.
- Third, the *European Commission should exercise a higher degree of control and coordination* than it currently does. This includes, among other things, calling on member states to provide more details on their notifications regarding reintroduced border controls. In addition, when controls do not (or no longer) meet EU law requirements, the Commission should make use of its powers under Article 258 TFEU to start infringement actions.

Introduction

The Schengen area represents a textbook example of differentiation in the European Union. In 1985, five out of ten member states of the then European Communities signed the Agreement on the gradual abolition of checks at common borders, the so-called Schengen Agreement. This agreement laid the groundwork for the Schengen area, whose implementation was completed ten years later, in 1995 (Schengen Implementing Convention 1990). Ever since, an increasing number of EU member states have gradually abolished internal borders while simultaneously strengthening controls at the external borders in accordance with a single set of rules. At present, the Schengen area includes 26 states: 22 EU members and four non-EU members. The area is fundamental for the functioning of the EU's internal market and its four freedoms¹ of which the “freedom of movement across EU internal borders is today the most symbolic and relevant” (Pirozzi et al. 2017: 15). At the same time, the Schengen area is highly differentiated in terms of “modalities of integration or cooperation that allow states (EU members and non-members) and sub-state entities to work together in non-homogeneous, flexible ways”.² It has thus always been marked by elements of both internal and external differentiation (for a definition see Schimmelfennig et al. 2015) with a high degree of flexibility.

The Schengen area is subject to a general dilemma that member states are facing in terms of European integration. On the one side, faced with transnational challenges which are intrinsically intertwined with the abolition of border controls, member states are driven by a “problem solving instinct” seeking concrete common and effective solutions at the EU level. Prominent areas of cooperation relate to fighting terrorism, combatting cross-border crime and drug trafficking as well as managing common external borders. On the other side, the provision of security is one of the core tasks of a sovereign nation state, which leads member states to develop “sovereignty reflexes” that undermine, differentiate or slow down common European solutions (Hofmann and Wessels 2008; see also Tekin 2020). The migration governance crisis of 2015–2016 and concomitant sources of pressure (new migratory waves in 2019 as well as health risks related to the COVID-19 pandemic) have reinforced this dilemma by increasing the demand for common solutions, in order to solve the transnational challenge of migratory influxes and the spread of COVID-19. At the same time, these challenges have also motivated members of Schengen to preserve their national sovereignty rights when it comes to the governance of their borders – a highly sovereignty sensitive issue (see also Genschel and Jachtenfuchs 2018).

This dilemma has usually been solved in a threefold manner. The first way is legislative, through a slow process of incremental communitarisation, which can be compatible with forms of intergovernmental cooperation or the preservation of veto options that can give justice to the sovereignty reflex. The Area of Freedom, Security and Justice was only fully communitarised by the Lisbon Treaty of 2009 taking

1 The EU seeks to guarantee the free movement of goods, capital, services and labour – the “four freedoms” – within the European Single Market.

2 As defined in the EU IDEA project description. For more information see the project website: <https://euidea.eu>.



full effect in 2014. The second is differentiation in terms of opt-outs or secondary law differentiation (e.g., minimum standards), which can help levelling out different degrees of sovereignty reflexes among members of Schengen. The third way is the reintroduction of border controls, which makes it possible to act at the national level within an established system of joint action. Hence, the Schengen system has been designed to enable a certain degree of flexibility in order to accommodate member states' reflexes to return to national border solutions when faced with certain cross-border policy challenges or specific crises. This third option corresponds to an “intra-Schengen” differentiation, given that the Schengen Borders Code (SBC) allows members of the Schengen area to temporarily reintroduce internal border controls in the event of a serious threat to public policy or internal security (European Parliament and Council of the European Union 2016). However, such reintroductions must remain an exception and limited in time.

In a first stage of Schengen, lasting until approximately the mid-2000s, such reintroductions usually remained exceptional and limited in time (Groenendijk 2004). The situation -changed, however, when Schengen was confronted with its first crisis in the context of the so-called 2011 “Franco-Italian affair”. This “affair” was prompted by the arrival of large numbers of Tunisian migrants in Italy as a result of the Arab Spring. Italy consequently granted temporary residence permits enabling them to travel freely within the Schengen area. In response, France unilaterally closed its borders with Italy at Ventimiglia. These national actions and counter-actions spurred strong political tensions and marked the start of increasing returns to national border controls more generally.

Such returns to national actions were also particularly prominent during the 2015–2016 migration governance crisis and the COVID-19 pandemic. Whereas the migration governance crisis resulted from unprecedented migratory flows at the EU's external borders and consequent secondary movements within the EU, the pandemic paralysed not only movements from outside the EU, but also the free movement of EU citizens within Schengen.

As a result of these crises, intra-Schengen differentiation has materialised through the reintroduction of internal border controls. Whilst the possibility of reintroducing national border controls is part and parcel of the flexibility that the Schengen governance system affords, challenges do arise when such “temporary” controls linger beyond what is necessary. In such instances, member states overstretch Schengen's flexibility which entails a larger risk of slowly eroding the common *acquis* in the long term.

Against this backdrop, and drawing on both academic and policy-oriented work, the paper highlights challenges related to intra-Schengen differentiation and its possible disrupting consequences for the functionality of the Schengen system in the long run. The recommendations presented at the end of the paper are geared towards counteracting an overstretch of Schengen's intra-differentiation. More specifically, we argue for a strengthening of those mechanisms that enable a return to the status quo ante as swiftly as possible once the necessity of internal border controls decreases. This includes (i) strengthening coordination mechanisms, (ii) strengthening common rules around the reintroduction of internal controls and (iii) promoting a stronger use

of the Commission's control and coordination competences.

In what follows, the next section describes why Schengen represents a textbook example of differentiation. A second section analyses the most recent examples of intra-Schengen differentiation in times of crises. The concluding section offers an overview of the disintegration dynamics that emerge when Schengen is under pressure, and presents a series of three recommendations to safeguard the functioning of the Schengen area.

1. The causes and nature of differentiated integration

Three structuring thoughts help to understand the implications of differentiation for the Schengen area, namely a Schengen-related (1) internal and (2) external differentiation, as well as an (3) intra-Schengen differentiation.

First, the Schengen area would not exist if it had not been for *internal* differentiation, i.e., modalities of cooperation that allow states to work together in non-homogeneous flexible ways. Put differently, differentiated integration, which refers to a process of integration in which member states opt to move forward at different speeds and/or towards different objectives, is a key constitutive element of the Schengen area. In the beginning, only five out of ten member states – Germany, France, Belgium, the Netherlands and Luxembourg – were able to agree on the gradual abolition of common border controls. The resulting 1985 Schengen Agreement as well as the 1990 Convention on implementing that agreement (Schengen Implementing Convention 1990) were transferred into the European treaty framework with the Amsterdam Treaty in 1999.

Although by that time additional member states had joined, Schengen *de facto* constitutes the EU's first closer/enhanced cooperation³ since Ireland and the United Kingdom were not willing to give up their border controls. This unwillingness is rooted in the fact that these countries are islands that provide internal security mainly through strict controls at their few points of entry such as harbours and airports. Additionally, both countries are part of a common travel area, which means that participation in the Schengen area would only make sense if both countries agreed to join. The Protocol on the Schengen *acquis* integrated into the Framework of the EU (Protocol No 19 annexed to the Lisbon Treaty) allows Ireland and the UK to request at any time "to take part in some or all of the provisions of the Schengen *acquis*" (Art. 4). Yet, "the Council shall decide on the request with the unanimity of its members" (Art.

3 In the EU, enhanced cooperation is a procedure where a minimum of nine EU member states are allowed to establish advanced integration or cooperation in an area within EU structures but without the other members being involved (for details visit the EUR-Lex website: *Glossary of Summaries of EU Legislation*, https://eur-lex.europa.eu/summary/glossary/enhanced_cooperation.html). See also in Article 20 of the Treaty on European Union (TEU) and the provisions of Articles 326-334 of the Treaty on the Functioning of the European Union (TFEU).

4). Differentiated integration in this context is hence flexible because it combines the so-called “opt-out” of Ireland and the UK with an option to “opt back in”. Both countries have benefited from this option by joining measures that complement effective border management policies, e.g., measures aimed at enhancing the fight against cross-border crime and irregular migration as well as countering trafficking of persons and drugs. Both Ireland and the UK opted-in to almost 50 per cent of the Schengen Implementation Agreement provisions, but kept entirely out of the chapter on the abolition of borders. Consequently, the UK and Ireland hardly participate in any border and visa policy measures adopted under EU law whereas their participation in Schengen-based irregular migration measures adds up to 85 per cent.

Denmark’s Schengen status adds to the complexity of differentiated integration. Ever since the 1992 Danish referendum on the Maastricht Treaty, Denmark has had some serious objections to the EU project. As a result, Denmark signed the Schengen Agreement in 1996 but does not agree to supranational policy-making or the jurisdiction of the Court of Justice of the EU in this area. Consequently, Schengen measures only “create an obligation under international law between Denmark and the other Member States bound by the measure” if Denmark decides to implement the measure in national law (Art. 4 Protocol No 22 annexed to the Lisbon Treaty).

Although the EU treaties grant such a substantial amount of flexibility to those states that were EU member states at the time of the introduction of Schengen into the EU’s legal framework, legal provisions preclude any further opt-outs by stipulating that the “Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all States candidates for admission” (Art. 7 Protocol No 19 annexed to the Lisbon Treaty). This does not imply, however, that all new EU member states can immediately join the Schengen area. As long as they do not fulfil certain criteria,⁴ they will not become Schengen members. Currently, such transitory periods apply to Bulgaria, Romania, Croatia and Cyprus.

Both the opt-outs and the transitory periods help preserve the functioning of the Schengen area. Without the opt-outs the Schengen area could not have become part of the EU’s *acquis communautaire* in the first place, and the transitory periods provide sufficient time for states to prepare before becoming a full-fledged member of the Schengen area.

Second, Schengen is also marked by *external* differentiation as the European Free Trade Area (EFTA) countries Iceland, Norway, Liechtenstein and Switzerland are part of the Schengen area. This external differentiation represents a spill-over from the development of the common internal market as well as from the Nordic Passport Union. In 1994, the European Economic Area (EEA) was set up to extend

4 Countries must fulfil a list of preconditions to join the Schengen area. They need to be prepared and have the capacity to: (1) take responsibility for controlling the EU’s external borders on behalf of the other Schengen states and for issuing uniform Schengen visas; (2) efficiently cooperate with law enforcement agencies in other Schengen states in order to maintain a high level of security once internal border controls are abolished; (3) apply the common set of Schengen rules (the so-called Schengen *acquis*); and (4) connect to and use the Central Schengen Information System (SIS).

the EU's provisions on its internal market to the EFTA countries. This implies that the four freedoms of the internal market also apply to the EEA. Although Switzerland was not able to ratify the EEA Agreement, it is bound to the EU's internal market through numerous bilateral agreements (currently 120) with the aim of preserving its economic integration. The abolition of border controls facilitates the provision of the free movement of persons also into those countries that are not willing to join the EU. Since 1952, the Nordic Passport Union allows Nordic citizens to travel and reside in one of the Nordic countries Denmark, Finland, Iceland, Norway and Sweden. This is another reason why Iceland and Norway are part of Schengen, and Denmark was not able to drop out of Schengen entirely. With regard to the current challenging negotiations between the EU and the UK with a minimal trade agreement at best, Brexit is unlikely to substantially redefine external differentiated integration. At present, Brexit does not set a precedent for future forms of the EU's external differentiated integration, and future UK–EU relations will demand a tailor-made approach (see also Eisl and Fabry 2020).

Third, the SBC allows for a certain degree of intra-Schengen flexibility by establishing detailed rules and conditions around the temporary reintroduction of border controls. States can reintroduce internal border controls in three types of situations. The first is foreseeable events (e.g., sport events) according to Articles 25 and 26 of the codified SBC. The duration of these measures needs to be limited to 30 days and can be prolonged for renewable periods of up to 30 days. The total period shall however not exceed six months. The second is in cases requiring immediate action (Article 28 of the codified SBC), in order to adequately respond to a serious threat to public policy or internal security. In these specific cases, states may reintroduce border controls for ten days without prior notification. The reintroduction can be prolonged for periods of up to 20 days, but the overall period shall not exceed two months. Finally, since the latest, 2013 reform of the SBC (see also below), states can reintroduce border controls in cases where exceptional circumstances put the overall functioning of the Schengen area at risk as a result of persistent serious deficiencies relating to external border control (Article 29 of the codified SBC). Such controls can be reintroduced for periods of up to six months, which can be extended – if the situation persists – for a maximum of three times.

Similar to the above observations around internal differentiation, intra-Schengen differentiation – through the option of temporarily reintroducing border checks – embeds the Schengen system with a high degree of flexibility. This is part of Schengen's strength as it provides member states with a sort of failsafe option in the event of serious threats to public policy or internal security. As previous research has shown, during the initial stages of Schengen's existence, roughly up to the mid-2000s, these provisions did not cause too much difficulty for the operation of the Schengen area. That is to say, internal border controls were only reintroduced in exceptional cases for short periods of time, e.g., in the context of high-level political gatherings (Groenendijk 2004).

However, and as the next section will document, in recent years, and in the face of new types of pressure, states are increasingly resorting to national border policies. In so doing, they have in several instances overstretched the flexibility afforded by the system.

2. Schengen under pressure – Overstretching flexibility

Differentiated integration dynamics are not only part of Schengen's past. They continue to mark the most recent developments in this area and reappear particularly strongly at times when Schengen is confronted with pressure, albeit at a more operational level. This section presents the different dynamics of differentiated integration that have marked Schengen's recent past. It touches on the three most high-profile moments of pressure or "crisis", specifically the 2011 Franco-Italian affair, the 2015–2016 migration governance crisis and the controls that were reintroduced following the 2020 COVID-19 pandemic. Whilst the causes and magnitude of these different crises differ, the sovereignty reflex dynamics at the operational level during each of these three episodes are similar.

2.1 The Franco-Italian affair

As stated in the introduction, after a relatively smooth start Schengen was confronted with its first real crisis in the context of the so-called Franco-Italian affair in 2011. This affair was prompted by the arrival of large numbers of Tunisian migrants in Italy as a result of the Arab Spring. Italy granted temporary residence permits to a number of these migrants enabling them to travel freely in the Schengen area. Italy's interior minister at the time, Roberto Maroni, justified the Italian course of action by stating that his country had been left alone to "shoulder the immigration burden" (Pop 2011).

As migrants subsequently started traveling onwards, France unilaterally closed its borders with Italy at Ventimiglia. These national actions and counter-actions spurred strong political tensions that eventually came to engulf EU-level affairs as a whole in the spring of 2011. Both Italy's policies and the French unilateral reintroduction of border controls pushed against the limits of EU law obligations (Carrera et al. 2011).

The conflict eventually led to a reform of the SBC, concluded in 2013, which introduced a new Article 29 that enabled member states to reintroduce internal border controls in the event of "serious deficiencies in the carrying out of external border control". This new article, and as stated in the Commission's Communication on the reform at the time, sought to enable a "coordinated, EU-based response" for future situations in which Schengen would be under strain (European Commission 2011).

2.2 Migration governance crisis of 2015–2016

Coordinated efforts, however, remained absent when the Schengen zone was again confronted with a high-pressure situation in 2015. At that time, and as the Syrian conflict entered into its fourth year, an unprecedented number of over 1.2 million asylum requests were submitted in the EU, around double the figure registered in the preceding year (Eurostat 2016). These arrival trends were, by and large, sustained until March 2016 (Eurostat 2017).

Confronted with images of large groups of asylum seekers arriving in Hungary and Slovakia, and in view of the mounting evidence of structural reception capacity problems there and in other states of first arrival, the German federal government unilaterally suspended Dublin returns for Syrian refugees in the late summer of 2015.⁵ Two weeks later, however, faced with domestic political pressure as high arrival numbers were registered in Bavaria, Germany reinstated checks along its land border with Austria. Bavarian finance minister Markus Söder, clearly highlighting national security concerns, had called for such checks stating that “when the EU’s external borders are not protected, the German government needs to think about how it will protect German borders” (Spiegel 2015).

A chain reaction followed. Starting with Austria and Slovakia in September 2015, other states also reintroduced border checks to avoid – at least in the beginning – becoming cul-de-sacs where asylum seekers could get stranded (Pastore and Henry 2016). Between October and December 2015, France, Hungary, Sweden and Norway also reintroduced border checks. Denmark and Belgium followed in early 2016, leading to a total of nine countries with reintroduced border controls at that time. Since then, six out of these originally nine states have continued to re-extend controls: Germany, France, Austria, Norway, Sweden and Denmark.

These continuous controls have been the subject of much controversy. Criticism relates, first, to states’ practices of accumulating different legal bases for introducing what should actually be temporary controls and, second, to the limited justifications adduced for doing so. With respect to the first point, what has been particularly contentious is the constant shifting from one legal basis to another to justify the extension of internal border checks once the temporal limit of a certain legal basis has been exhausted. For instance, when member states reached the temporal limits of Article 29 SBC in the fall of 2017, after having prolonged controls on that basis three times, they did not lift these controls but instead extended them by referring to Article 25 SBC (see also Carrera et al. 2018). The European Parliament as well as certain member states, as appears from internal documents, have called this out as constituting unlawful behaviour (European Parliament 2018).

As regards the second point, the justifications provided for reinstating internal border controls are generally regarded as weak and it is questionable whether they meet the necessity and proportionality requirements prescribed by the SBC (Carrera et al. 2018). Since 2015, states have predominantly adduced threats resulting from so-called “secondary movements” of asylum-seekers from Greece and other states at the EU external border into north-western Europe as the reason for reintroduced border checks. Other reasons for continuously reintroduced border checks refer to more general “shortcomings at the external borders” (European Commission 2020c). Arrival numbers have, however, dropped significantly since mid-2016 (Eurostat 2019). Numbers of connected secondary movements are more difficult to come by (see,

5 According to the Dublin Regulation (EU Regulation 604/2013), when an asylum-seeker has no prior link with an EU member state, responsibility for that person rests with the state where he/she first arrived. Under these rules, if a person travels on, states can return the asylum-seeker to the state of first arrival.

for instance, the recent study on secondary movements by Obermann and Vergeer 2020). The European Commission nevertheless reported, already in the fall of 2017, that these movements had become “limited” as evidenced by the “downward trend observed in asylum applications received at the internal borders of the member states concerned” (European Commission 2017: 4).

Yet, in the most recent notifications, dating from May 2020, and amidst historically low mobility numbers because of the COVID-19 crisis, Austria, Germany and Norway continue to explicitly cite concerns around secondary migration, whilst Sweden refers to “shortcomings at the external borders” (European Commission 2020c).

The six member states upholding these controls within Schengen appear to maintain some degree of multilateral coordination among them. This can be derived from the synchronisation of the notifications that are sent, every six months anew, by that same group of states. EU-wide coordination, however, is sorely lacking. In fact, the continued border controls are known to be a source of friction within the Council. As appears from media comments, particularly Eastern European states have long denounced these controls, amongst other reasons because their goods transport sectors are experiencing adverse consequences (see for instance Than and Nasralla 2016). Southern European states have similarly been critical. A recently leaked non-paper on the reform of the Common European Asylum System (CEAS) by Cyprus, Greece, Spain, Italy and Malta for instance stated that:

Reintroduction of internal border controls must revert to an extraordinary, proportionated and limited in time last resource. The image of traditional controls in our internal borders makes us go back decades in the European Project and could jeopardize trust among [member states]. In order to reinforce security in our territory, less coercive and more efficient measures are possible. (Cyprus et al. 2020)

The Commission has, on various occasions, publicly called on those member states upholding the controls to lift them (Nielsen and Eriksson 2017). Up until now, however, the Commission has not initiated infringement proceedings, since this could risk to further politicise and escalate an already very tense political situation. As for instance stated by then Commissioner-Designate for Home Affairs Ylva Johansson in her Hearing before the European Parliament, infringement proceedings could further undermine member states’ willingness to cooperate with the Commission to restore Schengen to full functionality (European Parliament 2019).

2.3 The COVID-19 pandemic

Whereas the previous migration governance crisis had to deal with problems related to migratory pressure from *outside* and secondary movements of asylum seekers *within* the EU, the 2020 COVID-19 pandemic affected not only the migratory flows but also the free movement of EU citizens within Schengen. As the pandemic hit Europe, Schengen entered into its most strenuous period so far. Over the course of March 2020, no less than 18 out of the 26 Schengen states reintroduced border

checks. Never before were border controls reintroduced by so many members and to such an extensive degree, as a consequence of sovereignty reflexes.

These reintroductions happened in a highly uncoordinated and even chaotic manner (Politico 2020). As a testimony of the lack of a unified, EU-based approach, different member states referred to different legal bases for reintroducing controls, leading to a patchwork interpretation of the SBC (Heinikoski 2020). At many border crossings, operational infrastructure had also long disappeared and, as a result, certain states resorted to unconventional and rather crude measures, including the positioning of large sandbags across small countryside roads to prevent crossings (see for instance, on border closures along the Belgian–Dutch border, RTL Nieuws 2020). Moreover, as checks were reinstated, long queues at the borders hindered the transport of (essential) goods and prevented EU citizens from reaching their homes, or state of residence (Zalan 2020).

Against this backdrop, the Commission issued a set of guidelines on 16 March 2020. In these guidelines, it urged states to facilitate the entry and transit of EU citizens returning home, and enable the swift transit of goods – particularly essential medical supplies – by for instance establishing “green lanes” (European Commission 2020a). In addition, it advanced a Communication inviting member states to temporarily restrict all “non-essential travel” to the EU (European Commission 2020b).

During the early summer of 2020, border controls were gradually lifted again by all member states for EU countries and a joint list of 15 non-EU states was agreed upon. However, despite the Commission’s attempts at forging a coordinated approach, different actions and implementing practices on the part of member states continue to prevail.

With regard to the lifting of border controls, the Commission had initially advanced a set of guidelines (European Commission 2020e) detailing the principles around which the lifting had to be coordinated. Amongst these, a core principle holds that the lifting of controls should take place in a non-discriminatory manner. This means, first, that where free movement restrictions are lifted between regions, this should apply to all EU citizens and residents of the states in question without discrimination on the basis of nationality. Second, there can also not be any discrimination between regions. Once controls are lifted between certain regions, intra-European travel should also be re-established with all other parts of the Union that present similar epidemiological situations.

Despite these guidelines, the first agreements on the lifting of border controls have been taking place in a highly uncoordinated manner. Numerous instances of infringements of the principle of non-discrimination between EU citizens and regions have been documented so far. This includes, for instance, the so-called “travel bubbles” established between the Baltic states as well as the selective border openings by Portugal towards those countries with the largest numbers of Portuguese nationals, or by Hungary which exempted nationals of the Czech Republic, Austria, Poland, Germany and Slovakia from its border checks (see for a further discussion Alemanno 2020, Van Elsuwege 2020).

A similarly chaotic image marks the lifting of the joint external travel ban for the 15 non-EU countries on the joint safe list, as different states are re-opening their borders to different sets of countries at different moments in time. Several EU states including Austria, Sweden and Hungary announced that they would not open their borders for international travel with the countries on the joint EU list by the agreed date (SchengenVisaInfo 2020d, 2020c, 2020a). Others, conversely, had already started to enable international travel again with certain third states prior to 1 July 2020, such as Cyprus, which enabled travel with Israel as from 9 June 2020 (SchengenVisaInfo 2020b). This external travel ban disorder could have particularly worrisome effects. As the COVID-19 crisis continues, member states could decide to reinstate internal border controls if they become dissatisfied with the external travel policy of neighbouring EU states or the EU's Schengen zone more generally (Renew Europe 2020).

3. Differentiation or disintegration?

Concluding thoughts and recommendations

As emerges from the above, Schengen, when under strain, and because of the relatively loose framework that governs it, seems to disentangle or disintegrate. When faced with pressure, following sovereignty reflex dynamics, states return to nation-state borders and generally adopt “going at it alone” strategies. These strategies are sometimes mixed-and-matched with bilateral or multilateral coordination. EU-wide coordination, however, remains wanting. Where, at best, joint initiatives are carried out at the EU level, as in the context of the lifting of border controls and the external travel ban following the COVID-19 crisis, the putting in practice of these joint initiatives tends to give way, again, to insufficient coordination across member states. Diverging national-level implementation practices counteract or confuse the earlier coordination attempts. This section offers an overview and evaluation of these practices through the lens of differentiated integration.

As a starting observation, the re-emergence of sovereignty reflexes in the face of crises is not unlike trends that were recently observed in the connected and similarly sovereignty-sensitive field of EU asylum and migration law. Slominski and Trauner have, for instance, described the emergence of deliberate strategies of “non-use of Europe” in the context of return procedures following the high migration arrivals in 2015–2016. This implied, for instance, prioritising bilateral or multilateral agreements with third states over EU-wide cooperation, in order to achieve higher return rates at the national level (Slominski and Trauner 2018). Similarly, Goldner Lang (2020) has highlighted trends of “spill-back” or “disintegration” as member states have been increasingly retrenching into national modes of decision-making on asylum and borders since 2015–2016. She points towards the non-compliance of the Visegrád states with the two relocation decisions of the Council in 2015, or the failure to take fingerprints of newly arriving migrants by states of first entry. These instances serve as examples of how member states, when faced with high migration

pressure, increasingly withdraw from, and in certain instances even violate, their legal obligations under the CEAS.

In spite of the parallels that can be drawn, it bears highlighting that the Schengen *acquis* has been constructed, from the very start, and as described in the introduction, as a system with a high degree of flexibility. To be sure, EU harmonisation in the area of EU migration and asylum also provides significant degrees of flexibility to member states. Certain first- and second-generation EU immigration instruments are notorious for the many vaguely formulated clauses or “may” provisions they contain as a result of difficult negotiations among member states (De Somer 2018). The Schengen system, however, has – from its very beginnings – explicitly provided for the possibility of reintroducing controls if “public policy or national security” made it necessary to do so (Article 2(2) Schengen Implementing Convention 1990). When such flexibility is, and has always been, inherently embedded in the system, to observe differentiated integration or “flexible dynamics” when pressure rises does not necessarily constitute a disintegration or spill-back of the system. In other words, when flexibility is part of Schengen’s DNA, the observed differentiation dynamics do not necessarily mean that the system is unravelling. Instead, the flexibility provided is one of Schengen’s strengths. It enables states to temporarily retrench into national modes of governance when pressure on public policy or national security rises, without flagrantly breaking the rules. By doing so, the system does not burst when under strain. It can be remoulded when needed, in order to revive again afterwards. Against this backdrop, the differentiated integration architecture of Schengen, and the flexibility this affords, also represent a tool to effectively handle the challenges the EU faces (Lavenex and Križić 2019).

However, there are also risks attached to such flexibility. First, border controls reintroduced as exceptional measures, and not unlike crisis or emergency measures more generally, tend to stick. The controls that have continuously been re-extended since 2015–2016 are a case in point. The longer such controls remain in place, the more they risk to be seen as the new normal (see also De Somer 2019). From there, the risk of overstressing Schengen’s flexibility and hence of actually eroding the *acquis* emerges. Whereas, as argued earlier, the temporary reintroduction of internal border checks does not necessarily constitute disintegration or spill-back in a system that has always embedded flexibility, a Schengen area where border controls remain in place on a semi-permanent basis is quite a different thing. Clearly, such a situation goes beyond the intended “temporary flexibility” design of the system and against the founding idea of Schengen as an area characterised by the absence of internal border checks.

Second, the flexibility with which the common rules are applied risks instilling fragmentation among member states. Again, the reintroduction of controls in 2015–2016 can serve as a case in point. As highlighted above, the controls which are upheld by northern and western European states are the subject of political tensions within the Council following criticism on the part of eastern and southern EU states. Similarly, in spite of the Commission’s attempts at achieving a common and coordinated approach, member states are (or are not) lifting the border controls that were reintroduced following the COVID-19 outbreak in highly uneven ways.

They are also applying the guidelines on the joint lifting of the external travel ban differently. In particular, the breaches of the earlier mentioned principle of non-discrimination indicate a high degree of fragmentation among member states which could, depending on the length and further degrees of these breaches, scar future Schengen relations.

In conclusion, Schengen is a textbook example of differentiation in the EU: it has a high degree of in-built flexibility that enables it to withstand situations of high pressure. This flexibility, however, is not entirely risk-free. When temporary flexible measures and hence intra-Schengen differentiation become semi-permanent, or instil fragmentation among member states, they risk jeopardising the long-term stability of the Schengen system. In light of the analysis conducted – and in view of the Commission's upcoming Strategy on the Future of Schengen (European Commission 2020d: 14) – this paper advances a set of three recommendations. Our recommendations are aimed at improving coordination and joint crisis management within the Schengen governance structure in order to counteract disintegration dynamics while safeguarding its flexible functioning. Accordingly, we do not argue for a structural overhaul of the system as it stands: flexibility is part of Schengen's DNA and is in itself a tool that can strengthen effective governance. Our recommendations rather aim at strengthening this tool by mitigating the risks currently connected to the flexibility options, i.e., the risk that temporary flexibility becomes permanent and/or that too high a degree of flexibility instils fragmentation among states.

- First, we argue that current governance gaps within the *coordination mechanisms* around Schengen need to be closed, and existing coordination structures *strengthened*. On an operational level, current efforts towards enhancing information-exchange mechanisms need to continue receiving high priority. This includes initiatives to continue strengthening the interoperability between different European databases (VIS, SIS, Eurodac, etc.), such as in the context of the recently adopted interoperability regulations (Regulations 2019/817 and 2019/818), as well as striving towards the development of increased digital migration management (for further information on digital migration management see Eržen et al. 2020). It also encompasses the need for further cooperation between national police authorities and border guards, e.g., through joint patrols or via the Schengen Forum that the Commission is expected to advance in its Strategy on the Future of Schengen. This Forum would bring together national authorities such as Ministries of Interior and border police at national and regional levels (European Commission 2020d: 15). On a political/institutional level, merit can be found in ideas around the establishment of a *Schengen Council* within the Council structures, for instance at the level of ministers of the interior.⁶ A new council of this sort would make it possible to pick up potential problems within the governance of Schengen more swiftly and at a higher political level. It could also form the structural locus of coordinated attempts at resolving any identified difficulties. In short, such a council could provide for strengthened “early warning” as well as crisis management mechanisms in order to counteract uncoordinated sovereignty reflexes.

⁶ See for instance the non-paper by France: *Refondation de l'espace Schengen*, 2019, on file with the author.

• Second, we argue that the SBC needs to be revised to provide *clear rules around the moments at which states reintroduce and re-lift controls*. Legal scholars have long pointed out that such rules are sorely needed (Peers 2013, see also De Somer 2020). In their absence, and as the COVID-19 controls made clear, chaotic situations emerge. As different member states reintroduce or lift internal and/or external controls at different points in time, confusion reigns and the effectiveness of the measures in place is hampered. For instance, travellers can easily circumvent an external travel ban in a given member state by travelling to the neighbouring state and crossing along an internal border where checks have been abandoned. Relatedly, and with a view to addressing the risk that temporary controls become semi-permanent as happened with the 2015–2016 controls, the SBC should require member states to add “*sunset clauses*” to their notifications on the reintroduction of internal border checks, indicating when controls will be lifted again (Carrera and Luk 2020).

• Third, current EU law provisions enable the *European Commission to exercise a higher degree of control and coordination* than it is doing. We argue that the Commission should make stronger use of its existing competences, and should step in more forcefully as well as earlier when things risk spiralling out of control. For instance, the Commission can, and should, push member states to provide more detail in the notifications they send regarding reintroduced border controls. This includes more details on the operational side (where, what, when), but also on the risk assessments that prompted these controls. At a higher level of politics, when controls do not, or no longer, meet EU law requirements, the Commission should make use of its powers under Article 258 TFEU to start infringement actions. This could be the case when such controls no longer meet proportionality and necessity requirements, or breach the EU legal requirement of non-discrimination among EU citizens on grounds of nationality. It is true that such infringement proceedings can have a political backlash in the short run since they may add further fuel to already highly contentious political discussions. Leaving things to fester, however, does not provide the right way forward either. As documented above, letting member states stretch the limits of their legal obligations almost indefinitely risks turning temporary controls into semi-permanent ones, which *fundamentally* undermines Schengen’s founding premises.

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EU Integration and Differentiation
for Effectiveness and Accountability

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

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

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



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